

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

In the Matter of Transfer Application) FINAL ORDER APPROVING
T-9038, Umatilla County, Oregon) CHANGES IN POINTS OF DIVERSION
) AND CHARACTER OF USE AND
) CANCELLING CERTAIN WATER
) RIGHTS

ORS 537.705, and 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

Robert G. Klahn and
Ralph W. Smuckal
43573 McKay Drive
Pendleton, OR 97801

Findings of Fact

1. Robert G. Klahn and Ralph W. Smuckal filed an application to change the point of diversion under Certificates 78923 and 46733, add an additional point of diversion under Certificate 53664, and change the use under Certificates 46733 and 53664 from supplemental to primary irrigation. The Department assigned the application number T-9038.

2. The portion of the FIRST right to be transferred is as follows:

Certificate: 78923 in the name of the Gallaher Farm Company
Use: Irrigation
Priority Date: 1890 for 1.61 acres, 1894 for 1.47 acres, 1900 for 7.7 acres, and 1908 for 0.42 acres
Quantity: 0.14 cubic foot per second
Source: Dugger Creek, tributary to Pine Creek

This is a final order in other than 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 either 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:

Township		Range		Meridian	Sec.	¼	¼	Location	
6	N	35	E	W.M.	30	NE	SW	Not Specified	

Authorized Place of Use:

Township		Range		Meridian	Sec	¼	¼	TL#	Priority Date	Acreage
6	N	34	E	W.M.	25	SW	NE	1900	1900	0.30
6	N	34	E	W.M.	25	SE	NE	1900	1890	1.61
6	N	34	E	W.M.	25	SE	NE	1900	1894	1.47
6	N	34	E	W.M.	25	SE	NE	1900	1900	3.25
6	N	34	E	W.M.	25	SE	NE	1900	1908	0.42
6	N	34	E	W.M.	25	NE	SE	1900	1900	3.95
6	N	34	E	W.M.	25	NW	SE	1900	1900	0.20
TOTAL									11.20	

3. Application T-9038 proposes to change the point of diversion for the above described lands to a point located:

Township		Range		Meridian	Sec	¼	¼	Location	
6	N	35	E	W.M.	30	SW	NW	2650 feet North and 1150 feet East from the SW Corner, Section 30	

4. The portion of the SECOND right to be transferred is as follows:

Certificate: 46733 in the name of T. L. Sherod
Use: Supplemental Irrigation
Priority Date: 1900
Quantity: 0.13 cubic foot per second
Source: Dugger Creek, tributary to Pine Creek

Authorized Point of Diversion:

Township		Range		Meridian	Sec	¼	¼	Lot	Location
6	N	35	E	W.M.	30	NW	SE	—	Hodgen Ditch – 1280 feet South and 1240 feet East from the C1/4, Section 30

Authorized Place of Use:

Township		Range		Meridian	Sec	¼	¼	Tax Lot	Acreage
6	N	35	E	W.M.	30	NW	SW	1500	8.60
6	N	35	E	W.M.	30	NW	SW	1600	1.60

5. Application T-9038 proposes to change the point of diversion for the above described lands to a point located:

Township		Range		Meridian	Sec	¼	¼	Location
6	N	35	E	W.M.	30	SW	NW	2650 feet North and 1150 feet East from the SW Corner, Section 30

6. Application T-9038 also proposes to change the character of use of the right from supplemental irrigation to primary irrigation.

7. The portion of the THIRD right to be transferred is as follows:

Certificate: 53664 in the name of Ralph W. Smuckal

Use: Supplemental Irrigation

Priority Date: June 19, 1911

Quantity: 0.02 cubic foot per second from May 1 to September 1 of each year or its equivalent in case of rotation; the total quantity diverted during each irrigation season not to exceed 4.80 acre-feet, if available at the original point of diversion: Hodgen Ditch – NW¼ SE¼, Section 30, T 6 N, R 35 E, W.M.; 1280' South and 1240' East from the Center, Sec. 30

Source: Dugger Creek, tributary to Pine Creek

Authorized Point of Diversion:

Township		Range		Meridian	Sec	¼	¼	Location
6	N	35	E	W.M.	30	NW	SE	Smuckal Ditch – 840 feet South and 540 feet East from the C1/4, Section 30

Authorized Place of Use:

Township		Range		Meridian	Sec	¼	¼	Tax Lot	Acreage
6	N	35	E	W.M.	30	NW	SW	1600	1.60

8. Application T-9038 proposes to change the point of diversion for the above described lands to a point located:

Township		Range		Meridian	Sec	¼	¼	Location
6	N	35	E	W.M.	30	SW	NW	2650 feet North and 1150 feet East from the SW Corner, Section 30

9. Application T-9038 also proposes to change the character of use of the right from supplemental irrigation to primary irrigation.

10. The water rights subject to transfer under Certificates 46733 and 53664 in the NW¼ SW¼, Section 30 are supplemental water rights, but have historically been used as primary water rights. The rights now evidenced by these certificates were originally confirmed in the Dugger Creek adjudication under Certificate 1712.

11. The primary water right underlying Certificates 46733 and 53664 was established under Permit 747 concurrently with the Dugger Creek adjudication and is evidenced by Certificate

908. Pursuant to OAR 690-380-2320, a supplemental right may be transferred to a primary right on cancellation of the existing, underlying primary right.

12. On June 21, 2004, the Department received an affidavit from Robert and Bonnie Klahn, owner of certain lands to which a portion of Certificate 908 is appurtenant, requesting cancellation of a portion of Certificate 908. The right to be cancelled authorizes the use of 0.117 cubic foot per second from Swamp water, diverted and measured into Hodgen Ditch, for the purpose of primary irrigation of 9.33 acres.
13. On November 17, 2004, the Department received an affidavit from Douglas R. Olsen, Counsel for Umatilla County, owner of certain lands to which a portion of Certificate 908 is appurtenant, requesting cancellation of a portion of Certificate 908. The right to be cancelled authorizes the use of 0.007 cubic foot per second from Swamp water, diverted and measured into Hodgen Ditch, for the purpose of primary irrigation of 0.6 acres.
14. On March 23, 2005, the Department received an affidavit from Mr. Ralph Smuckal, owner of certain lands to which a portion of Certificate 908 is appurtenant, requesting cancellation of a portion of Certificate 908. The right to be cancelled authorizes the use of 0.02 cubic foot per second from Swamp water, diverted and measured into Hodgen Ditch, for the purpose of primary irrigation of 1.6 acres.
15. The portions of Certificate 908 for which affidavits have been received underlie Certificates 46733 and 53664 on the following lands:

Township	Range	Mer	Sec	¼	¼	Tax Lot	Acreage	Landowner	
6	N	35	E	W.M.	30	NW SW	Ringer Rd	0.60	Umatilla County Road Dept.
6	N	35	E	W.M.	30	NW SW	1500	9.33	Robert & Bonnie Klahn
6	N	35	E	W.M.	30	NW SW	1600	1.60	Ralph Smuckal

16. Notice of the application for transfer was published pursuant to ORS 540.520 and OAR 690-380-4000. No comments were filed in response to the notices. However, the Oregon Department of Fish and Wildlife did respond by stating that there does not appear to be a potential for injury to instream or other water rights as a result of the transfer. The ODFW requires the installation of a fish screening or by-pass device to prevent fish from leaving and entering the diversion.
17. Because the changes in points of diversion exceeded a ¼ mile, the transfer request was required to be published in a local newspaper in accordance with ORS 540.520 (5). The affidavit of publication was received by the Department on March 4, 2003. No comments were received in response to the publication of notice.
18. Water has been used within the last five years according to the terms and conditions of the right and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.

19. A diversion structure, pump and pipe line system sufficient to use the full amount of water allowed under the existing rights are present.
20. The proposed changes would not result in enlargement of the rights.
21. The proposed changes would not result in injury to other water rights.

Conclusions of Law

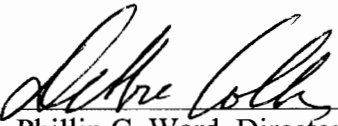
The changes in point of diversion and character of use proposed in application T-9038 are consistent with the requirements of ORS 537.705 and 540.505 to 540.580 and OAR 690-380-5000. The rights described as abandoned should be cancelled.

Now, therefore, it is ORDERED:

1. The changes in point of diversion and character of use proposed in application T-9038 are approved.
2. The portions of the water right evidenced by Certificate 908 that are appurtenant to the lands identified in Findings of Fact 11, 12, 13, 14, and 15 are cancelled.
3. Water right certificates 78923, 46733, 53664, and 908 are cancelled. New certificates will be issued describing those portions of the rights not involved in this transfer or cancellation.
4. 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 46733, 53664 and 78923.
5. The approved changes shall be completed and full beneficial use of the water shall be made on or before **October 1, 2007**. A Claim of Beneficial Use prepared by a Certified Water Rights Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the changes and full beneficial use of the water.
6. Water shall be acquired from the same surface water source as the original points of diversion.
7. The quantity of water diverted at the new point of diversion shall not exceed the quantity of water lawfully available at the original points of diversion.
8. Prior to diverting or using water, the water user shall install a headgate or other suitable devices that can be locked by the Watermaster to control water at the point of diversion. The type and plans of the controlling devices must be approved by the Department prior to beginning construction, and shall be installed under the general supervision of the Department. The water user shall ensure that the controlling devices are operational at all times.

9. The water user shall install and maintain a fish screen or fish by-pass device, as appropriate, at the new point of diversion. The type and plans of the screen or by-pass device must be approved by the Oregon Department of Fish and Wildlife prior to beginning of construction, and shall be installed under the supervision of the Department of Fish and Wildlife.
10. When satisfactory proof of the completed changes is received, new certificates confirming the rights transferred will be issued.

Dated at Salem, Oregon this 27th day of January, 2006.


for Phillip C. Ward, Director

Mailing date: FEB 15 2006