

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

In the Matter of Transfer Application	)	FINAL ORDER APPROVING A
T-10977, Polk and Yamhill County	)	CHANGE IN POINT OF DIVERSION
	)	AND PLACE OF 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**

DERAEVE FAMILY LLC  
ED DERA EVE  
PO BOX 3  
MCMINNVILLE, OR 97128

**Applicant**

RON AND JAMIE LEWIS  
20650 S HWY 99 W  
AMITY, OR 97101

**Agent**

MARTHA O. PAGEL  
SCHWABE, WILLIAMSON, & WYATT  
530 CENTER ST NE, SUITE 400  
SALEM, OR 97301

**Findings of Fact**

***Background***

1. On November 16, 2009, the DERA EVE FAMILY LLC and RON AND JAMIE LEWIS filed an application to change the point of diversion and to change the place of use under Certificate 83204. The Department assigned the application number T-10977.
2. The portion of the right to be transferred is as follows:

<b>Certificate:</b>	83204 in the name of MARVIN JOHN DERA EVE AND PATRICIA ANN DERA EVE (perfected under Permit R-6487)
<b>Use:</b>	STORAGE FOR IRRIGATION
<b>Priority Date:</b>	MAY 6, 1976

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.

**Rate:** 24.0 ACRE FEET

**Source:** ASH SWALE, tributary to the SOUTH YAMHILL RIVER

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
6 S	4 W	WM	7	NE SE	46	1590 FEET SOUTH AND 450 FEET WEST FROM THE NE CORNER OF DLC 46

**Authorized Place of Use:**

STORAGE FOR IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	DLC
6 S	4 W	WM	7	NE SE	46
6 S	4 W	WM	7	NW SE	46
6 S	4 W	WM	7	SW SE	46
6 S	4 W	WM	7	SE SE	46
6 S	4 W	WM	18	NW NE	46
6 S	4 W	WM	18	SW NE	
6 S	4 W	WM	18	NE NW	46
6 S	4 W	WM	18	SE NW	54

- Certificate 83204 describes Ash Swale as a tributary to the South Yamhill River. It is actually a tributary to Salt Creek.
- Transfer Application T-10977 proposes to move the authorized point of diversion approximately 5.28 miles downstream to the dam built for Application R-70373/Permit R-11254. Permit R-11254 was cancelled by an order issued March 26, 1997, recorded at Special Order Volume 51, page 318:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 S	4 W	WM	29	NE SE	2190 FEET NORTH AND 810 FEET WEST FROM THE SE CORNER OF SECTION 29

- Application T-10977 also proposes to change the place of use of the right to the former reservoir site which was the place of use for Permit R-11254:

STORAGE FOR IRRIGATION				
Twp	Rng	Mer	Sec	Q-Q
5 S	4 W	WM	28	NW SW
5 S	4 W	WM	28	SW SW
5 S	4 W	WM	29	NE SE
5 S	4 W	WM	29	SE SE

- Application R-70373 was filed May 22, 1990, by Marvin DeRaeve, requesting a permit to construct Raevenbrook Reservoir and to store the waters of Ash Swale for the purpose of irrigation, to be appropriated under a secondary water right for irrigation from the stored water. The storage application was subjected to public interest review under ORS 537.400, including an engineering safety review of the dam plans and specifications, public notice and a review by the Oregon Department of Fish and Wildlife (ODFW). On October 1, 1990, the Oregon Water Resources Department (OWRD) issued Permit R-11254, approving

construction of the dam according to the plans and specifications and storage of up to 25.0 acre-feet of water, subject to specific conditions requested by OWRD's dam safety engineer.

7. Conditions of Permit R-11254 included: The structure was to be constructed under the supervision of a registered engineer, licensed in Oregon; constructed, operated and maintained in accordance with the approved plans and specifications; no water was to be stored until notification from the engineer of construction completion and receiving written authorization from the Department. Operation and maintenance conditions included cycling the outlet gate at least once a year, keeping the embankment and spillway clear of trees, brush and debris and burrowing animals. An area-capacity curve prepared by an engineer was to be submitted once construction was completed and flashboards were to be removed no later than October 1 each year and not installed until after April 1 each year. Construction and storage was to be completed by October 1, 1993.
8. On October 28, 1993, the Department sent Marvin DeRaeve a letter stating that notice had not been received that the construction of the reservoir and storage of water under Permit R-11254 was completed, and requesting the notice of completion to be submitted promptly, or an extension of time could be requested. The letter also mentioned the requirement to hire a Certificate Water Right Examiner to prepare and submit a Claim of Beneficial Use by October 1, 1994.
9. On January 26, 1994, a request for assignment of the water right was received from Ticor Title Insurance Company, asking to assign the water right permit from Marvin DeRaeve to Northwest Farm Credit Services, ACA, and Marvin J. and Patricia A. DeRaeve. The assignment was approved on January 31, 1994.
10. On August 17, 1994, the Department acknowledged receipt of an application for extension of time, and extended the time for completion to October 1, 1995, as recorded in Special Order Volume 48, Page 227.
11. On October 25, 1995, the Department sent a letter to Northwest Farm Credit Services, stating that a notice of project completion had not been received and requesting the documentation of completion be promptly submitted. No response was received.
12. On June 19, 1996, the Department mailed a letter to Marvin and Patricia DeRaeve, stating that a Claim of Beneficial Use must be received by October 1, 1996, or the permit will be canceled without further notice. Marvin DeRaeve signed the return receipt, indicating that he had received the letter on June 21, 1996. No Claim of Beneficial Use was received.
13. On March 26, 1997, Permit R-11254 was cancelled by an order recorded in Special Order Volume 51, Page 318. Northwest Farm Credit Services was informed of the action by a letter dated April 1, 1997. No petition for reconsideration was received by the Department.
14. On August 23, 2000, the Department received a letter from Patricia DeRaeve, accompanied by a Claim of Beneficial Use Report and Map prepared by W. Richard Verboort, CWRE. Mrs. DeRaeve's letter stated that completion of the dam construction had been delayed

because her husband Marvin DeRaeve had passed away December 2, 1997, and he had been the one communicating with the Water Resources Department.

15. The Claim of Beneficial Use Report indicated that the dam had been constructed under observation by a registered engineer licensed in Oregon and that it had been constructed, operated and maintained in accordance with the approved drawings and specifications and the conditions of Permit R-11254. The CWRE's inspection on August 7, 2000, found some erosion had occurred in the streambank on the downstream side of the east abutment. This was in the process of being remedied. A stage storage curve was attached. The report stated that fish are able to pass through the dam structure when the boards are removed. The report stated "time conditions for this permit have been met", but did not offer specific dates.
16. The Claim of Beneficial Use Report also stated: "It should be noted that these permits [storage Permit R-11254 and secondary Permit S-51094 for irrigation from the stored water] have been cancelled by ODWR. Mrs. DeRaeve has discussed this with staff and they have agreed that due to extenuating circumstances a claim for the permits would be accepted. The circumstances involve the death of her husband and non receipt of ODWR notices due to mail theft."
17. On May 15, 2001, the Department sent a letter to Mrs. DeRaeve, acknowledging receipt of the request for a certificate, but stating that the order canceling the permit was not appealable beyond 60 days from the date it was mailed to the permit holder. Therefore, the Department would not consider reinstatement of the permit. The Claim of Beneficial Use and Site Report was returned to Mrs. DeRaeve, along with application forms and instructions for filing a new water right application.
18. Notice of the application for transfer was published on November 24, 2009, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
19. On January 12, 2010, the Raevenbrook Reservoir Dam was inspected by Eric Urstadt, a Registered Professional Engineer licensed in Oregon, in response to a request from the OWRD Dam Safety Division, to determine whether the dam was safe and functional. Mr. Urstadt's inspection found two minor spots of erosion that could be repaired with a few shovels of dirt and gravel. Mr. Ron Lewis was present during the inspection and agreed to do the repairs. The inspection acknowledged that the erosion mentioned in the Claim of Beneficial Use Report had been taken care of and the dam and flashboards appeared to be in fine shape. On January 22, 2010, OWRD Dam Safety Coordinator George Robison acknowledged receipt of the January 12, 2010 dam inspection and indicated that it met the need for dam safety documentation.
20. On August 11, 2010, the Department mailed a copy of the Preliminary Determination proposing to approve Transfer Application T-10977 to the applicants. The Preliminary Determination cover letter set forth a deadline of September 10, 2010, for the applicants to respond. The applicants requested that the Department remove the finding and condition in the requiring installation of a fish screen, stating that since the transfer involves only a storage right and no diversion from the stream, the fish screen requirement was not

applicable. The applicants also requested that the condition requiring a headgate be removed for the same reason. The Preliminary Determination also included a requirement for a dam inspection, and the applicants requested that condition be removed, citing a 2010 dam inspection by Eric Urstadt and correspondence with OWRD's dam safety coordinator indicating that the dam was acceptable. They asked for clarification of what might be required for fish passage.

21. Subsequent correspondence with ODFW and OWRD resolved these issues. ODFW agreed that fish screening and by/pass device is not needed for this storage right and OWRD found that a headgate also is not needed due to the nature of the right, resulting in removal of the referenced findings and conditions, and issuance of a revised draft Preliminary Determination.
22. On December 21, 2010, the Department mailed a copy of a revised draft Preliminary Determination proposing to approve Transfer Application T-10977 to the applicants. The revised draft Preliminary Determination cover letter set forth a deadline of January 21, 2011, 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 and requested that the date the flashboards are to be removed in the fall be adjusted from October 1<sup>st</sup> (as stated in the revised draft Preliminary Determination) to October 15<sup>th</sup>.
23. The basis for the Permit R-11254 condition to remove flashboards by October 1<sup>st</sup> was dam safety. The flashboards need to be removed prior to the occurrence of rain storms that might cause streamflow to increase sufficiently to overtop the dam. On January 5, 2011, in response to the request to change the flashboard removal date to October 15<sup>th</sup>, the Department's dam safety engineer determined that the date could be changed to October 15<sup>th</sup> and still satisfy the intent of the requirement without introducing undue risk. Therefore, this document reflects a modification of the date for flash board removal.
24. On January 31, 2011, the Department issued a Preliminary Determination proposing to approve Transfer Application T-10977 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 February 8, 2011, and in the News-Register newspaper on February 16, 23 and March 2, 2011, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.
25. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening and/or by-pass device is not required at the dam for the storage right involved in this transfer, but if a secondary right is issued to withdraw water for out-or-reservoir use, a fish screening and/or by-pass device will be 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.
26. ODFW also determined that the transfer triggers requirements for fish passage under ORS 509.585. ODFW district staff visited the site and concluded that during the period when

water is not being detained and when there are no dam boards installed, native migratory fish can successfully navigate through the diversion structure. The design of the structure is consistent with the “as built” construction plans and satisfies applicable fish passage provision requirements as evidenced by ODFW fish passage approval document PA-02-0028, which specifies that all stop logs shall be removed no later than October 15 and shall not be installed until April 15 of each year.

27. To meet the criteria in both the ODFW fish passage approval and the OWRD dam safety approval, flashboards can be removed no later than October 15 each year and not installed until April 15 of each year.

***Transfer Review Criteria [OAR 690-380-4010(2)]***

28. Water has been stored under Certificate 83204 within the five-year period prior to submittal of the transfer application according to the terms and conditions of the right. There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
29. A dam structure and reservoir sufficient to store the full amount of water allowed under the existing right (Certificate 83204) were present within the five-year period prior to submittal of Transfer Application T-10977.
30. The proposed change would not result in enlargement of the right.
31. The proposed change would not result in injury to other water rights.
32. Raevenbrook Dam and Reservoir, approved by OWRD through an application reviewed as per ORS 537.400, exists with the capacity to store the 24.0 acre-feet of water proposed to be transferred.

**Conclusions of Law**

The change in point of diversion and change in place of use proposed in Transfer Application T-10977 are consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000.

**Now, therefore, it is ORDERED:**

1. The change in point of diversion and change in place of use proposed in Transfer Application T-10977 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 83204 and any related decree.
3. Water right certificate 83204 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer.

4. The quantity of water diverted at the new point of diversion, together with that diverted at the original point of diversion, shall not exceed the quantity of water lawfully available at the original point of diversion.
5. Water use measurement conditions:
  - a. Before water use may begin under this order, the water user shall install a staff gage consistent with the plans and specifications of the reservoir, or with prior approval of the Director, other suitable measuring device, that measures the entire range and stage between empty and full in the reservoir. The staff gage shall be United States Geological Survey style.
  - b. Before water use may begin under this order, if the reservoir is located in channel, weirs or other suitable measuring devices must be installed upstream and downstream of the reservoir, and, an adjustable outlet valve must be installed. The water user shall maintain such devices in good working order. A written waiver may be obtained, if in the judgment of the Director, the installation of weirs or other suitable measuring devices, or the adjustable outlet valve, will provide no public benefit.
  - c. The water user shall allow the Watermaster access to the devices; provided however, where any device is located within a private structure, the Watermaster shall request access upon reasonable notice.
6. The dam shall be operated and maintained consistent with the conditions approved by OWRD for Raevenbrook Reservoir, originally specified in Permit R-11254, as modified below.
7. The water user shall maintain fish passage consistent with ODFW's Fish Passage Approval document #PA-02-0028.
8. Flashboards are to be removed no later than October 15 and not installed again until April 15 of each year.
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 Right 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 5<sup>th</sup> day of April, 2011.



Dwight French, Water Rights Services Administrator, for  
PHILLIP C. WARD, DIRECTOR

Mailing date: APR 12 2011