

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

In the Matter of Transfer Application)	FINAL ORDER APPROVING
T-9975, Polk County)	A CHANGE IN POINT OF DIVERSION
)	AND PLACE OF USE AND PARTIAL
)	CANCELLATION OF SUPPLEMENTAL
)	WATER USE PERMITS

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.

Applicants

DAVID AND JOAN SETNIKER
P.O. BOX 338
INDEPENDENCE, OR 97351

Receiving Landowners

EFIM AND JANICE ZYRYANOFF
12490 ANDERSON ROAD
INDEPENDENCE, OR 97351

Findings of Fact

Background

1. On July 22, 2005, David Setniker filed a transfer application to change the point of diversion and place of use under Certificate 81459. The Department assigned the application number T-9975.
2. Efim and Janice Zyryanoff, 12490 Anderson Road, Independence, Oregon 97351 have been designated as receiving landowners.
3. The portion of the right to be transferred is as follows:
Certificate: 81459 in the name of DAVE SETNIKER (perfected under Permit S-40168)
Use: IRRIGATION OF 35.5 ACRES
Priority Date: DECEMBER 17, 1975
Rate: 0.44 CUBIC FOOT PER SECOND (cfs), if available at the original point of diversion described as being located in the SE ¼ NW ¼ as projected within W. Prather DLC 67, Section 35, T. 9 South, R. 4 West, W.M.; 1520 feet South and 1540 feet East from the NW corner of Section 35.

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.

Limit/Duty: ONE-EIGHTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 2.5 acre feet per acre for each acre irrigated during the irrigation season of each year.

Source: WILLAMETTE RIVER, tributary to the COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Coordinates
8 S	4 W	WM	22	SW NW	43	2300 FEET SOUTH AND 1150 FEET WEST FROM THE EASTERLY NE CORNER OF DLC 43

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
8 S	4 W	WM	9	SW SW	41	3.6
8 S	4 W	WM	9	SE SW	41	2.2
8 S	4 W	WM	16	NE NW	41	7.6
8 S	4 W	WM	16	NW NW	41	11.4
8 S	4 W	WM	21	NE NE	43	2.9
8 S	4 W	WM	22	NW NW	43	7.8
TOTAL:						35.5

4. Transfer Application T-9975 proposes to change the authorized point of diversion approximately 13.0 miles upstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Coordinates
9 S	4 W	WM	35	NE NW	350 FEET SOUTH AND 1410 FEET EAST FROM THE NE CORNER OF SECTION 34

5. Transfer Application T-9975 also proposes to change the place of use of the right to:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
9 S	4 W	WM	34	NE NE	18.0
9 S	4 W	WM	34	SE NE	10.8
9 S	4 W	WM	35	NW NW	4.4
9 S	4 W	WM	35	SW NW	2.3
TOTAL:					35.5

6. Notice of the application for transfer was published on August 2, 2005, pursuant to ORS 540.520 and 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 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 currently equipped with an appropriate fish screening and/or by-pass device.

8. On May 2, 2007, the Department mailed to the applicant a copy of the draft Preliminary Determination proposing to approve Transfer Application T-9975, provided the applicant submitted information demonstrating the other recorded owner of the land to be transferred (Joan Setniker) consents to the proposed transfer. On September 27, 2007, the applicant provided a revised application containing Joan Setniker's signature and including her as an applicant, thus satisfying the Department's request. The applicants asked that the Department proceed with issuance of a Preliminary Determination. Necessary information to demonstrate that the applicants are authorized to pursue the transfer was also provided.
9. On September 29, 2008, the Department issued a Preliminary Determination proposing to approve Transfer Application T-9975 and mailed a copy to the applicants and receiving landowners. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on September 30, 2008, and in the *Polk County Itemizer-Observer* newspaper on October 8, 15 and 22, 2008, 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)]

10. 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.
11. A pump, pipeline, and sprinkler system sufficient to use the full amount of water allowed under the existing right are present.
12. There are portions of three water use permits (G-12474, S-53198 and G-13224) for primary and supplemental irrigation that are appurtenant to the same land from which Certificate 81459 is proposed to be transferred. Because these irrigation permits have later priority dates than Certificate 81459 and there is no deficiency in rate under Certificate 81459, the permits are considered supplemental to Certificate 81459.
13. Based upon conversations with the applicant's Certified Water Rights Examiner (Don Knauer), the applicant does not intend to transfer the supplemental water use permits described in Finding No. 11 along with Certificate 81459.
14. The proposed changes, as conditioned, would not result in enlargement of the right.
15. There are several intervening points of diversion between the existing authorized point of diversion under Certificate 81459 and the proposed new point of diversion. However, the use of water at the proposed new point of diversion can be conditioned to avoid injury to the intervening points of diversion (see proposed Condition No. 5 under the "Determination and Proposed Action" section below).
16. The proposed changes, as conditioned, would not result in injury to other water rights.

Partial Cancellation of Supplemental Water Use Permits

17. ORS 540.510(1) and OAR 690-380-2250(5) provide that the order approving the transfer of a primary right shall cancel the portion of a supplemental water right or permit appurtenant to the same lands if the supplemental water right or permit is not included in the transfer. Several water use permits that are supplemental to Certificate 81459 are not included in Transfer Application T-9975, and the appurtenant portions of those permits will be cancelled upon issuance of a final order approving T-9975, unless the applicant amends the application to include the supplemental water use permits in the transfer, or to withdraw those lands from the transfer.
18. Consistent with OAR 690-380-2250, the Department notified the applicant in the draft Preliminary Determination issued on May 2, 2007, that the Department intended to cancel the portions of the supplemental water use permits described below in Findings #18, #19 and #20, unless within 30 days of the date of the notification the applicant modified the application to include the supplemental water use permits or withdrew the application. The applicant did not provide any modification to include the supplemental rights nor did the applicant withdraw the application.
19. The portion of the first supplemental water use permit proposed to be cancelled is as follows:
- Permit:** G-12474 in the name of DAVID SETNIKER (Application G-13232)
Use: PRIMARY IRRIGATION OF 24.8 ACRES
Priority Date: DECEMBER 31, 1992
Source: TWO WELLS (Wells 1A and 1B), in the WILLAMETTE RIVER BASIN
(as amended by Special Order Volume 54, Pages 431 - 434.)

Authorized Points of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Coordinates
8 S	4 W	WM	21	NW NE	Well 1A – 200 FEET SOUTH AND 1950 FEET WEST FROM THE NE CORNER OF SECTION 21
8 S	4 W	WM	21	NE NE	Well 1B – 200 FEET SOUTH AND 600 FEET WEST FROM NE CORNER OF SECTION 21

Authorized Place of Use to be cancelled:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Acres	Type
8 S	4 W	WM	9	SW SW	3.6	Primary
8 S	4 W	WM	9	SE SW	2.2	Primary
8 S	4 W	WM	16	NE NW	7.6	Primary
8 S	4 W	WM	16	NW NW	11.4	Primary
TOTAL:					24.8	

20. The portion of the second supplemental water use permit proposed to be cancelled is as follows:

Permit: S-53198 in the name of DAVID SETNIKER (Application S-74014)
Use: PRIMARY AND SUPPLEMENTAL IRRIGATION OF 35.5 ACRES
Priority Date: APRIL 12, 1994
Source: WILLAMETTE BASIN PROJECT RESERVOIRS (constructed under Permits R-1625 and R-5363), tributaries of the COLUMBIA RIVER

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Coordinates
8 S	4 W	WM	22	SW NW	2300 FEET SOUTH AND 1150 FEET WEST FROM THE MOST EASTERLY NE CORNER OF THOMAS L. BURBANK DLC 43

Authorized Place of Use to be cancelled:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Acres	Type
8 S	4 W	WM	9	SW SW	3.6	Supplemental
8 S	4 W	WM	9	SE SW	2.2	Supplemental
8 S	4 W	WM	16	NE NW	7.6	Supplemental
8 S	4 W	WM	16	NW NW	11.4	Supplemental
8 S	4 W	WM	21	NE NE	2.9	Primary
8 S	4 W	WM	22	NW NW	7.8	Primary
TOTAL:					35.5	

21. The portion of the third supplemental water use permit proposed to be cancelled is as follows:

Permit: G-13224 in the name of DAVID SETNIKER (Application G-14278)
Use: PRIMARY AND SUPPLEMENTAL IRRIGATION OF 35.5 ACRES
Priority Date: MARCH 25, 1996
Source: EIGHT WELLS, in the WILLAMETTE RIVER BASIN, mitigated by stored water from Willamette Basin Project Reservoirs

Authorized Points of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Coordinates
8 S	4 W	WM	15	SW SW	Well 3 – 160 FEET SOUTH AND 1375 FEET WEST FROM THE MOST EASTERLY NE CORNER OF DLC 43
8 S	4 W	WM	15	SE SW	Well 4 – 750 FEET SOUTH AND 880 FEET EAST FROM THE MOST EASTERLY NE CORNER OF DLC 43
8 S	4 W	WM	15	NW SE	Well 8 – 1060 FEET NORTH AND 2150 FEET EAST FROM THE MOST EASTERLY NE CORNER OF DLC 43
8 S	4 W	WM	16	SE SW	Well 1 – 160 FEET SOUTH AND 4250 FEET WEST FROM THE MOST EASTERLY NE CORNER OF DLC 43
8 S	4 W	WM	21	NE NW	Well 2 – 990 FEET SOUTH AND 2575 FEET WEST FROM THE MOST EASTERLY NE CORNER OF DLC 43

Twp	Rng	Mer	Sec	Q-Q	Measured Coordinates
8 S	4 W	WM	22	NE NE	Well 6 – 1450 FEET SOUTH AND 3270 FEET EAST FROM THE MOST EASTERLY NE CORNER OF DLC 43
8 S	4 W	WM	22	NW NE	Well 5 – 580 FEET SOUTH AND 1700 FEET EAST FROM THE MOST EASTERLY NE CORNER OF DLC 43
8 S	4 W	WM	22	NE NW	Well 7 – 1100 FEET SOUTH AND 280 FEET EAST FROM THE MOST EASTERLY NE CORNER OF DLC 43
<p>**NOTE: Permit G-13224 contains a scrivener's error in the ¼ ¼ section description for Well 2. Based upon the permitted location coordinates and the associated map, the well is actually located in the NE ¼ <u>NE</u> ¼ of Section 21, T. 8 South, R. 4 West, WM.</p>					

Authorized Place of Use to be cancelled:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Acres	Type
8 S	4 W	WM	9	SW SW	3.6	Supplemental
8 S	4 W	WM	9	SE SW	2.2	Supplemental
8 S	4 W	WM	16	NE NW	7.6	Primary & Supplemental
8 S	4 W	WM	16	NW NW	11.4	Primary & Supplemental
8 S	4 W	WM	21	NE NE	2.9	Supplemental
8 S	4 W	WM	22	NW NW	7.8	Supplemental
TOTAL:					35.5	

Conclusions of Law


The changes in place of use and point of diversion proposed in Transfer Application T-9975 are consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000 and the portions of the supplemental water use permits described in Findings #18, #19 and #20, should be cancelled.

Now, therefore, it is ORDERED:

1. The changes in place of use and point of diversion proposed in Transfer Application T-9975 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 Certificate 81459 and any related decree.
3. Water right Certificate 81459 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer.
4. The portions of supplemental water use Permits G-12474, S-53198 and G-13224 described in Findings #18, #19 and #20, are cancelled.

5. The quantity of water diverted at the new point of diversion shall not exceed the quantity of water lawfully available at the original point of diversion.
6. The former place of use of the transferred right shall no longer receive water under the right.
7. The water user shall maintain and operate a fish screening and/or by-pass device, as appropriate, at the point of diversion consistent with the Oregon Department of Fish and Wildlife's operational and maintenance standards.
8. When required by the Department, the water user shall install, maintain and operate an in-line flow meters, weirs, or other suitable devices for measuring and recording the quantity of water diverted. The type and plans of the measuring devices must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.
9. The approved changes shall be completed and full beneficial use of the water shall be made on or before **October 1, 2010**. 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.
10. When satisfactory proof of the completed changes is received, a new certificate confirming the right transferred will be issued.

Dated at Salem, Oregon this 3rd day of December 2008.


Phillip C. Ward, Director

Mailing date: DEC 09 2008