



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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July 24, 2013

VIA E-MAIL

Applicant

THOMAS DAY
PO BOX 1100
POMONY, CA 91769
tom@tomdaytreeservice.com

Agent

WILLIS KIMBALL
59670 HIGHWAY 26
JOHN DAY, OR 97845
Kimball@ortelco.net

SUBJECT: Water Right Transfer Application T-11035

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11035. 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 Blue Mountain Eagle 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 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@wr.state.or.us if I may be of assistance.

Sincerely,

Dorothy Pedersen
Transfer Program Advisor

cc: T-11035
Eric W. Julsrud, District 4 Watermaster eric.w.julsrud@wr.state.or.us
Bob Bagett, CWRE #009, bob@johndaysurveyors.com
Blue Mountain Ditch Company, neilb@ortelco.net

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-11035, Grant County)	PROPOSING APPROVAL OF
)	ADDITIONAL POINTS OF
)	DIVERSION, A CHANGE IN PLACE
)	OF USE AND A PARTIAL
)	CANCELLATION OF A WATER
)	RIGHT

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.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicant
THOMAS DAY
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POMONY, CA 91769

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WILLIS KIMBALL
59670 HIGHWAY 26
JOHN DAY, OR 97845

Findings of Fact

Background

1. On March 18, 2010, Thomas Day, Et Al, filed an application for additional points of diversion and a change in place of use under Certificates 39354, 39355, 38358, 39359, and 86535. The Department assigned the application number T-11035.
2. Notice of the application for transfer was published on March 30, 2010, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On March 13, 2012, the Department contacted the agent explaining the deficiencies found on the application map and identified a water right, Certificate 26016, which was missing from the original application.
4. On April 12, 2013, the agent submitted a modified application map.

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.
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5. On May 7, 2012, the Department contacted the agent identifying deficiencies on the second application map.
6. On November 20, 2012, the agent submitted a corrected application map.
7. On April 3, 2013, the Department sent a copy of the Draft Preliminary Determination proposing to approve Transfer Application T-11035 to the applicant and agent. The Draft Preliminary Determination cover letter set forth a deadline of May 3, 2013, for the applicant to respond. The agent 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.
8. On May 10, 2013, the applicant submitted a revised application to reflect the revisions on the transfer application map and added Certificate 26016 that was missing earlier, resolving the remaining deficiencies that were addressed on March 13, 2012.
9. The first right to be transferred is as follows:

Certificate: 26016 in the name of FRED WOODS (confirmed by John Day River Decree)

Use: IRRIGATION of 9.0 ACRES

Priority Date: 1907

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-FORTIETH of one cubic foot per second, or its equivalent for each acre irrigated to June 1 and ONE-EIGHTIETH of one cubic foot per second per acre thereafter; and shall be further limited to a diversion of not to exceed 1.0 acre-feet per calendar month to June 1 and 4.0 acre feet per acre during season April 1 to Sept. 30 measured at the point of diversion.

Source: SLOUGH, tributary to the JOHN DAY RIVER

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	29 E	WM	21	SW SE	9.0

10. Certificate 26016 does not describe the location of the point of diversion, however information is available from the John Day Adjudication Map which indicates that the point of diversion is located as follows:

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
13 S	29 E	WM	28	NE NE

11. Transfer Application T-11035 proposes an additional point of diversion approximately 2310 feet north and 2300 feet west (downstream) to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	29 E	WM	21	SW SE	ADD'L POD #2: 760 FEET NORTH AND 2160 FEET WEST FROM THE SE CORNER OF SECTION 21

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

Certificate: 39354 in the name of CHARLIE L. PAGE (confirmed by John Day River Decree)

Use: IRRIGATION of 35.0 ACRES

Priority Date: 1885

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-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 ¾ acre foot per acre thereafter; total 5.0 acre feet per acre for season, measured at point of diversion.

Source: JOHN DAY RIVER, tributary to the COLUMBIA RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	POD #	Measured Distances
13 S	29 E	WM	21	SE SE	2	730 FEET NORTH AND 620 FEET WEST FROM THE SE CORNER OF SECTION 21
13 S	29 E	WM	27	NW NE	1	50 FEET SOUTH AND 3380 FEET EAST FROM THE NW CORNER OF SECTION 27

Authorized Place of Use:

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	Tract	POD	Acres
13 S	29 E	WM	21	NE SW	1	2	7.0
13 S	29 E	WM	21	NE SW	2	1	18.0
13 S	29 E	WM	21	SE SW	2	1	3.0
13 S	29 E	WM	21	SE SW	1	2	7.0
Total Acres:							35.0

13. Transfer Application T-11035 proposes an additional point of diversion (Proposed POD #1) which is approximately 6630 feet (downstream) and 880 feet north from Authorized POD #1. Proposed POD #1 is approximately 2790 feet west (downstream) and 830 feet north from the Authorized POD #2. The proposed point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	29 E	WM	21	SE SW	ADD'L POD # 1: 830 FEET NORTH AND 3190 FEET WEST FROM THE SE CORNER OF SECTION 21

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

Certificate: 39355 in the name of CHARLES LOWRY (confirmed by John Day River Decree)

Use: IRRIGATION of 32.9 ACRES

Priority Date: 1885

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-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 $\frac{3}{4}$ acre foot per acre thereafter; total 5.0 acre feet per acre for season, measured at point of diversion.

Source: JOHN DAY RIVER, tributary to the COLUMBIA RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Tract	Measured Distances
13 S	29 E	WM	21	SE SE	1	POD #2: 730 FEET NORTH AND 620 FEET WEST FROM THE SE CORNER OF SECTION 21
13 S	29 E	WM	27	NW NE	2	POD #1: 50 FEET SOUTH AND 3380 FEET EAST FROM THE NW CORNER OF SECTION 27

Authorized Place of Use:

TRACT 1 IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Type of Change	Acres
13 S	29 E	WM	21	NE SW	A_POD	8.5
13 S	29 E	WM	21	NW SW	A_POD	4.7
13 S	29 E	WM	21	NW SW	A_POD/POU	3.8
13 S	29 E	WM	21	SW SW	A_POD/POU	0.2
13 S	29 E	WM	21	SW SW	A_POD	3.8
13 S	29 E	WM	21	SE SW	A_POD	4.0
Total Acres:						25.0

TRACT 2 IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Type of Change	Acres
13 S	29 E	WM	21	NE SW	A_POD	6.5
13 S	29 E	WM	21	NW SW	A_POD	1.4
Total Acres:						7.9

15. Transfer Application T-11035 proposes an additional point of diversion (Proposed POD #1) which is approximately 6630 feet (downstream) and 880 feet north from Authorized POD #1. Proposed POD #1 is approximately 2790 feet west (downstream) and 830 feet north from the Authorized POD #2. The proposed point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	29 E	WM	21	SE SW	ADD'L POD #1: 830 FEET NORTH AND 3190 FEET WEST FROM THE SE CORNER OF SECTION 21

16. Application T-11035 also proposes to change the place of use of the 4.0 acres identified above to:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Acres	
13 S	29 E	WM	21	SW SW	1.0	
13 S	29 E	WM	21	SE SW	3.0	

17. The portion of the fourth right to be transferred is as follows:

Certificate: 39358 in the name of CHARLIE PAGE (confirmed by John Day River (F))

Use: IRRIGATION of 12.0 ACRES

Priority Date: 1885

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-FORTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated from April 1 to September 30; further limited to one acre foot per acre per calendar month to July 1 and $\frac{3}{4}$ acre foot per acre thereafter; and shall be further limited to a diversion of not to exceed 5.0 acre-feet per acre for each acre irrigated during the irrigation season of each year, measured at the point of diversion.

Source: JOHN DAY RIVER, tributary to the COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	29 E	WM	27	NW NE	50 FEET SOUTH AND 3380 FEET EAST FROM THE NW CORNER OF SECTION 27

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	29 E	WM	21	SE SE	12.0

18. Transfer Application T-11035 proposes an additional point of diversion (Proposed POD #1) is approximately 3840 feet west (downstream) and 780 feet north from Authorized POD #1. The proposed point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	29 E	WM	21	SE SW	ADD'L POD #1: 830 FEET NORTH AND 3190 FEET WEST FROM THE SE CORNER OF SECTION 21

19. The fifth right to be transferred is as follows:

Certificate: 39359 in the name of CHARLES PAGE (confirmed by John Day River (F))

Use: IRRIGATION of 82.0 ACRES

Priority Date: 1885

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-FORTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated from April 1 to September 30; further limited to one acre foot per acre per calendar month to July 1 and $\frac{3}{4}$ acre foot per acre thereafter; and shall be further limited to a diversion of not to exceed 5.0 acre-feet per acre for each acre irrigated during the irrigation season of each year, measured at the point of diversion.

Source: JOHN DAY RIVER, tributary to the COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	29 E	WM	27	NW NE	50 FEET SOUTH AND 3380 FEET EAST FROM THE NW CORNER OF SECTION 27

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	29 E	WM	21	NE SE	27.0
13 S	29 E	WM	21	NW SE	40.0
13 S	29 E	WM	21	SW SE	15.0
TOTAL ACRES:					82.0

20. Transfer Application T-11035 proposes an additional point of diversion (Proposed POD #1) is approximately 3840 feet west (downstream) and 780 feet north from Authorized POD #1. The proposed point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	29 E	WM	21	SE SW	ADD'L POD #1: 830 FEET NORTH AND 3190 FEET WEST FROM THE SE CORNER OF SECTION 21

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

Certificate: 86535 in the name of BLUE MOUNTAIN DITCH CO. (perfected under Permit S-3163)

Use: IRRIGATION of 9.0 ACRES

Priority Date: OCTOBER 23, 1916

Rate: 0.112 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-FORTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated from April 1 to September 30; further limited to one acre foot per acre per calendar month to July 1 and $\frac{3}{4}$ acre foot per acre and shall be further limited to a diversion of not to exceed 5.0 acre-feet per acre for each acre irrigated during the irrigation season of each year, measured at the point of diversion.

Source: JOHN DAY RIVER, tributary to the COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	30 E	WM	29	SW NE	BLUE MOUNTAIN DITCH: 565 FEET NORTH AND 2320 FEET WEST FROM THE E $\frac{1}{4}$ CORNER OF SECTION 29

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	29 E	WM	21	SW SE	9.0

22. On May 2, 2013, the applicant requested that the above lands described in Certificate 86535 be diminished to Supplemental Irrigation.
23. On May 17, 2013, the Department notified the Blue Mountain Ditch Company of the change to this water right which was issued in their name.

24. Transfer Application T-11035 proposes an additional point of diversion approximately 4 miles west (downstream) and ½ mile north from the authorized point of diversion. The additional point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	29 E	WM	21	SW SE	A_POD #2: 760 FEET NORTH AND 2160 FEET WEST FROM THE SE CORNER OF SECTION 21

25. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screen is necessary at the new points of diversion to prevent fish from entering the diversions and that the diversions are not currently equipped with an appropriate fish screens. These diversions may be eligible for screening cost-share funds.

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

26. 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.
27. Diversion structures 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-11035.
28. The proposed changes would not result in enlargement of the rights.
29. The proposed changes would not result in injury to other water rights

Partial Cancellation of a Water Right

30. On March 15, 2010, an affidavit certifying that a portion of a water right has been abandoned and requesting cancellation of the right was received from Thomas Day. The portion of the right to be cancelled is as follows:

Certificate: 39355 in the name of CHARLES LOWRY (confirmed by John Day River)
Use: IRRIGATION of 3.1 ACRES
Priority Date: 1885
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-FORTIETH of one cubic foot per second per acre, or its equivalent for each 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 and shall be further limited to a diversion of not to exceed 5.0 acre-feet per acre for each acre irrigated during the irrigation season of each year, measured at the point of diversion.
Source: JOHN DAY RIVER, tributary to the COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	29 E	WM	27	NW NE	50 FEET SOUTH AND 3380 FEET EAST FROM THE NW CORNER OF SECTION 27

Authorized Place of Use to be Cancelled:

Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	29 E	WM	21	NW SW	3.1

Determination and Proposed Action

The additional points of diversion and change in place of use proposed in Transfer Application T-11035 appear to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000, and the abandoned right should be cancelled. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be approved and the abandoned rights will be cancelled.

If Transfer Application T-11035 is approved, the final order will include the following:

1. *The additional points of diversion and change in place of use proposed in application T-11035 are approved. The portion of the right that has been abandoned is cancelled.*
2. *The portion of Certificate 86535 described in Finding of Fact #21 is diminished to supplemental irrigation.*
3. *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 26016, 39354, 39355, 38358, 39359 and 86535 and any related decree.*
4. *Water right certificates 26016, 39354, 39355, 38358, 39359 and 86535 are cancelled. New certificates will be issued describing the portions of Certificates 39354, 39355, 39358 and 86535 not affected by this transfer and cancellation.*
5. *The quantity of water diverted at the additional points of diversion, together with that diverted at the original points of diversion, shall not exceed the quantity of water lawfully available at the original points of diversion.*
6. *Water use measurement conditions:*
 - a. *Before water use may begin under this order, the water user shall install a Weir, Parshall Flume, or, with prior approval of the Director, another suitable measuring device, at each new point of diversion.*
 - b. *The water user shall maintain the measuring devices in good working order.*
 - c. *The water user shall allow the Watermaster access to the measuring devices; provided however, where the measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.*
7. *Prior to diverting water, the water user shall install a headgate to control and regulate the quantity of water diverted. The type and plans of the headgate must be approved by the*

Department prior to beginning construction and shall be installed under the general supervision of the Department. The water user shall maintain the headgate as required by the Department.

8. *Prior to diverting water, the water user shall install an approved fish screen at each 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 screens at the new point of diversion consistent with ODFW's operational and maintenance standards. If ODFW determines a 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.

9. *The former place of use of the transferred 4.0 acre portion of the right evidenced by Certificate 39355 shall no longer receive water under the right.*
10. *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.*
11. *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 July, 2013.


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

This Preliminary Determination was prepared by Carrie Matthews. If you have questions about the information in this document, you may reach me at: 541-523-8224 x 223 or Carrie.R.Matthews@wrđ.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.