

BEFORE THE OREGON WATER RESOURCES COMMISSION

In the Matter of the Protest against	)	<b>DRAFT</b>
Water Right Transfer Application T-8366	)	<b>FINAL ORDER</b>
	)	
In the name of Ken-Wal Farms	)	
<i>Applicant</i>	)	
	)	
Fort Vannoy Irrigation District and	)	
Herman Baertschiger, Jr.,	)	
<i>Protestants</i>	)	
	)	

**HISTORY OF THE CASE**

Applicant, Ken-Wal Farms, Inc., through its agent Robert J. Crouse, submitted a transfer application to the Oregon Water Resources Department (OWRD or Department) on November 30, 1999. The application was amended on February 2, 2000. The application proposes to modify the water rights evidenced by water right certificates 2803, 3247, 8943, 8942, and 15340 by changing the points of diversion and consolidating all of the authorized points of diversion into two diversions within the farm boundaries. The source of water for these certificates is the Rogue River and its tributaries. The consolidation would result in one diversion on the Rogue River and one on Vannoy Creek. Fort Vannoy Irrigation District and Herman Baertschiger, Jr., Protestants, submitted a timely protest to the proposed transfer.

The protestants raised the following issues in their protest: (1) the change in points of diversion will injure the District, Baertschiger, and other patrons of the District, by, among other things, reducing the amount of allowable flows in the District’s delivery system and reducing the amount of water available to meet the needs and rights of the other patrons of the District; (2) the District is the owner of the water rights proposed for transfer and transfer cannot be approved without its consent; and (3) the Applicant has not used water authorized under water right certificates 3247, 15340, and 2803 in accordance with the terms and conditions of the certificates over the last five years.

The Department filed an opening brief and moved for a ruling on the first two issues raised by the Protestants in their protest. The Protestants subsequently withdrew the first issue. On July 19, 2002, Administrative Law Judge (ALJ) Weisha Mize issued a Ruling on Legal Issues and Order, finding in favor of the Department that the District’s consent was not necessary to process the transfer. Therefore, the sole issue remaining for determination in the case was the following:

“Whether the applicant has provided evidence that the waters authorized under certificates 3247, 15340, and 2803 have been used on the lands

within applicant's property to which they are appurtenant in accordance with the terms and conditions of said certificates over the five years preceding the filing of Transfer Application T-8366."

On August 6, 2003, Applicant filed its Motion for Dismissal of Protestant's Protest and Motion for Summary Determination. The Applicant supported its Motion for Summary Determination with an affidavit signed by Robert Crouse, attesting that the land appurtenant to the water rights proposed for transfer, had been watered and irrigated in the previous five years. OWRD filed its Response on August 18, 2003. Protestants filed their Response on August 25, 2003. Applicant filed its Reply on September 10, 2003. Protestants filed a Clarification on September 16, 2003, and OWRD filed its Reply to Protestants' Response and a Motion to Strike on October 1, 2003.

On October 29, 2003, ALJ Maurice L. Russell II issued an Order on Motion to Strike and Motion for Summary Determination, disposing of the remaining issue in the case. The ALJ agreed with the Applicant and Department that the Protestants had raised no material issue of fact regarding whether water had been used over the past five years according to the terms and conditions of the water rights proposed for transfer.

### **ISSUES PRESENTED**

1. Whether the applicant must obtain permission from the Fort Vannoy Irrigation District to transfer water rights appurtenant to the applicant's land under Certificates 8942 and 8943?
2. Whether water under the water rights proposed for transfer have been used on the appurtenant lands in accordance with the terms and conditions of the water right certificates during the five years preceding the filing of Transfer Application T-8366?

### **EVIDENTIARY RULINGS**

The record consists of the Application, the briefs filed in the first Motion for Summary Judgment, the Order of ALJ Mize, the briefs filed in the second Motions to Strike and For Summary Determination, the Order on Motions to Strike and for Summary Determination, together with the exhibits and affidavits attached thereto; the Proposed Order, and Exceptions.

### **FINDINGS OF FACT**

1. This application is for consolidation of seven points of diversion under Certificates 2803, 3247, 15340, 8942 and 8943, located in Sections 14, 15, 16 and 21, T. 36 S., R. 6 W., W.M. from the Rogue River and its tributaries, into two diversion points from the Rogue River and Vannoy Creek, located in Sections 16 and 17, T. 36 S., R. 6 W., W.M., under the same certificates.

2. The certificates subject to this application are as follows:

- Certificate 2803: 0.88 cubic feet per second (cfs), priority date March 10, 1919.
- Certificate 3247: 0.81 cfs, priority date March 27, 1919.
- Certificate 15340: 0.25 cfs, priority date May 31, 1945.
- Certificate 8942: 10.21 cfs, priority date June 21, 1930.
- Certificate 8943: 0.89 cfs, priority date April 6, 1922.

3. The Applicant owns all the land appurtenant to the water rights proposed for transfer.

4. The waters authorized under Certificates 2803, 3247, and 15340 have been used on the lands within Applicant's property to which they are appurtenant in accordance with the terms and conditions of said certificates over the five years preceding the filing of Transfer Application T-8366.

### **CONCLUSION OF LAW**

1. The consent of the District is not statutorily required in order for the transfer to be approved.

2. The water rights proposed for transfer are water rights subject to transfer and have been used in the five years preceding the filing of the transfer application.

3. The changes proposed in the transfer application, changing and consolidating points of diversion will not cause injury to existing water rights.

### **OPINION**

Under Oregon law, the holder of a water right subject to transfer may apply to the Department to transfer or change the use, place or use, or point of diversion of a water right. ORS 540.505 et. seq. If the change proposed in the transfer application can be effected without injury to existing water rights, the Commission shall approve the transfer and fix a time limit within which the approved changes may be completed. ORS 540.530(1).

There have been no allegations by Protestants that the proposed transfer will result in injury, rather they have argued the Applicant is required to obtain the consent of the District in order for the transfer to be approved. Secondly, the Protestants have argued that at least three of the water rights proposed for transfer have not been used in the five years preceding the filing of the transfer application. We will take each issue in turn.

#### **I. Is the Applicant required to obtain the consent of the District in order for the transfer to be approved?**

Protestant's claim that the District is the "certificated owner of record of certificates 8942 and 8943," and as such, is a necessary party to any transfer application. The District is unwilling to consent or join in the transfer request. In essence, the District claims that it is the owner or co-owner of the water rights appurtenant to Applicant's land. The issue of ownership of a water right within an irrigation district is a recurring question. However, it is possible to resolve this issue by reference to the applicable statutes and rules, without having to fully resolve the underlying question of ownership. ORS 540.520(1) provides that "whenever the holder of a water use subject to transfer" desires to apply for a transfer, the holder shall submit an application to the Department. In addition to other information, the transfer application shall include "[t]he name of the owner." ORS 540.520(2)(a). Transfer application requirements are expanded upon in rule. OAR 690-015-0060<sup>1</sup> sets out a more complete list of transfer application requirements. In addition to requiring the applicant's name, the name on the certificate, and a description of the authorized place of use, the application must include the following ownership information:

Name of deeded owner of the land to which the water right is appurtenant. A copy of the recorded deed to the subject lands shall accompany the application. If the applicant is not the deeded owner, the applicant shall provide a notarized and signed statement from the deeded owner authorizing the change.

OAR 690-015-0060(13)<sup>2</sup>.

Thus, under the applicable rules and statutes the only permission that is required is that of the owner of the land to which the water right is appurtenant. There is no support in the text and context of the rules and statutes for Protestants' claim that an applicant within an irrigation District who applies to the Department for a change in point of diversion must also receive the permission of the irrigation district. To the contrary, the statutory scheme specifically identifies when and where an irrigation district is authorized to act on transfers and when district permission to make a transfer is necessary, highlighting the absence of such a requirement for a standard transfer application under ORS 540.520.

Throughout ORS chapter 540 the legislature provided for district participation in and authorization of specific types of transfers. For example, districts are authorized to initiate permanent or temporary changes of place of use within district boundaries, but a district must obtain the landowner's consent to the transfer. ORS 540.570 to ORS 540.580. Where a landowner has not used a water right for four years, a district, after the fourth year of non use, may petition to transfer the water right to a different place of use within the district boundaries. ORS 540.572. If an owner wants to temporarily transfer a water right to alternate acreage within a district, the owner must obtain the district's consent. ORS 540.570(2).

The above statutes demonstrate that the legislature recognized a district's interest in moving water around within a district's boundaries and provided for district participation and

---

<sup>1</sup> Since the filing of the application and the issuance of the proposed order, the transfer rules have been amended and are now found at OAR 690-380.

<sup>2</sup> Because the application for transfer was filed with the Department before July 1, 2003, OAR Chapter 690 division 380 is inapplicable here. OAR 690-380-0090.

authorization for transfers to alternate acreage within the district boundaries. There are no provisions for district authorization of other types of transfers initiated by district landowner/patrons with appurtenant water rights. The specificity with which irrigation district participation in transfers is set out, clearly indicates that if the legislature had intended to require irrigation district approval of standard transfer applications it would have done so. To read a requirement of irrigation district approval into a transfer application under ORS 540.520 would be contrary to the legislative intent to limit district participation, as evidenced by the statutory text and context, and contrary to the directive in ORS 174.010 not to insert what has been omitted. *See also* ORS 174.020 (1)(a) (“In the construction of a statute, a court shall pursue the intention of the legislature if possible.”).

In sum, the only permission that a transfer applicant is required to obtain for a standard transfer under ORS 540.520 and OAR 690-015-0060 is the permission of the owner of the land to which the water right is appurtenant. Applicant is the owner of the land, thus the permission requirement has been satisfied. There is no support for Protestant’s assertion that applicant also is required to obtain district permission for the proposed change in point of diversion.

## **II. Have the water rights proposed for transfer been used in the five years preceding the filing of the transfer application**

A transfer applicant is required to show that the water rights proposed for transfer have been used in the five years preceding the filing of the application, or are not otherwise subject to forfeiture. ORS 540.520(2)(g). Applicant presented an affidavit stating that he has used water on the property covered by the water rights. *See* Affidavit of Robert Crouse, August 1, 2003 pp. 1, 2. Protestants offer no counter-Affidavits to contest the facts in Applicant’s Affidavit. In fact, Protestants issued a clarification to their Response to Applicant’s Motion for Dismissal of Protestants’ Protest and Motion for Summary Determination, stating that up until 1994, the District had supplied water to Mr. Crouse under water rights certificates 8942 and 8943, and Mr. Crouse had applied water to the lands appurtenant to the water rights subject to transfer. *See* Fort Vannoy Irrigation District’s and Herman Baertschiger, Jr.’s Clarification. Thus, there is no disagreement among the parties that water from the Rogue River was applied to lands appurtenant to the water rights subject to transfer, within five years of the transfer application being filed.

Protestants’ argument focuses on the fact that the lands in question are covered by two water rights, one issued to the Applicant’s predecessor and one to the District. Although Protestants admit that Applicant used water on the lands described in Applicant’s certificates, Protestants nonetheless argue that Applicant’s rights are subject to forfeiture and therefore should not be available for transfer.

Protestants appear to argue that in order to avoid forfeiture, the Applicant must present the required evidence of use under ORS 540.520(2), and in addition must also establish that the water used on the property was “Applicant’s water”; that is to say “the water authorized under Applicant’s certificate”, rather than “the water authorized under the districts’ certificate.”

Protestants’ theory has no basis in law. In *Russell-Smith v WRD*, 152 Or. App. 88 (1998), the court made clear that “use”, is the key issue with respect to forfeiture and that use is

established, “[w]here water has been used from the proper source, on the correct lands, for the authorized purposes ...” (152 Or App 88, 93). In this case, the Applicant has met those elements and has provided evidence of such. The water was used from the proper source, on the correct lands, and for the authorized purpose. Applicant is not required to also demonstrate “under which certificate” the water right was exercised. Applicant has shown all that is required by law.

### **EXCEPTIONS**

The Protestants filed exceptions to the Proposed Order.

1. Exception No. 1: Protestants continue to assert that the District is the owner of water right certificates 8942 and 8943 and that without its approval, the transfer cannot be approved. As is stated above, the issue is not who owns the water right, but who is authorized to apply for and consent to a transfer. Since the transfer statutes do not require the District to consent to the transfer, the transfer can be approved without the District’s consent. This Exception is denied.

2. Exception No. 2: Protestants object to the finding in the Proposed Order that the water use reports provided in support of the argument that some of the water rights proposed for transfer had been “abandoned,” were not sufficient to present a material issue of fact with regard to forfeiture. The ALJ had ruled in the Applicant’s favor on a motion for summary judgment, on the issue of forfeiture. As is explained above, because it is undisputed that water from the authorized source was applied to the lands appurtenant to the water rights subject to transfer, the reports submitted by Protestants are immaterial. This Exception is denied.

### **ORDER**

The protest by Fort Vannoy Irrigation District and Herman Baertschiger, Jr. to transfer application T-8366 are DISMISSED.

Application T-8366 is approved. The Department shall issue an order approving the transfer consistent with this order.

IT IS SO ORDERED.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2005.

---

Chair  
Oregon Water Resources Commission

NOTICE: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the date of service of this order. The date of service is the date on which the order is delivered or mailed. Judicial review, pursuant to the provisions of ORS 536.075, is to the Court of Appeals.