



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

North Mall Office Building
725 Summer St. NE, Suite A
Salem, OR 97301
Phone 503-986-0900
FAX 503-986-0904
www.wrd.state.or.us

July 18, 2012

Applicant

WILLIAM AND ROSA RUPP
420 ROAD 49
PASCO, WA 99301

SUBJECT: Water Right Transfer Application T-11346

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11346. This document is an intermediate step in the approval process; water may not be used legally as proposed in the transfer application until a Final Order has been issued by the Department. Please read this entire letter carefully to determine your responsibility for additional action.

A public notice is being published in the Department's weekly publication and in the East Oregonian newspaper, simultaneously with issuance of the Preliminary Determination. The notice initiates a period in which any person may file either a protest opposing the decision proposed by the Department in the Preliminary Determination or a standing statement supporting the Department's decision. The protest period will end 30 days after the last date of newspaper publication.

If no protest is filed, the Department will issue a Final Order consistent with the Preliminary Determination. You should receive a copy of the Final Order about 30 days after the close of the protest period.

If a protest is filed, the application may be referred to a contested case proceeding. A contested case provides an opportunity for the proponents and opponents of the decision proposed in the Preliminary Determination to present information and arguments supporting their position in a quasi-judicial proceeding.

Please do not hesitate to contact me at (503) 986-0890 or Dorothy.I.Pedersen@wrd.state.or.us if I may be of assistance.

Sincerely,

Dorothy I. Pedersen
Transfer Program Advisor

cc: T-11346
Tony G. Justus, District 5 Watermaster (*via e-mail*)
Dale Van Schoiack, Agent for the applicant (*via e-mail*)

encs



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

In the Matter of Transfer Application)
T-11346, Umatilla County)
)
)
)

PRELIMINARY DETERMINATION
PROPOSING APPROVAL OF AN
ADDITIONAL POINT OF DIVERSION
AND PARTIAL CANCELLATION OF A
WATER RIGHT

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 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicant

WILLIAM and ROSA RUPP
420 ROAD 49
PASCO, WA 99301

Findings of Fact

Background

1. On January 25, 2012, William and Rosa Rupp filed an application to add an additional point of diversion under Certificates 434 and 2553. The Department assigned the application number T-11346.
2. On February 13, 2012, the applicants submitted a new map and amended a portion of the application.
3. The portion of the first right to be transferred is as follows:

Certificate: 434 in the name of PERRY HOUSER (perfected under Permit S-137)
Use: IRRIGATION of 3.6 ACRES
Priority Date: JUNE 7, 1909
Rate: 0.045 CUBIC FOOT PER SECOND (cfs) or its equivalent in case of rotation.

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.

Source: EAST BIRCH CREEK, a tributary of the Umatilla River

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q - Q	Acres
2 S	32 E	WM	11	SE SE	3.6

4. Certificate 434 states East Birch Creek is tributary to the Umatilla River, however, East Birch Creek actually flows into Birch Creek, which in turn contributes to the Umatilla River.
5. Certificate 434 does not describe the location of the point of diversion. However, the adjudication map describes the POD as within the SW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 12, T 2 S, R 32 E, W.M. In addition, information is available from the current map prepared by the applicants' Certified Water Rights Examiner based on a recent field visit and subsequent survey indicating that the point of diversion is more specifically located as follows:

Twp	Rng	Mer	Sec	Q - Q	Survey Coordinates
2 S	32 E	WM	12	SW SE	990 FEET NORTH AND 1350 FEET WEST FROM THE SE CORNER OF SECTION 12

6. Transfer application T-11346 proposes to add an additional point of diversion to the above described right downstream approximately 1 mile to a diversion located:

Twp	Rng	Mer	Sec	Q - Q	Survey Coordinates
2 S	32 E	WM	11	SE SE	680 FEET NORTH AND 6580 FEET WEST FROM THE SE CORNER OF SECTION 12

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

Certificate: 2553 in the name of PERRY HOUSER (confirmed by decree of the Circuit Court of the State of Oregon for Umatilla County)

Use: IRRIGATION of 32.2 ACRES

Priority Date: 1897

Rate: 0.40 cfs, subject to the provisions of Paragraph 33 of said decree

Source: EAST BIRCH CREEK, tributary to the Umatilla River

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q - Q	Acres
2 S	32 E	WM	11	SW SE	9.6
2 S	32 E	WM	11	SE SE	15.0
2 S	32 E	WM	12	SW SW	7.6

8. Certificate 2553 states East Birch Creek is tributary to the Umatilla River, however, East Birch Creek actually flows into Birch Creek, which in turn contributes to the Umatilla River.

9. Certificate 2553 does not describe the location of the point of diversion. However, the adjudication map describes the POD as within the SW¹/₄ of the SE¹/₄ within Section 12, T 2 S, R 32 E, W.M. In addition, information is available from the current map prepared by the applicants' Certified Water Right Examiner based on a recent field visit and subsequent survey indicating that the point of diversion is more specifically located as follows:

Twp	Rng	Mer	Sec	Q - Q	Survey Coordinates
2 S	32 E	WM	12	SW SE	990 FEET NORTH AND 1350 FEET WEST FROM THE SE CORNER OF SECTION 12

10. Transfer Application T-11346 proposes to add an additional point of diversion to the above described right downstream approximately 1 mile to a diversion located:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 S	32 E	WM	11	SE SE	680 FEET NORTH AND 6580 FEET WEST FROM THE SE CORNER OF SECTION 12

11. Notice of the application for transfer was published on February 7, 2012, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
12. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screen is necessary at the new point of diversion to prevent fish from entering the diversion and that the diversion is not currently equipped with an appropriate fish screen. This diversion may be eligible for screening cost-share funds.
13. On May 31, 2012, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11346 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of June 30, 2012, for the applicants to respond. On June 14, 2012, Dale Van Schoiack, agent for the applicants submitted correspondence via e-mail requesting the Department to proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicants are authorized to pursue the transfer.

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

14. The Department determined that there are two "stacked" primary water rights on a portion of the applicants' property. The Certified Water Right Examiner has appropriately mapped these two water rights. The permitted water right Certificate 434 (non-decreed right) with a priority date of June 7, 1909, is the more junior right. To alleviate the conflict, the Department provided a "Partial Cancellation of a Water Right" voluntary cancellation affidavit for the applicants' use if they agreed to cancellation of the junior right.
15. On June 28, 2012, the Department received a voluntary cancellation affidavit from William and Rosa Rupp requesting to cancel the above described portion of Certificate 434, further described in Finding of Fact #20.

16. Water has been used within the five-year period prior to submittal of the transfer application according to the terms and conditions of the rights. There is no information in the record that would demonstrate that the rights are 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 rights were present within the five-year period prior to submittal of Transfer Application T-11346.
18. The proposed changes would not result in enlargement of the rights.
19. The proposed changes would not result in injury to other water rights.

Partial Cancellation of a Water Right

20. On June 28, 2012, the Department received a voluntary cancellation affidavit from William and Rosa Rupp requesting to cancel a stacked primary water right on portions of the transferred primary water rights. The voluntary cancellation affidavit meets the requirements of ORS 540.621. The portion of the water right to be cancelled is described as follows:

Certificate: 434, in the name of Perry Houser (perfected under Permit S-137)
Use: Irrigation of 40.5 acres
Priority Date: June 7, 1919
Quantity: 0.51 cubic foot per second
Source: East Birch Creek, tributary to Birch Creek (which in turn contributes to the Umatilla River)

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q - Q
2 S	32 E	WM	12	SW SE

Place of Use to be cancelled:

IRRIGATION					
Twp	Rng	Mer	Sec	Q - Q	Acres
2 S	32 E	WM	11	SW SE	13.0
2 S	32 E	WM	11	SE SE	15.0
2 S	32 E	WM	12	SW SW	12.5

Determination and Proposed Action

The change in additional points of diversion proposed in Transfer Application T-11346 appears to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000 and the abandoned portion of Certificate 434 described above in Finding of Fact #20 should be cancelled. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be approved.

If Transfer Application T-11346 is approved, the final order will include the following:

1. *The additional points of diversion proposed in application T-11346 are approved, and the portion of the right evidenced by Certificate 434 that has been abandoned is cancelled.*
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 Certificates 434 and 2553 and any related decree.*
3. *Water right Certificates 434 and 2553 are cancelled. New certificates will be issued for the remainder of the rights not transferred or cancelled by this order, clarifying that East Birch Creek is tributary to Birch Creek.*
4. *The quantity of water diverted at the new additional 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. *Prior to diverting water, the water user shall install approved fish screens at the new points of diversion and shall provide to the OWRD a written statement from Oregon Department of Fish and Wildlife (ODFW) that the installed screens meet the state's criteria, or that ODFW has determined screens are not necessary.*
6. *The water user shall operate and maintain a fish screen at each new point of diversion consistent with ODFW's operational and maintenance standards. If ODFW determines a screen is not functioning properly, and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that OWRD regulate the use of water until OWRD receives notification from ODFW that the fish screen is functioning properly.*
7. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2013**. 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.*
8. *After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.*

Dated at Salem, Oregon this 19th day of July, 2012.

E. Timothy Wall for

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

This Preliminary Determination was prepared by Ken Dowden. If you have questions about the information in this document, you may reach me at 541-278-5456 or Ken.D.Dowden@wrdd.state.or.us.

Protests should be addressed to the attention of Transfer and Conservation Section, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.

