

**BEFORE THE
OREGON WATER RESOURCES DEPARTMENT**

In the Matter of Transfer)	FINAL ORDER IN CONTESTED CASE
Application T-13471, Coos)	
County)	
)	
Upper Coos River Water)	OAH Reference No. 2022-OWRD-00117
Association,)	Agency Case No. T-13471
<i>Applicants</i>)	
)	

HISTORY OF THE CASE

On April 7, 2021, Oregon Water Resources Department (OWRD or Department) issued a Preliminary Determination Proposing Approval of a Change in Place of Use and Character of Use (“Notice” or “Preliminary Determination”), announcing the Department’s intention to approve Water Right Transfer Application T-13471 in the Name of Upper Coos River Water Association (UCRWA); Michael and Susan Mylnarczyk; Dustin and Emily Parkhurst; Adam Henry Kubli; Steve and Tina Winfrey; Donald and Diane Boyer; Tyler and Steffanie Dean; and Robert and Tina George (Applicants). On May 13, 2021, George Smith, Sr. (Protestant) filed a protest to the Notice. On August 8, 2022, OWRD referred this matter to the Office of Administrative Hearings (OAH) for further proceedings. The OAH assigned Administrative Law Judge (ALJ) Alek A. Wipperman to preside at hearing.

On November 4, 2022, a prehearing conference was held by telephone with ALJ Wipperman presiding. Will Cross represented the Department; Patricia McCarty of the Department also participated in the conference. Protestant appeared on his own behalf. Peter Mohr, attorney at law, represented Applicants. Applicant Susan Mylnarczyk participated in the conference. During the conference, the parties indicated a need for discovery and motions practice. A prehearing conference was scheduled for February 24, 2023 to select the date of the hearing. The parties agreed to submit a statement of the issues by November 18, 2022. Applicants and the Department jointly submitted a statement of issues on November 18, 2022. Protestant did not submit a statement of issues. On November 30, 2022, ALJ Wipperman issued a Scheduling Order. On January 19, 2023, Laura A. Schroeder, attorney at law, provided a letter of representation of Protestant in this matter.

On February 8, 2023, the Department requested that the parties convene before the February 24, 2023 prehearing conference to identify potential hearing dates to enable reservation of a venue. On February 13, 2023, ALJ Wipperman held a prehearing conference by telephone. Mr. Mohr represented Applicants. Ms. Schroeder represented Protestant. Mr. Cross represented the Department. The parties identified potential dates for hearing.

On February 21, 2023, the parties submitted a joint motion for extension of deadlines

established in the Scheduling Order. On February 22, 2023, ALJ Wipperman granted the motion, and the deadline to submit exhibits, exhibit lists, and witness lists was rescheduled to March 3, 2023.

On February 23, 2023, Renee Moulun, Department of Justice Assistant Attorney-in-Charge, filed a notice of appearance as counsel for the Department in this matter.

On February 24, 2023, ALJ Wipperman held a prehearing conference by telephone. Ms. Moulun represented the Department. Mr. Mohr represented Applicants. Ms. Schroeder represented Protestant. The parties agreed to amend the filing deadline for submission of exhibits, exhibit lists, and witness lists to May 2, 2023. The parties agreed to submit written direct testimony by May 2, 2023, and written rebuttal by May 10, 2023. A hearing was scheduled to convene on May 22, 2023 at the Coos Bay Public Library. ALJ Wipperman issued an Amended Scheduling Order on March 24, 2023.

On May 2, 2023, Applicants and Protestant submitted a joint motion to amend the Amended Scheduling Order to modify the deadlines for the submission of evidence to May 8, 2023. On May 5, 2023, ALJ Wipperman granted the motion.

On May 8, 2023, Ms. Schroeder notified the parties and the OAH that Protestant had passed away on April 30, 2023. On the ALJ's motion, a prehearing conference was scheduled for May 17, 2023.

On May 12, 2023, Applicants submitted a motion to permit filing of written direct testimony responsive to the proposed written testimony of Applicants' witness Marc Van Camp by May 18, 2023. On May 16, 2023, ALJ Wipperman granted the motion.

On May 17, 2023, ALJ Wipperman convened a prehearing conference by telephone. Ms. Moulun represented the Department. Mr. Mohr represented Applicants. Ms. Schroeder appeared for Protestant. The hearing scheduled for May 22, 2023 was postponed. The ALJ requested that the parties provide a memorandum addressing whether the protest and contested case in this matter survived Protestant, and if so, whether a successor to Protestant may participate as a party. An additional prehearing conference was scheduled for June 1, 2023. On May 25, 2023, the Department submitted a Memorandum addressing the ALJ's request; Ms. Schroeder submitted a Memorandum in Support of Proceeding With the Protest Filed by George W. Smith, Sr.

On June 1, 2023, Ms. Schroeder submitted a Motion for Substitution of Party, proposing, alternatively, to substitute the Estate of George W. Smith, Sr., (the Estate) through personal representative George W. Smith, Jr. (the personal representative) as Protestant in this matter, or the George and Alicia Smith Trust (the Trust) through George W. Smith, Jr. as holder of Trustee Alicia Smith's durable power of attorney as Protestant in this matter.

On June 1, 2023, a prehearing conference was held. Ms. Moulun represented the Department. Ms. Schroeder represented the Estate. Mr. Mohr represented Applicants. During the conference, the Department offered no objection to the motion for substitution with respect to the substitution of the Estate through the personal representative; the Department orally objected to

the Motion with respect to substitution of the Trust. Applicants joined the Department's position. Protestant orally withdrew the Motion to substitute the Trust as holder of Trustee Alicia Smith's durable power of attorney as Protestant in this matter. The Department and Applicants waived written response to the Motion. An additional prehearing conference was scheduled for June 6, 2023. On June 2, 2023, ALJ Wipperman issued a ruling granting the motion for the substitution of the Estate as Protestant in this matter.

On June 6, 2023, ALJ Wipperman held a prehearing conference. Ms. Moulun represented the Department. Ms. Schroeder represented Protestant. Mr. Mohr represented Applicants. The parties agreed to convene a hearing in person in Coos Bay on July 25, 2023.

On July 13, 2023, Protestant withdrew the May 13, 2021 protest to the Notice. On July 14, 2023, the Department submitted a motion for a prehearing conference to schedule a limited hearing on the issue of whether the proposed transfer would result in injury to existing water rights. On July 18, 2023, Protestant provided a notice of appearance for attorney Kelsey Seibel in this matter. On July 20, 2023, ALJ Wipperman held a prehearing conference by telephone. Ms. Moulun represented the Department. Ms. Seibel appeared on behalf of Protestant. Applicants did not participate in the conference. During the conference, the July 25, 2023 hearing was rescheduled to be held by videoconference with the agreement of those present.

A hearing was held by videoconference on July 25, 2023. ALJ Wipperman presided. Ms. Moulun represented the Department. Mr. Mohr represented Applicants. Ms. Seibel represented Protestant. Applicants waived the requirement that the hearing be held in the area where the rights are located. The following individuals testified: Department Transfer and Conservation Section Manager Lisa Jaramillo, Department Transfer Case Worker Tamara Smith, Department Deputy Administrator Jake Johnstone, and Department Watermaster Susan Douthit. The record closed at the conclusion of the hearing on July 25, 2023.

On September 5, 2023, ALJ Wipperman issued a Proposed Order in 2022-OWRD-00117/T-13471 recommending that OWRD approve Transfer Application T-13471 as conditioned in the Preliminary Determination. The Proposed Order stated that any party to the proceeding or OWRD could file exceptions to the Proposed Order no later than 30 days after service of the order.

Applicants timely filed exceptions to the Proposed Order. Neither Protestant nor OWRD filed exceptions to the Proposed Order. Now, OWRD's Acting Director (Director) considers the exceptions, allows the exceptions in part and denies them in part, and issues this final order approving Transfer Application T-13471 as conditioned in the Preliminary Determination.

The "History of the Case," "Issue," "Evidentiary Ruling," "Findings of Fact," "Conclusion of Law," "Opinion," and "Order" sections of this final order set forth the ALJ's Proposed Order as modified by the Director in response to the exceptions and on the Director's own motion. The "Consideration of Exceptions" and "Director's Amendments to the Proposed Order" sections identify and explain the Director's modifications of the ALJ's Proposed Order.

ISSUE

Whether effecting the water right transfer proposed by Water Right Transfer Application T-13471 will result in injury to existing water rights. ORS 540.520(7).

EVIDENTIARY RULINGS

The Department submitted into evidence the full record developed by the parties prior to Protestant's withdrawal of the protest. Department Exhibits A1 through A41, Applicants' Exhibits B1 through B16, Protestant's Exhibits P1 through P23, and the written direct and rebuttal testimony of Steve Winfrey, Marc Van Camp, and George Smith Jr. were admitted into evidence without objection.

FINDINGS OF FACT

1. Water Right Certificate 39351 in the name of School District Number 9 authorizes the use of 0.06 cubic feet per second (cfs) from an unnamed tributary of the Coos River for Domestic Supply for Old and New School Buildings and Teacher's Residence. The certificate provides that the 0.06 cfs shall be used as follows: 0.038 cfs for the old school buildings, 0.021 cfs for the new school buildings, and 0.001 cfs for the teacher's residence. (Exs. A2, A5.)

2. Water Right Certificate 39423 in the name of School District Number 9 authorizes the use of 0.06 cfs from an unnamed tributary of the Coos River, with 0.02 cfs for School Use and 0.04 cfs for Irrigation of 3.2 acres. (Exs. A2, A5.)

3. In Department staff's exhibits and written testimony in this case, Department staff refer to the unnamed tributary of the Coos River described in Water Right Certificates 39351 and 39423 as "Smith Creek." (Exs. A3 at 4 and throughout, A4 at 4 and throughout, A41.) The unnamed tributary is also referred to as Smith Creek in certain documents filed by both Applicants and Protestant (Exs. A6 at 21, 22, A10 at 5, Written Testimony of George Smith, Jr. at 2). As such, the record reflects that the unnamed tributary of the Coos River described in Water Right Certificates 39351 and 39423 is, at least at certain times and for certain purposes, known to the parties and referred to by the parties as "Smith Creek." However, because Water Right Certificates 39351 and 39423 respectively refer to the water body from which water may be diverted and beneficially used under those certificates as "unnamed creek a tributary of Coos River," (Ex. A5 at 1,) and "unnamed stream a tributary of Coos River," (Ex. A5 at 3,) this final order refers to the unnamed tributary as "Unnamed Tributary." The correct name for the Unnamed Tributary is not an issue to be determined in this matter, and this final order makes no finding of fact or conclusion of law concerning the correct name for the Unnamed Tributary.

4. The point of diversion for both Water Right Certificates 39351 and 39423 is located on Unnamed Tributary at NW1/4 SE1/4, Section 34, T. 25 S., R. 12 W., W.M., 6105.63 feet South and 1762.55 feet West from the W1/4 Corner, Section 26. (Ex. A5.)

5. On June 8, 2020, the Department received Transfer Application T-13471, proposing to change the place of use and character of use of Certificate 39351, in the amount of 0.022 cfs,

from Domestic Supply for New School Buildings and Teacher's Residence to Domestic Expanded for Eight Residences located in NW ¼ SW ¼ Section 26, T. 25 S., R12 W, W.M. and NE ¼ SE ¼ Section 27, T 25 S., R 12 W, W.M. Transfer Application T-13471 also proposes to change the place of use and character of use of Certificate 39423, in the amount of 0.02 cfs from School Use located in NW¼ SW ¼ Section 26, T 25 S., R 12 W., W.M. to Domestic Expanded Use for Eight Residences located in NW ¼ SW ¼ Section 26, T. 25 S., R12 W, W.M. and NE ¼ SE ¼ Section 27, T 25 S., R 12 W, W.M. (Exs. A6, A9, A10.) The authorized points of diversion under Certificate 39351 and Certificate 39423 were not proposed for transfer under Transfer Application T-13471. (Exs. A2 at 3, A6, A9, A10.)

6. The changes to place of use and character of use proposed by Transfer Application T-13471 would not result in another water right user not receiving previously available water to which that user was legally entitled. (Test. of Johnstone and Douthit; Exs. A3 and A4.) Water rights held by the Estate or the George and Alicia Smith Trust under Water Right Certificates 43030, 43031, and 62715 are sourced from a tributary of the Coos River that is different from the Unnamed Tributary and that joins the Unnamed Tributary downstream from the point of diversion for the water rights subject to the transfer proposed by Transfer Application T-13471. (Exs. A15, A41 at 4-5.)

7. On April 7, 2021, the Department issued the Notice at issue in this matter, proposing to approve Transfer Application T-13471 with proposed conditions described in the Notice. (Ex. A22.)

CONCLUSION OF LAW

Effecting the water right transfer proposed by Water Right Transfer Application T-13471 will not result in injury to existing water rights.

OPINION

This matter was referred to the OAH for a contested case hearing after Protestant filed a protest of the Department's Preliminary Determination proposing approval of a change in place of use and character of use of water. Protestant subsequently withdrew the protest. ORS 540.520(7) provides that "[i]f a timely protest is filed, or in the opinion of the Water Resources Director a hearing is necessary to determine whether the proposed changes as described by the application would result in injury to existing water rights, the department shall hold a hearing on the matter." The Clackamas County Circuit Court has held that this creates "an unambiguous, nondiscretionary statutory duty to make a 'no-impairment finding'" when approving a transfer, and a similarly "unambiguous nondiscretionary duty to conduct a contested case hearing" if a protest is filed. *Kusyk v. Water Resources Commission*, 164 Or App 738, 744 (2000) (describing Clackamas County Circuit Court's holdings and noting that "we do not comment on the correctness of those rulings but assess whether they are 'in favor of' petitioners"). OAR 137-003-0630(3)(a) provides that in cases (such as this case) that involve notices of proposed action that do not become final without a hearing or default, "an agency or [ALJ] may issue an order adverse to a party upon default * * * only upon a prima facie case made on the record." When, as here, the referring agency "determines that evidence is necessary to establish a prima facie case,

* * * the [ALJ] shall conduct a hearing and issue a proposed order in accordance with OAR 137-003-0645.” OAR 137-003-0630(3).

The only issue for consideration following the withdrawal of the protest is whether the proposed transfer would result in injury to existing water rights. “Injury” means that a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled. OAR 690-380-0100(3). The prima facie evidence in the record in this matter, especially the persuasive evidence from Mr. Johnstone and Ms. Douthit, establishes conclusively that no such impact would result from effecting the proposed transfer. Any implicated downstream water rights are sourced from a different tributary that joins the Unnamed Tributary downstream from the point of diversion for water rights proposed for transfer, such that diversions by the water rights proposed for transfer will not affect the amount of water available to the implicated downstream water rights. Consequently, the evidence shows that approval of the transfer described by the Notice would not result in injury to existing water rights, and the transfer application should be approved.

The evidence also shows that approval of the transfer described in the Preliminary Determination will not result in injury to existing water rights for the following additional reasons. First, the proposed transfer will not change the points of diversion of or the amounts of water that may be diverted under the water rights proposed for transfer, and the Preliminary Determination’s measurement conditions will allow the Department to ensure that the amounts of water diverted under the water rights proposed for transfer will not exceed the allowed amounts. (Ex. A3 at 16-17 (describing how Preliminary Determination’s measurement conditions and requirement that former places of use no longer receive water under the water rights proposed for transfer will prevent enlargement of the water rights proposed for transfer)). Therefore, the proposed transfer will not enlarge the amount of water that may be legally diverted under the water rights proposed for transfer and will not result in any downstream water right not receiving previously available water to which the downstream water right is legally entitled.

Second, an existing water right is only legally entitled to receive the amount of water stated on the face of the water right from the source stated on the face of the water right at the point of diversion stated on the face of the water right. (Ex. A3 at 15.) Water users are responsible for creating a diversion and distribution system that allows for diversion of the authorized amount of water at the authorized point of diversion and conveyance of the water to the authorized place of use. (*Id.*) Water rights alone do not give water users a legal entitlement to receive a specific amount of water existing within a private distribution system as between users of that system. (*Id.*) Therefore, any assertions that the proposed transfer will cause injury to existing water rights based on issues related to a private water distribution system do not show that the proposed transfer will cause injury as defined in OAR 690-380-0100(3).

CONSIDERATION OF EXCEPTIONS

The Director considers and disposes of Applicants’ exceptions as shown below. The Director may modify a proposed finding of historical fact only if the agency determines that there is clear and convincing evidence in the record that the finding was wrong. ORS

183.650(3); OAR 1137-003-0665(4). A finding of historical fact is a determination “that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing.” ORS 183.650(3); OAR 137-003-0665(4). The Director finds that all changes to the Proposed Order made in response to the exceptions are supported by evidence in the record that meets the highest potentially applicable standard of “clear and convincing.” Additions to the text of the Proposed Order are shown in underline, and deletions are shown in ~~strikeout~~.

Exception A.1: Applicants take exception to a typographical error in the seventh paragraph of the History of the Case section that describes Applicants as “Appellant,” and ask that “Appellant” be corrected to “Applicant.”

Disposition: The exception is allowed, except that “Appellant” is corrected to “Applicants” rather than “Applicant” to be consistent with how Applicants are described throughout the final order.

Exception B.1: Applicants take exception to the Proposed Order’s Finding of Fact 3, which states: “The unnamed tributary of Coos River described in Water Right Certificates 39351 and 39423 is known to the parties as ‘Smith Creek.’ (Ex A2.)” Applicants argue that Exhibit A2 does not support Finding of Fact 3, and that Exhibit A3 (the direct testimony of OWRD employee Jake Johnstone) only establishes that OWRD staff refer to the Unnamed Tributary as Smith Creek. Applicants further assert that there is no evidence in the record that Applicants or other parties refer to the Unnamed Tributary as “Smith Creek.” Based on the above and the fact that Water Right Certificates 39351 and 39423 refer to their source as an “unnamed creek” and an “unnamed stream,” Applicants request that Finding of Fact 3 be removed from the final order.

Disposition: The exception is denied, but the Director has revised Finding of Fact 3 and other portions of the final order in response to the exception. The record shows that, at least at certain times and for certain purposes, Department staff, Applicants, and Protestant refer to the Unnamed Tributary described in Water Right Certificates 39351 and 39423 as Smith Creek. Department employees Jake Johnstone and Susan Douthit refer to the Unnamed Tributary as “Smith Creek” in their written testimony. (Exs. A3 at 4 and throughout, A4 at 4 and throughout, A41.) Applicants refer to the Unnamed Tributary as “Smith Creek” in documents filed with the Department as part of Applicants’ transfer application. (Exs. A6 at 21, 22, A10 at 5.) Protestant refers to the Unnamed Tributary as “Smith Creek” in the Written Testimony of George Smith, Jr. (Written Testimony of George Smith, Jr. at 2.) As such, there is not clear and convincing evidence in the record that justifies removing Finding of Fact 3. However, because Water Right Certificates 39351 and 39423 respectively refer to the water body from which water may be diverted and beneficially used under those certificates as “unnamed creek a tributary of Coos River,” (Ex. A5 at 1,) and “unnamed stream a tributary of Coos River,” (Ex. A5 at 3,) the Director has revised the Proposed Order to refer to the source of Certificates 39351 and 39423 as “Unnamed Tributary” rather than “Smith Creek.” In addition, the Director has revised Finding of Fact 3 to qualify the statement that the Unnamed Tributary is known to the parties as Smith Creek.

Changes to Finding of Fact 3: The unnamed tributary of Coos River described in Water Right Certificates 39351 and 39423 is known to the parties as “Smith Creek.” (Ex A2.) In Department staff’s exhibits and written testimony in this case, Department staff refer to the unnamed tributary of the Coos River described in Water Right Certificates 39351 and 39423 as “Smith Creek.” (Exs. A3 at 4 and throughout, A4 at 4 and throughout, A41.) The unnamed tributary is also referred to as Smith Creek in certain documents filed by both Applicants and Protestant (Exs. A6 at 21, 22, A10 at 5, Written Testimony of George Smith, Jr. at 2). As such, the record reflects that the unnamed tributary of the Coos River described in Water Right Certificates 39351 and 39423 is, at least at certain times and for certain purposes, known to the parties and referred to by the parties as “Smith Creek.” However, because Water Right Certificates 39351 and 39423 respectively refer to the water body from which water may be diverted and beneficially used under those certificates as “unnamed creek a tributary of Coos River,” (Ex. A5 at 1,) and “unnamed stream a tributary of Coos River,” (Ex. A5 at 3,) this final order refers to the unnamed tributary as “Unnamed Tributary.” The correct name for the Unnamed Tributary is not an issue to be determined in this matter, and this final order makes no finding of fact or conclusion of law concerning the correct name for the Unnamed Tributary.

Exception B.2: Applicants ask that Finding of Fact 4 be altered to remove the reference to “Smith Creek” as the source of Water Right Certificates 39351 and 39423 and to state the legal description of the common point of diversion for Water Right Certificates 39351 and 39423 expressly as that legal description is stated in Water Right Certificates 39351 and 39423. Applicants assert that the correct legal description is “NW1/4 SE1/4, Section 34, T. 23 S., R. 12 W., W.M., 6105.63 feet South and 1762.5 feet West from the W1/4 Corner, Section 26.”

Disposition: The exception is allowed in part and denied in part. The reference to “Smith Creek” is changed to “Unnamed Tributary,” and the legal description of the point of diversion is changed to match the legal description in Water Right Certificates 39351 and 39423. However, in accordance with the certificates, the legal description describes the point of diversion as located in Township 25 South, rather than Township 23 South as stated in Applicant’s exceptions, and as located 1762.55 feet west from the west quarter corner of Section 26 rather than 1762.5 feet west as stated in Applicant’s exceptions. (Ex. A5.)

Changes to Finding of Fact 4: The point of diversion for both Water Right Certificates 39351 and 39423 is located on ~~Smith Creek~~ the Unnamed Tributary at ~~25 S., 12 W, W.M. 34, 6105 feet south and 1762.55 feet west from the W ¼ Corner of Section 26~~ NW1/4 SE1/4, Section 34, T. 25 S., R. 12 W., W.M., 6105.63 feet South and 1762.55 feet West from the W1/4 Corner, Section 26. (Ex. A5.)

Exception B.3: Applicants ask that the Director alter Finding of Fact 6 to do the following: (1) include alternative language that Applicants contend more clearly states the ALJ’s finding that the Water Right Certificates proposed to be transferred (39351 and 39423) authorize diversion and use of water from a different body of water than Water Rights Certificates 43030, 43031,

and 62175, held by Protestant; (2) include a conclusion that “the water rights authorized under Water Right Certificates 43030, 43031, and 62715 cannot be subject to injury as a result of future diversions made under the water rights subject to transfer as proposed by Transfer Application T-13471”; and (3) delete the citation to Exhibit A41 because “no such document appears in the record.”

Disposition: The exception is granted in part and denied in part. First, Finding of Fact 6 is altered as shown below to attempt to more clearly state the ALJ’s finding that Certificates 39351 and 39423 and Certificates 43030, 43031, and 62715 are sourced from different bodies of water. However, the Director declines to adopt the portions of Applicants’ suggested changes that appear to alter the ALJ’s finding of fact by adding language indicating that Certificates 39351 and 39423 authorize diversion of water from a tributary of the Unnamed Tributary/Smith Creek rather than from the Unnamed Tributary/Smith Creek itself. Applicants’ exceptions do not cite evidence in the record that justifies such a change, and the Director cannot find any such evidence in the record. The Director notes that whether Certificates 39351 and 39423 allow diversion of water from a tributary of the Unnamed Tributary/Smith Creek or from the Unnamed Tributary/Smith Creek itself does not affect the ALJ’s analysis that the proposed transfer of Certificates 39351 and 39423 will not injure Certificates 43030, 43031, and 62715 because Certificates 39351 and 39423 and Certificates 43030, 43031, and 62715 are sourced from different bodies of water.

Second, the Director declines to include in Finding of Fact 6 the conclusion that “the water rights authorized under Water Right Certificates 43030, 43031, and 62715 cannot be subject to injury as a result of future diversions made under the water rights subject to transfer as proposed by Transfer Application T-13471.” The conclusion that the proposed transfer will not result in injury to existing water rights is a conclusion of law, rather than a finding of fact, and is already stated in the Conclusion of Law section. However, the Director has altered the second paragraph of the Opinion section as shown below to include additional explanation of why the proposed transfer will not injure the water rights represented by Water Right Certificates 43030, 43031, and 62715.

Third, the Director declines to remove the citation to Exhibit A41 (the Written Rebuttal Testimony of Jake Johnstone). The ALJ accepted Exhibit A41 into the record as noted in the Evidentiary Rulings section, and the cited pages of Exhibit A41 support Finding of Fact 6.

Finally, the Director has altered the first sentence of Finding of Fact 6 as shown below so that the sentence more closely tracks the definition of “injury” in OAR 690-380-0100(3). This change is supported by the written direct testimonies of Jake Johnstone and Susan Douthit, which address whether the proposed transfer would result in another existing water right not receiving previously available water to which that existing water right is legally entitled. (Exs. A3 and A4.)

Changes to Finding of Fact 6: The changes to place of use and character of use proposed by Transfer Application T- 13471 would not result in another water right user not receiving previously available water to which that user was legally entitled. (Test. of Johnstone and Douthit; Exs. A3 and A4.) Water rights held by

the Estate or the George and Alicia Smith Trust under Water Right Certificates 43030, 43031, and 62175 are sourced from a ~~different~~ tributary of Coos River that is different from the Unnamed Tributary, and than the water rights subject to the transfer proposed by Transfer Application T-13471; that tributary and that joins the Unnamed Tributary Smith Creek downstream from the point of diversion for the water rights subject to transfer proposed by Transfer Application T-13471. (Exs. A15, A41 at 4-5.)

Changes to second paragraph of the Opinion section: The only issue for consideration following the withdrawal of the protest is whether the proposed transfer would result in injury to existing water rights. “Injury” means that a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled. OAR 690-380-0100(3). The prima facie evidence in the record in this matter, especially the persuasive evidence from Mr. Johnstone and Ms. Douthit, establishes conclusively that no such impact would result from effecting the proposed transfer. Any implicated downstream water rights are sourced from a different tributary that joins the Unnamed Tributary downstream from the point of diversion for water rights proposed for transfer, such that diversions by the water rights proposed for transfer will not affect the amount of water available to the implicated downstream water rights. Consequently, the evidence shows that approval of the transfer described by the Notice would not result in injury to existing water rights, and the transfer application should be approved.

DIRECTOR’S AMENDMENTS TO THE PROPOSED ORDER

In addition to the changes discussed in the Consideration of Exceptions section, the Director has amended the Proposed Order as described below. The Director finds that to the extent any of the changes to the Proposed Order described in this section constitute changes to a finding of historical fact as “finding of historical fact” is defined in ORS 183.650(3) and OAR 137-003-0665(4), the changes are supported by clear and convincing evidence in the record. Additions to the text of the Proposed Order are shown in underline, and deletions are shown in ~~strikeout~~.

Amendment 1: The History of the Case section is updated to reflect issuance of the Proposed Order, the filing and consideration of exceptions, and issuance of this final order.

Amendment 2: Finding of Fact 5 is amended to change the date that the Department received Transfer Application T-13471 from June 8, 2021, to June 8, 2020. Exhibit A6 shows that the application was received on June 8, 2020.

Amendment 3: The first sentence of the second paragraph of the Opinion section is amended as shown below to better track OAR 690-380-0100(3):

Changes to first sentence of second paragraph of Opinion section: The only issue for consideration following the withdrawal of the protest is whether the

proposed transfer would result in injury to existing water rights. “Injury” means that a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled. OAR 690-380-0100(3).

Amendment 4: The fourth sentence of the first paragraph of the Opinion section is amended as shown below to provide additional detail concerning Oregon courts’ interpretation of ORS 540.520(7) as reflected in the Oregon Court of Appeals opinion in *Kusyk v. Water Resources Commission*, 164 Or App 738 (2000), and to remove the implication that the Oregon Court of Appeals has held that ORS 540.520(7) creates a nondiscretionary duty to conduct a contested case hearing concerning a transfer application if a protest is filed.

Changes to fourth sentence of first paragraph of Opinion section: The Clackamas County Circuit Court has held that this ~~This~~ creates “an unambiguous, nondiscretionary statutory duty to make a ‘no- impairment finding’” when approving a transfer, and a similarly “unambiguous nondiscretionary duty to conduct a contested case hearing” if a protest is filed. *Kusyk v. Water Resources Commission*, 164 Or App 738, 744 (2000) (describing Clackamas County Circuit Court’s holdings and noting that “we do not comment on the correctness of those rulings but assess whether they are ‘in favor of’ petitioners”).

Amendment 5: The Opinion section is amended to add two additional paragraphs (the third and fourth paragraphs of the section) describing additional bases for the conclusion that effecting the water right transfer proposed by Water Right Transfer Application T-13471 will not result in injury to existing water rights.

Amendment 6: The Order section is amended to include information and conditions from the Preliminary Determination so that the Order section fully describes the consequences of approving Transfer Application T-13471 as conditioned in the Preliminary Determination.

ORDER

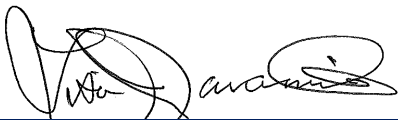
Now, therefore, it is ORDERED:

1. The change in place of use and change in character of use proposed in Transfer Application T-13471 and described herein in Attachment 1 are approved.
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 this order and Certificates 39351 and 39423, and any related decree.
3. Water right Certificates 39351 and 39423 are cancelled. New certificates will be issued describing the portion of these rights not affected by this transfer.
4. Water use measurement conditions:
 - a. Before water use may begin under this order, the water user shall install totalizing flow meters, at each point of diversion, (new and existing), as described below and illustrated

on the map included herein as Attachment 2. Totalizing flow meter #1 shall be placed within 100 feet of the existing diversion point from the source (T25S, R12W, Section 34, NWSE, 6105.63 feet south and 1762.55 feet west from the W1/4 of Section 26); totalizing flow meter #2 shall be placed at the point of rediversion (labelled #2) and located in T25S, R12W, Section 27, NESE, approximately 500 feet south and 360 feet east from the NW corner of the NESE of Section 27 (the current location of the required meter under Limited License #1819); totalizing flow meter #3 shall be placed on the supply line and under the control of the owners of the property (currently Riverview Christian Fellowship) described as T25S, R12W, Section 26, SWNW and NWSW, tax lot 600.

- b. The water user shall maintain the meters or measuring devices in good working order.
 - c. The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.
5. The former place of use of the transferred rights shall no longer receive water under the rights.
 6. Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2025**. A Claim of Beneficial Use prepared by a Certified Water Right Examiner shall be submitted by the Applicants to the Department within one year after the deadline for completion of the changes and full beneficial use of the water.
 7. After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.

Dated in Salem, Oregon on February 9, 2024.



Lisa J. Jaramillo
Transfer and Conservation Section Manager
For DOUGLAS E. WOODCOCK, ACTING DIRECTOR
Oregon Water Resources Department

NOTICE

Appeal of this order is to the Oregon Court of Appeals pursuant to ORS 183.482 and ORS 536.075(2). Petitions for judicial review of this order must be filed with the Court of Appeals within 60 days from the day this order was served. If the order was mailed, the date of service is the day it was mailed. Alternatively, under OAR 137-003-0675, a party may petition OWRD for reconsideration or rehearing of this order within 60 days from the day this order was served. Petitions for reconsideration or rehearing shall be filed by emailing to will.d.davidson@water.oregon.gov. Failure to file a petition for judicial review or a petition for reconsideration or rehearing within the 60-day time period will waive your right of appeal.

ATTACHMENT 1 – page 1

The portion of the water right represented by Certificate 39351 to be transferred is as follows:

Certificate: 39351 in the name of SCHOOL DISTRICT NUMBER 9 (perfected under Permit S-9319)
Use: DOMESTIC SUPPLY FOR NEW SCHOOL BUILDINGS AND TEACHERS RESIDENCE
Priority Date: OCTOBER 16, 1929
Rate: 0.021 CUBIC FOOT PER SECOND (CFS) FOR THE NEW SCHOOL BUILDINGS, AND 0.001 CFS FOR THE TEACHERS RESIDENCE
Source: UNNAMED CREEK, a tributary of COOS RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
25 S	12 W	WM	34	NW SE	6105.63 FEET SOUTH AND 1762.55 FEET WEST FROM THE W1/4 CORNER OF SECTION 26

Authorized Place of Use:

DOMESTIC SUPPLY FOR NEW SCHOOL BUILDINGS AND TEACHERS RESIDENCE					
Twp	Rng	Mer	Sec	Q-Q	GLot
25 S	12 W	WM	26	SW NW	5
25 S	12 W	WM	26	NW SW	

Approval of Transfer Application T-13471 changes the place of use of the right to:

DOMESTIC EXPANDED						
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	CFS
25 S	12 W	WM	26	NW SW	400	0.0028
25 S	12 W	WM	26	NW SW	500	0.0028
25 S	12 W	WM	26	NW SW	600	0.0028
25 S	12 W	WM	26	NW SW	801	0.0028
25 S	12 W	WM	26	NW SW	900	0.0028
25 S	12 W	WM	26	NW SW	1000	0.0028
25 S	12 W	WM	27	NE SE	600	0.0028
25 S	12 W	WM	27	NE SE	700	0.0028
TOTAL						0.022

Approval of Transfer Application T-13471 changes the character of use from Domestic Supply for New School Buildings and Teachers Residence; to Domestic Expanded for Eight Residences.

ATTACHMENT 1 – page 2

The portion of the water right represented by Certificate 39423 to be transferred is as follows:

Certificate: 39423 in the name of SCHOOL DISTRICT #9 (perfected under Permit S-34986)
Use: SCHOOL USE
Priority Date: APRIL 17, 1970
Rate: 0.02 CUBIC FOOT PER SECOND (CFS)
Source: UNNAMED STREAM a tributary of COOS RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
25 S	12 W	WM	34	NW SE	6105.63 FEET SOUTH AND 1762.55 FEET WEST FROM THE W1/4 CORNER OF SECTION 26

Authorized Place of Use:

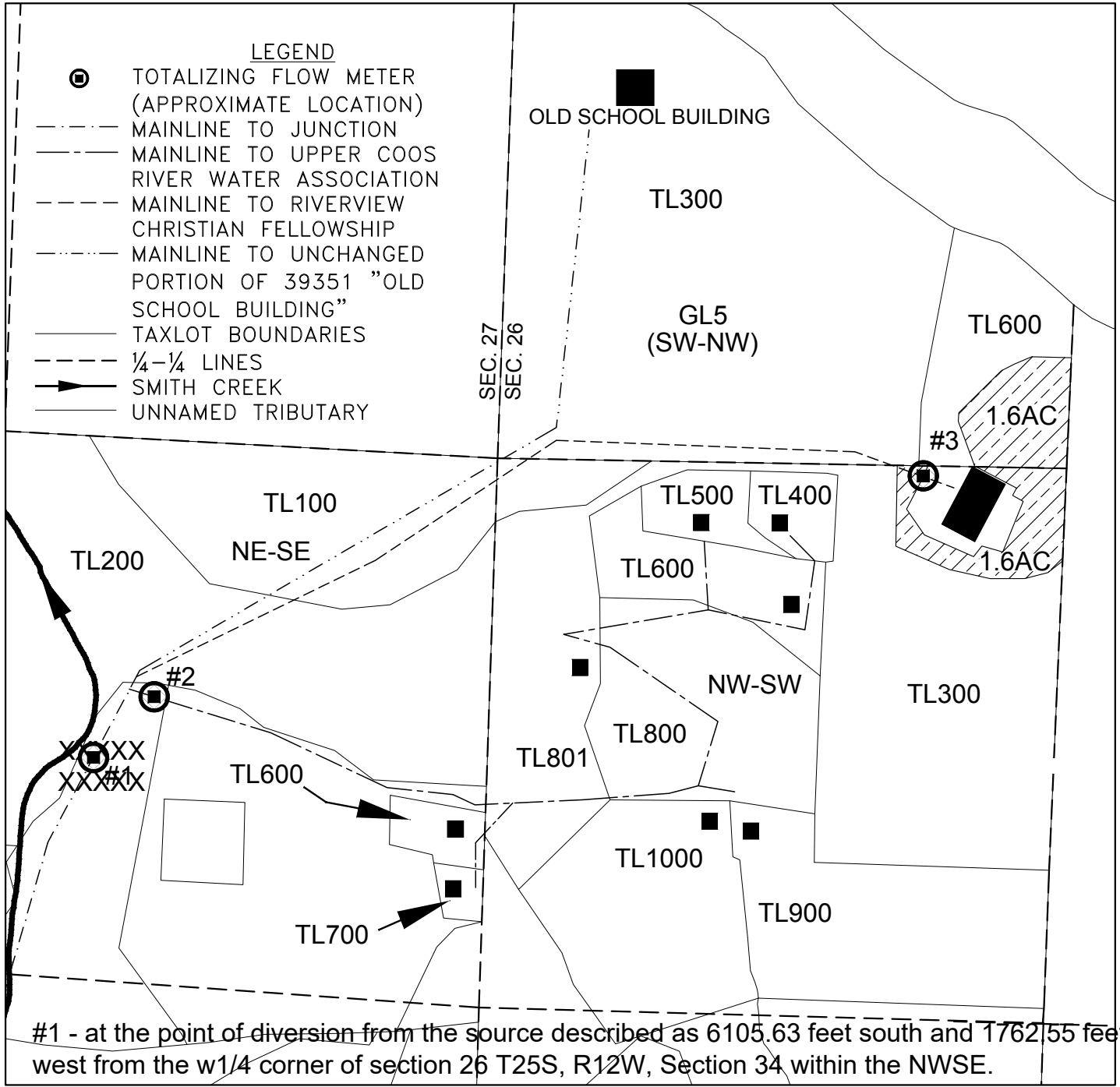
SCHOOL USE					
Twp	Rng	Mer	Sec	Q-Q	GLot
25 S	12 W	WM	26	SW NW	5
25 S	12 W	WM	26	NW SW	

Approval of Transfer Application T-13471 changes the place of use of the right to:

DOMESTIC EXPANDED						
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	CFS
25 S	12 W	WM	26	NW SW	400	0.0025
25 S	12 W	WM	26	NW SW	500	0.0025
25 S	12 W	WM	26	NW SW	600	0.0025
25 S	12 W	WM	26	NW SW	801	0.0025
25 S	12 W	WM	26	NW SW	900	0.0025
25 S	12 W	WM	26	NW SW	1000	0.0025
25 S	12 W	WM	27	NE SE	600	0.0025
25 S	12 W	WM	27	NE SE	700	0.0025
TOTAL						0.02

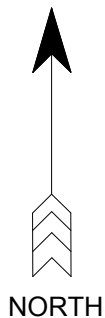
Approval of Transfer Application T-13471 changes the character of use from School Use; to Domestic Expanded Use for Eight Residences.

TRANSFER T-13471 MEASURING DEVICE PLAN
 SECTION 26, 27, & 34, TOWNSHIP 25 SOUTH, RANGE 12 WEST, W.M.
 COOS COUNTY, OREGON



SCALE: 1" = 400'

DISCLAIMER: THIS MAP WAS PREPARED FOR THE PURPOSE OF IDENTIFYING THE LOCATION OF WATER RIGHT ONLY AND IS NOT INTENDED TO PROVIDE LEGAL DESCRIPTIONS OR LOCATIONS OF PROPERTY LINES.



ATTACHMENT 2



P.O. Box 995
 Coos Bay, OR 97420
 (541) 297-1880
 vancampconsulting@gmail.com

Prepared For:
 Upper Coos River Water
 Association
 64170 Solari Rd.
 Coos Bay, OR 97420

Project:
 T-13471 Measurement
 Device Plan

Date:
 12/10/2020

CERTIFICATE OF SERVICE

I certify that on **February 9, 2024**, I caused the foregoing FINAL ORDER IN CONTESTED CASE to be served by electronic mail and by mailing in a sealed envelope, with first-class postage prepaid, as follows:

BY ELECTRONIC MAIL:

Name	Email Address
Upper Coos River Water Association Michael and Susan Mlynarczyk	bhappytoo@yahoo.com
Estate of George Smith, Sr	gwsmithjr@charter.net
Peter D Mohr	peter.mohr@mohrwaterlegal.com
Laura A Schroeder, Tara J Lomacz, & Kelsey J Seibel	counsel@water-law.com
George Smith, Jr	gwsmithjr@charter.net
Jesse Ratcliffe	jesse.d.ratcliffe@doj.state.or.us

BY U.S. MAIL:

Name	Mailing Address
Upper Coos River Water Association Michael and Susan Mlynarczyk	64225 Solari Road Coos Bay, OR 97420
Estate of George Smith, Sr	96614 Coos River Lane Coos Bay, OR 97420
George Smith, Jr	94668 Highway 241 Coos Bay, OR 97420
Peter D Mohr Mohrwater Legal, PC	1631 NE Broadway St., PMB 632 Portland, OR 97232
Laura A Schroeder, Tara J Lomacz, & Kelsey J Seibel Schroeder Law Offices, PC	1915 NE Cesar E. Chavez Blvd. Portland, OR 97212

/s/ Will Davidson
Will Davidson
Protest Program Coordinator
Oregon Water Resources Department