

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

In the Matter of Transfer Application)
T-13139, Wallowa County)
)
) FINAL ORDER APPROVING A CHANGE IN
) POINT OF DIVERSION TO REFLECT HISTORIC
) USE AND PARTIAL CANCELLATION OF
) WATER RIGHT CERTIFICATE 3077

Authority

ORS 540.532 establishes the process in which a water right holder may submit a request for a change in point of diversion to reflect historical use under an existing water right. OAR Chapter 690-380-2120 implements the statute and provides the Department’s procedures and criteria for evaluating historic point of diversion/appropriation transfer applications.

Oregon Revised Statute (ORS) 540.621 and Oregon Administrative Rules 690-017-0100 direct the Commission to enter an order canceling a water right whenever the owner of a perfected and developed water right certifies under oath to the Commission that the water right has been abandoned and the owner desires to cancel the right.

Applicant

Kenneth and Bobbie Baker
81705 Hwy 82
Wallowa, OR 97885

Findings of Fact

1. On March 6, 2019, Kenneth and Bobbie Baker, 81705 Hwy 82, Wallowa, OR 97885, filed a transfer application for authorization of an historic point of diversion under Certificate 3077. The Department assigned the application number T-13139.
2. Notice of the application for transfer was published in the Department’s weekly notice on March 12, 2019, pursuant to OAR 690-380-2120(3)(d). On April 9, 2019, timely comments were received from the Oregon Department of Fish and Wildlife (ODFW). ODFW does not oppose the transfer.

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.

3. Pursuant to OAR 690-380-2120(4), the Department provided a list of the affected water rights to the Applicant's agent. In addition, the Department provided a copy of the Notice of the proposed transfer to be served to the Applicant's agent.
4. On March 22, 2019, the Applicant's agent submitted a Proof of Service of the notice of the proposed historic transfer.
5. The portion of the first right to be transferred is as follows:

Certificate: 3077 in the name of RUDOLPH KUEHL (confirmed by Wallowa River Decree)

Use: IRRIGATION of 90.0 ACRES, DOMESTIC AND LIVESTOCK

Priority Date: 1883 for IRRIGATION, and MAY 1897 for DOMESTIC

Limit/Duty: The amount of water is limited to an amount actually beneficially used shall not exceed 1.5 acre feet per acre during any period of 30 days prior to July 31 of each year, and thereafter not to exceed 1.0 acre foot per acre during the entire remainder of the irrigation season.

Source: LOSTINE RIVER (aka SOUTH FORK OF WALLOWA RIVER), a tributary of the WALLOWA RIVER

Authorized Point of Diversion: Not Listed on Certificate.

Authorized Place of Use:

| IRRIGATION, DOMESTIC, AND LIVESTOCK | | | | | |
|-------------------------------------|------|-----|-----|-------|-------|
| Twp | Rng | Mer | Sec | Q-Q | Acres |
| 1 N | 43 E | WM | 32 | SW NE | 40.0 |
| 1 N | 43 E | WM | 32 | SE NE | 16.0 |
| 1 N | 43 E | WM | 32 | NE SE | 34.0 |
| Total | | | | | 90.0 |

6. Certificate 3077 does not describe the specific location of the point of diversion from the Kuehl Ditch. Based on information available from the Watermaster and Department records, the point of diversion is located as follows:

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|-----|------|-----|-----|-------|--|
| 1 S | 43 E | WM | 4 | NW NW | KUEHL DITCH – 200 FEET SOUTH AND 630 FEET EAST OF THE NW CORNER OF SECTION 4 |

7. Transfer Application 3077 proposes to formally recognize the point of diversion to reflect historic use at the following location:

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|-----|------|-----|-----|-------|---|
| 1 S | 43 E | WM | 4 | NE SW | FOSTER DITCH – 320 FEET SOUTH AND 625 FEET WEST OF THE CENTER OF SECTION 4 LATITUDE: 45.50716, LONGITUDE: -117.45096 |

8. An Evidence of Use Affidavit signed by Perry Johnston was submitted asserting water has been used on the lands covered under Certificate 3077 during the last five years according

to the terms and conditions of the right. The Affiant also asserts water has been diverted at the current point of diversion for more than 10 years.

9. The Oregon Department of Fish and Wildlife has determined that a fish screen is necessary at the new point of diversion to prevent fish from entering the diversion and that the diversion is currently equipped with an appropriate fish screen.

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

10. Pursuant to OAR 690-380-2120(2)(a), evidence has been submitted that the actual, current point of diversion for the water right in question, as described in Finding No. 7, has been in use for more than 10 years.
11. Pursuant to OAR 690-380-2120(2)(c), the Watermaster provided a statement that based on the Department's records and to his knowledge no complaints of injury due to the use of water at the actual, current point of diversion prior to the transfer request have been filed.
12. Pursuant to OAR 690-380-2120(3), the Department provided the applicant a list of the affected water rights and a copy of the notice to be provided to each affected water right holder. The applicant has provided written proof of service of notice of the proposed transfer on all affected water right holders.

Partial Cancellation of a Water Right

13. On March 13, 2019, an affidavit certifying that a portion of a water right has been abandoned and requesting cancellation of the water use was received from Kenneth and Bobbie Baker. The right to be cancelled is as follows:

Certificate: 3077 in the name of RUDOLPH KUEHL (confirmed by Wallowa River Decree)
Use: DOMESTIC
Priority Date: MAY 1897
Source: LOSTINE RIVER (aka SOUTH FORK OF WALLOWA RIVER), a tributary of the WALLOWA RIVER

Authorized Point of Diversion: Not Specified in Certificate; however Decree states Clearwater Ditch

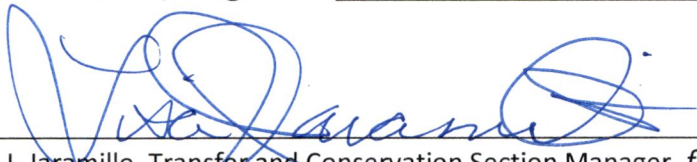
Conclusions of Law

The proposed change in point of diversion to reflect historic use in application T-13139 is consistent with the requirements of ORS 540.532, 540.621, OAR 690-380-2120, and OAR 690-017-0100, and the abandoned right should be cancelled.

Now, therefore, it is ORDERED:

1. The change proposed in T-13139 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 Certificate 3077 and any related decree.
3. Water right certificate 3077 is cancelled. Certificate 94327 will be issued to describe the change in point of diversion and the cancellation of domestic use. Certificate 94327 shall supersede Certificate 3077.
4. The quantity of water diverted at the new point of diversion (Foster Ditch) shall not exceed the quantity of water lawfully available at the original point (Kuehl Ditch) of diversion.
5. The water user shall operate and maintain an approved fish screen at the new point of diversion. If Oregon Department of Fish and Wildlife (ODFW) determines the screen is not functioning properly, and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that OWRD regulate the use of water until OWRD receives notification from ODFW that the fish screen is functioning properly.

DATED at Salem, Oregon this APR 18 2019.



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
THOMAS M. BYLER, Director
Oregon Water Resources Department

Mailing date: APR 19 2019