



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

North Mall Office Building
725 Summer St. NE, Suite A
Salem, OR 97301
Phone: 503-986-0900
FAX: 503-986-0904
www.oregon.gov/owrd

September 24, 2012

VIA E-MAIL

Applicant

TRUDY JESSEN
STEVE DRAPER
BOX 388
PILOT ROCK, OR 97868

SUBJECT: Water Right Transfer Application T-11357

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11357. This document is an intermediate step in the approval process; water may not be used legally as proposed in the transfer application until a Final Order has been issued by the Department. Please read this entire letter carefully to determine your responsibility for additional action.

A public notice is being published in the Department's weekly publication and in the Pendleton Record newspaper, simultaneously with issuance of the Preliminary Determination. The notice initiates a period in which any person may file either a protest opposing the decision proposed by the Department in the Preliminary Determination or a standing statement supporting the Department's decision. The protest period will end 30 days after the Department's notice *or* 30 days after the last date of newspaper publication.

If no protest is filed, the Department will issue a Final Order consistent with the Preliminary Determination. You should receive a copy of the Final Order about 30 days after the close of the protest period.

If a protest is filed, the application may be referred to a contested case proceeding. A contested case provides an opportunity for the proponents and opponents of the decision proposed in the Preliminary Determination to present information and arguments supporting their position in a quasi-judicial proceeding.

Please do not hesitate to contact me at (503) 986-0890 or Dorothy.I.Pedersen@wrp.state.or.us if I may be of assistance.

Sincerely,

Dorothy I. Pedersen
Transfer Program Advisor

cc: T-11357
Tony G. Justus, District 5 Watermaster (*via e-mail*)

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-11357, Umatilla County)	PROPOSING APPROVAL OF A
)	CHANGE IN POINT OF DIVERSION,
)	PLACE OF USE AND PARTIAL
)	DIMINUTION OF A WATER RIGHT

Authority

ORS 537.705 and 540.505 to 540.580 establish the process in which a water right holder may submit a request to transfer the point of appropriation, 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.

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Findings of Fact

Background

1. On February 21, 2012, Trudy Jessen (Draper), filed an application to change the places of use and points of diversion under Certificates 86723, 51538 and 86818. The Department assigned the application number T-11357.
2. Certificate 86723 superseded Certificate 32154 as a result of a Court Decree Correction, to correctly identify the place of use of the water right. Subsequently, transfer application T-11067 cancelled Certificate 86723 and superseding Certificates 87458 and 87459 were issued. On March 30, 2012, the Department issued Certificate 87502 to supersede Certificate 87459 and correct a scrivener's error.
3. The portion of the FIRST right to be transferred is as follows:
Certificate: 87502 in the name of ESTATE OF ISAAC KNOTTS (confirmed by decree of the Circuit Court of the State of Oregon for Umatilla County)
Use: IRRIGATION of 25.6 ACRES, DOMESTIC and STOCK USE
Priority Date: 1875 for 11.6 ACRES and 1892 for 14.0 ACRES
Rate: 0.32 CUBIC FOOT PER SECOND (cfs)

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.

Limit/Duty: The use is subject to the provisions of paragraph 33 of said decree and all other conditions and limitations contained in said decree

Source: EAST BIRCH CREEK, a tributary of BIRCH CREEK (Umatilla River basin)

Authorized Place of Use:

IRRIGATION, DOMESTIC & STOCK USE						
Twp	Rng	Mer	Sec	Q - Q	Tax Lot	Acres
2 S	32 E	WM	3	NW SW	500	4.0
2 S	32 E	WM	3	SW SW	500	14.0
2 S	32 E	WM	4	NE SE	500	1.7
2 S	32 E	WM	4	NE SE	600	5.9

4. Certificate 87502 states East Birch Creek is a tributary to the Umatilla River. However, East Birch Creek actually flows into Birch Creek, which in turn contributes to the Umatilla River.
5. Certificate 87502 superseded Certificate 87429 and earlier Certificate 87623. These certificates were issued as a result of transfer application T-11067 (Weinke), which acted upon earlier Certificate 32154 for this right. Certificate 32154 was issued to describe the portion of the right not affected by Transfer Application M-151, which approved a point of diversion (POD) for only 5.0 acres of the originating right, not for the remaining portion of the right (Vol. 13, pg. 553). Original Certificate 2575 did not describe a POD, but the new M-151 POD in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 4 was inadvertently also added to remaining right Certificate 32154, and the error was carried forward into Certificates 86723, 87429 and 87502. This error should be corrected. A remaining right issued as a result of this transfer will drop the POD in NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 4, and again be consistent with original Certificate 2575.
6. Certificate 87502 does not describe the correct location of the point of diversion for this water use. However information is available from the Umatilla River adjudication map and from the current map prepared by the applicant's Certified Water Rights Examiner based on a recent field visit and subsequent survey indicating that the actual point of diversion on East Birch Creek is located as follows:

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 S	32 E	WM	10	NE NW	SOUTH 17 DEGREES, 59 MINUTES, 43 SECONDS WEST; 1369.06 FEET FROM THE N $\frac{1}{4}$ CORNER OF SECTION 10

7. Transfer Application T-11357 proposes to change the place of use for the above described right to:

Twp	Rng	Mer	Sec	Q - Q	Priority Date	Acres (all TL 500)
2 S	32 E	WM	3	NW SW	1875	3.61
2 S	32 E	WM	3	NW SW	1892	0.42
2 S	32 E	WM	3	SW SW	1875	7.63
2 S	32 E	WM	3	SW SW	1892	11.69

Twp	Rng	Mer	Sec	Q - Q	Priority Date	Acres (all TL 500)
2 S	32 E	WM	3	SE SW	1892	0.54
2 S	32 E	WM	4	NE SE	1875	0.36
2 S	32 E	WM	4	NE SE	1892	1.35

8. Transfer Application T-11357 also proposes to change the point of diversion for the above described lands downstream approximately 1500 feet from the original point of diversion to:

Proposed Point of Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 S	32 E	WM	3	SW SW	NORTH 77 DEGREES, 43 MINUTES, 40 SECONDS WEST; 1820.66 FEET FROM THE S¼ CORNER OF SECTION 3

9. The SECOND water right to be transferred is as follows:

Certificate: 51538 in the name of STEPHEN F. DRAPER (perfected under Permit G-4565)

Use: IRRIGATION of 6.8 ACRES and SUPPLEMENTAL IRRIGATION of 16.9 ACRES

Priority Date: April 21, 1969

Rate: 0.30 cfs

Limit/Duty: ONE-EIGHTIETH of one cfs per acre, not to exceed 3.0 ACRE-FEET per acre per year during the irrigation season of each year, and shall be further limited to appropriation of water only to the extent that it does not impair or substantially interfere with existing surface water rights of others

Source: A WELL, within the EAST BIRCH CREEK BASIN

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 S	32 E	WM	3	SW SW	350 FEET NORTH AND 1380 FEET WEST FROM THE S¼ CORNER OF SECTION 3

Authorized Place of Use:

IRRIGATION (IR)					
Twp	Rng	Mer	Sec	Q - Q	Acres
2 S	32 E	WM	3	SW SW	6.5*
2 S	32 E	WM	3	SE SW	0.3*

SUPPLEMENTAL IRRIGATION (IS)					
Twp	Rng	Mer	Sec	Q - Q	Acres
2 S	32 E	WM	3	NW SW	2.9
2 S	32 E	WM	3	SW SW	14.0

* Note: 4.31 acres within the South ½ of the SW¼ to be diminished to supplemental irrigation at new place of use, to be supplemental to the rights currently evidenced by Certificates 87502 and 86818.

10. Transfer Application T-11357 proposes to change the place of use for the above described right to:

Proposed Place of Use:

PRIMARY IRRIGATION (IR)					
Twp	Rng	Mer	Sec	Q - Q	Acres
2 S	32 E	WM	3	NW SW	0.91
2 S	32 E	WM	3	SW SW	1.58

SUPPLEMENTAL IRRIGATION (IS)					
Twp	Rng	Mer	Sec	Q - Q	Acres
2 S	32 E	WM	3	NW SW	4.03
2 S	32 E	WM	3	SW SW	15.11
2 S	32 E	WM	4	NE SE	1.71
2 S	32 E	WM	4	SE SE	0.36

11. The portion of the THIRD water right to be transferred is as follows:

Certificate: 86818 in the name of CARL A. JOHNSON (confirmed by decree of the Circuit Court of the State of Oregon for Umatilla County)

Use: IRRIGATION of 0.36 ACRES, DOMESTIC and STOCK USE

Priority Dates: 1892

Rate: 0.005 CUBIC FOOT PER SECOND (cfs)

Limit/Duty: The use is subject to the provisions of paragraph 33 of said decree and all other conditions and limitations contained in said decree

Source: EAST BIRCH CREEK, a tributary of the UMATILLA RIVER

Authorized Place of Use:

IRRIGATION, DOMESTIC and STOCK USE						
Twp	Rng	Mer	Sec	Q - Q	Tax Lot	Acres
2 S	32 E	WM	4	SE SE	500	0.36

12. Certificate 86818 does not describe a location of the point of diversion for this portion of the water use. However information is available from the Umatilla River adjudication map and from the current map prepared by the applicant's Certified Water Rights Examiner based on a recent field visit and subsequent survey indicating that the current point of diversion for these lands accesses only East Birch Creek (though other portions of the right access additional sources allowed under the right), and is located as follows:

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 S	32 E	WM	10	NE NW	EAST BIRCH CREEK POD - SOUTH 17 DEGREES, 59 MINUTES, 43 SECONDS WEST; 1369.06 FEET FROM THE N¼ CORNER OF SECTION 10

13. Certificate 86818 states East Birch Creek is a tributary to the Umatilla River. However, East Birch Creek actually flows into Birch Creek, which in turn contributes to the Umatilla River.

14. Transfer Application T-11357 proposes to change the point of diversion for the above described 0.36 acres downstream approximately 1500 feet from the original point of diversion to:

Proposed Point of Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 S	32 E	WM	3	SW SW	NORTH 77 DEGREES, 43 MINUTES, 40 SECONDS WEST; 1820.66 FEET FROM THE S¼ CORNER OF SECTION 3

Partial diminution of a portion of the water right

15. The applicant submitted an affidavit requesting a partial diminution of water right Certificate 51538 to supplemental irrigation at the new place of use. Certificate 51538, issued in the name of Stephen F. Draper, with a priority date of April 21, 1969, was issued partly for primary irrigation and partly for supplemental. The applicant’s request to diminish 4.31 acres of primary irrigation to supplemental irrigation is needed to provide supplementation to primary rights, evidenced by Certificates 87502 and 86818 at the new place of use, as described in Finding of Fact #10 above. Where Certificate 51538 overlies Certificates 87502 and 86818, the primary and supplemental rights will become “layered” rights as defined in OAR 690-380-0100(4) and will then be tied to each other.

PORTION OF WATER RIGHT CERTIFICATE 51538 TO BE DIMINISHED TO SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q - Q	Acres
2 S	32 E	WM	3	SW SW	4.01
2 S	32 E	WM	3	SE SW	0.30

16. Notice of the application for transfer was published on February 28, 2012, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
17. 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
18. On July 19, 2012, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11357 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of August 20, 2012, for the applicant to respond. On September 12, 2012, the applicant hand delivered a request for the Department to proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that she is authorized to pursue the transfer.

Transfer Review Criteria (OAR 690-380-4010)

19. Water has been used within the five-year period prior to submittal of the transfer application T-11357 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.

20. Diversion structures, a well and ditches 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-11357.
21. The proposed changes would not result in enlargement of the rights.
22. The proposed changes would not result in injury to other water rights.

Determination and Proposed Action

The changes in place of use and points of diversion proposed in Transfer Application T-11357 appear to be consistent with the requirements of ORS 537.705 and 540.505 to 540.580 and OAR 690-380-5000. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved.

If Transfer Application T-11357 is approved, the final order will include the following:

1. *The changes in place of use and points of diversion proposed in application T-11357 are approved. The portion of Certificate 51538 listed in Finding of Fact 15 is diminished from primary to supplemental irrigation.*
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 87502, 51538 and 86818 and any related decree.*
3. *Water right Certificates 87502, 51538 and 86818 are cancelled. New certificates will be issued describing those portions of the rights evidenced by Certificates 84502 and 86818 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. *The water user shall maintain and operate the existing measurement devices and shall make such improvements as may be required by the Department.*
6. *The water user shall maintain and operate the fish screen, at the new point of diversion consistent with ODFW's operational and maintenance standards.*
7. *The former places of use of the transferred rights shall no longer receive water under the rights.*
8. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2014**. 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.*

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

Dated at Salem, Oregon this 24 day of September, 2012.


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

This Preliminary Determination was prepared by Ken Dowden. If you have questions about the information in this document, you may reach me at 541-278-5456 or Ken.D.Dowden@ wrd.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.