

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

In the Matter of Transfer Application)	RECONSIDERATION OF A FINAL
T-12906, Grant County)	ORDER RECORDED IN SPECIAL
)	ORDER VOLUME 114, PAGES 695-
)	703, WITHDRAWING A FINAL
)	ORDER AND ISSUING A
)	SUPERSEDING FINAL ORDER
)	APPROVING A CHANGE IN POINT
)	OF DIVERSION AND PLACE OF USE

Authority

Oregon Revised Statutes (ORS) 540.505 to 540.580 establish 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. Oregon Administrative Rules (OAR) Chapter 690, Division 380 implement the statutes and provides the Department's procedures and criteria for evaluating transfer applications.

Applicant

ELMWOOD RANCH INC
c/o RUSSEL RICCO
25880 GREEN HAVEN RD
PRAIRIE CITY, OR 97869

Findings of Fact

1. On April 19, 2018, ELMWOOD RANCH INC, c/o RUSSEL RICCO filed an application to change the point of diversion and to change the place of use under Certificates 32384, 32398, and 75446. The Department assigned the application number T-12906.
2. On April 19, 2018, the applicant's agent identified a scrivener's error in the authorized place of use under Certificate 75446. The certificate identifies acreage located within Section 1, T13S, R33E, W.M. However, the correct authorized place of use should be identified as Section 16, T13S, R33E, W.M.
3. Notice of the application for transfer was published on April 24, 2018, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.

This final order is subject to judicial review by the Court of Appeals under ORS 183.482. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.482(1). Pursuant to ORS 536.075 and OAR 137-003-0675, you may petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

4. On June 12, 2018, the Department contacted the applicant's agent regarding a few discrepancies found in the application regarding Table 2 of the application and the application map.
5. On June 13, 2018, the Department received the requested amended application materials.
6. On June 20, 2018, the Department emailed a copy of the draft Preliminary Determination proposing to deny Transfer Application T-12906 to the applicants.
7. On June 25, 2018, the applicant's agent contacted the Department in response to the draft Preliminary Determination regarding the type of measuring device specified in the condition section of the document. The Watermaster confirmed that a Weir, Parshall Flume, Ramp Flume, Submerged Orifice, or a Flow Restrictor will be required to be installed, at the new point of diversion, prior to any diversion of water.
8. On June 26, 2018, the Department mailed a copy of the revised draft Preliminary Determination proposing to deny Transfer Application T-12906 to the applicants. The revised draft Preliminary Determination cover letter set forth a deadline of July 26, 2018, for the applicants to respond. On June 27, 2018, the agent for the applicant requested that the Department proceed with the application and seek a recommendation from the Oregon Department of Fish and Wildlife (ODFW) and Oregon Department of Environmental Quality (DEQ) as to whether the Department should consent to the injury of instream water right, Certificate 59788, pursuant to OAR 690-380-4030, and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
9. On July 19, 2018, the Department issued a Preliminary Determination proposing to deny Transfer Application T-12906 unless ODFW and DEQ recommended consent to injury, and sent a copy to the applicant. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on May 10, 2016, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.
10. On July 19, 2018, a request was sent to ODFW for a recommendation concerning consent to injury of the instream water right Certificate 59788.
11. On October 29, 2018, a request was sent to DEQ for a recommendation concerning consent to injury of the instream water right Certificate 59788.
12. Notice of the agencies' recommendation was published in the Department's weekly notice on June 25, 2019, pursuant to OAR 690-380-5050. No comments or requests for a public meeting were filed in response to the notice.

13. On January 15, 2019, a recommendation for OWRD to consent to injury to instream water right Certificate 59788 was received from DEQ. DEQ has found that the transfer and associated restoration actions will result in a net benefit for water quality in the John Day River for fish and aquatic life and water contact recreation uses if conditioned as follows:

a) The applicant shall revegetate stream banks at the new and old point of diversion locations after construction to promote stream shading.

14. On January 24, 2019, a recommendation for OWRD to consent to injury to instream water right Certificate 59788 was received from ODFW. ODFW recommends that OWRD consent to the injury with the following conditions:

a) The permittee (transfer applicant) comply with terms of the associated Mitigation Proposal to minimize detrimental impacts to fish, wildlife, and/or their habitat. ODFW understands that the mitigation and following conditions will be fully incorporated into the requirements of the new certificate and may only be altered by written mutual agreement of all parties. ODFW recommends:

i) Completion of the engineered rock riffle diversion, as approved by ODFW that will allow volitional fish passage for all life stages of salmonids.

b) As required by ORS 509.585, the permittee (transfer applicant) shall not construct, operate, or maintain any dam or artificial obstruction to fish passage across any waters of this state that are inhabited, or were historically inhabited, by native migratory fish without obtaining approval from the Oregon Department of Fish and Wildlife (ODFW). The permittee (transfer applicant) shall either submit a proposal for fish passage to ODFW or apply for a waiver or exemption. Approval of the proposed fish passage facility, waiver, or exemption must be obtained prior to construction of any in-channel obstruction or prior to diversion of water that may create an artificial obstruction due to low flow, and the permittee (transfer applicant) shall submit proof to ODFW that fish passage has been implemented per the plan, waiver, or exemption prior to diversion of water. The permittee (transfer applicant) shall maintain adequate passage of native migratory fish at all times (ORS 509.610) as per the approved plan, waiver, or exemption. If ODFW determines adequate passage of native migratory fish is not being provided, and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that OWRD regulate the use of water until OWRD receives notification from ODFW that adequate fish passage is being provided. The permittee is hereby directed to schedule a consultation with an ODFW Fish Passage Coordinator.

i) A Fish Passage Plan, Waiver, or Exemption has been granted for the proposed point of diversion that fulfills the fish passage requirements for this use.

- c) The permittee (transfer applicant) shall install, maintain, and operate fish screening consistent with current ODFW standards or submit documentation that ODFW has determined fish screening is not necessary or is exempted. Fish screening is to prevent fish from entering the proposed diversion. The required screen is to be in place, functional, and approved in writing by ODFW prior to diversion of water. The water user shall operate and maintain the fish screen consistent with ODFW's operation and maintenance standards. If ODFW determines the screen is not functioning properly, and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that OWRD regulate the use of water until OWRD receives notification from ODFW that the fish screen is functioning properly. The permittee is hereby directed to schedule a consultation with an ODFW Fish Screening Coordinator.
 - i) The new point of diversion is currently equipped with an appropriate fish screen.
- d) Construction must occur during the established in-water work period (July 15 to August 15) unless otherwise approved by ODFW.

15. On February 5, 2020, the applicant submitted a Request for Reconsideration in accordance with OAR 137-004-0080. The Final Order that was issued on January 2, 2020, at Special Order Volume 114, Page 695-703, incorrectly described the condition as recommended by ODFW in condition no. 7 on page 8 of the Final Order.

16. The portion of the first right to be transferred is as follows:

Certificate: 32384 in the name of GEORGE H. HALL
(confirmed by John Day River (F))
Use: IRRIGATION of 63.4 ACRES
Priority Date: 1867
Rate: 1.6 CUBIC FEET PER SECOND
Limit/Duty: The amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed ONE-FORTIETH cubic foot per second per acre irrigated from April 1 to September 30; further limited to one acre-foot per acre per calendar month to July 1 and 3/4 acre-foot per acre thereafter; total five acre feet per acre for season.
Source: JOHN DAY RIVER, a tributary of COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
13 S	33 E	WM	9	SE SE

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Acres	Change
13 S	33 E	WM	9	NE SW	1.0	POU/POD

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Acres	Change
13 S	33 E	WM	9	NE SW	12.0	POD
13 S	33 E	WM	9	SW SW	20.0	POD
13 S	33 E	WM	9	SE SW	20.0	POD
13 S	33 E	WM	9	NW SE	3.4	POU/POD
13 S	33 E	WM	9	NW SE	1.4	POD
13 S	33 E	WM	9	SW SE	5.6	POD
TOTAL					63.4	

17. Transfer Application T-12906 proposes to move the authorized point of diversion approximately 600 feet upstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	33 E	WM	9	NE SE	HALL DITCH: 44.45060° , -118.73739°

18. Transfer Application T-12906 also proposes to change the place of use of the right for 4.4 acres to:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	9	NW SW	0.7
13 S	33 E	WM	17	NE NE	2.0
13 S	33 E	WM	17	NW NE	1.7
TOTAL					4.4

19. The portion of the second right to be transferred is as follows:

Certificate: 32398 in the name of GEORGE H. & WILLIAM HALL, JR
(confirmed by John Day River (F))

Use: IRRIGATION of 65.7 ACRES

Priority Date: 1867 for Tract #2

Rate: 1.64 CUBIC FEET PER SECOND

Limit/Duty: The amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed ONE-FORTIETH of one cubic foot per second per acre irrigated from April 1 to September 30; further limited to 1.0 acre-foot per acre per calendar month to July and 3/4 acre-foot per acre thereafter; total 5.0 acre-feet per acre for season.

Source: JOHN DAY RIVER, a tributary of COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
13 S	33 E	WM	9	SE SE

Authorized Place of Use:

IRRIGATION – TRACT #2					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	8	SE SE	12.1
13 S	33 E	WM	9	SW SW	13.6
13 S	33 E	WM	16	NW NW	9.0
13 S	33 E	WM	17	NE NE	31.0

IRRIGATION – TRACT #2					
Twp	Rng	Mer	Sec	Q-Q	Acres
TOTAL					65.7

20. Transfer Application T-12906 proposes to move the authorized point of diversion approximately 600 feet upstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	33 E	WM	9	NE SE	HALL DITCH: 44.45060°, -118.73739°

21. The portion of the third right to be transferred is as follows:

Certificate: 75446 in the name of TED BARNHOUSE
(confirmed by John Day River (F))

Use: IRRIGATION of 73.5 ACRES

Priority Date: 1867

Rate: 1.8 CUBIC FEET PER SECOND

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to ONE-FORTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated from April 1 to September 30 and shall be further limited to 1.0 acre-foot per acre per calendar month to July 1 and 3/4 acre-foot per acre thereafter for a diversion of not to exceed 5.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: JOHN DAY RIVER, a tributary of the COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	33 E	WM	9	NE SE	1390 FEET NORTH AND 420 FEET WEST FROM THE SE CORNER OF SECTION 9

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	9	SW SW	2.0
13 S	33 E	WM	9	SE SW	20.0
13 S	33 E	WM	16	NE NW	18.7
13 S	33 E	WM	16	NW NW	28.8
13 S	33 E	WM	17	NE NE	3.0
13 S	33 E	WM	17	SE NE	1.0
TOTAL					73.5

22. Transfer Application T-12906 proposes to move the authorized point of diversion approximately 600 feet upstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	33 E	WM	9	NE SE	HALL DITCH: 44.45060°; -118.73739°

23. The Oregon Department of Fish and Wildlife has determined that a fish screen is necessary at the new point of diversion to prevent fish from entering the diversion and that the diversion is currently equipped with an appropriate fish screen.

Transfer Review Criteria [OAR 690-380-4010(2)]

24. Water has been used within the last five years according to the terms and conditions of the right. There is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
25. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing rights were present within the five-year period prior to submittal of Transfer Application T-12906.
26. The proposed changes would not result in enlargement of the rights.
27. An instream water right, Certificate 59788, exists for the reach of the river in which the authorized point of diversion would be moved upstream, and the streamflow within the reach are frequently below levels allocated under the instream water right. Thus, the instream water right would be injured as a result of the proposed change in point of diversion.
28. All other application requirements are met.

Conclusions of Law

Based on the recommendations of the Oregon Department of Fish and Wildlife and Oregon Department of Environmental Quality, the Department consents to injury of the instream water right evidenced by Certificate 59788. The change in point of diversion and change in place of use proposed in Transfer Application T-12906 are consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000, 690-380-5030, and 690-380-5050.

Now, therefore, it is ORDERED:

1. The changes in points of diversion and place of use proposed in Transfer Application T-12906 are approved.
2. The right to the use of the water is restricted to beneficial use at the place of use described, and is subject to all other conditions and limitations contained in Certificates 32384, 32398, 75446 and any related decree.
3. Water right Certificates 32384, 32398, and 75446 are cancelled. New certificates will be issued describing that portion of the rights not affected by this transfer.
4. The quantity of water diverted at the new point of diversion shall not exceed the quantity of water lawfully available at the original points of diversion.
5. Water use measurement conditions:

- a. Before water use may begin under this order, the water user shall install a Weir, Parshall Flume, Ramp Flume, Submerged Orifice, Flow Restrictor or another suitable open channel measuring device, at each new point of diversion.
 - b. The water user shall maintain the open channel measuring devices in good working order.
 - c. The water user shall allow the Watermaster access to the open channel measuring device; provided however, where the open channel measuring device is located within a private structure, the Watermaster shall request access upon reasonable notice.
6. The applicant shall revegetate stream banks at the new and old point of diversion locations after construction to promote stream shading.
 7. The permittee (transfer applicant) shall comply with terms of the associated Mitigation Proposal to minimize detrimental impacts to fish, wildlife, and/or their habitat. ODFW understands that the mitigation and following conditions will be fully incorporated into the requirements of the new certificate and may only be altered by written mutual agreement of all parties.
 - a) Completion of the engineered rock riffle diversion, as approved by ODFW that will allow volitional fish passage for all life stages of salmonids.
 8. The permittee (transfer applicant) shall install, maintain, and operate fish screening consistent with current ODFW standards or submit documentation that ODFW has determined fish screening is not necessary or is exempted. Fish screening is to prevent fish from entering the proposed diversion. The required screen is to be in place, functional, and approved in writing by ODFW prior to diversion of water. The water user shall operate and maintain the fish screen consistent with ODFW's operation and maintenance standards. If ODFW determines the screen is not functioning properly, and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that OWRD regulate the use of water until OWRD receives notification from ODFW that the fish screen is functioning properly. The permittee is hereby directed to schedule a consultation with an ODFW Fish Screening Coordinator. ODFW acknowledges that the new point of diversion is equipped with an appropriate fish screen.
 9. Construction must occur during the established in-water work period (July 15 to August 15) unless otherwise approved by ODFW.
 10. The former place of use of the transferred rights shall no longer receive water under the rights.
 11. Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2021**. A Claim of Beneficial Use prepared by a Certified Water Right Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the changes and full beneficial use of the water.

12. After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.

Dated in Salem, Oregon on

MAR 06 2020


Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
THOMAS M BYLER, DIRECTOR
Oregon Water Resources Department

Mailing date: _____

MAR 09 2020