

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

In the Matter of Transfer Application)
T-8075, Douglas County)
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**PRELIMINARY DETERMINATION
PROPOSING APPROVAL OF A
CHANGE IN POINTS OF DIVERSION,
PLACES OF USE 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.

Applicants

MICHAEL W. BURWELL	ANTHONY L AND TERRIE R FRANSSSEN
201 STARBUCK LANE	199 STARBUCK LANE
MYRTLE CREEK OR 97457	MYRTLE CREEK OR 97457

Findings of Fact

Background

1. On September 4, 1998, Michael W. Burwell, Anthony L. and Terrie R. Franssen filed an application to change the places of use and points of diversion under Certificates 8183 and 55157. The Department assigned the application number T-8075.
2. On October 27, 2003, the applicants submitted a revised map, amending the points of diversion and places of use on both Certificates 8183 and 55157.
3. On October 27, 2003, the applicants submitted an Affidavit for Partial Cancellation of a Water Right Certificate requesting voluntary cancellation of 2.9 acres of irrigation use appurtenant to tax lots 1200 and 1201, in the NE SW of Section 8, T29S, R4W as evidenced by certificate 55157.

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.

4. The portion of the first right to be modified is as follows:

Certificate: 8183 in the name of W. L. BURK (perfected under Permit S-5877)

Use: IRRIGATION of 5.1 ACRES

Priority Date: MAY 12, 1923

Rate: 0.06 CUBIC FOOT PER SECOND (cfs)

Limit/Duty: ONE-EIGHTIETH of one cfs per acre, or its equivalent in case of rotation

Source: NORTH MYRTLE CREEK, tributary to MYRTLE CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
29 S	4 W	WM	8	NE SW	COORDINATES NOT LISTED ON CERTIFICATE

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
29 S	4 W	WM	8	NE SW	1.75
29 S	4 W	WM	8	NE SW	3.25
29 S	4 W	WM	8	SE NW	0.10
Total					5.10

5. The May 12, 1923, application map for Permit S-5877 placed the point of diversion in the NE SW of Section 8, T29S, R4W. A final proof survey for Permit S-5877 was not performed by the Department. As a result, Certificate 8183 lists the point of diversion in the NE SW of Section 8, T29S, R4W, but does not list the point of diversion coordinates.
6. On February 19, 2002, a notarized affidavit was received from Clarence Leo Collins, a prior owner of certain lands evidenced by Certificate 8183. He attested to the existence of a ditch and diversion point in the NE NW, Section 8, T29S, R4W indicating that the point of diversion was located in the NE NW rather than in the NE SW of Section 8, T29S, R4W and requested that the record for the right be amended.
7. On October 27, 2003, a map submitted by a Certified Water Rights Examiner, using the exact diversion coordinates on permit S-5887, confirmed that the point of diversion is in the NE SW as indicated on Certificate 8183. However, those coordinates (North 119 rods East 121 rods East from the Southwest corner of Section 8) place the diversion 360 feet southeast of North Myrtle Creek, in an open field, providing further evidence the point of diversion coordinates as described on Permit S-5877 could not have conveyed water from North Myrtle Creek.
8. On March 7, 2007, Department staff conducted a field inspection and interviewed Mr. Charles E. Barnhart. Mr. Barnhart acquired property served under Certificate 8183 in the mid to late 1940's. Mr. Barnhart stated that water was diverted from North Myrtle Creek immediately above a bridge located in the NE SW. Field measurements placed the point of diversion, 76 feet south and 484 feet west from the center ¼ corner of Section 8, T29S, R4W. The bridge is shown on the final proof survey map for Certificate 55157. This location is north of the point of diversion shown on the application map for Permit S-5877 but within the same quarter-quarter.

9. Based on the information contained in Findings of Fact #5 , #7 and #8 above, the Department finds that the point of diversion for the water right evidenced by Certificate 8183 is located in the NE SW of Section 8, T29S, R4W being 76 feet south and 484 feet west from the center ¼ corner of Section 8.
10. Transfer Application T-8075 replaces the old point of diversion with three new points of diversion, all less than ¼ of a mile downstream from the authorized point of diversion referenced in Finding of Fact #9 and are located at:

Twp	Rng	Mer	Sec	Q-Q	POD #	Survey Coordinates
29 S	4 W	WM	8	NE SW	1	465 FEET SOUTH AND 1035 FEET WEST FROM THE CENTER OF SECTION 8
29 S	4 W	WM	8	NE SW	2	115 FEET SOUTH AND 645 FEET WEST FROM THE CENTER OF SECTION 8
29 S	4 W	WM	8	NE SW	3	320 FEET SOUTH AND 820 FEET WEST FROM THE CENTER OF SECTION 8

11. Transfer Application T-8075 proposes to change the place of use to:

Twp	Rng	Mer	Sec	Q-Q	Acres
29 S	4 W	WM	8	SE NW	1.75

12. A summary table of the proposed changes in Transfer Application T-8075 affecting Certificate 8183 are as follows:

Twp	Rng	Mer	Sec	Q-Q	Acres	Type of Change
29 S	4 W	WM	8	NE SW	1.75	POU (from)
29 S	4 W	WM	8	SE NW	1.75	POD and POU (to)
29 S	4 W	WM	8	NE SW	3.25	POD Only
29 S	4 W	WM	8	SE NW	0.10	POD Only

13. The portion of the second right to be modified is as follows:

Certificate: 55157 in the name of CHARLES E. BARNHART (perfected under Permit S-38522)

Use: IRRIGATION of 3.1 ACRES

Priority Date: JULY 14, 1974

Rate: 0.039 CUBIC FOOT PER SECOND (cfs)

Limit/Duty: ONE-EIGHTIETH of one cfs per acre or its equivalent for each acre irrigated and shall be further limited to a diversion not to exceed 2.5 acre-feet during the irrigation season of each year

Source: NORTH MYRTLE CREEK, tributary to MYRTLE CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
29 S	4 W	WM	8	NE SW	260 FEET SOUTH AND 820 FEET WEST FROM CENTER OF SECTION 8

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
29 S	4 W	WM	8	SE NW	1.75
29 S	4 W	WM	8	SE NW	1.35
Total					3.10

14. Application T-8075 proposes to replace the authorized point of diversion with the following two points of diversion both less than ¼ mile downstream.

Twp	Rng	Mer	Sec	Q-Q	POD #	Survey Coordinates
29 S	4 W	WM	8	NE SW	1	465 FEET SOUTH AND 1035 FEET WEST FROM THE CENTER OF SECTION 8
29 S	4 W	WM	8	NE SW	3	320 FEET SOUTH AND 820 FEET WEST FROM THE CENTER OF SECTION 8

15. Application T-8075 also proposes to change the place of use to:

Twp	Rng	Mer	Sec	Q-Q	Acres
29 S	4 W	WM	8	NE SW	1.75

16. A summary table of the proposed changes affecting Certificate 55157 in Transfer Application T-8075 is as follows:

Twp	Rng	Mer	Sec	Q-Q	Acres	Type of Change
29 S	4 W	WM	8	SE NW	1.75	POU (from)
29 S	4 W	WM	8	NE SW	1.75	POD and POU (to)
29 S	4 W	WM	8	SE NW	1.35	POD Only

17. Notice of the application for transfer was published on September 15, 1998, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
18. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening and/or by-pass device is necessary at the new points 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. These new diversions may be eligible for ODFW's Fish Screening and Passage Cost Share Grant Program.
19. Newspaper notice was previously published pursuant to OAR 609-015-0080(1). Publication occurred in The News Review of Douglas County (a newspaper having a general circulation in the area in which the change is proposed) on January 19, 26, and February 2, 2004. In accordance with OAR 690-380-0090(5), therefore, newspaper notice of the preliminary determination is not required.

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

- 20. Water has been used within the last five years according to the terms and conditions of the rights, and there is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
- 21. A pump, pipeline, and sprinkler system sufficient to use the full amount of water allowed under the existing rights were present within the five-year period prior to submittal of Application T-8075.
- 22. The proposed change would not result in enlargement of the right.
- 23. The proposed change would not result in injury to other water rights.

Partial Cancellation of a Water Right

- 24. An affidavit for partial cancellation of a water right was received from Michael Burwell, Anthony Franssen and Terrie Franssen on October 27, 2003 as follows:

Certificate: 55157 in the name of CHARLES E. BARNHART AND GEORGE F. WOLFF
Use: IRRIGATION of 2.9 ACRES
Priority Date: JULY 14, 1974
Rate: 0.036 CUBIC FOOT PER SECOND
Limit/Duty: ONE-EIGHTIETH cfs per acre, not to exceed 2.5 acre-feet per acre during the irrigation season of each year
Source: NORTH MYRTLE CREEK, tributary to MYRTLE CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
29 S	4 W	WM	8	NE SW	260 FEET SOUTH AND 820 FEET WEST FROM THE CENTER OF SECTION 8

Authorized Place of Use to be cancelled:

Twp	Rng	Mer	Sec	Q-Q	Acres
29 S	4 W	WM	8	NE SW	2.9

Determination and Proposed Action

The changes in places of use and points of diversion proposed in Transfer Application T-8075 appear to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000 and the abandoned rights should be cancelled. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved and the abandoned rights will be cancelled.

If application T-8075 is approved, the final order will include the following:

- 1. *The changes in places of use and points of diversion proposed in application T-8075 are approved. The portion of the right that has been abandoned is cancelled.*

2. *Water right certificate 8183 and 55157 are cancelled. New certificates will be issued describing the portions of the rights not affected by this transfer and cancellation.*
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 Certificates 8183 and 55157 and any related decree.*
4. *The quantity of water diverted at the new points 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 a fish screening and/or by-pass device, as appropriate, at the new points of diversion consistent with the Oregon Department of Fish and Wildlife's (ODFW) design and construction standards. The water user shall maintain and operate the fish screen and/or by-pass device, as appropriate, at the points of diversion consistent with ODFW's operational and maintenance standards.*
6. *When required by the Department, the water user shall install, maintain and operate 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.*
7. *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.*
8. *When satisfactory proof of the completed changes is received, new certificates confirming the rights transferred will be issued.*

Dated at Salem, Oregon this 20th day of July 2007.



PC Phillip C. Ward, Director

This Preliminary Determination was prepared by Alan Ome. If you have questions about the information in this document, you may reach me at 541-471-2886 x 228 or Alan.G.Ome@wrdd.state.or.us.

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