



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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August 30, 2013

Applicants

BLUE MOUNTAIN ANGUS, LLC
STEVE & CAROLYN MULLIN
64444 INDIAN CREEK ROAD
PRAIRIE CITY, OR 97869

SUBJECT: Water Right Transfer Application T-10898

Please find enclosed the Preliminary Determination indicating that, based on the information available, and consistent with the draft of the Department intends to **deny** application T-10898. 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, 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) 986-0890 or Dorothy.I.Pedersen@wrd.state.or.us if I may be of assistance.

Sincerely,

Dorothy I. Pedersen
Transfer Program Advisor

cc: T-10898
Eric W. Julsrud, District 4 Watermaster (*via e-mail*)
Robert Bagett, CWRE #009

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

In the Matter of Transfer Application)
T-10898, Grant County)
)
)

PRELIMINARY DETERMINATION
PROPOSING DENIAL OF CHANGES
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.

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Findings of Fact

Background

1. On June 3, 2009, Steve and Carolyn Mullin of Blue Mountain Angus, LLC, filed an application to change the point of diversion and place of use under Certificate 25844. The Department assigned the application number T-10898.
2. Notice of the application for transfer was published on June 30, 2009, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On August 25, 2011, the Department mailed a copy of a draft Preliminary Determination to the applicants, proposing to deny Transfer Application T-10898 due to enlargement and injury concerns. The Preliminary Determination set forth a deadline of September 26, 2011, for the applicants to respond. On September 26, 2011, the Department received a request from the applicants to place the transfer on “administrative” hold for additional time to resolve the concerns over the enlargement and injury issues raised. The applicants requested another “administrative” hold until April 1, 2012 and authorized the Department to acquire information on flows needed to serve the maximum number of cows through the Hillis Ditch in the winter season.

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.

4. The Department offered the applicants several times in writing and through a meeting with the Watermaster alternative means to get water to all their cattle in the winter time at both places, but none were accepted. To date, the applicants have not amended their application, stated alternative measures or supplied additional information to overcome the enlargement issues.

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

Certificate: 25844 in the name of ZOE A. STEPHENSON (confirmed by John Day River (F) decree)

Use: STOCK

Priority Date: 1877

Limit/Duty: outside the irrigation season, the right to use of water for stock purposes as herein confirmed shall entitle the owner thereof to one-tenth (1/10th) of a cubic foot per second (cfs) per each one thousand head of stock measured at the place of use

Source: INDIAN CREEK, tributary to JOHN DAY RIVER

Authorized Place of Use:

IRRIGATION, DOMESTIC AND STOCK					
Twp	Rng	Mer	Sec	Q - Q	Footprint (acres)
13 S	33 E	WM	28	SE NW	16.5

6. Certificate 25844 does not describe the location of the point of diversion, however information is available from the John Day River Decree and associated adjudication map indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q - Q
14 S	33 E	WM	3	NW SW

7. Application T-10898 proposes to change the place of use of a portion of the out of season Stockwater described above to:

STOCK						
Twp	Rng	Mer	Sec	GL	Q - Q	Footprint (acres)
13 S	33 E	WM	28	1	SE NE	15.9
13 S	33 E	WM	28	--	NE SE	0.6

8. Transfer Application T-10898 also proposes to change the point of diversion to facilitate the movement of Stockwater upstream approximately 1/2 mile on Indian Creek to a diversion and ditch located:

Proposed Point of Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
14 S	33 E	WM	10	NE NW	LONG JOHN DITCH - 9450 FEET SOUTH AND 3850 FEET EAST FROM THE NW CORNER OF SECTION 33

9. The Oregon Department of Fish and Wildlife (ODFW) has determined that there is a potential for injury to an instream water right. The ODFW believes that the proposed transfer may injure instream water right Certificate 64193, priority of June 12, 1989 on

Indian Creek, tributary to the John Day River. The Water Resources Department conducted an evaluation to determine whether there are enlargement and injury issues.

10. The Oregon Department of Fish and Wildlife (ODFW) has also 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.
11. The John Day River decree stipulates that “outside the irrigation season, the right to use of water for stock and domestic purposes as herein confirmed shall entitle the owner thereof to one-tenth of a cubic foot per second per each one thousand head of stock measured at the place of use; provided that at no time shall more water be diverted for such purposes than is reasonably necessary for such purposes, and to prevent the ditches and channels use for such purposes from being completely frozen.”
12. During the winter of 2011-2012, the Department authorized the landowner to work with the Watermaster’s office in determining the rate and/or amounts of water necessary to deliver water to the place of use for stock purposes on Hillis Ditch. The amount of “carriage” water needed to get 0.10 cfs two miles to the place of use in the winter was found to require a maximum of 1.5 cfs at times to overcome the freezing conditions that prevailed in March. The Department asserts the same amount of water would be needed, although a shorter distance down the John Long Ditch, in order to provide stockwater in the winter time proposed place of use.
13. The amount of water found to be required to get stockwater down the Hillis Ditch was not an amount sufficient to be split simultaneously to both ditches. The Department cannot condition the transfer to prevent the use of more water than could be beneficially used without waste at the new place of use, without shutting off the original ditch. If the same amount of water will continue to be diverted down the original Hillis Ditch at times, this will constitute enlargement of the right.
14. There exists an instream water right for the reach of the creek 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 during several months of the year.

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

15. Water has been used within the five-year period prior to submittal of the transfer application according to the terms and conditions of the rights. There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
16. 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-10898.

17. The proposed changes would result in enlargement of water right Certificate 25844. The amount of water determined to be beneficially needed for stockwater purposes both at the originating "FROM" lands and proposed "TO" lands would effectively exceed the original amounts allowed in the Hillis Ditch in the winter time. The lands currently irrigated under water right Certificate 25844 would continue to receive water from the same source resulting in enlargement of the right as well.
18. The proposed changes would result in injury to instream water right Certificate 64193, which is for the reach of the creek in which the authorized point of diversion would be moved upstream. The Department's streamflow model indicates that flows in Indian Creek are insufficient to meet the requirements of the instream water right during most of the year, including the months outside the irrigation season. Thus, the instream water right would be injured as a result of the proposed change in point of diversion during the winter season.

Determination and Proposed Action

The request to change the point of diversion and place of use proposed in application T-10898 cannot be made without enlargement to Certificate 25844 and injury to an existing instream water right within the immediate stretch of the creek. Thus, the application appears **NOT** 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 transfer application will be denied.

Dated at Salem, Oregon this 30 day of August, 2013.


Dwight French, Water Right Services Administrator, for
PHILLIP 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@wr.d.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.*