

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-10643, Yamhill County)	PROPOSING DENIAL OF A CHANGE
)	IN POINT OF DIVERSION,
)	ADDITIONAL POINTS OF
)	DIVERSION, CHANGE IN PLACE OF
)	USE, AND A CHANGE IN
)	CHARACTER 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

JULIE DEAN
32020 WEST VALLEY HWY
SHERIDAN OR 97378

Findings of Fact

Background

1. On June 9, 2008, JULIE DEAN filed an application to change the point of diversion, additional points of diversion, change the place of use and to change the character of use under Certificates 23254, 49958 and 43096. The Department assigned the application number T-10643.
2. The first right to be transferred is as follows:
 - Certificate:** 23254 in the name of JOHN AND BARBARA LEITH (perfected under Permit S-21692)
 - Use:** IRRIGATION of 3.5 ACRES
 - Priority Date:** AUGUST 8, 1952
 - Rate:** 0.04 CUBIC FOOT PER SECOND
 - Limit/Duty:** The amount of water used for irrigation, together with the amount secured under any other right existing for 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

Pursuant to OAR 690-380-4030, any person may file a protest or standing statement within 30 days after the last date of publication of notice of this preliminary determination.
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exceed 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: SOUTH YAMHILL RIVER, tributary to the WILLAMETTE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC
5 S	6 W	WM	33	SE NE	44

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	6 W	WM	33	NE NE	42	0.75
5 S	6 W	WM	33	SE NE	42	2.75

3. Certificate 23254 does not describe the measured distance of the authorized point of diversion; however information is available from Transfer Application T-10643 that describes the measured distance and puts the authorized point of diversion in the SWNE. The point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distance
5 S	6 W	WM	33	SW NE	44	550 FEET NORTH AND 1290 FEET WEST FROM THE E ¹ / ₄ CORNER OF SECTION 33 (ALSO DESCRIBED AS: 10 FEET NORTH AND 23 FEET WEST FROM THE SE CORNER OF THE WOOD DLC 44)

4. Certificate 23254 lists the South Yamhill River as a tributary to the Willamette River. The South Yamhill River is a tributary to the Yamhill River.
5. Transfer Application T-10643 proposes an additional point of diversion approximately 0.33 mile upstream:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
5 S	6 W	WM	33	SE NW	44	NORTH 55 DEGREES WEST, 550 FEET FROM THE C ¹ / ₄ CORNER OF SECTION 33

6. Application T-10643 also proposes to change the place of use of the right to:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	6 W	WM	33	NE NW	44	3.5

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

Certificate: 49958 in the name of OTTO W. HEIDER (perfected under Permit S-22222)

Use: IRRIGATION of 22.3 ACRES

Priority Date: MARCH 30, 1953

Rate: 0.19 CUBIC FOOT PER SECOND

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited

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 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: SOUTH YAMHILL RIVER, tributary to the WILLAMETTE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC
5 S	6 W	WM	34	SW NW	42

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	6 W	WM	34	NW NW	42	10.9
5 S	6 W	WM	34	SW NW	42	11.4

8. Certificate 49958 does not describe the measured distance of the authorized point of diversion, however information is available from Transfer Application T-10643 indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
5 S	6 W	WM	34	SW NW	42	1485 FEET SOUTH AND 1180 FEET EAST FROM THE NW CORNER OF SECTION 34

9. Certificate 49958 lists the South Yamhill River as a tributary to the Willamette River. The South Yamhill River is a tributary to the Yamhill River.
10. Transfer Application T-10643 proposes to move the authorized point of diversion and establish an additional point of diversion located between approximately 1.25 and 1.58 miles upstream from the authorized point of diversion, respectively:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
5 S	6 W	WM	33	SE NE	44	10 FEET NORTH AND 23 FEET WEST FROM THE SE CORNER OF WOOD DLC 44
5 S	6 W	WM	33	SE NW	44	NORTH 55 DEGREES WEST, 550 FEET FROM THE C ¹ / ₄ CORNER OF SECTION 33

11. Application T-10643 also proposes to change the place of use of the right to:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	6 W	WM	33	NE NW	44	8.1
5 S	6 W	WM	33	NW NW	44	14.2

12. The third right to be transferred is as follows:

Certificate: 43096 in the name of TAYLOR LUMBER COMPANY (perfected under Permit S-37083)

Use: INDUSTRIAL (SAWMILL AND WOOD TREATING PLANT)

Priority Date: AUGUST 4, 1972

Rate: 0.22 CUBIC FOOT PER SECOND

Source: SOUTH YAMHILL RIVER, tributary to the YAMHILL RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
5 S	6 W	WM	33	SE NE	42	10 FEET NORTH AND 23 FEET WEST FROM THE SE CORNER OF WOOD DLC 44

Authorized Place of Use:

INDUSTRIAL						
Twp	Rng	Mer	Sec	Q-Q	DLC	
5 S	6 W	WM	27	SW SW	42	
5 S	6 W	WM	28	SE SE	42	
5 S	6 W	WM	33	NE NE	42	
5 S	6 W	WM	33	NE NE	44	
5 S	6 W	WM	33	NW NE	44	
5 S	6 W	WM	33	SW NE	44	
5 S	6 W	WM	33	SE NE	44	

13. Transfer Application T-10643 proposes an additional point of diversion approximately 0.33 mile upstream:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
5 S	6 W	WM	33	SE NW	33	NORTH 55 DEGREES WEST, 550 FEET FROM THE C ¹ / ₄ CORNER OF SECTION 33

14. Transfer Application T-10643 proposes to change the character of use to IRRIGATION.

15. Application T-10643 also proposes to change the place of use of the right to:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	6 W	WM	28	SE SW	44	8.9
5 S	6 W	WM	33	NE NW	44	8.7

16. The rate per acre for irrigation in the vicinity of the proposed place of use is 1/80 cfs per acre. At this ratio, 0.22 cfs could be applied to 17.6 acres for irrigation.
17. Certificate 43096 does not set an annual duty for industrial uses; however, ORS 540.610 states "beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state." Use of more water per year than could maximally have been beneficially used for the original industrial use would constitute enlargement of the right, which is not allowable. Therefore, to avoid enlarging the right in the conversion to irrigation, an annual limit should be added to the right.
18. The best currently available information indicates that beneficial use of water for irrigation of crops in the area would not likely exceed 2.5 acre-feet per acre, for a total of 44.0 acre-feet per year (17.6 x 2.5 = 44.0 acre-feet). This volume does not exceed the annual amount of water that could have been used by the sawmill and wood treating plant.

19. Notice of the application for transfer was published on June 24, 2008, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
20. On June 29, 2009, the Department sent the applicant an email, recapping changes to the application that were agreed to at a meeting with the applicant on June 26, 2009, and requesting confirmation of those changes. No record of the applicant's response is in the file.
21. On December 30, 2009, the Department sent a letter to the applicant, requesting more information about the pumping and delivery system and acknowledgement of the requirement to submit landownership information prior to approval of the transfer. The letter requested the information to be submitted by January 29, 2010. On January 29, 2010, Julie Dean requested 90 more days to submit the information. A verbal acknowledgement of the requirement for ownership information was received June 21, 2010.
22. On May 12, 2010, the Department sent an email reminder to Julie Dean and received an email in response, stating that she had been in the hospital. The Department sent a reminding email on May 19, 2010.
23. On June 21, 2010, the applicant was reached by phone. She indicated that she was trying to set up a meeting with the railroad, and would email pumping and delivery information. It is unclear when the information about the pumping and delivery system was received.
24. On July 16, 2010, Julie Dean indicated by email that she was still waiting to receive a letter of approval from the railroad. Further email exchanges on August 27 and September 3, 2010 did not result in any additional information.
25. On October 29, 2010, Julie Dean emailed, indicating the location for the proposed point of diversion and stating that she still planned to pursue consent for routing the delivery system in relation to the highway and the railroad.
26. On May 10, 2011, the Department contacted the applicant by email, indicating that portions of the rights identified for transfer appear to have had buildings on them prior to 2003, which would make those portions of Certificates 49958 and 23254 not transferable. The applicant was requested to respond by May 20th, to plan a strategy and time schedule for modifying the application as needed to be able to continue processing. No response was received.
27. On June 28, 2011, the Department attempted to contact Julie Dean by phone and discovered the phone number was out of service. The May 10th email was again sent, with a statement that if no response was received by June 30, 2011, a Preliminary Determination to deny T-10643 would be issued. On June 29, 2011, Julie Dean responded by email indicating that she was out of town and would get back to us when she had returned, but no response was received.
28. On July 8, 2011, the Department again emailed Julie Dean, offering to meet with her by phone or in person to work out a plan to resolve the deficiencies. A response was requested by July 20, 2011. No response was received.

29. On August 5, 2011, the Department emailed the applicant, indicating that a Preliminary Determination would be issued within a few days, and explaining the steps in processing the transfer. Julie Dean responded by email, asking what would be needed to make it easy. The Department asked her to call and indicated the Preliminary Determination would be sent after Wednesday, August 10, 2011, with information in the cover letter, if no phone conversation had occurred. No response was received from Julie Dean.
30. 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.
31. On August 12, 2011, the Department mailed a copy of a draft Preliminary Determination proposing to deny Transfer Application T-10643 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of September 12, 2011, for the applicant to respond.
32. On August 12, 2011, the applicant responded by email, indicating that she could come to the Water Resources Department office on August 22, 2011, to discuss options. However, Julie Dean did not come to the appointment.
33. On August 23, 2011, the applicant indicated that she would not be able to meet until sometime in September after the start of school. The Department responded that a Preliminary Determination to deny would be issued unless modifications to the transfer or plans to have changes made by a CWRE were received before September 12th. The Department invited Julie Dean to communicate her questions by email or phone, or to make another appointment to come into the office to meet with a staff person. No response was received.
34. On September 27, 2011, the Department sent Julie Dean another email, stating that unless she submitted changes or came in for a conference by September 30, 2011, a Preliminary Determination to deny the T-10643 transfer application would be issued and put on public notice October 4, 2011. Again no response was received from the applicant.

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

35. Evidence was submitted with the application indicating that water has been used within the last five years according to the terms and conditions of the right. However, aerial photographs of the lands to which the right is appurtenant suggest that there has been an extended period of time during which portions of the rights under Certificates 23254 and 49958 were not exercised due to paving and construction of buildings. Those portions are subject to forfeiture, and therefore, not eligible for transfer. All of Certificate 43096 appears to be subject to transfer.

36. Pumps, pipelines, and delivery systems sufficient to use the full amount of water allowed under the existing rights were present within the five-year period prior to submittal of Transfer Application T-10643.
37. Unless the transfer application is modified to eliminate portions of the Certificate 23254 and 49958 rights that have not been used for five or more consecutive years, transfer to the full number of acres as proposed would result in enlargement of those rights.
38. Unless the proposed changes are modified to prevent enlargement, the Department cannot make a positive finding that the transfer would not result in injury to other water rights.

Determination and Proposed Action

The change in point of diversion and additional points of diversion and change in place of use and change in character of use proposed in Transfer Application T-10643 appear NOT to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380 because portions of the rights are not subject to transfer. The transfer application cannot be approved without modification. If the application is not modified or withdrawn, or protests are not filed pursuant to OAR 690-380-4030, the transfer application will be denied.

Dated at Salem, Oregon this 7 day of October, 2011.



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

This Preliminary Determination was prepared by Dorothy Pedersen. If you have questions about the information in this document, you may reach me at 503-986-0890 or Dorothy.I.Pedersen@wrds.state.or.us.

Protests should be addressed to the attention of Field Services Division, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.