



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

REPORT OF EXAMINATION
Change of: Place of Use
WRTS File No. CS3-*34295J

PRIORITY DATE Not Given (Class 64)	CLAIM NO.	PERMIT NO.	CERTIFICATE NO. Touchet River Adjudicated Certificate No. 295
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NAME Mary Phillips		
ADDRESS/STREET 1161 Preston Avenue	CITY/STATE Waitsburg, Washington	ZIP CODE 99361

PUBLIC WATERS TO BE APPROPRIATED

SOURCE Touchet River		
TRIBUTARY OF (IF SURFACE WATERS) Walla Walla River		
MAXIMUM CUBIC FEET PER SECOND	MAXIMUM GALLONS PER MINUTE	MAXIMUM ACRE-FEET PER YEAR

QUANTITY, TYPE OF USE, PERIOD OF USE

DENIED

LOCATION OF DIVERSION/WITHDRAWAL

APPROXIMATE LOCATION OF DIVERSION--WITHDRAWAL

LOCATED WITHIN (SMALLEST LEGAL SUBDIVISION)	SECTION	TOWNSHIP	RANGE	WRIA	COUNTY
PARCEL NUMBER	LATITUDE		LONGITUDE	DATUM	

LEGAL DESCRIPTION OF PROPERTY ON WHICH WATER IS TO BE USED

[Attachment 1 shows location of the authorized place of use and point(s) of diversion or withdrawal.]

DENIED

DESCRIPTION OF PROPOSED WORKS

DEVELOPMENT SCHEDULE

BEGIN PROJECT BY THIS DATE	COMPLETE PROJECT BY THIS DATE	WATER PUT TO FULL USE BY THIS DATE
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PROVISIONS

n/a

FINDINGS OF FACT AND ORDER

Upon reviewing the investigator's report, I find all facts relevant and material to the subject application, have been thoroughly investigated.

Therefore, I ORDER denial of the requested change of place of use under Change Application of Touchet River Adjudicated Certificate No. 295.

You have a right to appeal this action to the Pollution Control Hearing Board (PCHB) within 30 days of the date of receipt of this document. 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 this document:

- File your appeal and a copy of this document 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 document on Ecology in paper form - by mail or in person. (See addresses below.) Email 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 Road SW Suite 301 Tumwater, WA 98501	Pollution Control Hearings Board PO Box 40903 Olympia, WA 98504-0903

Please also send a copy of your appeal to:

Mr. Keith L. Stoffel
Department of Ecology
Eastern Regional Office
4601 North Monroe Street
Spokane, WA 99205-1295

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://www.l.leg.wa.gov/CodeReviser>.

Signed at Spokane, Washington, this day of 2011.

Keith L. Stoffel, Section Manager
Water Resources Program
Eastern Regional Office

BACKGROUND

Description and Purpose of Proposed Change

An application for change/transfer was submitted by Mary Phillips of Waitsburg, Washington, to Ecology on January 9, 2004. Ms. Phillips proposes to change a portion of the place of use as granted under Touchet River Adjudicated Surface Water Certificate No. 295 (Certificate No. 295).

Attributes of the Certificate and Proposed Change

Table 1 Summary of Proposed Changes to Certificate No. 295

<i>Attributes</i>	<i>Documented</i>	<i>Proposed</i>
Name	Margaret A Percefull, John Arseneau and Lillian Arseneau	Mary Phillips
Dates	Priority Date: none (class 64)	Date of Application for Change: January 9, 2004
Instantaneous Quantity	0.094 cfs April 1 to Sept. 15 0.142 cfs from Sept. 15 to April 1	<i>no change</i>
Annual Quantity	Up to 35.4 acre feet	<i>no change</i>
Source	Touchet River	<i>no change</i>
Point of Diversion/Withdrawal	SW ¹ / ₄ SW ¹ / ₄ of Sec. 12, T. 9 N., R. 37 E.W.M	<i>no change</i>
Purpose of Use	Irrigation of 7.08 acres	<i>no change</i>
Period of Use	Sept. 15 to Sept. 15 the following year	<i>no change</i>
Place of Use	Approximation: E ¹ / ₂ E ¹ / ₂ S ³ / ₄ SE ¹ / ₄ of Sec. 11 and the W ¹ / ₂ W ¹ / ₂ S ³ / ₄ SW ¹ / ₄ of Sec. 12, all within T. 9 N., R. 37 E.W.M.	Approximation: E ¹ / ₂ E ¹ / ₂ E ¹ / ₂ NE ¹ / ₄ SE ¹ / ₄ of Sec. 11 and W ¹ / ₂ W ¹ / ₂ NW ¹ / ₄ SW ¹ / ₄ of Sec. 12, all within T. 9 N., R. 37 E.W.M.

In addition to this application, one other application for change was filed by Ms. Phillips on Touchet River Adjudicated Certificate No. 68. Ecology is issuing a separate decision for each of the applications.

Legal Requirements for Proposed Change

The following is a list of requirements that must be met prior to authorizing the proposed change in place of use.

- **Public Notice**

A notice of application was duly published in accordance with RCW 90.03.280 in The Walla Walla Union Bulletin on April 23 and 30, 2009 and no protests were received.

- **State Environmental Policy Act (SEPA)**

Environmental review under SEPA is required for many projects; however, some minor projects are categorically exempt from SEPA. Appropriations of one cfs or less of surface water, or of 2,250 gpm or less of ground water, for any purpose, and appropriations of 50 cfs or less for surface water used for irrigation are categorically exempt from SEPA. See WAC 197-11-305.

- **Water Resources Statutes and Case Law**

RCW 90.03.360 requires that the owner of any water diversion maintain substantial controlling works and a measuring device. It must be constructed and maintained to permit accurate measurement and practical regulation of the flow of water diverted. Technical requirements for the measuring and reporting of water use are described in WAC 173-173. This decision contains provisions requiring the measuring and reporting of the quantities of water withdrawn or diverted.

RCW 90.03.380(1) states that a water right that has been put to beneficial use may be changed. The point of diversion, place of use, and purpose of use may be changed if it would not result in harm or injury to other water rights.

The Washington Supreme Court has held that Ecology, when processing an application for change to a water right, is required to make a tentative determination of extent and validity of the claim or right. This is necessary to establish whether the claim or right is eligible for change. R.D. Merrill v. PCHB and Okanogan Wilderness League v. Town of Twisp.

RCW 90.14.140(2)(c) states that a water right not used for more than 5 years is not relinquished if it is claimed for a determined future development to take place within 15 years of the last beneficial use of water under the water right. In addition, a series of court cases provide additional guidance in assessing such a plan. In order to be valid, a determined future development plan must satisfy a series of tests as established in *R.D. Merrill Company v. Pollution Control Hearings Board*; *City of Union Gap and Ahtanum Ridge Business Park LLC v. Washington State Department of Ecology*; and *Protect Our Water v. Islanders for Responsible Water Management (Intervenors)*, *State of Washington, Department of Ecology, and King County Water District No. 19*:

- The project must be sufficiently complex as to require more than 5 years to complete;
- The plan must be determined and fixed within five years of the last beneficial use of the water;
- The party asserting the plan must have equity in the water right;
- The plan must remain fixed, and;
- Affirmative steps must be taken to implement the plan within 15 years.

INVESTIGATION

In considering the proposed changes/transfers, the investigation included, but was not limited to, research and review of: (1) appropriate rules and statutes; (2) Touchet River Adjudicated Certificate Nos. 68, 295, and other water rights/claims/permit in the vicinity; (3) diversion works; (4) USGS topographic maps, aerial photographs, State of Washington Irrigation Guide (Natural Resources Conservation Service 1997) and; (5) discussions with Department of Ecology regional program staff.

A site visit of the project was conducted on February 3, 2009 by Dan Tolleson with Mary Phillips. This project is located on the eastern edge of the Town of Waitsburg, Washington. The water right is located in the Walla Walla Basin, which is managed under Chapter 173-532 WAC Water Resources Program for the Walla Walla River Basin, WRIA 32.

The place of use authorized under Certificate No. 295 is approximately 13 acres of land lying on both sides of the Touchet River. This right, also shares the same place of use with Touchet River Adjudicated Surface Water Certificate No. 68 (Certificate No. 68). The land lying south of the river is undeveloped and is for the most part not irrigable. The land lying north of the river is primarily cultivated land, with hay storage and riparian vegetation along the river. Highway 12 generally coincides with the north boundary of the place of use.

The authorized place of use, currently, has multiple owners. Approximately 40 years ago, the Washington Department of Transportation (DOT) acquired most of the place of use of Certificate Nos. 68 and 295, lying north of the Touchet River. Their land has been leased out to various farmers over the years. The remaining portion of the right lying south of the river and approximately 2 acres of land north of the river, has been retained by various other owners. Most of this land, not owned by the DOT, along with the remains of the diversion were purchased by Ms. Phillips in November of 2001. The remainder of the place of use, that totals somewhat less than ½ of an acre, is owned by various other entities.

Ms. Phillips proposes to move 5.5 acres of Certificate Nos. 68 and 295 to her lands north of the highway. Since most of the right lies on land owned by the DOT, she would need to obtain their signature to release interest in the right. According to Linda Raber, from the DOT, they will not sign the application for change without compensation. Since she was unable to obtain a signature from the DOT, only that portion of the right on lands owned by Ms. Phillips is available for review under this change.

History of Water Use

Certificate No. 295 was issued on December 31, 1930 as a Class 64 with the priority date listed as not given. The right historically utilized a gravity feed ditch diversion, which at some point was converted to a pressurized pumping station.

Aerial photographs were used to help verify the extent of development, historical use and recent beneficial use of Certificate Nos. 68 and 295. According to a 1939 air photograph, it appears that irrigation within the place of use only occurred north of the river. This pattern of use is consistent with recent aerial photographs, despite the river changing course over the years. It is unclear if any irrigation ever occurred south of the river. No irrigation has occurred within the authorized place of use since 1995. Ms. Phillips owns approximately ½ acre of the place of

use that is currently farmed with dry land crops. This area of current dry land crops is approximately the same area that was historically irrigated.

In the spring of 1996, a flood destroyed the diversion permitted under Certificate No. 295 along with portions of the mainline and its risers. Sections of the system's mainline were removed between 1997-2001. During this time, the previously irrigated portion of the place of use was farmed with dry land crops. According to Ms. Phillips, plans were made to rebuild the diversion in early 2001. In November of 2001, Ms. Phillips purchased the land on which the diversion is located. Along with the diversion, she also purchased most of the remaining portions of the place of use not owned by the DOT. Reconstruction of the diversion and mainline were completed in October of 2003. In January of 2004, applications were submitted to change the place of use of this right to lands north of Highway 12, belonging to Ms. Phillips. After the applications were submitted, they began to irrigate the proposed place of use without authorization. Meter data was submitted for their water use from 2005 to present. Seasonal changes were filed to reflect what was actually being irrigated from 2007 to present.

Ms. Phillips maintains that although the right was not used for more than five consecutive years, it is not relinquished from non-use due to the sufficient cause exception. The specific exception cited is future determined use defined in RCW 90.14.140. Unfortunately, her project does not meet the requirements set forth in the RCW and its defining court cases. Six years of non-use occurred before she purchased a portion of the place of use and the appurtenant water right. In addition, the fixed plan for determined future use was not made until approximately six years after the date of last use. Therefore, this right was relinquished prior to her ownership and plan.

Consideration of Impairment, Enhancement and Other Appurtenant Rights

Impairment to existing rights, enhancement of the right and other rights appurtenant to the place of use have not been evaluated in this report, since this right is relinquished.

CONCLUSIONS

It is the conclusion of this examiner that, in accordance with Chapters 90.03 and 90.14, this application (which proposes changing a portion of the place of use, as granted under Touchet River Adjudicated Certificate No. 295) is not available for change. This right is relinquished from nonuse, since sufficient cause has not been demonstrated.

RECOMMENDATIONS

Based on the above investigation and conclusions, I recommend that this request for change to a portion of the place of use to Touchet River Adjudicated Certificate No. 295 be **denied**.

Report by: _____

Dan Tolleson, Water Resources Program

_____ Date

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W/Draft ROEs/Tolleson 2009/TRAC 295 Phillips