

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

In the Matter of Transfer Application)
T-6823, Washington County)
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)

RECONSIDERATION OF A FINAL
ORDER RECORDED IN SPECIAL
ORDER VOLUME 65, PAGES 16 – 20
and CORRECTING SCRIVENER’S
ERRORS FOLLOWING
RECONSIDERATION

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. ORS 183.480 outlines the legal authority for requests for reconsideration of final orders in contested cases. OAR 137-004-0080 describes the process for reconsideration of an order in other than contested case.

Applicant

LAWRENCE L. WAIBEL
4250 SW MINTER BRIDGE ROAD
HILLSBORO, OR 97123

Agent

RICHARD VERBOORT
2137 19TH AVE
FOREST GROVE, OR 97116

Findings of Fact

1. On September 17, 1992, Lawrence L. Waibel filed an application to transfer the place of use and point of diversion under Certificates 23662 and 23465. The Department assigned the application number T-6823.
2. On March 15, 2005 Juliana Waibel (Lawrence L. Waibel’s widow) amended the transfer to propose that the new point of diversion be an additional point of diversion.
3. The first right to be transferred is as follows:
Certificate: 23662 in the name of LAWRENCE L.
Use: IRRIGATION of 28.3 ACRES
Priority Date: JANUARY 26, 1953
Rate: 0.35 CUBIC FEET PER SECOND (CFS)
Limit/Duty: ONE-EIGHTIETH cfs per acre, not to exceed 2.50 acre-feet per acre
Source: TUALATIN RIVER, tributary to the WILLAMETTE RIVER

This is an 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.

Authorized Point of Diversion:

Twtp	Rng	Mer	Sec	Q-Q	Survey Coordinates
1 S	2 W	WM	17	NW SW	None specified on certificate

Authorized Place of Use:

Twtp	Rng	Mer	Sec	Q-Q	GLot	Acres
1 S	2 W	WM	18	NE NE	1	6.4
1 S	2 W	WM	18	SE NE		20.2
1 S	2 W	WM	18	NE SE		1.7

4. The second right to be transferred is as follows:

Certificate: 23465 in the name of LAWRENCE L. WAIBEL

Use: IRRIGATION of 44.0 ACRES

Priority Date: JANUARY 9, 1950

Rate: 0.50 CFS

Limit/Duty: ONE-EIGHTIETH cfs per acre, not to exceed 2.50 acre-feet per acre

Source: TUALATIN RIVER, tributary to the WILLAMETTE RIVER

Authorized Point of Diversion:

Twtp	Rng	Mer	Sec	Q-Q	Survey Coordinates
1 S	2 W	WM	17	NW SW	None specified on certificate

Authorized Place of Use:

Twtp	Rng	Mer	Sec	Q-Q	Acres
1 S	2 W	WM	17	SW NW	19.4 (APOD)
1 S	2 W	WM	17	NE SW	1.0 (POU & APOD)
1 S	2 W	WM	17	NE SW	0.1 (POU)
1 S	2 W	WM	17	NW SW	18.2 (APOD)
1 S	2 W	WM	17	NW SW	5.3 (POU & APOD)

5. Transfer Application T-6823 proposes to change the place of use for 5.4 acres under Certificate 23465 to:

Twtp	Rng	Mer	Sec	Q-Q	Acres
1 S	2 W	WM	17	SW NW	5.4

6. Transfer Application T-6823 also proposes to add an additional point of diversion for Certificates 23662 and 23465 approximately ½ mile upstream in the Tualatin River to:

Twtp	Rng	Mer	Sec	Q-Q	Survey Coordinates
1 S	2 W	WM	17	NW SW	1120 FEET SOUTH AND 535 FEET EAST FROM THE W¼ CORNER OF SECTION 17

7. Notice of the application for transfer was published pursuant to ORS 540.520 and OAR 690-380-4000.
8. WaterWatch of Oregon filed a response to the notice, raising questions about the effect of the proposed changes on the instream water right, and requesting the Department to condition the transfer to require installations of fish screens and bypass devices, measurement and recording of water use and compatibility with local comprehensive plans.

9. The Oregon Department of Fish and Wildlife (ODFW) was notified of the transfer as required under ORS 540.525 and 540.532. ODFW requested that any order approving the transfer be conditioned to require the proposed diversion to be equipped with an appropriate fish screening or by-pass device, and noted that the existing point of diversion is equipped with such a device.
10. Water has been used within the five years prior to filing of the transfer application according to the terms and conditions of the rights and there is no evidence in the record 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 rights are present.
12. The proposed change would not result in enlargement of the rights.
13. The transfer proposes an additional point of diversion upstream in a reach where flows are protected under instream water right certificates 72960 and 59692.
14. Instream water right Certificate 72960, established pursuant to ORS 537.336 at the request of the Oregon Department of Environmental Quality (DEQ), is for flows to be maintained in the Tualatin River from river mile 52.8 (NE ¼ Section 9, T1S, R3W, W.M.) to river mile 38.5 (NW¼, Section 16, T1S, R2W, W.M.). The date of priority of the right is August 5, 1993. The quantity of water allocated under the instream right is 75 cfs year round for pollution abatement.
15. Instream water right Certificate 59838, established pursuant to ORS 537.346, is for flows to be maintained in the Tualatin River and its tributaries above USGS gage no. 14-2075 at West Linn, (SW¼, Section 34, T2S, R1E, W.M.), measured at the gage. The date of priority of the right is May 25, 1966. The quantities of water allocated under the instream right for supporting aquatic life and minimizing pollution are 30 cfs October 1-May 31, 20 cfs June 1-July 15, and 15 cfs July 16-September 30.
16. The Department's streamflow model indicates the likelihood that natural flows in the Tualatin River at gage 14206500 (near Farmington) would often be insufficient to meet the requirements of the instream water right Certificate 72960 during the period from June through November. Therefore, an upstream movement of the point of diversion would allow the potential for injury to the instream water right by further reducing the flows available to the instream water right in the stretch between the authorized and proposed diversion points.
17. Actual streamflow records at the Rood Bridge gage less than three miles downstream of the authorized and proposed diversion points indicate that most years the flows at Rood Bridge do not drop below 75 cfs due to augmentation of natural flow with stored water. During the period of record from 1995-2002 daily streamflow was consistently above 75 cfs with the exception of 79 days in 2001 (between July 5 and October 21), and one day (September 24) in 1995.

18. The Department cannot find that the proposed change would not result in injury to the instream water right, if water is diverted at the new point of diversion during the period from June through October of each year at times when flows are insufficient to meet instream right.
19. On March 12, 2005, the applicant agreed to the condition contained in the Preliminary Determination that the applicant would not divert water at the proposed point of diversion whenever flows in Tualatin River, as measured at the Rood Bridge gage, dropped below 75 cfs. This condition is sufficient to ensure that the change **would not** result in injury to the instream water right.
20. On June 6, 2005, the Department issued a final order approving Transfer Application T-6823. This order, recorded in Special Order Volume 65, Pages 16 – 20, contained a condition which would eliminate injury to instream water right Certificate 72960.
21. On July 18, 2005, a Petition for Reconsideration of Transfer Application T-6823 was received by the Department. This petition was received within the 60 day period specified by ORS 183.484(2). The petition requested the Department discuss with the Department of Environmental Quality (DEQ) the necessity of the condition on the proposed additional point of diversion which limited diversion of water at the additional point of diversion to only occur when streamflow in the Tualatin River, as measured at the Rood Bridge gage, is less than 75 cubic feet per second. The letter also explained the applicant's objection to the condition that would eliminate the injury.
22. On August 11, 2005, the Department notified the applicant that the Department would reconsider the Final Order, recorded in Special Order Volume 65, Pages 16 – 20.
23. On September 2, 2008, DEQ responded that without conditioning the additional point of diversion, as originally included in the final order approving the changes, instream Certificate 72960 would be injured and no net benefit could be found. Therefore, DEQ could not recommend consenting to injury of the instream water right.
24. Based on the response from DEQ and all available information, the Department must reaffirm the necessity of including the condition to avoid injury to instream Certificate 72960.
25. Based on additional review resulting from the request for reconsideration, scrivener's errors in the proposed changes (as listed within the Final Order approving Transfer Application T-6823) were identified. The table listing the authorized place of use and proposed changes were listed in the Final Order approving Transfer Application T-6823 as follows:

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
1 S	2 W	WM	17	SW NW	19.4 (APOD)
1 S	2 W	WM	17	NE SW	1.0 (POU & APOD)
1 S	2 W	WM	17	NE SW	0.1 (POU)
1 S	2 W	WM	17	NW SW	18.2 (APOD)
1 S	2 W	WM	17	NW SW	5.3 (POU & APOD)

26. The **corrected table** listing the authorized place of use and proposed changes follows:

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres	Proposed Change(s)
1 S	2 W	WM	17	SW NW	19.4	APOD
1 S	2 W	WM	17	NE SW	1.0	APOD**
1 S	2 W	WM	17	NE SW	0.1	POU & APOD**
1 S	2 W	WM	17	NW SW	18.2	APOD
1 S	2 W	WM	17	NW SW	5.3	POU & APOD

** denotes corrections

Conclusions of Law


1. The changes in place of use, additional point of diversion and correction of scrivener's errors (as listed in Finding of Fact #26), in Transfer Application T-6823 are consistent with the requirements of ORS 537.705 and 540.505 and 540.580, and OAR 690-380-500.
2. The inclusion of the condition (as outlined in Finding of Fact #19 and Condition #4 below) is necessary to avoid injury to the instream water right.

Now, therefore, it is ORDERED:

1. The Final Order recorded in Volume 65, Pages 16-20, is withdrawn and of no further force or effect.
2. Water right Certificates 23662 and 23465 are cancelled.
3. The right to 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 23662 and 23465 and any related decree.
4. Water shall **not** be diverted at the additional upstream point of diversion when streamflow in the Tualatin River, as measured at the Rood Bridge gage, is less than 75 cfs.
5. The proposed changes were completed on or before October 1, 2006 and a Claim of Beneficial Use prepared by a Certified Water Rights Examiner has been submitted by the applicant to the Department.
6. The quantity of water diverted at the additional point of diversion, together with that diverted at the old point of diversion, shall not exceed the quantity of water lawfully available at the original point of diversion.
7. The former place of use of the transferred water shall no longer be irrigated as part of this water right.
8. When required by the Department, the water user shall install and maintain a headgate, an in-line flow meter, weir, or other suitable device for measuring and recording the quantity of water diverted. The type and plans of the headgate and measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.

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. The water user may participate in the Department of Fish and Wildlife's cost-sharing program for installation of screening and by-pass devices in accordance with ORS 540.525.
10. When satisfactory proof of the completed changes has been reviewed, new certificates confirming the rights transferred will be issued.

Dated at Salem, Oregon this 22nd day of December, 2008.


Phillip C. Ward, Director

Mailing date: ~~JAN 07 2009~~