

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

In the Matter of Transfer Application)	FINAL ORDER DENYING A CHANGE
T-10688, Washington County)	IN POINT OF DIVERSION AND
)	PLACE OF USE

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.

Applicant

Oregon Berry Packing Company
Roy Malensky
PO Box 1326
Hillsboro, OR 97123

Agent

Stuntzner Engineering & Forestry
William Kness
2137 19th Avenue
Forest Grove, OR 97116

Findings of Fact

Background

1. On July 31, 2008, Roy Malensky filed an application on behalf of Oregon Berry Packing Company to change the place of use and point of diversion under Certificate 14092 and the perfected portion of Permit S-35792. The Department assigned the application number T-10688.
2. The portion of the first right to be transferred is as follows:

Certificate:	14092 in the name of A.F. Hayes and Blaine Brown (perfected under Permit S-8849)
Use:	Irrigation of 23.6 acres
Priority Date:	December 29, 1928
Rate:	0.30 cubic foot per second
Limit/Duty:	The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to one-eighthieth of one cubic foot per second per acre, or its equivalent for each acre irrigated,
Source:	Tualatin River, tributary to the Willamette River

This final order is subject to judicial review by the Court of Appeals under ORS 183.482. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.482(1). Pursuant to ORS 536.075 and OAR 137-003-0675, 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.

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	4 W	WM	36	NW SW	NONE GIVEN

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
1 S	4 W	WM	36	NE SW	3	0.6
1 S	4 W	WM	36	SE SW	6	4.9
1 S	4 W	WM	36	NW SE	4	0.2
1 S	4 W	WM	36	SW SE	5	5.2
2 S	4 W	WM	1	NW NE	12	9.8
2 S	4 W	WM	1	SW NE	11	1.8
2 S	4 W	WM	1	NE NW		1.1
Total:						23.6

3. Transfer Application T-10688 proposes to change the point of diversion approximately 10.3 miles downstream from the authorized point of diversion; located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	2 W	WM	18	NW SE	OREGON BERRY POD - 720 FEET NORTH AND 2170 FEET EAST FROM THE N.N.E. CORNER OF N.C. RICHARDSON DLC 63

4. Transfer Application T-10688 also proposes to change the place of use of the right to:

Twp	Rng	Mer	Sec	Q-Q	Acres
1 S	2 W	WM	18	SE SW	17.5
1 S	2 W	WM	18	SW SE	6.1
Total:					23.6

5. The portion of the second right to be transferred is as follows

Order: Special Order Volume 67, Pages 627 - 662 (Determination of Satisfactory Proof for Permit S-35792 in the name of The United States of America – Bureau of Reclamation)

Use: Supplemental irrigation of 17.0 acres

Priority Date: February 20, 1963

Rate: 0.21 cubic foot per second

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second per acre or its equivalent for each acre irrigated from direct flow and shall be further limited to a diversion of not to exceed 2.5 acre-feet for each acre irrigated during the irrigation season of each year from direct flow and storage from the reservoir constructed under R-5777 provided further that the right allowed herein shall be limited to any deficiency in the available supply of any prior right existing for the same land and shall not exceed the limitation allowed herein and further limited to the use of stored water only on the lands as described as supplemental.

Source: Reservoir constructed under Permit R-5777, tributary to Scoggins Creek

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	4 W	WM	36	SE SW	POD W-5 - 45°26'08.10"N, 123°07'32.66"W

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
1 S	4 W	WM	36	SE SW	6	1.8
1 S	4 W	WM	36	SW SE	5	2.5
2 S	4 W	WM	1	NW NE	12	9.8
2 S	4 W	WM	1	SW NE	11	1.8
2 S	4 W	WM	1	NE NW		1.1
Total:						17.0

6. Transfer Application T-10688 proposes to change the point of diversion approximately 10.45 miles downstream from the authorized point of diversion; located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	2 W	WM	18	NW SE	OREGON BERRY POD: 720 FEET NORTH AND 2170 FEET EAST FROM THE N.N.E. CORNER OF N.C. RICHARDSON DLC 63

7. Transfer Application T-10688 also proposes to change the place of use of the right to:

Twp	Rng	Mer	Sec	Q-Q	Acres
1 S	2 W	WM	18	SE SW	10.9
1 S	2 W	WM	18	SW SE	6.1
Total:					17.0

8. Notice of the application for transfer was published on August 12, 2008, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
9. 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. This diversion may be eligible for screening cost share funds.
10. On September 9, 2009, the mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10688 to the applicant. The draft Preliminary Determination set forth a deadline of October 9, 2009, for the applicant to respond. The applicant requested the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
11. On October 23, 2009, the Department issued a Preliminary Determination proposing to approve Transfer T-10688 and mailed a copy to the applicant. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on October 27, 2009, and in The Hillsboro Argus newspaper on October 30, November 6 and 13, 2009, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.

12. On December 24, 2009, landowner of the "from" lands, Sergio Gonzalez withdrew his consent to transfer the water rights under Certificate 14092.
13. On August 26, 2011, the Department issued an Order Withdrawing Preliminary Determination Proposing Approval of a Change in Point of Diversion and Place of Use, recorded at Vol. 85, Pages 276-277.
14. On October 27, 2011, the Department issued a Revised Preliminary Determination proposing to deny Transfer Application T-10688 and mailed a copy to the applicant. Additionally, notice of the Revised Preliminary Determination was published on the Department's weekly notice on November 1, 2011, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.

Transfer Review Criteria OAR 690-380-4010(2)

15. Water has been used within the last five years according to the terms and conditions of the rights. There is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
16. A pump, pipeline, and sprinkler system sufficient to use the full amount of water allowed under the existing rights were present within the five-year period prior to submittal of Transfer Application T-10688.
17. The proposed changes would not result in enlargement of the rights.
18. The proposed changes would not result in injury to other water rights.
19. Based on the notarized withdrawal of consent, the applicant is no longer authorized to pursue the transfer.

Conclusions of Law

The changes in point of diversion and place of use proposed in Transfer Application T-10688 appear not to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000.

Now, therefore, it is ORDERED:

Transfer application T-10688 is **denied** and is of no further force or affect.

Dated at Salem, Oregon this 2 day of December 2011.



Dwight French, Water Right Services Administrator, for
PHILIP C. WARD, DIRECTOR

Mailing date: DEC 05 2011