

State of Washington
 Department of Ecology
 Office of Columbia River
 Temporary Permit
 for Application S4-33116

File NR S4-33116
 WR Doc ID 6203128

****For the 2014 Irrigation Season Only****

PRIORITY DATE 4/16/2014	APPLICATION NUMBER S4-33116
MAILING ADDRESS Zirkle Fruit Co. 352 Harrison Rd. PO Box 190 Selah, WA 98942-0190	SITE ADDRESS <i>See Place of Use description</i>

Quantity Authorized for Diversion

DIVERSION RATE	UNITS	ANNUAL QUANTITY (AF/YR)
0.63	CFS	112

REMARKS: This temporary water use authorization relies on mitigation water from non-use of change authorization CS3-22143C. For year 2014, any use of water under CS3-22143C or S3-22143C would have proportionate reductions to this authorization.

Purpose

PURPOSE	DIVERSION RATE		UNITS	ANNUAL QUANTITY (AF/YR)		PERIOD OF USE (mm/dd)
	ADDITIVE	NON-ADDITIVE		ADDITIVE	NON-ADDITIVE	
Irrigation	0.63		CFS	112		04/01 - 10/31

ADDITIVE	IRRIGATED ACRES		PUBLIC WATER SYSTEM INFORMATION	
	NON-ADDITIVE		WATER SYSTEM ID	CONNECTIONS
30	0		N/A	

Source Location

COUNTY	WATERBODY	TRIBUTARY TO	WATER RESOURCE INVENTORY AREA
Douglas	Columbia River	Pacific Ocean	44-Moses Coulee

SOURCE FACILITY/DEVICE	PARCEL	WELL TAG	TWP	RNG	SEC	QQ Q	LATITUDE	LONGITUDE
Columbia River	21222820021		21N.	22E.W.M.	21	SWSW	47.29119	-120.08715
Columbia River	21222820016		21N.	22E.W.M.	28	SWNW	47.28625	-120.08769

Datum: NAD83

FILE COPY

Place of Use

PARCELS

21222820020, 21222820005, 21222210004

LEGAL DESCRIPTION OF AUTHORIZED PLACE OF USE

All in T. 21N., R. 22E.W.M.:

That portion of the E½SE¼ and the S½SW¼SE¼ of Section 21 described as follows: Beginning at the SE corner of Section 21, thence S 89°32'31" W 2651.28 feet along the S line of said section to the S quarter corner thereof, thence N 00°48'50" E 425.0 feet along the W side of said SE corner , thence N 89°32'31" E 1321.80 feet to the W side of the SE¼SE¼, thence N 44°52'26" E 1325.61 feet, thence N 73°00'40" E 400.0 feet to a point on the E side of Section 21, thence S 00°13'02" E 1470.63 feet to the Point of Beginning.

That portion of the W½SW¼ of Section 22 described as follows: Beginning at a point on the W line of said Section 22, which point is 369.70 feet N of the SW corner of said Section 22, thence N along said W line to the centerline of the Bonneville Power Administration (BPA) substation easement road, thence Easterly along said easement road to the Westerly right of way line of SR 28, thence Southerly along said Westerly right of way line to the centerline of the BPA spur railroad line, thence Westerly along the centerline of said spur railroad line to the Point of Beginning; EXCEPT any portion thereof deeded to Douglas County for road purposes contiguous to and abutting SR 28.

Proposed Works

One season of irrigation of some 30 acres of orchard trees that otherwise lack the authority to be irrigated. A permanent solution is actively being pursued.

Measurement of Water Use

How often must water use be measured?	Weekly
How often must water use data be reported to Ecology?	Upon Request by Ecology
What volume should be reported?	Total Annual Volume in acre-feet
What rate should be reported?	Annual Peak Rate of Diversion in cfs

Provisions

Expiration of Temporary Authorization

This Temporary Authorization expires on October 31, 2014.

Reliance on Mitigation Water

This temporary water use authorization relies on mitigation water from non-use of change authorization CS3-22143C. For year 2014, any use of water under CS3-22143C or S3-22143C would have proportionate reductions to this authorization, and would be subject to formal enforcement actions.

Measurements, Monitoring, Metering and Reporting

An approved measuring device shall be installed and maintained for each of the sources identified by this water right in accordance with the rule "Requirements for Measuring and Reporting Water Use", Chapter 173-173 WAC.

Chapter 173-173 WAC describes the requirements for data accuracy, device installation and operation, and information reporting. It also allows a water user to petition the Department of Ecology for modifications to some of the requirements.

Department of Fish and Wildlife Requirement(s)

The intake(s) shall be screened in accordance with Department of Fish and Wildlife screening criteria (pursuant to RCW 77.57.010, RCW 77.57.070, and RCW 77.57.040). Contact the Department of Fish and Wildlife, 600 Capitol Way N., Olympia, WA 98501-1091. Attention: Habitat Program, Phone: (360) 902-2534 if you have questions about screening criteria. <http://wdfw.wa.gov/about/contact/>.

Family Farm Permit

This authorization to use public waters of the state is classified as a Family Farm Permit in accordance with chapter 90.66 RCW. This means the land being irrigated under this authorization shall comply with the following definition: Family Farm - a geographic area including not more than 6,000 acres of irrigated agricultural lands, whether contiguous or noncontiguous, the controlling interest in which is held by a person having a controlling interest in no more than 6,000 acres of irrigated agricultural lands in the State of Washington which are irrigated under water rights acquired after December 8, 1977. Furthermore, the land being irrigated under this authorization must continue to conform to the definition of a family farm.

Easement and Right-of-Way

The water source and/or water transmission facilities may not be wholly located upon land owned by the applicant. Issuance of a water right authorization by this department does not convey a right of access to, or other right to use, land which the applicant does not legally possess. Obtaining such a right is a private matter between applicant and owner of that land.

Water Use Efficiency

The water right holder is required to maintain efficient water delivery systems and use of up-to-date water conservation practices consistent with RCW 90.03.005.

Schedule and Inspections

Department of Ecology personnel, upon presentation of proper credentials, shall have access at reasonable times, to the project location, and to inspect at reasonable times, records of water use, wells, diversions, measuring devices and associated distribution systems for compliance with water law.

Findings of Facts

Upon reviewing the investigator's report, I find all facts, relevant and material to the subject application, have been thoroughly investigated. Furthermore, I concur with the investigator that water is available from the source in question; that there will be no impairment of existing rights; that the purpose(s) of use are beneficial; and that there will be no detriment to the public interest.

Therefore, I ORDER approval of Application No. S4-33116, subject to existing rights and the provisions specified above.

Your Right To Appeal

You have a right to appeal this Order to the Pollution Control Hearings Board (PCHB) within 30 days of the date of receipt of this Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do the following within 30 days of the date of receipt of the Order.

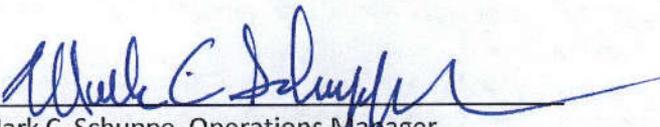
File your appeal and a copy of this Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.

- Serve a copy of your appeal and this Order on Ecology in paper form - by mail or in person. (See addresses below.) E-mail is not accepted.
- You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

Street Addresses	Mailing Addresses
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503	Department of Ecology Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608
Pollution Control Hearings Board 1111 Israel Rd. SW, Ste. 301 Tumwater, WA 98501	Pollution Control Hearings Board PO Box 40903 Olympia, WA 98504-0903

For additional information visit the Environmental Hearings Office Website: <http://www.eho.wa.gov>. To find laws and agency rules visit the Washington State Legislature Website: <http://www1.leg.wa.gov/CodeReviser>.

Signed at Yakima, Washington, this 25th day of September 2014.


 Mark C. Schuppe, Operations Manager
 Office of Columbia River

INVESTIGATOR'S REPORT

Application for Water Right - Zirkle Fruit Company
Water Right Control Number S4-33116
Thomas Perkow, Department of Ecology

BACKGROUND

This report serves as the written findings of fact concerning Water Right Application Number S4-33116. Table 1 below displays the attributes of the application:

Table 1 Summary of Requested Water Right

Applicant Name:	Zirkle Fruit Company
Date of Application:	4/16/2014
Place of Use	See Place of Use description at the end of this report.

County	Waterbody	Tributary To	WRIA
Douglas	Columbia River	Pacific Ocean	44-Moses Coulee

Purpose	Rate	Unit	Ac-ft/yr	Begin Season	End Season
Irrigation	0.83	CFS	162	04/01	10/31

Source Name	Parcel	Twp	Rng	Sec	QQ Q	Latitude	Longitude
Columbia River	21222820021	21N.	22E.W.M.	21	GL 8	47.29119	-120.08715
Columbia River	21222820016	21N.	22E.W.M.	28	GL 4	47.28625	-120.08769

CFS = Cubic Feet per Second; Ac-ft/yr = Acre-feet per year; Sec. = Section; QQ Q = Quarter-quarter of a section; WRIA = Water Resource Inventory Area; E.W.M. = East of the Willamette Meridian; Datum: NAD83.

Legal Requirements for Approval of Appropriation of Water

Each application for a new water right is subject to meeting statutory criteria before approval may be granted. The discussions below capture the evaluations on these criteria.

Public Notice

RCW 90.03.280 requires that notice of a water right application be published once a week, for two consecutive weeks, in a newspaper of general circulation in the county or counties where the water is to be stored, diverted and used. Notice of this application was published in the Douglas County Empire Press on June 5 and June 12, 2014.

Consultation with the Washington Department of Fish and Wildlife

The Department must give notice to the Washington Department of Fish and Wildlife (WDFW) of applications to divert, withdraw or store water. Notice was provided to the WDFW on August 13, 2014, via email. The WDFW responded on August 18, 2014, via email indicating that they had reviewed the application and do not oppose approval due to its being mitigated by existing, currently unused water rights. The WDFW also included a reminder about compliance with the Hydraulic Code (Chapter 77.55 RCW) and screening criteria (RCWs 77.57.010, 040, and 070).

State Environmental Policy Act (SEPA)

A water right application is subject to a SEPA threshold determination (i.e. an evaluation whether there are likely to be significant adverse environmental impacts) if any one of the following conditions are met:

- (a) It is a surface water right application for more than one (1) cubic foot per second, unless that project is for agricultural irrigation, in which case the threshold is increased to 50 cubic feet per second, so long as that irrigation project will not receive public subsidies;
- (b) It is a groundwater right application for more than 2,250 gallons per minute;
- (c) It is an application that, in combination with other water right applications for the same project, collectively exceed the amounts above;
- (d) It is a part of a larger proposal that is subject to SEPA for other reasons (e.g. the need to obtain other permits that are not exempt from SEPA);
- (e) It is part of a series of exempt actions that, together, trigger the need to do a threshold determination, as defined under WAC 197-11-305.

Because this application does not meet any of these conditions, it is categorically exempt from SEPA and a threshold determination is not required.

INVESTIGATION

Proposed Use and Basis of Water Demand

This temporary new water right application, submitted by Zirkle Fruit Company (Zirkle) on April 16, 2014, was assigned the tracking number S4-33116. Earlier, Zirkle planted and irrigated approximately 43 acres of apple orchard without the benefit of legal authorization in an area upstream of Crescent Bar and downstream of Rock Island Dam. In working with the Department of Ecology's (Ecology) Office of Columbia River, Zirkle submitted this temporary application seeking compliance for the 2014 irrigation season while a permanent solution is pursued. No new construction is proposed as the orchard trees are already planted and the water delivery system in place and in operation. Zirkle diverts water for the 43 acres from the Columbia River's Wanapum Pool.

If approved, water use under this temporary application would rely on mitigation water from temporary non-use of water further downstream yet also drawing from the Columbia River's Wanapum Pool. The proposed unused water is authorized for use at Crescent Bar (Riverview) under Change Authorizations CS4-*14257C(B) and CS3-22143C. These two change authorizations had previously transferred water from much further upstream. Originally, the proposal included the donation of these two change authorizations into the State's Trust Water Rights Program (Trust) to facilitate this use of mitigation water, and two Trust water donations (File Numbers CS3-*14257C(B) and CS3-22143C@1) were processed separately at Ecology's Eastern Region Office. However, water donated to Trust is often inadequate for mitigation for a new out-of-stream use, as a full review of the validity and extent of the donated water is typically not made. Rather, other more robust means for using these two change authorizations as mitigation were sought.

Change Authorization No. CS4-*14257C(B) was authorized as a downstream transfer in place of use, point of diversion, 0.195 cfs and 50 ac-ft for 13 acres of irrigation. The original site was located upstream near Chelan, from the Columbia River's Lake Entiat. There was no Trust water component as part of this transfer. To more effectively use this change authorization as partial mitigation for irrigating the ~43 acres, a temporary transfer of 13 acres of irrigation in place of use and point of diversion will be

pursued in lieu of the donation. Zirkle would submit a temporary change application to facilitate this change and request cancellation of the donation. Processing of the temporary transfer would include a tentative determination of the validity and extent of the authorization (*Okanogan Wilderness League, Inc v. Town of Twisp*, 133 Wn.2d 769, 947 P.2d 732). As such, values proposed as mitigation deriving from non-use of CS4-*14257C(B) will not be considered under this temporary authorization.

Change Authorization No. CS3-22143C was authorized as a downstream transfer in place of use, point of diversion, 0.63 cfs, and 112 acre-feet for 25.5 acres of irrigation. The original site was located upstream (east) of Bridgeport and diverted water from the Columbia River's Rufus Woods Lake. As part of this transfer, the water was placed into Trust for the intervening reach between the original and Crescent Bar places of use. As such, with non-use at the Crescent Bar site, the existing transfer to Trust can be used as mitigation for processing the subject application, S4-33116. Values for consideration of this temporary application will derive solely from those authorized under CS3-22143C. Also, for year 2014, any partial or full use of water under CS3-22143C or S3-22143C would have proportionate reductions on this authorization. If approved, authorization under S4-33116 would be provisioned as such.

The reduced values associated with this application result in proportionally fewer irrigated acres considered for this application. A proportional reduction is found by the following calculations. Under the assumption that 50 ac-ft would be available for transfer under a temporary change to CS4-*14257C(B), and assuming that 112 ac-ft would be available to be used under CS3-22143C, then 31% of the irrigated acres would be covered by CS4-*14257C(B) and 69% by CS3-22143C. This equates to CS3-22143C covering approximately 30 of the 43 acres. This yields a water duty estimate of 3.73 ac-ft per acre. Analyses of data presented in the Washington Irrigation Guide (WIG) suggest that this is a reasonable estimate for apple orchard for this area. One of the triggers for an Annual Consumptive Quantity (ACQ) analysis required under RCW 90.03.380 is an increase in acres as part of a change proposal. The increase in acres from 25.5 to approximately 30 triggers ACQ, and this analysis is discussed in the following paragraph.

Change Authorization CS3-22143C placed 95 ac-ft into Trust and allowed this plus an additional 17 ac-ft to be used non-consumptively at the Crescent Bar site. With the non-use of this water at the Crescent Bar site, these amounts would be available as mitigation for water use under this application. The 95 ac-ft were determined by an ACQ analysis for years 2001-2005. The ROE for CS3-22143C indicated that no use occurred in 2009 and that it was "highly unlikely" that water had been used in 2007 or 2008. With no use occurring in 2014, the most recent five-year period of continuous use is the same 2001-2005 period. As such, this investigation will leave the previous ACQ findings undisturbed.

Under RCW 90.14.140(1)(h), water placed into Trust is protected from relinquishment. Change authorization CS3-22143C was approved by Ecology in February of 2011, and conveyed 95 ac-ft into Trust. CS3-22143C remains in good standing at the Completion of Construction phase, so the full 112 ac-ft is still available for use at the Crescent Bar site. Indeed, the applicant's consultant, Tim Reiersen, P.E., in an email dated August 6, 2014, indicates that water use at the Crescent Bar site can be argued such that the full amount of CS3-22143C was used during 2011 or 2012. In this email, Mr. Reiersen acknowledges that this would mean that other rights were left unused. Nevertheless, aerial photography of the unchanged place of use (at the original S3-22143C site) was inspected to note whether water was used there in violation of the Trust conveyance. Within the place of use of S3-22143C, aerial photography shows that (1) established orchard existed in 1991, (2) some of the land was not irrigated in 2005, (3) very limited irrigation occurred in 2006, (4) no irrigation took place in 2009 and 2011, (5) and perhaps only weeds were growing in early July of 2013, as no discernible irrigation

patterns could be observed yet splotchy, irregular green shapes cover about half of the site. This observation could be consistent with late spring/early summer rains allowing some weed growth. As such, it appears water formerly used at the original place of use under S3-22143C remains in Trust as conveyed and available at the new place of use under CS3-22143C. Since it was left unused at both sites, this water is available to offset use under this proposal.

The late application submittal date, coupled with public notice requirements and the complexities involved with the mitigation water, did not allow for processing prior to the 2014 irrigation season.

Other Rights Appurtenant to the Place of Use

There are no other irrigation water rights associated with the subject 43 acres.

Impairment Considerations

Impairment is an adverse impact on the physical availability of water for a beneficial use that is entitled to protection. A water right application may not be approved if it would:

- Interrupt or interfere with the availability of water to an adequately constructed groundwater withdrawal facility of an existing right. An adequately constructed groundwater withdrawal facility is one that (a) is constructed in compliance with well construction requirements and (b) fully penetrates the saturated zone of an aquifer or withdraws water from a reasonable and feasible pumping lift.
- Interrupt or interfere with the availability of water at the authorized point of diversion of a surface water right. A surface water right conditioned with instream flows may be impaired if a proposed use or change would cause the flow of the stream to fall to or below the instream flow more frequently or for a longer duration than was previously the case.
- Interrupt or interfere with the flow of water allocated by rule, water rights, or court decree to instream flows.
- Degrade the water quality of the source to the point that the water is unsuitable for beneficial use by existing users (e.g. via sea water intrusion).

Here, a proposed new use of water would be mitigated by a water right temporarily left unused. The points of withdrawal of the mitigation right are hydraulically connected to the same pool (Wanapum) of the Columbia River as the proposed points of diversion. The mitigation water in Trust has a priority of 1973 and water use under the subject proposal, if approved, would be subject to any regulation based on these dates. The March forecast for this year (2014) did not trigger flow restrictions under Chapter 173-563 WAC, a 1980-vintage rule with instream flow requirements.

Water Availability

For water to be available for appropriation, it must be both physically and legally available.

Physical availability

For water to be physically available for appropriation there must be ground or surface water present in quantities and quality and on a sufficiently frequent basis to provide a reasonably reliable source for the requested beneficial use or uses. In addition, the following factors are considered:

- Volume of water represented by senior water rights, including federal or tribal reserved rights or claims;
- Water right claims registered under Chapter 90.14 RCW;

- Ground water uses established in accordance with Chapter 90.44 RCW, including those that are exempt from the requirement to obtain a permit; and
- Potential riparian water rights, including non-diversionary stock water.
- Lack of data indicating water usage can also be a consideration in determining water availability, if the department cannot ascertain the extent to which existing rights are consistently utilized and cannot affirmatively find that water is available for further appropriation.

Drawdown from repair work related to structural damage of the Wanapum Dam has compromised the availability of water at the proposed points of diversion. However, the applicant's strategic contingency planning and a possible partial re-fill of the Wanapum Pool by Grant County PUD #2 should help mitigate this temporary water availability issue.

Legal Availability

To determine whether water to be legally available for appropriation, the following factors are considered:

- Regional water management plans – which may specifically close certain water bodies to further appropriation.
- Existing rights – which may already appropriate physically available water.
- Fisheries and other instream uses (e.g. recreation and navigation). Instream needs, including instream and base flows set by regulation. Water is not available for out of stream uses where further reducing the flow level of surface water would be detrimental to existing fishery resources.
- The Department may deny an application for a new appropriation in a drainage where adjudicated rights exceed the average low flow supply, even if the prior rights are not presently being exercised. Water would not become available for appropriation until existing rights are relinquished for non-use by state proceedings.

Under the proposal, water would be legally available as mitigation water already in Trust would offset the proposed use. The change authorization that relies on the mitigation water – CS3-22143C – will go unused for the 2014 season, and the applicant has proffered this water to mitigate the proposed use. For the 2014 season, any partial or full use of water under CS3-22143C or S3-22143C would result in a proportionate reduction on any authorization issued under this proposal.

Beneficial Use

The proposed use of water (irrigation) is defined in statute as a beneficial use (RCW 90.54.020(1)).

Public Interest Considerations

Consideration of Protests and Comments

No protests were filed against this application.

CONCLUSIONS

Based on the investigation above, the following conclusions are drawn under this proposed mitigated, temporary use of water:

- 1) The proposal was properly noticed.
- 2) Notice was given to the Washington Department of Fish and Wildlife for consultation.
- 3) Impairment is not expected.

- 4) Water is available.
- 5) Water will be applied to a beneficial use.
- 6) There will be no detriment to the public interest.

RECOMMENDATIONS

Based on the conclusions, I recommend that this request for a water right be approved in the amounts and within the limitations listed below and subject to the provisions listed above

Purpose of Use and Authorized Quantities

The amount of water recommended is a maximum limit and the water user may only use that amount of water within the specified limit that is reasonable and beneficial:

For the 2014 Irrigation Season Only

0.63 cfs

112 acre-feet

For the irrigation of 30 acres

Points of Diversion

SW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 21, T. 21N., R. 22E.W.M.

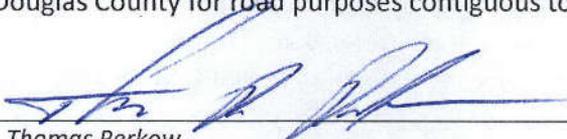
SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, T. 21N., R. 22E.W.M.

Place of Use

All in T. 21N., R. 22E.W.M.:

That portion of the E $\frac{1}{2}$ SE $\frac{1}{4}$ and the S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 21 described as follows: Beginning at the SE corner of Section 21, thence S 89°32'31" W 2651.28 feet along the S line of said section to the S quarter corner thereof, thence N 00°48'50" E 425.0 feet along the W side of said SE corner, thence N 89°32'31" E 1321.80 feet to the W side of the SE $\frac{1}{4}$ SE $\frac{1}{4}$, thence N 44°52'26" E 1325.61 feet, thence N 73°00'40" E 400.0 feet to a point on the E side of Section 21, thence S 00°13'02" E 1470.63 feet to the Point of Beginning.

That portion of the W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 22 described as follows: Beginning at a point on the W line of said Section 22, which point is 369.70 feet N of the SW corner of said Section 22, thence N along said W line to the centerline of the Bonneville Power Administration (BPA) substation easement road, thence Easterly along said easement road to the Westerly right of way line of SR 28, thence Southerly along said Westerly right of way line to the centerline of the BPA spur railroad line, thence Westerly along the centerline of said spur railroad line to the Point of Beginning; EXCEPT any portion thereof deeded to Douglas County for road purposes contiguous to and abutting SR 28.


Thomas Perkow

Date 9/25/14

If you need this publication in an alternate format, please call Water Resources Program at (360) 407-6600. Persons with hearing loss can call 711 for Washington Relay Service. Persons with a speech disability can call 877-833-6341.