

STATE OF OREGON
OREGON WATER RESOURCES DEPARTMENT

In the Matter of the Protest Against)	FINAL ORDER DISMISSING
Water Right Transfer Application T-8867,)	CONTESTED CASE HEARING
)	APPROVING TRANSFER
M&P Holdings, LLC,)	APPLICATION T-8867 FOR A
<i>Applicant,</i>)	CHANGE IN USE, PLACE OF USE,
)	AN ADDITIONAL POINT OF
WaterWatch of Oregon,)	APPROPRIATION AND
<i>Protestant</i>)	CANCELLATION OF A PORTION
)	OF CERTIFICATE 34282
)	

FINDINGS OF FACT

On July 16, 2001, M&P Holdings, LLC (Applicant) submitted transfer application T-8867 pursuant to ORS 540.505 to 540.530. The application proposes to modify the water right evidenced by water right certificate 34282 by changing the use, place of use, and adding a point of appropriation. The subject water right authorizes the use of ground water from a well within the Columbia River Basin. The current and proposed places of use are located in Morrow County. The priority date is December 19, 1960. The current use is for irrigation of 320.0 acres, limited to an amount actually beneficially used and not to exceed 4.0 cubic feet per second ("cfs"). The proposed transfer changes a portion of the water right from irrigation use on 62.8 acres to agricultural use associated with a dairy, changes the place of use for irrigation on another 62.8 acres, adds an additional point of appropriation (well), and cancels a portion of the water right. The current well and the proposed well develop a confined basalt aquifer and do not have the potential for substantial interference with surface water. The proposed transfer from irrigation to agricultural use for dairy operations includes a corresponding change in the period of use from the irrigation season to the full calendar year.

Protestant WaterWatch of Oregon, Inc. filed a timely protest to the transfer application alleging that it violates Oregon's water right transfer laws and would result in injury *per se*. Pursuant to the provisions of ORS 540.520, the Water Resources Department (Department) initiated a contested case hearing and referred the matter to the Central Hearing Officer Panel. The case was assigned to Hearing Officer Weisha Mize.

On April 22, 2002, the Department moved for a ruling on whether a proposed change in the period of use constitutes injury *per se*, and requested that on a finding that such a change did not constitute injury, the contested case proceeding be dismissed. On April 22, 2002, Applicant

joined in the Department's motion and also moved for a ruling, and subsequent dismissal, on the grounds that WaterWatch lacked standing to file a protest against the proposed transfer. At WaterWatch's unopposed request for additional time to file responsive argument, an order issued on April 25, 2002 allowing WaterWatch until May 10, 2002 to file a response and setting May 17, 2002 as the due date for the Department and Applicant replies. Having considered the arguments and accompanying documents submitted on these issues, Hearing Officer Mize issued a Proposed Order proposing to dismiss the contested case hearing. None of the parties filed exceptions to the Proposed Order. This Final Order is issued as provided in OAR 690-002-0170.

STANDARD OF REVIEW

OAR 137-003-0580(1) provides that an agency or party involved in a contested case before the Hearing Officer Panel may request "a ruling in favor of the agency or party on any or all legal issues (including claims and defenses) in the contested case." The Administrative Law Judge (ALJ) presiding over the case "shall grant the motion if ... the pleadings, affidavits, supporting documents ... and the record in the contested case show there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought, and ... the agency or party filing the motion is entitled to a favorable ruling as a matter of law." OAR 137-003-0580(6).

CONCLUSIONS OF LAW

1. WaterWatch has standing to protest Transfer Application T-8867

ORS 540.520(6) provides that "any person" may file a protest against approval of a transfer application. OAR 690-015-0085(1), the Water Resources Commission's rule on filing protests against transfer applications, also provides that "any person"¹ may file a protest against approval of a transfer application. The rule further incorporates the basis on which a transfer application may be denied – injury – and requires a protest to be based on the ground that the transfer will result in injury.

Applicant asserts that WaterWatch lacks standing to protest this transfer application as it does not allege injury to any existing water rights. Applicant further argues that assertions of injury to the public interest do not constitute allegations of injury to existing water rights. The Department notes that WaterWatch has alleged that a change in season of use will cause enlargement, and as the definition of injury includes enlargement, WaterWatch has thus alleged injury. OAR 690-015-0050.

WaterWatch is a nonprofit corporation and thus qualifies as "any person" under the definition in OAR 690-002-0010(7). WaterWatch has alleged "injury" within the meaning of the

¹ OAR 690-002-0010(7) defines person as "any individual, partnership, corporation, association, governmental subdivision or public or private organization of any character...."

applicable rules. Therefore, we need not address whether a Protestant must allege injury in order to secure standing. WaterWatch has standing in this matter.

2. Where there is no determination of injury, a change in the time of use, made as part of the change in type or place of use may be made.

WaterWatch argues that the water right proposed to be transferred, an irrigation right, has a seasonal parameter, that OAR 690-250-0005(9) does not limit the imposition of seasonal restrictions to irrigation rights only, and that the Department has no authority under ORS 540.510 *et seq.* to approve changes in any aspect of a water right other than the place or type of use or point of diversion. In particular, WaterWatch asserts that the use authorized in the right is the type of beneficial use authorized or allowed under the right, while the period of use is a limitation on when the type of use may be made and still remain beneficial. The Department and Applicant disagree that the law prohibits a change in the season of use. As WaterWatch notes, the reason for establishing an irrigation season is to assure that the use remains beneficial – most crops will not benefit from the application of water during the winter or outside the growing season. If the beneficial use to which the use is changed requires year-round use, there is no longer a need to ensure the use is beneficial by way of a seasonal limitation.

ORS 540.510(1) clearly allows a change in the type of use. In this case, the certificate issued for the water right to be transferred provides that the amount of water to which the right is entitled, for “the purposes aforesaid” (irrigation of 320.0 acres) is limited to an amount actually beneficially used for said purposes, is not to exceed a specified amount, and the water used for irrigation is to be limited to a particular rate of appropriation and total application, or duty, during the irrigation season. (emphasis added). The maximum amount of water that may be appropriated under the right for the new use will not, and may not, change from that allocated in the right originally issued for irrigation. The season of use is clearly applicable only to use of the right for irrigation purposes.

No season is assigned for agricultural use, the proposed use under the subject transfer. ORS 540.510(1) contemplates a whole-scale change in the type of use, including a change in the period of use, by authorizing a change in the “use theretofore made of the water.” In contrast there are no statutory provisions that implicitly or explicitly prohibit changing the period of use to correspond with a change in the type of use. The law allows, and in at least 14 instances since 1980, the Department has interpreted the law to allow, and has approved, changes in the season of use where the resultant change does not result in injury. If the authorized use changes, it is implicit that the time or the season during which that use may be made, if there is one, may also change.

3. A change in the time of use, made as part of the change in type or place of use, does not constitute enlargement and thus injury *per se.*

WaterWatch asserts that if expanding the rate and duty constitutes injury as a matter of law, then increasing the period of time allowed for use under the permit is an enlargement and

thus constitutes injury requiring denial of the transfer. In support of this position, WaterWatch suggests that expanding the period of use to allow appropriation during a time previously prohibited by the right “has the same effect as increasing the rate and duty during that time” and will affect the resource and other users, even though there will be no net increase in either the rate or duty (total amount of water allowed for appropriation).

In contrast, M&P and the Department note that the transfer statute does not define injury, a task thus left to the Department. The Department defined injury to existing water rights in OAR 690-015-0005(5) as meaning that “a proposed transfer would result in a water right not receiving the water to which it is legally entitled.” The definition of injury is expanded in OAR 690-015-0050(2)(a)-(c) to include enlargement.² Enlargement is defined as the transfer resulting in the diversion of more water (i.e. increased rate or duty) than an applicant is entitled to under the right, an existing right receiving less than it is entitled to, or, where there is a change in place of use, where the lands from which the right is removed continue to benefit from water following completion of the transfer. *Id.* A change in season that does not result in enlargement as defined herein does not constitute enlargement or injury. The Department’s interpretation of its own rules is entitled to deference so long as the interpretation is “plausible” and “cannot be shown either to be inconsistent with the working of the rule itself, with the rule’s context, or with any other source of law.” *Don’t Waste Oregon Comm. v. EFSC*, 320 Or 132, 142, 881 P2d 119 (1994); *County of Morrow v. ODFW*, 37 P3d 180, 184 n.1 (Or App 2001) (citations omitted).

WaterWatch provides no factual support for its assertion that the proposed change “will result in effects on resources and other right holders that would not have occurred but for the transfer,” an increase in rate or duty, a reduction in water available to other water rights, or the original place of use continuing to receive water. The Department’s hydrogeologist conducted a technical analysis of the proposed transfer and determined that none of these effects would occur as a result and that the proposed transfer would not result in injury. This determination is based

² OAR 690-015-0050 **Transfer Shall Not Result in Injury to Existing Water Rights**

- (1) A transfer application shall not be approved if the proposed transfer would result in the injury of an existing water right. Injury shall include the following:
- (a) A transfer would result in a net loss of water available to downstream water rights; or
 - (b) The water right to be transferred would be enlarged.
- (2) An injury to an existing water right or an enlargement of the water right to be transferred shall be determined to result from, but is not limited to, the following:
- (a) A change reducing the quantity of water previously available to another water right and to which the other water right is entitled;
 - (b) A diversion of more water than is specified as a rate of flow or duty of water per acre for the subject water right; or
 - (c) Under a change in place of use, the original place of use cannot be prevented from receiving water from the same source.

Stat. Auth.: ORS 536.025 & ORS 536.027

Stats. Implemented: ORS 540.510 - ORS 540.532

Hist.: WRD 7-1987, f. & ef. 6-11-87; WRD 5-1996, f. & cert. ef. 7-11-96

on undisputed facts of this case -- the allowed rate and volume of use will not exceed that allowed under the original right; the existing and proposed wells develop the same confined basalt aquifer; ground water in the subject aquifer is available in storage on a continuous basis and therefore water not pumped from the aquifer during one time of the year is left in "storage" for use in another time of year; and the subject aquifer does not have the potential for substantial interference with surface water.

The Department and the Applicant requested that on a finding that a change in season of use did not constitute injury, the contested case proceeding be dismissed. I concur with the Hearing Officer that a change in season of use may be made in a transfer and that the proposed change in the season of use will not constitute injury. The Department and Applicant are entitled to a favorable ruling on these issues as a matter of law, and therefore this contested case is dismissed.

ORDER

It is ORDERED that the contested case proceeding in this matter is dismissed.

It is FURTHER ORDERED that pursuant to ORS 540.510 to 540.530 and ORS 537.705, and finding no injury to existing water rights would result, Transfer Application T-8867, submitted by M&P Holdings, LLC, requesting a change in use, place of use and an additional point of appropriation is APPROVED as limited and conditioned below.

The right to be modified, as evidenced by a PORTION of Certificate 34282, was perfected under Permit G-1738 with a date of priority of DECEMBER 19, 1960. The right allows the use of WELL NO. 1, in the COLUMBIA RIVER BASIN, for IRRIGATION OF 125.6 ACRES. The amount of water to which this right is entitled is limited to an amount actually beneficially used and shall not exceed 1.57 cubic feet per second, if available at the original well; SW¼ NE¼, SECTION 14, T 3 N, R 26 E, W.M.; 2540 FEET SOUTH AND 1520 FEET WEST FROM THE NE CORNER, SECTION 14, or its equivalent in case of rotation, measured at the well.

The amount of water used for irrigation, together with the amount secured under any other right existing on 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 3 acre-feet per acre for each acre irrigated during the irrigation season of each year. The use shall conform to any reasonable rotation system ordered by the proper state officer.

The authorized place of use is as follows:

NE¼ NE¼	31.4 ACRES
NW¼ NE¼	31.4 ACRES
SW¼ NE¼	31.4 ACRES
SE¼ NE¼	31.4 ACRES

SECTION 14
TOWNSHIP 3 NORTH RANGE, 26 EAST, W.M.

The right to use water for the above purpose is restricted to beneficial use on the lands or place of use described.

The applicant proposes to change the place of use of 62.8 acres to:

NE $\frac{1}{4}$	NE $\frac{1}{4}$	21.0	ACRES
SE $\frac{1}{4}$	NE $\frac{1}{4}$	36.8	ACRES
NE $\frac{1}{4}$	SE $\frac{1}{4}$	5.0	ACRES

SECTION 14
TOWNSHIP 3 NORTH RANGE, 26 EAST, W.M.

The applicant further proposes to change the character of use from IRRIGATION OF 62.8 ACRES to AGRICULTURAL WATER USE ASSOCIATED WITH A DAIRY. In addition, the period of allowed use shall be changed from MARCH 1 THROUGH OCTOBER 31 to YEAR-ROUND. The amount of water to which this new use is entitled is limited to an amount beneficially used and shall not exceed 0.527 cubic foot per second (236.5 gallons per minute) and shall be further limited to a diversion of not to exceed 188.4 acre-feet.

The proposed place of use for the AGRICULTURAL WATER USE ASSOCIATED WITH A DAIRY is located as follows:

NW $\frac{1}{4}$	NE $\frac{1}{4}$
SW $\frac{1}{4}$	NE $\frac{1}{4}$

SECTION 14
TOWNSHIP 3 NORTH RANGE, 26 EAST, W.M.

The applicant further proposes to add an ADDITIONAL POINT OF APPROPRIATION (WELL 2) for both the irrigation and dairy uses to:

NW $\frac{1}{4}$ NE $\frac{1}{4}$, SECTION 14, T 3 N, R 26 E, W.M.; WELL 2 - 1300 FEET SOUTH 2610 FEET WEST FROM THE NE CORNER, SECTION 14.

It is FURTHER ORDERED that pursuant to ORS 540.610, a portion of the water rights evidenced by Certificate 34282 are canceled as described below.

On July 16, 2001, an affidavit was received from Glenn Chowning and Ken Vandewall, owners of certain land and the water right appurtenant to it. A portion of the water right has been abandoned and is requested to be canceled.

The portion is described by Certificate 34282, State Record of Water Right Certificates. The date of priority is December 19, 1960. The water use was for irrigation of 68.8 acres from Well No. 1, within the Columbia River Basin. The amount of water authorized is 0.86 cubic foot per second.

The abandoned portion is located as follows:

NE ¹ / ₄ NE ¹ / ₄	8.6 ACRES
NW ¹ / ₄ NE ¹ / ₄	8.6 ACRES
SW ¹ / ₄ NE ¹ / ₄	8.6 ACRES
SE ¹ / ₄ NE ¹ / ₄	8.6 ACRES
NE ¹ / ₄ SE ¹ / ₄	8.6 ACRES
NW ¹ / ₄ SE ¹ / ₄	8.6 ACRES
SW ¹ / ₄ SE ¹ / ₄	8.6 ACRES
SE ¹ / ₄ SE ¹ / ₄	8.6 ACRES

SECTION 14

TOWNSHIP 3 NORTH RANGE, 26 EAST, W.M.

THESE CHANGES TO AN EXISTING WATER RIGHT MAY BE MADE PROVIDED THE FOLLOWING CONDITIONS ARE MET BY THE WATER USER:

1. The proposed changes shall be completed on or before October 1, 2005.
2. The quantity of water diverted for IRRIGATION at the new point of appropriation (Well 2), together with the quantity diverted at the old point of appropriation (Well 1), shall not exceed the quantity of water lawfully available from the original point of appropriation. That is, the water user cannot divert more than 0.785 cubic foot per second (352.3 gallons per minute) from either well or a combination of both wells. In addition, they cannot exceed a total volume of 188.4 acre-feet of water during the irrigation season, being March 1 through October 31, of each year.
3. The quantity of water diverted for AGRICULTURAL WATER USE ASSOCIATED WITH A DAIRY at the new point of appropriation (Well 2), together with the quantity diverted at the old point of appropriation (Well 1), shall not exceed the quantity of water lawfully available from the original point of appropriation. That is, the water user cannot divert more than 0.527 cubic foot per second (236.5 gallons per minute) from either well or a combination of both wells. In addition, they cannot exceed a total volume of 188.4 acre-feet of water in a calendar year, being January 1 through December 31.
4. **Prior** to beginning use of water as approved by this order, the water user **shall** install and maintain totalizing flow meters for measuring and recording the rate and volume of water appropriated for permitted irrigation use, permitted dairy use and exempt uses from both the old and new wells. That is, the water user must be able to separate and account for the total use of each permitted use and any exempt use. 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.

5. The water user shall submit a **yearly** record of the measurements from all the meters to the Watermaster due on the 15th of January of each year for the preceding year's uses on a form provided by the Department. The report shall contain the total volume of water diverted from the wells for permitted irrigation use, permitted dairy use and exempt uses for the previous year. The Watermaster may modify the reporting requirements as needed.
6. The water user shall measure the static water level in the new well before any new or modified water use begins. That water level shall be reported to the Department's Ground Water and Hydrology Section within 90 days from the date of measurement.
7. Water shall be acquired from the same aquifer as the original point of appropriation.
8. The former place of use shall no longer be irrigated as part of this water right.

It is FURTHER ORDERED that Certificate 34282 is canceled. A new certificate will be issued to confirm that portion of the right NOT involved in this transfer. When satisfactory proof of the completed changes is received, a new certificate confirming this water right will be issued.

WITNESS the signature of the Water Resources

Director, affixed Sept. 16, 2002



Paul R. Cleary, Director

Appeal Rights

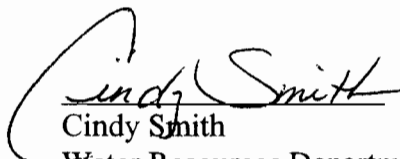
You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review with 60 days from the date of service of this Order. If this Order was personally delivered to you, the date of service is the date you received the Order. If this Order was mailed to you, the date of service is the day it was mailed. Judicial review, pursuant to the provisions of ORS 536.075, is to the Oregon Court of Appeals. If you do not file a petition for judicial review within the 60-day time period, you will lose your right to appeal.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September 2002, I served the attached FINAL ORDER DISMISSING CONTESTED CASE HEARING, APPROVING TRANSFER APPLICATION T-8867 FOR A CHANGE IN USE, PLACE OF USE, AN ADDITIONAL POINT OF APPROPRIATION AND CANCELLATION OF A PORTION OF CERTIFICATE 34282, by mailing certified in a sealed envelope, and by regular U.S. mail, postage pre-paid, a copy thereof addressed as follows:

David E. Filippi
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