

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-7185, Wasco County)	PROPOSING APPROVAL OF A CHANGE
)	IN POINT OF DIVERSION, ADDITIONAL
)	POINTS OF DIVERSION, PARTIAL
)	CANCELLATION OF A WATER RIGHT
)	AND CLARIFICATION OF THE PLACES
)	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.

ORS 540.621 establishes the process for the owner of land to which a water right certificate 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

Oregon Department of Fish and Wildlife
attn: Realty Division
3406 Cherry Ave. NE
Salem, Oregon 97303

White River Game Management Area
attn: Josh Moulton
78430 Dodson Road
Tygh Valley, Oregon 97063

Findings of Fact

1. On July 5, 1994, the Oregon Department of Fish and Wildlife (ODFW) filed a transfer application to change the point of diversion, add points of diversion, and change the place of use under Certificates 5755 and 5734, each with a priority date of 1884. The Department assigned the application number T-7185.
2. The first right to be transferred is as follows:
Certificate: 5734 in the name of Gustav Balzer
Use: Irrigation of 4.6 acres
Priority Date: 1884
Rate/Duty: Three acre-feet per acre during any irrigation season (with the further limitations contained in Paragraph 24 of said decree).
Source: Jordan Creek, tributary to White River

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 transfer application and preliminary determination.

Authorized Place of Use:

Twp	Rng	Mer	Sec	¼ ¼	Acres
3 S	12 E	W.M.	24	SW¼ SW¼	2.5
3 S	12 E	W.M.	25	NW¼ NW¼	2.1
TOTAL					4.6 acres

3. Certificate 5734 did not specify the location of the point of diversion, however a 1999 survey by a Certified Water Right Examiner established that the diversion point is located as follows:

Authorized Point of Diversion:

TWP	RNG	MER	SEC	¼ ¼	Survey Coordinates
3 S	12 E	W.M.	24	SW SW	1080 feet North and 580 feet East from the SW Corner of Section 24

4. Transfer Application T-7185 proposes to move the authorized point of diversion approximately 900 feet downstream in Jordan Creek to:

Proposed Point of Diversion:

TWP	RNG	MER	SEC	¼ ¼	Survey Coordinates
3 S	12 E	W.M.	24	SW SW	250 feet North and 250 feet East from the SW Corner of Section 24

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

Certificate: 5755 in the name of Alex McCartney

Use: Irrigation of 15.9 acres

Priority Date: 1884

Rate/Duty: Three acre-feet per acre during any irrigation season (with the further limitations contained in Paragraph 24 of said decree).

Source: Tygh Creek and Jordan Creek, tributaries to the White River

Authorized Place of Use:

Twp	Rng	Mer	Sec	¼ ¼	Acres
3 S	12 E	W.M.	26	NE NE	4.0
3 S	12 E	W.M.	26	NW NE	0.3
3 S	12 E	W.M.	26	SW NE	0.1
3 S	12 E	W.M.	26	SE NE	11.1
3 S	12 E	W.M.	26	NE SE	0.4
TOTAL					15.9 acres

6. Certificate 5755 did not specify the locations of the points of diversion, however a 1999 survey by a Certified Water Right Examiner established that the diversion points are located as follows:

Authorized Points of Diversion:

TWP	RNG	MER	SEC	¼ ¼	Survey Coordinates
3 S	12 E	W.M.	24	SW SW	JORDAN CREEK (POD to be Abandoned): 1080 feet North and 580 feet East from the SW Corner of Section 24
3 S	12 E	W.M.	26	NW NE	TYGH CREEK (POD to Remain: 1200 feet South and 1720 feet West from the NE Corner of Section 26

7. Transfer Application T-7185 proposes to move the authorized point of diversion (SW¼ SW¼, Sec. 24) approximately 2860 feet downstream in Jordan Creek to:

TWP	RNG	MER	SEC	¼ ¼	Survey Coordinates
3 S	12 E	W.M.	26	NE NE	1190 feet South and 180 feet West from the NE corner of Section 26

8. Transfer Application T-7185 also proposes two additional points of diversion approximately 900 feet and 2000 feet downstream in Tygh Creek to:

TWP	RNG	MER	SEC	¼ ¼	Survey Coordinates
3 S	12 E	W.M.	26	SE NE	1650 feet South and 980 feet West from the NE corner of Section 26
3 S	12 E	W.M.	26	SE NE	2060 feet South and 240 feet West from the NE corner of Section 26

9. In 1918, the State Engineer performed a survey of the water uses for the adjudication of claims in the White River Basin. The results of the 1918 survey described the place of use in relation to Township, Range, Section and Quarter-Quarter lines. The adjudication map depicting the place of use described by water right Certificate 5734 identifies the general layout of the lands irrigated, but the locations of the survey monuments and section corner are not consistent with those of current land surveys.
10. A new survey was performed in March, 1999 for application T-7185 by a Certified Water Rights Examiner. The survey of the area of present water use closely corresponds in shape and size to the lands mapped in the 1918 survey. The 1999 survey superimposed the Township, Range, Section and Quarter-Quarter lines on the place of use differently from the 1918 State Engineer survey.

11. There are similar discrepancies between the two surveys for the locations of the authorized points of diversion. The locations of the authorized points of diversion (Bauger and McCortney Ditches) as described in the 1918 survey and in the 1999 survey indicate that the reference point using in the 1918 survey is approximately 75 feet west and 300 feet south of the reference point used in the 1999 survey.
12. Table 1 provides a comparison of the descriptions of the authorized place of use for Certificate 5734 from the 1918 and 1999 surveys. Table 2 provides a comparison of the descriptions of the authorized place of use for Certificate 5755 from the 1918 and 1999 surveys.

TABLE 1 Water Right Certificate 5734 Place of Use	
1918 State Engineer Survey	1999 CWRE Survey
SW¼ SW¼ 2.5 acres Section 24	SE ¼ SE¼ 1.1 acres Section 23
NW¼ NW¼ 5.5 acres Section 25	SW¼ SW¼ 3.9 acres Section 24
Township 3 South, Range 12 East, W.M.	NW¼ NW¼ 3.0 acres Section 25
TOTAL = 8.0 acres	Township 3 South, Range 12 East, W.M. TOTAL = 8.0 acres

TABLE 2 Water Right Certificate 5755 Place of Use	
1918 State Engineer Survey	1999 CWRE Survey
NE¼ NE¼ 2.5 acres	NE¼ NE¼ 9.1 acres
SW¼ NE¼ 1.7 acres	NW¼ NE¼ 0.6 acre
SE¼ NE¼ 21.0 acres	SW¼ NE¼ 0.3 acre
NE¼ SE¼ 2.0 acres	SE¼ NE¼ 16.8 acres
Section 26	NE¼ SE¼ 0.4 acre
Township 3 South, Range 12 East, W.M.	Section 26
TOTAL = 27.2 acres	Township 3 South, Range 12 East, W.M. TOTAL = 27.2 acres

13. Both surveys describe the same irrigated land. The differences between the two surveys result from different bases of bearing and reference points used in the surveys. The CWRE based his retracement on reference points established or re-established by government land surveyors instead of a retracement of the original survey made by the State Engineer upon which the water right certificate was based. The actual location of the place of use and the point of diversion as they are found on the ground remains the same as the State Engineer found them in 1918.
14. On September 16, 1993, the final order dismissing contested case PC 91-7-B was issued. The order is recorded at Special Order Volume 47, Page 328. The order stated in part that,

“... ODFW also will request cancellation of any portions of Certificates 5734 and 5755 that are appurtenant to those portions of the subject lands determined by mapping not to be irrigated.” The order also states “ODFW will further request cancellation of any portions of Certificates 5734 and 5755 appurtenant to those portions of the subject lands on which no beneficial use has been made of the water, as determined by the Water Resources Department of the State of Oregon.”

15. Application T-7185 identifies those portions of the subject water rights that have not been beneficially irrigated, that have been abandoned, and are therefore subject to cancellation as required under the order dismissing contested case PC 91-7-B.
16. The portion of Certificate 5734 to be cancelled is described based on the 1999 survey as follows:

Twp	Rng	Mer	Sec	Q-Q	Acres
3 S	12 E	WM	23	SE SE	1.1
3 S	12 E	WM	24	SW SW	1.4
3 S	12 E	WM	25	NW NW	0.9
TOTAL					3.4 acres

17. The portion of Certificate 5755 to be cancelled is described based on the 1999 survey as follows:

Twp	Rng	Mer	Sec	Q-Q	Acres
3 S	12 E	WM	26	NE NE	5.1
3 S	12 E	WM	26	NW NE	0.3
3 S	12 E	WM	26	SW NE	0.2
3 S	12 E	WM	26	SE NE	5.7
TOTAL					11.3 acres

18. Notice of the application for transfer was published pursuant to ORS 540.520 and OAR 690-380-4000. No comments were filed in response to the notice. However, the Oregon Department of Fish and Wildlife did request inclusion of a condition requiring installation of proper fish screens.
19. Upon receipt of the draft Preliminary Determination, the applicant submitted a written comment in response to the requirement for the installation of a flow meter as a condition of the transfer. The applicant indicated that installation of a flow meter would be difficult because of the temporary and portable pumping situation in used to irrigate the lands. Given the amount of water, site in a low priority water availability basin, and a low likelihood of regulation on the stream system, installation of a flow meter will not be required as a condition of the transfer. However, the Department may require the applicant to install a flow meter should the need arise at a future date.
20. Water was used within the last five years prior to according to the terms and conditions of the rights and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.

21. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing rights are present and a pump, pipeline, and sprinkler system sufficient to use the full amount of water allowed under the existing rights are present.
22. The proposed change would not result in enlargement of the rights.
23. The proposed change would not result in injury to other water rights.

Determination and Proposed Action

The proposed changes in point of diversion, additional points of diversion, and partial cancellation and redescription of the places of use in Transfer Application T-7185 appear to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000 and will be approved provided that protests are not filed pursuant to OAR 690-380-4030.

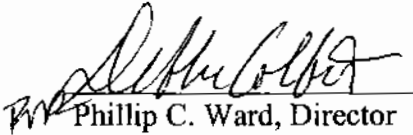
The portions of Certificates 5734 and 5755 described in Findings of Fact #16 and #17 as abandoned will be cancelled.

If approved, the changes and subsequent use of water shall be subject to the following conditions:

1. 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 5734 and 5755 and any related decree.
2. Upon issuance of a final order approving Transfer Application T-7185, water right Certificates 5734 and 5755 will be cancelled.
3. The approved changes shall be completed and full beneficial use of the water shall be made on or before **October 1, 2008**. A Claim of Beneficial Use prepared by a Certified Water Rights 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.
4. The quantity of water diverted (Certificate 5755) at the additional points of diversion, together with that diverted at the original points of diversion, shall not exceed the quantity of water lawfully available at the original points of diversion.
5. The quantity of water diverted (Jordan Creek) at the new proposed points of diversion (Certificates 5734 and 5755) shall not exceed the quantity of water lawfully available at the original points of diversion.
6. 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.

7. 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.
8. When satisfactory proof of the completed changes is received, new certificates confirming the rights transferred will be issued.

Dated at Salem, Oregon this 8th day of November, 2006.


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@wrд.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 97301-1271

