



# Oregon

John A. Kitzhaber, MD, Governor

## Water Resources Department

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October 31, 2012

MARTIN & SANDRA HERTLER  
5980 DEER CR RD  
PO BOX 67  
SELMA, OR 97538

SUBJECT: Water Right Transfer Application T-11438

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11438. 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, 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.

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 503-986-0881 or [teri.k.hranac@wrd.state.or.us](mailto:teri.k.hranac@wrd.state.or.us), if I may be of assistance.

Sincerely,

Teri Hranac  
Transfer Specialist  
Transfer and Conservation Section

Enclosure

cc: T-11438  
Kathy A. Smith, District 14 Watermaster (*via e-mail*)  
Gary D. Wicks, Agent for the Applicant (*via e-mail at [gdwicks@gmail.com](mailto:gdwicks@gmail.com)*)



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

|                                       |   |                              |
|---------------------------------------|---|------------------------------|
| In the Matter of Transfer Application | ) | PRELIMINARY DETERMINATION    |
| T-11438, Josephine County             | ) | PROPOSING APPROVAL OF A      |
|                                       | ) | CHANGE IN POINT OF DIVERSION |

**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**

MARTIN AND SANDRA HERTLER  
5980 DEER CR RD  
PO BOX 67  
SELMA, OR 97538

**Findings of Fact**

***Background***

1. On June 27, 2012, MARTIN AND SANDRA HERTLER filed an application to change the point of diversion under Certificate 49056. The Department assigned the application number T-11438.

2. The right to be transferred is as follows:

|                       |                                                                                                                                                                                                                                                                                                                |
|-----------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Certificate:</b>   | 49056 in the name of EARLE A. JACKSON (perfected under Permit S-35530)                                                                                                                                                                                                                                         |
| <b>Use:</b>           | DOMESTIC USE FOR ONE FAMILY AND SUPPLEMENTAL IRRIGATION OF 12.5 ACRES                                                                                                                                                                                                                                          |
| <b>Priority Date:</b> | AUGUST 14, 1970                                                                                                                                                                                                                                                                                                |
| <b>Rate:</b>          | 0.26 CUBIC FOOT PER SECOND (CFS), BEING 0.01 CFS FOR DOMESTIC USE FROM STREAM AND 0.25 CFS FROM STREAM AND RESERVOIR FOR SUPPLEMENTAL IRRIGATION                                                                                                                                                               |
| <b>Limit/Duty:</b>    | 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-FIFTIETH 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 |

|                                                                                                                                                                                  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 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. |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

not to exceed 3.5 acre feet per acre for each acre irrigated during the irrigation season of each year from direct flow and storage from reservoir constructed under Permit No. R-5713.

**Sources:** UNNAMED STREAM AND RESERVOIR CONSTRUCTED UNDER PERMIT R-5713, tributary to DEER CREEK

**Authorized Points of Diversion:**

| Twp  | Rng | Mer | Sec | Q-Q   | Measured Distances                                                                                   |
|------|-----|-----|-----|-------|------------------------------------------------------------------------------------------------------|
| 38 S | 7 W | WM  | 10  | SW NE | POD 1 - 1200 FEET NORTH AND 30 FEET EAST FROM THE C <sup>1</sup> / <sub>4</sub> CORNER OF SECTION 10 |
| 38 S | 7 W | WM  | 10  | SW NE | POD 2 - 600 FEET NORTH AND 300 FEET EAST FROM THE C <sup>1</sup> / <sub>4</sub> CORNER OF SECTION 10 |
| 38 S | 7 W | WM  | 10  | SW NE | POD 3 - 400 FEET NORTH AND 310 FEET EAST FROM THE C <sup>1</sup> / <sub>4</sub> CORNER OF SECTION 10 |

**Authorized Place of Use:**

| DOMESTIC |     |     |     |       |
|----------|-----|-----|-----|-------|
| Twp      | Rng | Mer | Sec | Q-Q   |
| 38 S     | 7 W | WM  | 10  | SW NE |

| SUPPLEMENTAL IRRIGATION |     |     |     |       |       |
|-------------------------|-----|-----|-----|-------|-------|
| Twp                     | Rng | Mer | Sec | Q-Q   | Acres |
| 38 S                    | 7 W | WM  | 10  | SW NE | 3.8   |
| 38 S                    | 7 W | WM  | 10  | NW SE | 8.7   |

- Transfer Application T-11438 proposes to move the authorized point of diversion (POD 1) approximately 95 feet to correct the location of the point of diversion based upon a more recent survey and an agreement between the landowners:

| Twp  | Rng | Mer | Sec | Q-Q   | Measured Distances                                                                                   |
|------|-----|-----|-----|-------|------------------------------------------------------------------------------------------------------|
| 38 S | 7 W | WM  | 10  | SE NW | POD 1 - 1182 FEET NORTH AND 65 FEET WEST FROM THE C <sup>1</sup> / <sub>4</sub> CORNER OF SECTION 10 |

- Notice of the application for transfer was published on July 3, 2012, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
- On October 9, 2012, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11438 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of November 9, 2012, 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 applicants are authorized to pursue the transfer.
- The Oregon Department of Fish and Wildlife (ODFW) 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 not currently equipped with an appropriate fish screen. This diversion may be eligible for screening cost-share funds.

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

7. 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 right is subject to forfeiture under ORS 540.610.
8. A pipeline, and sprinkler system sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Transfer Application T-11438.
9. The proposed change would not result in enlargement of the right.
10. The proposed change would not result in injury to other water rights.

### **Determination and Proposed Action**

The change in point of diversion proposed in Transfer Application T-11438 appears 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 approved.

*If Transfer Application T-11438 is approved, the final order will include the following:*

1. *The change in point of diversion proposed in Transfer Application T-11438 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 Certificate 49056 and any related decree.*
3. *Water Right Certificate 49056 is cancelled.*
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. *Prior to diverting water, the water user shall install an approved fish screen at the new point of diversion and shall provide to the OWRD a written statement from Oregon Department of Fish and Wildlife (ODFW) that the installed screen meets the state's criteria, or that ODFW has determined a screen is not necessary.*

*The water user shall operate and maintain the fish screen at the new point of diversion consistent with ODFW's operational 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.*

6. *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 change and full beneficial use of the water.*

7. *After satisfactory proof of beneficial use is received, a new certificate confirming the right transferred will be issued.*

Dated at Salem, Oregon this 31 day of October, 2012.

  
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@wr.state.or.us](mailto:Teri.K.Hranac@wr.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.