

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

In the Matter of Transfer Application	)	RECONSIDERATION OF A FINAL
T-12907, Grant County	)	ORDER RECORDED IN SPECIAL
	)	ORDER VOLUME 114, PAGES 704-
	)	712, 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.  
RUSSELL RICCO  
25880 GREEN HAVEN ROAD  
PRAIRIE CITY, OR 97869

ROGER AND JANNA LEE  
PO BOX 870  
PRAIRIE CITY, OR 97869

**Findings of Fact**

1. On April 19, 2018, ELMWOOD RANCH, INC./ RUSSELL RICCO and ROGER AND JANNA LEE filed an application to change the point of diversion and to change the place of use under Certificates 25272, 25273, and 32398. The Department assigned the application number T-12907.

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.

2. 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.
3. On October 18, 2018, the Department contacted the applicant by written correspondence to notify the applicant and applicant's agent of deficiencies in the application. The Department requested that deficiencies be resolved by November 16, 2018.
4. On October 18, 2018, the applicant's agent submitted a revised Table 2 for each certificate, and a revised application map, resolving the deficiencies.
5. On December 14, 2018, the Department mailed a copy of the draft Preliminary Determination proposing to deny Transfer Application T-12907 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of January 14, 2019, for the applicants to respond. The applicants requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
6. On February 1, 2019, the Department issued a Preliminary Determination proposing to deny Transfer Application T-12906 unless Oregon Department of Fish and Wildlife (ODFW) and Oregon Department of Environmental Quality (ODEQ) 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 February 5, 2019, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.
7. On February 1, 2019, a request was sent to ODFW for a recommendation concerning consent to injury of the instream water right Certificate 59788.
8. On February 1, 2019, a request was sent to ODEQ for a recommendation concerning consent to injury of the instream water right Certificate 59788.
9. 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.
10. On February 12, 2019, a recommendation for OWRD to consent to injury to instream water right Certificate 59788 was received from ODEQ. ODEQ 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.
  - b) The applicant shall allow for the growth of riparian vegetation along the length of the injured reach.

- c) The applicant shall have a functioning fence that protects riparian vegetation and prevents stream bank erosion from livestock access.
  - d) The applicant shall provide a buffer between the fence and the stream to allow for the growth of riparian vegetation.
11. On April 18, 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.

12. On February 5, 2020, the applicant submitted a Request for Reconsideration as recommendations from ODFW and ODEQ were either incorrect or not included in the Final Order issued on January 2, 2020. Recommendations identified by ODEQ, which are described in Finding of Fact 10 above, were excluded from the Final Order. A recommendation identified by ODFW, which is described in FOF 11 above, is described to simplify the original intent of the recommendation. The previous recommendation was clarified by ODFW on July 1, 2019, "remove the language, as that is intended to cover water-for-water mitigation and not necessarily habitat projects."

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

**Certificate:** 25272 in the name of JOHN W. HALL (confirmed by John Day River (F))  
**Use:** IRRIGATION of 266.6 ACRES  
**Priority Date:** 1863  
**Limit/duty:** 6.67 CUBIC FEET PER SECOND, [BEING 1/40 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 ¾ ACRE-FOOT PER ACRE THEREAFTER; TOTAL FIVE ACRE-FEET PER ACRE FOR SEASON, MEASURED AT POINT OF DIVERSION]  
**Source:** JOHN DAY RIVER, tributary of the COLUMBIA RIVER

**Authorized Place of Use:**

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	17	NE NW	30.2
13 S	33 E	WM	17	NW NW	33.5
13 S	33 E	WM	17	SW NW	14.0

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	17	SE NW	3.9
13 S	33 E	WM	18	NE NE	34.0
13 S	33 E	WM	18	NW NE	37.3
13 S	33 E	WM	18	SW NE	30.6
13 S	33 E	WM	18	SE NE	21.1
13 S	33 E	WM	18	NE NW	33.8
13 S	33 E	WM	18	SE NW	28.2
Total					266.6

14. The Department received information from the applicant that better describes the location of the authorized point of diversion for Certificate 25272 as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
13 S	33 E	WM	17	NE NE	NORTH 44.44271° WEST 118.75946°

15. Transfer Application T-12907 proposes to change the place of use of the right to:

Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	17	NW NE	5.9
13 S	33 E	WM	17	NE NW	34.9
13 S	33 E	WM	17	NW NW	37.9
13 S	33 E	WM	17	SW NW	14.5
13 S	33 E	WM	17	SE NW	0.7
13 S	33 E	WM	18	NE NE	37.7
13 S	33 E	WM	18	NW NE	39.7
13 S	33 E	WM	18	SW NE	19.7
13 S	33 E	WM	18	SE NE	23.5
13 S	33 E	WM	18	NE NW	35.9
13 S	33 E	WM	18	SE NW	16.2
Total					266.6

16. The second right to be transferred is as follows:

**Certificate:** 25273 in the name of JOHN W. HALL (confirmed by John Day River (F))  
**Use:** SUPPLEMENTAL IRRIGATION of 185.0 ACRES  
**Priority Date:** 1863  
**Limit/duty:** 4.63 CUBIC FEET PER SECOND, [BEING 1/40 CUBIC FOOT PER SECOND PER ACRE IRRIGATED TO JUNE 1 AND 1/80 CUBIC FOOT PER SECOND PER ACRE THEREAFTER; FURTHER LIMITED TO ONE ACRE-FOOT PER CALENDAR MONTH TO JUNE 1 AND FOUR ACRE-FEET PER ACRE DURING SEASON APRIL 1 TO SEPTEMBER 30, MEASURED AT POINT OF DIVERSION]  
**Source:** BEAR CREEK, tributary of JOHN DAY RIVER

**Authorized Place of Use:**

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	18	NE NE	34.00

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	18	NW NE	37.30
13 S	33 E	WM	18	SW NE	30.60
13 S	33 E	WM	18	SE NE	21.10
13 S	33 E	WM	18	NE NW	33.80
13 S	33 E	WM	18	SE NW	28.20
Total					185.0

17. Transfer Application T-12907 proposes to change the place of use of the right to:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	17	NW NW	9.9
13 S	33 E	WM	17	SW NW	3.6
13 S	33 E	WM	18	NE NE	37.7
13 S	33 E	WM	18	NW NE	39.7
13 S	33 E	WM	18	SW NE	19.7
13 S	33 E	WM	18	SE NE	23.5
13 S	33 E	WM	18	NE NW	35.9
13 S	33 E	WM	18	SE NW	15.0
Total					185.0

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

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

**Use:** IRRIGATION of 16.7 ACRES

**Priority Date:** 1863 – TRACT #1

**Limit/duty:** 0.42 CUBIC FOOT PER SECOND, [BEING ONE-FORTIETH OF ONE 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, MEASURED AT POINT OF DIVERSION]

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

**Authorized Point of Diversion:**

TRACT #1					
Twp	Rng	Mer	Sec	Q-Q	Ditch
13 S	33 E	WM	9	SE SE	
13 S	33 E	WM	17	NE NE	JOHN DAY RIVER

**Authorized Place of Use:**

IRRIGATION – TRACT #1					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	17	NW NE	16.7

19. Transfer Application T-12907 proposes to move the authorized point of diversion to:

TRACT #1							
Twp	Rng	Mer	Sec	Q-Q	Ditch	Survey Coordinates	Approximate distance from authorized point of diversion in feet (ft.)
13 S	33 E	WM	9	NE SE	HALL	NORTH 44. 45060 ° WEST 118.73739 °	1478 ft. upstream
13 S	33 E	WM	17	NE NE	JOHN DAY RIVER	NORTH 44. 44274 ° WEST 118.75946 °	959 ft. upstream

20. Transfer Application T-12907 also proposes to change the place of use of the right to:

IRRIGATION – TRACT #1						
Twp	Rng	Mer	Sec	Q-Q	Acres	
13 S	33 E	WM	17	NE NE	4.2	
13 S	33 E	WM	17	NW NE	12.5	
Total					16.7	

21. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening and/or by-pass device is necessary at the new point of diversion to prevent fish from entering the diversion and/or safely transport fish back to the body of water from which the fish were diverted and that the diversion is currently equipped with an appropriate fish screening and/or by-pass device.

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

22. Water has been used within the last five years according to the terms and conditions of the rights. There is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
23. 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-12907.
24. The proposed changes would not result in enlargement of the rights.
25. Instream water right Certificate 59788 exists for the reach of the river in which the authorized point of diversion would be moved upstream, and stream flows within the reach are frequently below the 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.
26. Instream water right Certificate 59788 is for flows to be maintained in the John Day River between the mouth of Rail Creek (Section 24, T14S, R34E, WM) and USGS Gage No. 14-038530 (Section 19, T13S, R32E, WM).
27. 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 as proposed in Transfer Application T-12907 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 change in point of diversion and change in place of use proposed in Transfer Application T-12907 is 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 25272, 25273, and 32398 and any related decree.
3. Water right Certificates 25272, 25273, and 32398 are cancelled. A new certificate will be issued describing that portion of Certificate 32398 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 point of diversion.
5. Water use measurement conditions:
  - a. Before water use may begin under this order, the water user shall install a flume, weir or other suitable open channel measuring device, at each new point of diversion.
  - b. The water user shall maintain the flume, weir or other suitable open channel measuring device in good working order.
  - c. The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are 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 applicant shall allow for the growth of riparian vegetation along the length of the injured reach.
8. The applicant shall have a functioning fence that protects riparian vegetation and prevents stream bank erosion from livestock access.
9. The applicant shall provide a buffer between the fence and the stream to allow for the growth of riparian vegetation.



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

Dated at Salem, Oregon this MAR 11 2020,



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

Mailing date: MAR 12 2020

10. 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.
11. 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.
12. Construction must occur during the established in-water work period (July 15 to August 15) unless otherwise approved by ODFW.
13. The former place of use of the transferred rights shall no longer receive water under the rights.
14. 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.