

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

In the Matter of Transfer Application)
T-10999, Marion County)
)
)
)
)

FINAL ORDER APPROVING
CHANGES IN POINTS OF
APPROPRIATION AND PLACE OF
USE AND CANCELLATION OF
WATER RIGHTS

Authority

ORS 537.705 and 540.505 to 540.580 establish the process in which a water right holder may submit a request to transfer the point of appropriation, 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.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicants

STEVEN V. JOHNSON AND CONSTANCE A. JOHNSON
10404 HAZELGREEN RD
SILVERTON, OR 97381

THE PICTSWEET COMPANY
TEN PICTSWEET DRIVE
BELLS, TENNESSEE 38006

Findings of Fact

Background

1. On December 29, 2009, STEVEN V. JOHNSON, CONSTANCE A. JOHNSON, and the PICTSWEET COMPANY filed an application to change the points of appropriation and to change the place of use under Certificate 82388. The Department assigned the application number T-10999.
2. On May 19, 2010, the applicants’ agent notified the Department by email of modifications to the transfer application and map to reduce the number of acres of water right proposed to be transferred from 46.1 acres to 40.0 acres.

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.

3. On August 23, 2010, a new map with revisions to the well locations was submitted.
4. The portion of the right to be transferred is as follows:

Certificate: 82388 in the name of UNITED FOODS, INC. (perfected under Permit G-11940)

Use: IRRIGATION of 40.0 ACRES

Priority Date: JUNE 24, 1992

Rate: 0.50 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 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.

Period of Use: March 1 through October 31

Source: WELL #2 in the WEST FORK LITTLE PUDDING RIVER BASIN

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
7 S	2 W	WM	29	NW SW	77	1,450 FEET NORTH AND 1,620 FEET WEST FROM THE MOST NORTHERLY CORNER OF DLC 75

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
7 S	2 W	WM	29	SE NW	80	17.4
7 S	2 W	WM	29	NE SW	77	7.1
7 S	2 W	WM	29	SW SW	74	1.5
7 S	2 W	WM	29	SE SW	74	14.0

5. Transfer Application T-10999 proposes to move the authorized point of appropriation to four wells approximately 7 ½ miles northeast from the existing point of appropriation to:

Twp	Rng	Mer	Sec	Q-Q	WELL ID	Measured Distances
6S	1W	WM	31	SE NE	WELL #1	40 FEET NORTH AND 510 FEET WEST FROM THE EAST ¼ CORNER OF SECTION 31
6S	1W	WM	31	NE SE	WELL #2	800 FEET SOUTH AND 520 FEET WEST FROM THE EAST ¼ CORNER OF SECTION 31
6S	1W	WM	31	SE SE	WELL #3	1,850 FEET SOUTH AND 530 FEET WEST FROM THE EAST ¼ CORNER OF SECTION 31
6S	1W	WM	31	SE SE	WELL #4	2,440 FEET SOUTH AND 540 FEET WEST FROM THE EAST ¼ CORNER OF SECTION 31

6. Transfer Application T-10999, as revised, also proposes to change the place of use of the right to:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
6S	1W	WM	31	SE NE	0.4
6S	1W	WM	31	NE SE	11.6
6S	1W	WM	31	SE SE	11.9
6S	1W	WM	32	SW NW	4.7
6S	1W	WM	32	NW SW	8.2
6S	1W	WM	32	SW SW	3.2

7. The area proposed to be irrigated under this application, as revised, is currently covered by existing primary irrigation water rights. These primary rights include Certificates 33895, 48063, and 28929. The proposed movement of Certificate 82388 onto these lands would result in multiple primary rights on the same lands. OAR 690-380-5120 provides that when multiple primary rights exist on the same lands, one primary irrigation right (by default the one with the oldest priority date) may remain primary, and all other rights on the same land shall be diminished to supplemental.
8. Notice of the application for transfer was published on January 12, 2010, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
9. On March 28, 2010, the Department mailed a copy of the Preliminary Determination to the applicants, proposing to deny Transfer Application T-10999 due to the potential for injury, since the proposed wells would be hydraulically connected to a different surface water source. This would likely result in a significant increase in interference with the Pudding River and Silver Creek, impacting a group of water users not previously impacted by this water right. The Preliminary Determination cover letter set forth a deadline of April 28, 2010, for the applicants to respond. The applicants and their attorney Shonee Langford and their agent Greg Kupillas requested information about the groundwater review and a meeting with the Department to consider options that could allow the Department to make a positive finding that the change would not result in injury to other water rights.
10. On May 11, 2010, Mr. Johnson and his agent Greg Kupillas met with Department staff members to discuss the preliminary determination and mitigation options.
11. On May 19, 2010, the applicant proposed to relinquish Certificates 33895, 28929, and 48063 if T-10999 is approved, either through transferring them instream or by cancellation of the rights. The applicant requested further discussion of these processes with the Department.
12. A 20.0 acre portion of the area proposed to be irrigated under this application, as revised, is currently covered by groundwater Permit G-16519 (priority date July 3, 2008), for supplemental irrigation from the same Well 1 and Well 2 proposed to be used for the transferred rights. This presents a conflict with the proposed transfer.

13. On May 19, 2010, the applicants proposed to cancel or withdraw supplemental groundwater Permit G-16519, conditional upon approval of T-10999.
14. On May 21, 2010, Greg Kupillas requested that a new determination be issued in the form of a revised Preliminary Determination, so that the applicants could again make comments.
15. On July 7, 2010, Greg Kupillas indicated by email that Steve Johnson would be willing to cancel the water rights if transferring them instream would cause further delays in completing the transfer.
16. On July 20, 2010, Department consultation about the considerations and relative benefits of mitigating the impacts by cancelling the rights versus by transferring the water instream concluded that cancellation would offer the greatest mitigation value. While a small benefit could result from creating an instream water right through the transfer process, it would be outweighed by the conditions that would need to be built into the right to prevent other rights from becoming subject to additional regulation.
17. On July 22, 2010, the Department mailed a copy of the revised draft Preliminary Determination proposing to approve Transfer Application T-10999 to the applicants. The revised draft Preliminary Determination cover letter set forth a deadline of August 23, 2010, for the applicants to respond. The applicants requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicants are authorized to pursue the transfer.
18. On September 3, 2010, the Department issued a Preliminary Determination proposing to approve Transfer Application T-10999 and mailed a copy to the applicants. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on September 7, 2010, and in the Silverton Appeal-Tribune newspaper on September 15, 22 and 29, 2010, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.
19. On September 16, 2010, Greg Kupillas, the applicants' agent, informed the Department of some scrivener's errors in the cancellation listings in the Preliminary Determination, which have been corrected in this document.

Transfer Review Criteria (OAR 690-380-4010)

20. Certificate 82388 which was issued to confirm the right in the last five years serves as evidence that the right is not subject to forfeiture under ORS 540.610.
21. A pump, pipeline, and sprinkler system sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Transfer Application T-10999.
22. The proposed change would not result in enlargement of the right.

- 23. The proposed wells are located approximately 7.5 miles northeast from the permitted well; and pumping at the proposed wells will impact an entirely different group of groundwater users. Although pumping at the proposed wells will increase interference with nearby groundwater users, the magnitude of increase is not likely to be significant due to hydraulic properties of the aquifer system.
- 24. The proposed change will likely result in a significant increase in interference with another surface water source. The authorized POA is located in the Pudding River>Mollalla River – AB Howell Prairie Water Availability Basin. The proposed POAs are located in the Pudding River>Mollalla River-AB Mill Creek Water Availability Basin and will interfere with the Pudding River and Silver Creek.
- 25. The revised proposed pumping rate of 0.50 cfs is nearly three times the allowed use for wells less than one mile from, and hydraulically connected to, surface water sources in the Pudding River>Mollalla River-AB Mill Creek Water Availability Basin.

Cancellation of Water Rights

- 26. On September 1, 2010, affidavits proposing to authorize abandonment and cancellation of three water rights and one permit were *conditionally delivered* by Steven V. Johnson and Constance A. Johnson, landowners and permit holders. These affidavits are to be held by the Department awaiting authorization from Steven Johnson to effect the cancellations. Such authorization is contingent upon full and final approval of T-10999 on terms acceptable to the applicants.
- 27. The first right to be cancelled is as follows:

Certificate: 33895 in the name of GWENETH N. THACKERY (perfected under Permit S-16903)
Use: IRRIGATION of 20.0 ACRES
Priority Date: APRIL 15, 1946
Rate: 0.25 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-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: PUDDING RIVER, tributary to the MOLALLA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
6 S	1 W	WM	32	NW SW

Authorized Place of Use to be Cancelled:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
6 S	1 W	WM	31	SE NE	1	0.4
6 S	1 W	WM	31	NE SE		12.6
6 S	1 W	WM	32	SW NW	2	1.0
6 S	1 W	WM	32	NW SW		6.0

28. The second right to be cancelled is as follows:

Certificate: 28929 in the name of the ESTATE OF LEONARD W. THACKERY; C/O MRS. GWENETH THACKERY (perfected under Permit S-23918)
Use: IRRIGATION of 6.8 ACRES
Priority Date: DECEMBER 31, 1954
Rate: 0.08 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-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: PUDDING RIVER, tributary to the MOLALLA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
6 S	1 W	WM	32	NW SW

Authorized Place of Use to be Cancelled:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
6 S	1 W	WM	32	SW NW	2	3.2
6 S	1 W	WM	32	NW SW		3.6

29. The third right to be cancelled is as follows:

Certificate: 48063 in the name of GWENETH N. THACKERY (perfected under Permit S-32331)
Use: IRRIGATION of 20.1 ACRES
Priority Date: FEBRUARY 3, 1967
Rate: 0.25 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-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: PUDDING RIVER, tributary to the MOLALLA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
6 S	1 W	WM	32	NW SW	2280 FEET NORTH AND 870 FEET EAST FROM THE SW CORNER OF SECTION 32

Authorized Place of Use to be Cancelled:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
6 S	1 W	WM	31	NE SE	3.6
6 S	1 W	WM	31	SE SE	12.6
6 S	1 W	WM	32	NW SW	0.1
6 S	1 W	WM	32	SW SW	3.8

30. The fourth right to be cancelled is as follows:

- Permit:** G-16519 in the name of STEVE AND CONSTANCE JOHNSON (applied for under Application G-17078)
- Use:** SUPPLEMENTAL IRRIGATION of 20.0 ACRES
- Priority Date:** JULY 3, 2008
- Rate:** 0.086 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, 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:** WELL 1 AND WELL 2, in the PUDDING RIVER BASIN

Authorized Point(s) of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
6 S	1 W	WM	31	NE SE	WELL 1: 40 FEET SOUTH AND 520 FEET WEST FROM THE E ¹ / ₄ CORNER OF SECTION 31
6 S	1 W	WM	31	NE SE	WELL 2: 700 FEET SOUTH AND 520 FEET WEST FROM THE E ¹ / ₄ CORNER OF SECTION 31

Authorized Place of Use to be Cancelled:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
6 S	1 W	WM	31	SE NE	0.4
6 S	1 W	WM	31	NE SE	11.6
6 S	1 W	WM	31	SE SE	2.4
6 S	1 W	WM	32	SW NW	0.9
6 S	1 W	WM	32	NW SW	4.7

31. The proposed revised changes, including relinquishment of Certificates 33895, 28929, 48063, and Permit G-16519, would not result in injury to other water rights.

Conclusions of Law

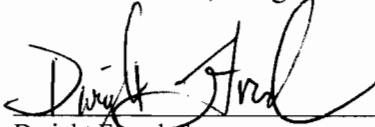
The change in point of appropriation and change in place of use proposed in Transfer Application T-10999, as revised, are consistent with the requirements of ORS 537.705 and 540.505 to 540.580 and OAR 690-380-5000 and the abandoned rights should be cancelled.

Now, therefore, it is ORDERED:

1. The change in point of appropriation and change in place of use proposed in application T-10999 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 82388 and any related decree.
3. Water right certificate 82388 is cancelled. A new certificate will be issued describing those portions of the right not affected by this transfer.
4. The quantity of water diverted at the new points of appropriation shall not exceed the quantity of water lawfully available at the original point of appropriation.
5. Water use measurement conditions:
 - a) Before water use may begin under this order, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of appropriation.
 - 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.
6. Water shall be acquired from the same aquifer (water source) as the original point of appropriation.
7. Water right Certificates 33895, 48063, and 28929 will be cancelled, effective upon expiration of the periods for reconsideration and judicial review of the Final Order for T-10999.
8. Water right Permit G-16519 will be cancelled, effective upon expiration of the periods for reconsideration and judicial review of the Final Order for T-10999.
9. The approved changes shall be completed and full beneficial use of the water shall be made on or before **October 1, 2012**. 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 19 day of November 2010.



Dwight French for
PHILIP C. WARD, DIRECTOR

Mailing date: NOV 23 2010