

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-7012, Washington County)	PROPOSING DENIAL OF A CHANGE
)	IN POINT OF DIVERSION AND
)	PLACE 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

CLEAN WATER SERVICES
ATTN: STEPHEN E. KEBBE
16060 SW 85TH AVENUE
TIGARD, OR 97224

Receiving Landowners

RON AND DIANE DAVIS
215 SW WOOD STREET
HILLSBORO, OR 97123

Findings of Fact

1. The Unified Sewerage Agency filed a transfer application on July 2, 1993, to change the place of use and point of diversion under Certificate 12235. The Department assigned the application number T-7012.
2. On June 5, 2001, the Unified Sewerage Agency Board of Directors resolved and ordered (No. USA 01-30) that the name of Unified Sewerage Agency is changed to Clean Water Services.
3. The applicant initially proposed to transfer 70.4 acres which included several tax lots not owned by Clean Water Services. On November 21, 2006, the applicant amended the application and map to remove the tax lots not under their ownership, resulting in a proposed transfer of only 53.3 acres.

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 right to be transferred is as follows:

Certificate: 12235 in the name of EDWARD H. FREUDENTHAL (perfected under Permit S-10791)

Use: IRRIGATION of 53.3 ACRES

Priority Date: NOVEMBER 26, 1932

Rate: 0.67 CUBIC FOOT PER SECOND (cfs)

Limit/Duty: ONE-EIGHTIETH of one cfs per acre

Source: TUALATIN RIVER, tributary to WILLAMETTE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC	Survey Coordinates
1 S	2 W	WM	7	SW NE	42	NONE SPECIFIED IN CERTIFICATE

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
1 S	2 W	WM	7	NE NE	42	31.8
1 S	2 W	WM	7	NW NE	42	7.0
1 S	2 W	WM	7	SW NE	42	8.3
1 S	2 W	WM	7	SE NE	42	5.1
1 S	2 W	WM	8	NW NW	42	1.1
TOTAL:						53.3

5. Transfer Application T-7012 proposes to move the authorized point of diversion approximately 1.2 miles upstream to:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
1 S	3 W	WM	12	SE NE	1700 FEET SOUTH AND 1090 FEET WEST OF THE NE CORNER OF SECTION 12

6. Transfer Application T-7012 also proposes to change the place of use of the right to:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 S	3 W	WM	1	SE NW	4.3
1 S	3 W	WM	1	NE SW	7.5
1 S	3 W	WM	1	NW SE	1.1
1 S	3 W	WM	12	NE NE	30.9
1 S	3 W	WM	12	NW NE	7.3
1 S	3 W	WM	12	SE NE	2.0
1 S	3 W	WM	12	NE NW	0.2
TOTAL:					53.3

7. Notice of the application for transfer was published on July 14, 1993, 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 (ODFW) did request inclusion of a condition requiring installation of proper fish screens. This request is based upon ODFW's determination 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.

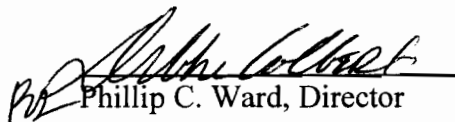
8. Water was not used within the five years prior to submittal of the transfer application on July 2, 1993, according to the terms and conditions of the right. Since the applicant purchased the property to which Certificate 12235 is appurtenant in 1985, the subject land has been irrigated with treated wastewater effluent known as reclaimed water. However, because the nonuse occurred during a period of time within which the water right holder was using reclaimed water in lieu of using water under the existing water right, the applicant has sufficiently rebutted the presumption of forfeiture in accordance with ORS 540.610(2)(h).
9. A diversion structure, ditch, pipeline and sprinklers sufficient to use the full amount of water allowed under the existing right are present.
10. The location to which the place of use is proposed to move is already covered by a junior primary irrigation right (Certificate 35409, priority August 2, 1966). The applicant has indicated in correspondence received November 21, 2006, that they wish the lands proposed for transfer under the senior primary irrigation right (Certificate 12235, priority November 26, 1932) to become supplemental to the existing primary irrigation Certificate 35409 upon the issuance of a final order approving Transfer T-7012.
11. The proposed change would not result in enlargement of the right.
12. There are several intervening points of diversion for junior water rights between the existing authorized point of diversion under Certificate 12235 and the proposed point of diversion. However, the use of water at the proposed point of diversion can be conditioned to avoid injury to the junior points of diversion by limiting the quantity of water diverted at the proposed point of diversion to the quantity of water lawfully available at the original point of diversion.
13. Instream Water Right Certificates 59692 and 72960 exist for the reach of the Tualatin River in which the authorized point of diversion would be moved upstream, and streamflows within the reach are frequently below the levels allocated under the instream water rights during the months of June, July, August, September, October and November. Thus, the instream water rights would be injured as a result of the proposed change in point of diversion.
14. Instream Water Right Certificate 59692, established pursuant to ORS 537.346 at the request of the Oregon Department of Environmental Quality and the Oregon Department of Fish and Wildlife, is for flows to be maintained in the Tualatin River and its tributaries above USGS Gage No. 14-2075 (being approximately river mile 2.0), at West Linn (SW ¼, Sec. 34, T2S, R1E, W.M.), measured at the gage. The date of priority of the right is May 25, 1966.
15. Instream Water Right Certificate 72960, established pursuant to ORS 537.341 at the request of the Oregon Department of Environmental Quality, is for flows to be maintained in the Tualatin River from river mile 52.8 (NE ¼, Sec. 9, T1S, R3W, W.M.) to the mouth at river mile 38.5 (NW ¼, Sec. 16, T1S, 2W, W.M.). The date of priority of the right is August 5, 1993.

16. Due to the potential for injury to instream water right Certificates 59692 and 72960, the Department mailed a draft preliminary determination proposing to deny Transfer Application T-7012 to the applicant on January 5, 2007. The draft preliminary determination set forth a deadline of February 5, 2007, in which the applicant could respond; however the deadline was extended to May 1, 2007, to allow the applicant time to assess the situation and decide whether or not to proceed with the transfer application.
17. On April 30, 2007, the Department received an e-mail from the applicant requesting the Department pursue consent to injury to the instream water rights as outlined in ORS 540.530 and OAR 690-380-5050, and requested the Department seek a recommendation from the agencies that requested the instream water rights.

Determination and Proposed Action

The changes in place of use and point of diversion proposed in Transfer Application T-7012 cannot be effected without injury to instream water right Certificates 59692 and 72960, as described in Finding #13 above. Pursuant to ORS 540.530, the application will be denied unless, on the recommendation of the Oregon Department of Fish and Wildlife and the Oregon Department of Environmental Quality, the Department consents to injury of instream water right Certificates 59965 and 81501.

Dated at Salem, Oregon this 24th day of May 2007.


Phillip C. Ward, Director

This Preliminary Determination was prepared by Lisa Jaramillo. If you have questions about the information in this document, you may reach me at 503-986-0880 or Lisa.J.Jaramillo@wrdd.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.