

Findings of Fact

Background

1. On July 9, 2008, Bend Metro Park and Recreation District, Swalley Irrigation District and Trinity Evangelical Lutheran Church filed an application to change the place of use and point of diversion under Certificate 74145. The Department assigned the application number T-10669.

2. The portion of the right to be transferred is as follows:

Certificate: 74145 in the name of SWALLEY IRRIGATION DISTRICT (confirmed by Deschutes River, 1958 decree)

Use: IRRIGATION

Priority Date: SEPTEMBER 1, 1899

Season of Use: APRIL 1 TO NOVEMBER 1, FURTHER LIMITED AS FOLLOWS:

April 1 to May 1 & October 1 to November 1 described as Season 1

May 1 to May 15 & September 15 to October 1 described as Season 2

May 15 to September 15 described as Season 3

Acres: 8.0

Rate: Season 1- limited to 1/83 cfs per acre

Season 2 - limited to 1/62 cfs per acre

Season 3 – limited to 1/33.45 cfs per acre

Limit/Duty: Not to exceed 9.58 acre-feet per acre per year

The above rates include a 43% transmission loss allowed by the Court to compensate for seepage from the canal. The amount of water diverted directly from the Deschutes River and not through the main Swalley Irrigation District canal shall be limited to the above diversion rates **without** the 43% transmission loss allowed by the March 24, 1933 decree, and shall not exceed 5.46 acre feet for each acre irrigated during the irrigation season.

Source: DESCHUTES RIVER, tributary to COLUMBIA RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	12 E	WM	32	SE NE	POD 1 - 100 FEET SOUTH AND 50 FEET EAST FROM THE MOST NORTHERLY CORNER OF TAX LOT 4100
17 S	12 E	WM	29	SE NE	POD 3 - SWALLEY MAIN CANAL: 985 FEET NORTH AND 617 FEET WEST FROM E1/4 CORNER OF SECTION 29

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres
17S	12E	WM	22	NE/SE	300	2.2 (POD 3)
17S	12E	WM	22	NE/SE	200	4.1 (POD 3)
17S	12E	WM	17	SW/SE	7400	1.0 (POD 3)
17S	12E	WM	32	SE/NW	4100	0.7 (POD 1)

3. There is an apparent scrivener's error in the description of point of diversion (POD) 1 in Certificate 74145 (described in Finding #2 above). The listing of POD 1 being 100 feet south and 50 feet east from the most northerly corner of tax lot 4100 and within the SE/NE Section 32, Township 17S Range 12E, W.M., is in error. Based on the transfer application, transfer map and the location and place of use for tax lot 4100 listed on page 24 of Certificate 74145, the location of POD 1 should be listed as within the SE/NW of Section 32, being 100 feet south and 50 feet east from the most northerly corner of tax lot 4100, Township 17S, Range 12E, W.M.
4. Application T-10669 proposes to move the authorized point of diversion approximately 2.5 and 3.4 miles upstream from the two existing canal diversions to a pumping point, located:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Measured Distances
18S	12E	WM	5	NW SW	700	761 FEET SOUTH AND 62 FEET EAST FROM THE W¼ CORNER OF SECTION 5

5. Application T-10669 also proposes to change the place of use of the right to:

Twp	Rng	Mer	Sec	Q-Q	Acres
18S	12E	WM	5	NW SW	8.0

6. Notice of the application for transfer was published on July 22, 2008, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
7. On October 13, 2008, the Department, by written correspondence, notified the applicant's agent of deficiencies in the application and maps. Specifically, additional information was necessary concerning location of authorized points of diversion, and to determine which lands as listed on Certificate 74145 or the Department's electronic record, would be affected by this transfer, and the location of remaining right. Additional evidence of use was needed and clarification on whether a change in point of diversion or an additional point of diversion was being requested. The Department requested that the deficiencies be resolved by November 30, 2008.
8. The applicant's agent responded on November 18, 2008 with additional information and revised maps. The agent's response did not resolve all of the issues as requested. The location of remaining rights remained unresolved.
9. On April 14, 2009, the Department, by email correspondence, notified the applicant's agent of the remaining deficiencies in the application and maps. Specifically, additional information was necessary concerning the location of the remaining right. The Department requested that the deficiencies be resolved by May 1, 2009.
10. On May 8, 2009, revised maps were submitted that portrayed the remaining portions of the right in each quarter quarter being affected by the transfer, based on records of Swalley Irrigation District. The applicant's agent submitted a proposal to condition the transfer to avoid injury to the instream water right by ceasing to divert at the new point of diversion

whenever flows in the Deschutes River would be insufficient to meet the needs of the instream water right, as well as to supply water under this transfer.

11. On July 7, 2009, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T- 10669 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of August 7, 2009, for the applicants to respond. The applicants requested an update of the address for Bend Metro Park and Recreation District and identified scrivener’s errors in the points of diversion listed on page 2, and mis-spellings or omissions in Finding of Fact #8 and Condition #6 of the draft. These have been corrected in this document. 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.
12. On July 30, 2009, the Department issued a Preliminary Determination proposing to approve Transfer Application T-10669 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 August 11, 2009, and in The Bend Bulletin newspaper on August 12, 19 and 26, 2009, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.
13. The rate and duty allowed under Certificate 74145 (under the terms of the March 24, 1933 decree) for each acre irrigated by the Swalley Irrigation District (SID) main canal systems reflect a 43% transmission loss. Those lands not served from the district main canal systems, but by direct pumping from the Deschutes River, are not allowed the 43% transmission loss.
14. T-10669 proposes to change the point of diversion and delivery system for this portion of the right from the SID canal system to a direct pumping point on the Deschutes River. Therefore the rate including provision for transmission losses cannot be allowed and the transfer will be limited to the rates listed below and an annual duty not to exceed 5.46 acre-feet per acre:

Time of Year	Instantaneous Rate per Acre (cfs/acre)	Total Area (acres)	Total Diversion Rate for T-10669 without 43% transmission loss (cfs)
April 1 to May 1	1/83	8.0	0.055
May 1 to May 15	1/62	8.0	0.074
May 15 to Sep 15	1/33.45	8.0	0.136
Sep 15 to Oct 1	1/62	8.0	0.074
Oct 1 to Nov 1	1/83	8.0	0.055

15. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening and/or by-pass device is 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 and that the diversion is not currently equipped with an appropriate fish screening and/or by-pass device. This diversion may be eligible for screening cost share funds.

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

16. Water has been used within the last five years according to the terms and conditions of the right, and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610
17. A diversion structure and ditch 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-10669.
18. The proposed change would not result in enlargement of the right.
19. The transfer proposes to move the point of diversion upstream within a stretch of the Deschutes River with flows protected by a junior instream water right under Certificate 59778 (priority date November 3, 1983). Historically, river flows are often insufficient to meet the requirements of the instream water right (660 cfs) during the periods from April 1-15 when water from reservoir releases is first coming down river and October 15-31 when water is no longer being released.
20. The Department is unable to determine that the proposed change would not result in injury to the instream water right if water is diverted at the new POD at times during the periods from April 1-November 1 of each year when Swalley Irrigation District is not delivering water. However, applicant agreement not to divert water for the allowed use whenever flows in the Deschutes River at the point of diversion drop below 660 cfs during the period from April 1 to November 1 outside of the operational season of the irrigation district, when water is not being delivered by the district, would be sufficient to ensure that the change would not result in injury to the instream water right.
21. On May 8, 2009, the applicant's agent suggested the following condition to prevent injury to the instream water right: "The water user shall not divert water for the allowed use whenever flows in the Deschutes River at the new point of diversion are less than 660 cfs (in addition to the rate allowed to be diverted under this order) during the period from April 1 to November 1."
22. If the use is conditioned as above, the proposed change would not result in injury to other water rights.

Conclusions of Law


The changes in place of use and point of diversion proposed in application T-10669 are consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000.

Now, therefore, it is ORDERED:

1. The changes in place of use and point of diversion proposed in application T-10669 are approved.
2. Water right certificate 74145 is modified. The Department will issue a superseding certificate describing the right when it determines that is necessary for record keeping.
3. 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 74145 and any related decree.
4. The quantity of water diverted at the new point of diversion shall not exceed the quantity of water lawfully available at the original point of diversion and shall not include the 43% transmission water.
5. The former place of use of the transferred right shall no longer receive water under the right.
6. The maximum rates of diversion from the Deschutes River under the portion of the right evidenced by Certificate 74145 for delivery to the receiving landowner's property, shall be based upon 8.0 acres transferred, excluding 43% transmission loss, being:
 - 0.055 cfs from April 1 to May 1 and October 1 to November 1 (Season 1)
 - 0.074 cfs from May 1 to May 15 and September 15 to October 1 (Season 2)
 - 0.136 cfs from May 15 to September 15 (Season 3)
7. The water user shall not divert water for the allowed use whenever flows in the Deschutes River at the new point of diversion drop below 660 cfs (in addition to the rate allowed to be diverted under this order) during the period from April 1 to November 1.
8. Prior to diverting water, the water user shall install a fish screening and/or by-pass device, as appropriate, at the new point of diversion consistent with the Oregon Department of Fish and Wildlife's (ODFW) design and construction standards. Prior to installation, the water user shall obtain written approval from ODFW that the required screen and/or by-pass device meets ODFW's criteria. Prior to submitting a Claim of Beneficial Use, the water user must obtain written approval from ODFW that the required screening and/or by-pass device was installed to the state's criteria. The water user shall maintain and operate the fish screen and/or by-pass device, as appropriate, at the point of diversion consistent with ODFW's operational and maintenance standards.
9. Prior to diverting water, the water user shall install 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 measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department. The water user shall maintain and operate the measuring device as required by the Department.

10. Prior to diverting water, the water user shall install a headgate to control and regulate the quantity of water diverted. The type and plans of the headgate must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department. The water user shall maintain the headgate as required by the Department.
11. The approved changes shall be completed and full beneficial use of the water shall be made on or before **October 1, 2014**. A Claim of Beneficial Use prepared by a Certified Water Rights Examiner shall be submitted by the **receiving landowner**, to the Department within one year after the deadline for completion of the changes and full beneficial use of the water.

Dated at Salem, Oregon this 29th day of September 2009.


Phillip C. Ward, Director *P*

Mailing date: OCT 01 2009