

**BEFORE THE WATER RESOURCES DEPARTMENT
OF THE
STATE OF OREGON**

In the Matter of Transfer Application)
T-10722, Klamath County)
)
)
)
)

FINAL ORDER APPROVING CHANGES
IN POINTS OF DIVERSION TO REFLECT
HISTORIC USE AND PARTIAL
CANCELLATION OF PORTIONS OF
WATER RIGHTS

Authority

ORS 540.505 to 540.580 establishes the process in which a water right holder may submit a request to transfer the point of diversion, place of use, or character of use authorized under an existing water right. OAR Chapter 690, Division 380 implements the statutes and provides the Department’s procedures and criteria for evaluating transfer applications.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicant

ROBERT AND ROBERTA VALLADAO
P.O. BOX 321
BLY, OR 97622

Findings of Fact

Background

1. On November 7, 2008, Robert and Roberta Valladao filed a transfer application to change the points of diversion to reflect the use of historic points of diversion under Certificates 9968, 9988, and 9989. The Department assigned the application number T-10722.
2. On May 4, 2009, Certificate 9989 was cancelled by transfer application T-10775 (Special Order Volume 77, pages 685-691) and was superseded by Certificate 85440 to describe the portion of the right not modified by T-10775.
3. The first right to be transferred is as follows:

<p>This is a final order in other than a contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080, you may petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.</p>

Certificate: 9968 in the name of MARY H. DIXON (confirmed by Sprague River decree)

Use: IRRIGATION of 245.0 ACRES

Priority Date: 1879

Limit/Duty: ONE-FORTIETH of a cubic foot per second per acre, prior to June 15th, and ONE-EIGHTIETH of a cubic foot per second per acre after June 15th, with a total limitation of three acre feet per acre from March 1st to October 1st of each year.

Source: SOUTH FORK SPRAGUE RIVER, tributary to SPRAGUE RIVER

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	14 E	WM	28	NE NE	37.0
36 S	14 E	WM	28	NW NE	37.0
36 S	14 E	WM	28	SW NE	40.0
36 S	14 E	WM	28	SE NE	40.0
36 S	14 E	WM	28	NE SE	40.0
36 S	14 E	WM	28	NW SE	37.0
36 S	14 E	WM	28	SE SE	14.0
TOTAL:					245.0

4. Certificate 9968 does not describe the location of the point of diversion, however the tabulation describing the right in the Sprague River Decree and the associated adjudication map recognize and identify ditches and dams located:

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
36 S	14 E	WM	28	SE NE	-- not specified
37 S	15 E	WM	8	NE NE	-- not specified

5. Application T-10722 proposes to CHANGE THE POINT OF DIVERSION TO REFLECT HISTORICAL USE approximately 6.0 miles downstream to:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
36 S	14 E	WM	28	SE NE	2770 FEET NORTH AND 10 FEET WEST FROM THE SE CORNER OF SECTION 28

6. The second right to be transferred is as follows:

Certificate: 9988 in the name of MODOC REALTY CO. (confirmed by Sprague River decree)

Use: DOMESTIC, LIVESTOCK, AND IRRIGATION of 120 ACRES

Priority Date: 1881

Limit/Duty: ONE-FORTIETH of a cubic foot per second per acre, prior to June 15th, and ONE-EIGHTIETH of a cubic foot per second per acre after June 15th, with a total limitation of three acre feet per acre from March 1st to October 1st of each year.

Source: SOUTH FORK SPRAGUE RIVER, tributary to SPRAGUE RIVER

Authorized Place of Use:

IRRIGATION, DOMESTIC, AND LIVESTOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	14 E	WM	28	NE NW	24.0
36 S	14 E	WM	28	NW NW	36.0
36 S	14 E	WM	28	SW NW	40.0
36 S	14 E	WM	28	SE NW	20.0
TOTAL:					120.0

7. Certificate 9988 does not describe the location of the point of diversion, however the tabulation describing the right in the Sprague River Decree and the associated adjudication map recognize and identify a ditch and dam located:

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
37 S	15 E	WM	8	NE NE	WALKER PARKER DITCH

8. Application T-10722 proposes CHANGE THE POINT OF DIVERSION TO REFLECT HISTORICAL USE at two points approximately 6.0 and 6.5 miles downstream:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
36 S	14 E	WM	28	NW NE	POD #2 – 4100 FEET NORTH AND 2580 FEET WEST FROM THE SE CORNER OF SECTION 28
36 S	14 E	WM	28	SE NE	POD #1 – 2770 FEET N AND 10 FEET WEST FROM THE SE CORNER OF SECTION 28

9. The following table describes the specific lands to be served by each point of diversion:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	POD	Acres
36 S	14 E	WM	28	NE NW	1 & 2	11.4
36 S	14 E	WM	28	NE NW	1	12.6
36 S	14 E	WM	28	NW NW	1	34.1
36 S	14 E	WM	28	NW NW	1 & 2	1.9
36 S	14 E	WM	28	SW NW	1	40.0
36 S	14 E	WM	28	SE NW	1	20.0
TOTAL:						120.0

10. The portion of the third right to be transferred is as follows:

Certificate: 85440 in the name of MODOC REALTY CO. (confirmed by Sprague River decree)

Use: LIVESTOCK, DOMESTIC, and IRRIGATION of 20.0 ACRES

Priority Date: 1881

Limit/Duty: ONE-FORTIETH of a cubic foot per second per acre, prior to June 15th, and ONE-EIGHTIETH of a cubic foot per second per acre after June 15th, with a total limitation of three acre feet per acre from March 1st to October 1st of each year.

Source: SOUTH FORK SPRAGUE RIVER, tributary to SPRAGUE RIVER

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	14 E	WM	28	NE NW	16.0
36 S	14 E	WM	28	NW NW	4.0
TOTAL:					20.0

11. Certificate 85440 does not describe the location of the point of diversion, however the tabulation describing the right in the Sprague River Decree and the associated adjudication map recognize and identify a ditch and dam located:

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
36 S	14 E	WM	28	SE NE	TRACT 1, WALLER DITCH

12. Application T-10722 proposes to CHANGE THE POINT OF DIVERSION TO REFLECT HISTORICAL USE for irrigating the above listed 20.0 acres, to two points (PODs) approximately 1,000 feet upstream for POD 1 and 1,600 feet downstream for POD 2:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
36 S	14 E	WM	28	NW NE	POD #2 – 4100 FEET NORTH AND 2580 FEET WEST FROM THE SE CORNER OF SECTION 28
36 S	14 E	WM	28	SE NE	POD #1 – 2770 FEET NORTH AND 10 FEET WEST FROM THE SE CORNER OF SECTION 28

13. Notice of the application for transfer was published pursuant to ORS 540.520 and OAR 690-380-4000. No comment was filed in response to the notice.
14. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening and/or by-pass device is necessary at the new point of diversion to prevent fish from entering the diversion and/or safely transport fish back to the body of water from which the fish were diverted and that the diversion is not currently equipped with an appropriate fish screening and/or by-pass device. Listed fish species are not present at the point of diversion, the originating water right diversion is not screened, cost-share funds are not currently available, and the proposed diversion may be eligible for ODFW’s cost-share program. A grace period of two years is appropriate until such time as cost share funds become available to assist in the construction of a fish screening and/or by-pass device. If cost share funds do not become available, the water user must screen within the indicated time period regardless of the availability of cost share funding.
15. On December 12, 2008, the Department issued a copy of a draft preliminary determination proposing to approve Transfer Application T-10722 to the applicants. On December 18, 2008, the applicants requested that the Department proceed with processing transfer application T-10722 and on May 6, 11 and 15, 2009 provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.

Transfer Review Criteria (OAR 690-380-4010)

16. Pursuant to OAR 690-380-2120(2)(a), evidence has been submitted that the actual, current points of diversion for the water rights in question have been in use for more than 10 years.
17. Pursuant to OAR 690-380-2121 (c) the Watermaster provided a statement that to his knowledge there has been no complaint of injury due to the use of water at the actual, current points of diversion, prior to the transfer request.
18. Pursuant to OAR 690-2120(3), the applicant received a letter from the Watermaster dated July 2, 2008, indicating there are water rights that may potentially be affected as a result of this proposed change. A copy of a notice and a list of the affected water right holders and their addresses were provided to the applicant.
19. As required by 690-380-2120(4), notification to the affected water right holders was mailed by the applicant. A comment was received as a result of this written notice. The comment seem to talk about ownership of the new Point of Diversion which is not proposed for JWTR properties. This was confirmed with the JWTR personnel by phone on December 11, 2008. The applicant has provided written proof of service of notice of the proposed transfer on all affected water right holders.
20. Water has been used within the last five years according to the terms and conditions of the rights, and no evidence is available that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
21. Pump structures and ditches sufficient to use the full amount of water allowed under the existing rights are present.
22. The proposed change would not result in enlargement of the rights.
23. The proposed change would not result in injury to other water rights.

Partial Cancellation of Water Rights

24. On November 7, 2008 an affidavit certifying that the domestic use portion of a water right has been abandoned and requesting cancellation of the domestic use under the right was received from Robert A. and Roberta E. Valladoa. The portion of the right to be cancelled is as follows:

Certificate: 9988 in the name of MODOC REALTY CO. (confirmed by Sprague River decree)

Use: DOMESTIC

Priority Date: 1881

Source: SOUTH FORK SPRAGUE RIVER, tributary to SPRAGUE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
37 S	15 E	WM	8	NE NE	WALKER PARKER DITCH

Authorized Place of Use:

DOMESTIC USE				
Twp	Rng	Mer	Sec	Q-Q
36 S	14 E	WM	28	NE NW
36 S	14 E	WM	28	NW NW
36 S	14 E	WM	28	SW NW
36 S	14 E	WM	28	SE NW

25. On November 7, 2008, an affidavit certifying that the domestic use for a portion of a water right has been abandoned and requesting cancellation of the domestic use under that portion of the right was received from Robert A. and Roberta E. Valladoa. The portion of the right to be cancelled is as follows:

Certificate: 9989 (now superseded by Certificate 85440) in the name of MODOC REALTY CO. (confirmed by Sprague River decree)

Use: DOMESTIC

Priority Date: 1881

Source: SOUTH FORK SPRAGUE RIVER, tributary to SPRAGUE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
36 S	14 E	WM	28	SE NE	TRACT 1, WALLER DITCH

Authorized Place of Use:

DOMESTIC USE				
Twp	Rng	Mer	Sec	Q-Q
36 S	14 E	WM	28	NE NW
36 S	14 E	WM	28	NW NW

Conclusions of Law

The change in points of diversion to reflect historic use proposed in Transfer Application T-10722 is consistent with the requirements of ORS 540.505 to 540.580, and OAR 690-380-5000 and the abandoned portions of the water rights should be cancelled.

Now, therefore, it is ORDERED:

1. The change proposed in Transfer Application T-10722 is approved and effective immediately.
2. The right to the use of the water is restricted to beneficial use at the place of use described, and is subject to all other conditions and limitations contained in Certificates 9968, 9988, and 85440 and any related decree.

3. Water right certificates 9968, 9988 and 85440 are cancelled. Certificates 85437, 85438 and 85439, respectively, will be issued to describe the change in points of diversion for the portions of the rights included in Transfer Application T-10722.
4. The quantity of water diverted at the new points of diversion shall not exceed the quantity of water lawfully available at the original points of diversion.
5. When required by the Department, the water user shall install and maintain a headgate, an in-line flow meter, weir, or other suitable device for measuring and recording the quantity of water diverted. The type and plans of the headgate and measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.
6. Within two years after the date of this order, the water user shall install a fish screening and/or by-pass device, as appropriate, at the new point of diversion consistent with the Oregon Department of Fish and Wildlife's (ODFW) design and construction standards. Prior to installation, the water user shall obtain written approval from ODFW that the required screen and/or by-pass device meets ODFW's criteria. The water user may withdraw water at the new point of diversion without screening or by-pass devices until two years after the date of this order. Prior to submitting a Claim of Beneficial Use, the water user must obtain written approval from ODFW that the required screening and/or by-pass device was installed to the state's criteria. The water user shall maintain and operate the fish screen and/or by-pass device, as appropriate, at the point of diversion consistent with ODFW's operational and maintenance standards.

Dated at Salem, Oregon this 29th day of May 2009.


Phillip C. Ward, Director *PCW*

Mailing date: JUN 12 2009