

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

|                                       |   |                                |
|---------------------------------------|---|--------------------------------|
| In the Matter of Transfer Application | ) | REVISED PRELIMINARY            |
| T-10688, Washington County            | ) | DETERMINATION PROPOSING        |
|                                       | ) | DENIAL OF A CHANGE IN POINT OF |
|                                       | ) | DIVERSION AND PLACE OF USE     |

**Authority**

ORS 540.505 to 540.580 establishes 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. OAR Chapter 690, Division 380 implements the statutes and provides the Department's procedures and criteria for evaluating transfer applications.

**Applicant**

Oregon Berry Packing Company  
Roy Malensky  
PO Box 1326  
Hillsboro, OR 97123

**Agent**

Stuntzner Engineering & Forestry  
William Kness  
2137 19<sup>th</sup> Avenue  
Forest Grove, OR 97116

**Findings of Fact**

**Background**

1. On July 31, 2008, Roy Malensky filed an application on behalf of Oregon Berry Packing Company to change the place of use and point of diversion under Certificate 14092 and the perfected portion of Permit S-35792. The Department assigned the application number T-10688.

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

- Certificate:** 14092 in the name of A.F. Hayes and Blaine Brown (perfected under Permit S-8849)
- Use:** Irrigation of 23.6 acres
- Priority Date:** December 29, 1928
- Rate:** 0.30 cubic foot 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, is limited to a diversion of one-eightieth of one cubic foot per second, or its equivalent for each acre irrigated,
- Source:** Tualatin River, tributary to the Willamette River

**Authorized Point of Diversion:**

| Twp | Rng | Mer | Sec | Q-Q   | Measured Distances |
|-----|-----|-----|-----|-------|--------------------|
| 1 S | 4 W | WM  | 36  | NW SW | NONE GIVEN         |

Pursuant to OAR 690-380-4030, any person may file a protest or standing statement within 30 days after the last date of publication of notice of this preliminary determination.

**Authorized Place of Use:**

| Twp    | Rng | Mer | Sec | Q-Q   | GLot | Acres |
|--------|-----|-----|-----|-------|------|-------|
| 1 S    | 4 W | WM  | 36  | NE SW | 3    | 0.6   |
| 1 S    | 4 W | WM  | 36  | SE SW | 6    | 4.9   |
| 1 S    | 4 W | WM  | 36  | NW SE | 4    | 0.2   |
| 1 S    | 4 W | WM  | 36  | SW SE | 5    | 5.2   |
| 2 S    | 4 W | WM  | 1   | NW NE | 12   | 9.8   |
| 2 S    | 4 W | WM  | 1   | SW NE | 11   | 1.8   |
| 2 S    | 4 W | WM  | 1   | NE NW |      | 1.1   |
| Total: |     |     |     |       |      | 23.6  |

3. Transfer Application T-10688 proposes to change the point of diversion approximately 10.3 miles downstream from the authorized point of diversion; located as follows:

| Twp | Rng | Mer | Sec | Q-Q   | Measured Distances   |
|-----|-----|-----|-----|-------|--|
| 1 S | 2 W | WM  | 18  | NW SE | OREGON BERRY POD: 720 FEET NORTH AND 2170 FEET EAST FROM THE N.N.E. CORNER OF N.C. RICHARDSON DLC 63 |

4. Application T-10688 also proposes to change the place of use of the right to:

| Twp    | Rng | Mer | Sec | Q-Q   | Acres |
|--------|-----|-----|-----|-------|-------|
| 1 S    | 2 W | WM  | 18  | SE SW | 17.5  |
| 1 S    | 2 W | WM  | 18  | SW SE | 6.1   |
| Total: |     |     |     |       | 23.6  |

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

**Order:** Special Order Volume 67, Pages 627 – 662 (Determination of Satisfactory Proof for Permit S-35792 in the name of The United States of America – Bureau of Reclamation)

**Use:** Supplemental Irrigation of 17.0 acres

**Priority Date:** February 20, 1963

**Rate:** 0.21 cubic foot 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, is limited to a diversion of one-eightieth of one cubic foot per second per acre or its equivalent for each acre irrigated from direct flow and shall be further limited to a diversion of not to exceed 2.5 acre-feet for each acre irrigated during the irrigation season of each year from direct flow and storage from the reservoir constructed under R-5777 provided further that the right allowed herein shall be limited to any deficiency in the available supply of any prior right existing for the same land and shall not exceed the limitation allowed herein and further limited to the use of stored water only on the lands as described as supplemental.

**Source:** Tualatin River, tributary to the Willamette River

**Authorized Point of Diversion:**

| Twp | Rng | Mer | Sec | Q-Q   | Measured Distances                     |
|-----|-----|-----|-----|-------|--|
| 1 S | 4 W | WM  | 36  | SE SW | POD W-5: 45°26'08.10"N, 123°07'32.66"W |

**Authorized Place of Use:**

| Twp    | Rng | Mer | Sec | Q-Q   | GLot | Acres |
|--------|-----|-----|-----|-------|------|-------|
| 1 S    | 4 W | WM  | 36  | SE SW | 6    | 1.8   |
| 1 S    | 4 W | WM  | 36  | SW SE | 5    | 2.5   |
| 2 S    | 4 W | WM  | 1   | NW NE | 12   | 9.8   |
| 2 S    | 4 W | WM  | 1   | SW NE | 11   | 1.8   |
| 2 S    | 4 W | WM  | 1   | NE NW |      | 1.1   |
| Total: |     |     |     |       |      | 17.0  |

6. Transfer Application T-10688 proposes to change the point of diversion approximately 10.45 miles downstream from the authorized point of diversion; located as follows:

| Twp | Rng | Mer | Sec | Q-Q   | Measured Distances   |
|-----|-----|-----|-----|-------|--|
| 1 S | 2 W | WM  | 18  | NW SE | OREGON BERRY POD: 720 FEET NORTH AND 2170 FEET EAST FROM THE N.E. CORNER OF N.C. RICHARDSON DLC 63 |

7. Application T-10688 also proposes to change the place of use of the right to:

| Twp    | Rng | Mer | Sec | Q-Q   | Acres |
|--------|-----|-----|-----|-------|-------|
| 1 S    | 2 W | WM  | 18  | SE SW | 10.9  |
| 1 S    | 2 W | WM  | 18  | SW SE | 6.1   |
| Total: |     |     |     |       | 17.0  |

8. Notice of the application for transfer was published on August 12, 2008, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
9. 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 not currently equipped with an appropriate fish screening and/or by-pass device. This diversion may be eligible for screening cost share funds.
10. On September 9, 2009, the mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10688 to the applicant. The draft Preliminary Determination set forth a deadline of October 9, 2009, for the applicant to respond. The applicant requested 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.
11. On October 23, 2009, the Department issued a Preliminary Determination proposing to approve Transfer T-10688 and mailed a copy to the applicant. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on October 27, 2009, and in The Hillsboro Argus newspaper on October 30,

November 6 and 13, 2009, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.

12. On December 24, 2009, landowner of the "from" lands, Sergio Gonzalez withdrew his consent to transfer the water rights under Certificate 14092.
13. On August 26, 2011, the Department issued an Order Withdrawing Preliminary Determination Proposing Approval of a Change in Point of Diversion and Place of Use, recorded at Vol. 85, Pages 276-277.

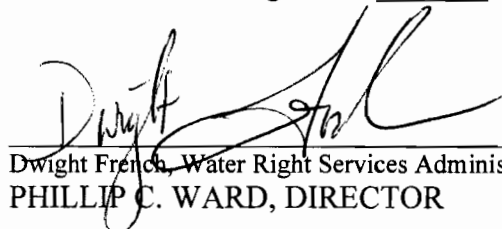
***Transfer Review Criteria OAR 690-380-4010(2)***

14. 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.
15. A pump, pipeline, and sprinkler system 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-10688.
16. The proposed changes would not result in enlargement of the rights.
17. The proposed changes would not result in injury to other water rights.
18. Based on the notarized withdrawal of consent, the applicant is no longer authorized to pursue the transfer.

***Determination and Proposed Action***

The changes in point of diversion and place of use proposed in Transfer Application T-10688 appear not to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be denied as the applicant is no longer authorized to pursue the transfer.

Dated at Salem, Oregon this 28 day of October 2011.

  
Dwight French, Water Right Services Administrator, for  
PHILLIP C. WARD, DIRECTOR

This Preliminary Determination was prepared by Teri Hranac. If you have questions about the information in this document, you may reach me at 503-986-0881 or [teri.k.hranac@wrds.state.or.us](mailto:teri.k.hranac@wrds.state.or.us).

*Protests should be addressed to the attention of Transfer and Conservation Section, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.*