

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

In the Matter of Transfer Application) FINAL ORDER APPROVING
T-11095, Harney County) ADDITIONAL POINTS OF DIVERSION
) TO REFLECT HISTORIC 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

JOHN PEILA
P.O. BOX 697
BURNS, OR 97720

Findings of Fact

Background

1. On June 16, 2010, Peila Ranches Inc., filed a transfer application for authorization of additional historic points of diversion under the Silvies River Decree numbered DN917939. The Department assigned an application number T-11095.
2. On September 23, 2010 the applicant requested that the name of the transfer applicant be modified from Peila Ranches Inc. to John Peila.
3. The portion of the right to be transferred is as follows:

Decree: 1926 Silvies River Decree; Volume 9 at Page 179 number 39 in the name of Pacific Live Stock Company
Use: IRRIGATION of 341.4 ACRES
Priority Date: 1885
Source: SILVIES RIVER, AND SAGE HEN CREEK tributary to the WEST FORK SILVIES RIVER

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.

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
24 S	31 E	WM	7	NE SW	40.0
24 S	31 E	WM	7	NW SW	5.9
24 S	31 E	WM	7	SW SW	5.3
24 S	31 E	WM	7	SE SW	40.0
24 S	31 E	WM	7	NE SE	40.0
24 S	31 E	WM	7	NW SE	40.0
24 S	31 E	WM	7	SW SE	40.0
24 S	31 E	WM	7	SE SE	40.0
24 S	31 E	WM	18	NE NE	40.0
24 S	31 E	WM	18	NW NE	35.7
24 S	31 E	WM	18	NE NW	14.5
Total:					341.4

4. The Silvies River Decree tabulation does not describe the authorized points of diversion, however information is available from the District 10 Watermaster's office and application map that indicates that the points of diversion are located as follows:

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
24 S	31 E	W.M.	7	NW NW	POTTER SWAMP DAM AKA PEILA UPPER #1: 1196 FEET EAST AND 390 FEET SOUTH FROM THE NW CORNER OF SECTION 7
24 S	31 E	W.M.	7	NW NW	POTTER SWAMP DAM AKA PEILA UPPER #2: 1156 FEET EAST AND 400 FEET SOUTH FROM THE NW CORNER OF SECTION 7

5. Transfer Application T-11095 proposes to add points of diversion to reflect historic use approximately 2530 feet downstream from the authorized points of diversion. The location of the additional points of diversion are located below:

Historical Additional Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
24 S	31 E	W.M.	7	NW SW	LOWER W DITCH: 1156 FEET EAST AND 2930 FEET SOUTH FROM THE NW CORNER, SECTION 7
24 S	31 E	W.M.	7	NW SW	LOWER E DITCH: 1226 FEET EAST AND 2890 FEET SOUTH FROM THE NW CORNER, SECTION 7

The proposed points of diversion above have historically served the following lands

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Peila #1 & Lower E	Peila #2 & Lower W
24 S	31 E	WM	7	NE SW	21.9	18.1
24 S	31 E	WM	7	NW SW	1.4	4.5
24 S	31 E	WM	7	SW SW		5.3
24 S	31 E	WM	7	SE SW		40.0
24 S	31 E	WM	7	NE SE	40.0	
24 S	31 E	WM	7	NW SE	39.7	0.3
24 S	31 E	WM	7	SW SE	17.6	22.4
24 S	31 E	WM	7	SE SE	40.0	
24 S	31 E	WM	18	NE NE	23.4	16.6
24 S	31 E	WM	18	NW NE		35.7
24 S	31 E	WM	18	NE NW		14.5
ACRE TOTALS					184.0	157.4

6. Notice of the application for transfer was published on June 29, 2010, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
7. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening and/or by-pass device may be required in the future at the points 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.
8. The Watermaster provided information that modified the injury review to clarify that the PEILA UPPER #2 diversion may be required in the future to install a headgate and measuring device.
9. On August 27, 2010, the Department mailed a copy of the Draft Final Order proposing to approve Transfer Application T-11095 to the applicant. The draft Final Order cover letter itemized deficiencies that needed to be addressed before processing could continue. A deadline of September 30, 2010, was set for the applicant to respond and provide the necessary items for processing.
10. On August 30, 2010 the department received a portion of the items addressed.
11. On September 23, 2010 and October 13, 2010 the applicant submitted the outstanding items that were needed and requested that the Department proceed with issuance of a Final Order. They also provided the necessary information to demonstrate that they are authorized to pursue the transfer.

Transfer Review Criteria (ORS 540.532 and OAR 690-380-2120)

12. Pursuant to OAR 690-380-2120(2)(a), evidence has been submitted that the actual, current points of diversion for the water right in question, as described in Finding of Fact #4, have been in use for more than 10 years.

13. Pursuant to OAR 690-380-2120(2)(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 diversions , prior to the transfer request.
14. The Department identified the affected water rights pursuant to OAR 690-380-2120(3).
15. Notice was served to the applicants during the application process. The affected water right holders provided consent to the change proposed in T-11095.
16. Water has been used within the last five years according to the terms and conditions of the right. There is no evidence available that would demonstrate that the right is subject to forfeiture under ORS 540.610.
17. Diversion structures and ditches sufficient to use the full amount of water allowed under the existing rights are present.
18. The proposed change would not result in enlargement of the right.
19. The proposed change would not result in injury to other water rights.

Conclusions of Law


The proposed addition of points of diversion to reflect historical use in application T-11095 is consistent with the requirements of ORS 540.505 to 540.580, and OAR 690-380-5000.

Now, therefore, it is ORDERED:

1. The change proposed in T-11095 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 the Silvies River Decree.
3. The following entry in the 1926 Silvies River Decree; Volume 9 at Page 179 #39 in the name of Pacific Live Stock Company is hereby modified.
4. The quantity of water diverted at the additional historic 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 at the Peila upper #2 diversion point. 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 one year after receiving written notification from the Oregon Department of Fish and Wildlife (ODFW) that a fish screening and/or by-pass device is required, the water user shall install a screening and/or by-pass device, as appropriate, at the points of diversion. The fish screening and/or by-pass device must meet ODFW's design and construction standards.

Prior to installation, the water user shall obtain written approval from ODFW that the required screening and/or by-pass device meets ODFW's criteria. Once installed the water user shall maintain and operate the fish screening 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 18 day of November 2010.



Dwight French for
PHILIP C. WARD, DIRECTOR

Mailing date: NOV 19 2010