



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item L, July 29, 2005
Water Resources Commission Meeting

Consideration of Exceptions and Direction to Issue a Final Order Approving Water Right Transfer Application T-8366

I. Issue Statement

The Commission is asked to consider contested case hearing exceptions and direct issuance of a Final Order Approving Water Right Transfer T-8366, in the name of Ken-Wal Farms.

II. Background

Ken-Wal Farms filed Water Right Transfer Application (T-8366) on November 30, 1999. The application proposed to change the point of diversion for the lands appurtenant to the applicant's land, authorized under Water Right Certificates 2803, 3247, 15340, 8942 and 8943. The applicant's lands are within Fort Vannoy Irrigation District (FVID). Water is diverted and delivered to the lands in question by FVID.

The transfer application proposes changes to two points of diversion, one each from the Rogue River and Vannoy Creek. The applicant has direct access to the two proposed points of diversion. Upon approval of the transfer, the water would no longer be diverted and delivered by FVID. Notice of T-8366 was published in the Grants Pass Daily Courier newspaper for three consecutive weeks ending on September 30, 2000. A timely protest was filed by FVID and Herman E. Baertschiger, Jr.

III. Discussion

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 matter of the protest was referred to the Central Hearing Panel. Following motions by the Department, the Administrative Law Judge ruled on the legal issues and order, finding in favor of the Department, resulting in the issuance of a Proposed Order (Attachment 1).

The Department argued that other users of the district would not be injured by the transfer. The basis for the argument was that the quantity of water to which the other water users are legally entitled would still be available at their authorized point of diversion. Protestants subsequently withdrew the issue of injury to the other users.

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 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.

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.

Transfer applicants are required to show that 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). The applicant presented an affidavit stating that he has used water on the property covered by the water rights. Protestants offered no counter-Affidavits to contest the facts in the Applicant's Affidavit. Additionally, the 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. 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.

The Protestants filed exceptions (Attachment 2) to the Proposed Order. Both exceptions were denied by the Hearings Officer. First, 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 stated, 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.

The other exception relates to whether portions of some of the water rights have been forfeited. Protestants objected 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. This exception was also denied since it is undisputed that water from the authorized source was applied to the lands appurtenant to the water rights subject to transfer.

IV. Alternatives

1. Deny Fort Vannoy exceptions and issue a final order substantially in the form of the DRAFT Final Order in Attachment 3 and DRAFT transfer order in Attachment 4.
2. Direct staff to develop a final order and permit that differs from that in Attachment 3 and 4.
3. Table the matter for further deliberations.

V. Recommendation

The Director recommends the Commission adopt Alternative 1 to deny the exceptions and issue a final order substantially in the form of the draft Final Order and draft Transfer Order in Attachments 3 and 4.

Attachments

1. Proposed Order
2. Exceptions filed by Protestants
3. Draft Final Order
4. Draft Transfer Order

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