



# Oregon

John A. Kitzhaber, MD, Governor

## Water Resources Department

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May 9, 2014

VIA E-MAIL

JERRY R AND PATRICIA J NANCE  
59678 RHEA CREEK ROAD  
HEPPNER OR 97836

SUBJECT: Water Right Transfer Application T-11623

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11623. 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 Heppner Gazette-Times 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 503-986-0886 or [Patrick.K.Starnes@ wrd.state.or.us](mailto:Patrick.K.Starnes@ wrd.state.or.us) if I may be of assistance.

Sincerely,

Kelly Starnes  
Transfer Analyst

cc: Transfer Application file T-11623  
Ken Thiemann, District 21 Watermaster (*via e-mail*)  
Molly Reid, Agent for the applicant (*via e-mail*)  
Ted Ressler, CWRE #78185 (*via e-mail*)

encs

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

In the Matter of Transfer Application	)	PRELIMINARY DETERMINATION
T-11623, Morrow County	)	PROPOSING APPROVAL OF
	)	CHANGES IN PLACE OF USE AND
	)	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**

JERRY R AND PATRICIA J NANCE  
59678 RHEA CREEK ROAD  
HEPPNER OR 97836

**Findings of Fact**

1. On June 28, 2013, JERRY AND PATRICIA NANCE filed an application for an additional point of diversion under a portion of Certificate 78513. The Department assigned the application number T-11623.
2. Notice of the application for transfer was published on July 2, 2013, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On October 25, 2013, the applicant amended the application requesting to also change the place of use under Certificate 78513 and submitted the appropriate fees.
4. On March 13, 2014, the Department mailed out a draft of the Preliminary Determination proposing to approve Transfer Application T-11623. Comments were received regarding the mapping and lay out of the water rights per priority dates. The Department has consulted with the applicant's agent and reached a consensus and reasonable agreement to amend the application to better describe the place of use consistent with the right of record and associated adjudication map.
5. This previous draft of the Preliminary Determination mailed out did not recognize or include an original diversion structure that supplies the applicant's existing lands on both sides of Rhea Creek. The Department, in its review and subsequent approval of a previous transfer application T-6761 in November of 2001, the Department inadvertently introduced two points of diversion to the water right for these and other lands down the creek that were not

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.

necessarily tied specifically to these 1874 and 1879 lands, but to neighbors' lands. Thus, the Department concludes that this existing, historical diversion structure still in use today and described below in Finding No. 8 should be added to the record.

6. On April 9, 2014, the applicant submitted an amended application and map requesting a change in point of diversion and not an additional point of diversion change under a portion Certificate 78513. The amended application and map also reflects the modifications to the place of use description and makes part of the record this original diversion structure necessary to deliver water to those lands historically delivered on both sides of the creek.
7. On April 18, 2014, the Department sent a copy of the revised draft Preliminary Determination proposing to approve Transfer Application T-11623Error! Reference source not found. to the applicants. The draft Preliminary Determination cover letter set forth a deadline of May 18, 2014, 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.
8. The portion of the right to be transferred is as follows:

**Certificate:** 78513 in the name of D. E. Gilman (confirmed by Decree of the Circuit Court of the State of Oregon for Morrow County)

**Use:** IRRIGATION of 32.8 ACRES

**Priority Date:** 1874 for 17.8 acres and 1879 for 15.0 acres

**Rate:** 0.546 CUBIC FEET PER SECOND (CFS), BEING 0.296 CFS FOR 1874 AND 0.25 CFS FOR 1879

**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 ONE-SIXTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated during the irrigation season of each year

**Source:** RHEA CREEK, a tributary of WILLOW CREEK

**Authorized Points of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
3 S	25 E	WM	21	SW SE	GAY, GILMAN AND BELLENBROCK DITCH - 310 FEET NORTH AND 2220 FEET WEST FROM THE SE CORNER OF SECTION 21
3 S	25 E	WM	28	SW SE	COX AND BELLENBROCK DITCH - 800 FEET NORTH AND 1450 FEET WEST FROM THE SE CORNER OF SECTION 28

**Authorized Place of Use:**

IRRIGATION						
Twp	Rng	Mer	Sec	Q - Q	Priority Date Acres	
					1874	1879
3 S	25 E	WM	16	SE NW	5.3	2.5
3 S	25 E	WM	16	NE SW	11.0	11.0
3 S	25 E	WM	16	SE SW	1.5	1.5
TOTAL					17.8	15.0

9. Certificate 78513 does not describe the point of diversion location that serves these lands on both sides of Rhea Creek. However, the Department's July, 1909 adjudication map and the Department's subsequent 1923 (Perry) map identifies a diversion dam structure and ditch within the SE¼ of the SW¼ of Section 16, T 3 S, R 25 E, W.M.. In addition, information is available from the current Certified Water Rights Examiner's map and Watermaster's basin regulation map indicating that the original point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q - Q	Measured Distance
3 S	25 E	WM	16	SE SW	Lat: 45° 18' 02.1" N Long: -119° 42' 40.82" W

10. Transfer Application T-11623 proposes to change the place of use of the above described lands to:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Priority Date Acres	
					1874	1879
3 S	25 E	WM	16	SW NW	--	0.8
3 S	25 E	WM	16	SE NW	5.3	4.1
3 S	25 E	WM	16	NE SW	11.0	10.1
3 S	25 E	WM	16	SE SW	1.5	--
TOTAL					17.8	15.0

11. Transfer Application T-11623 also proposes to change the two upstream points of diversion to all lands described in Finding No. 7, downstream approximately 8,300 feet to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
3 S	25 E	WM	16	SE NW	2900 FEET NORTH AND 1890 FEET EAST FROM THE SW CORNER OF SECTION 16

12. 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. Listed fish species are not present at the point of diversion, the originating water right diversion is not screened, cost-share funds are not currently available, and the proposed diversion may be eligible for ODFW's cost-share program. A grace period of two years is appropriate until such time as cost-share funds become available to assist in the construction of a fish screen. If cost-share funds do not become available, the water user must screen within the indicated time period regardless of the availability of cost-share funding.

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

13. Water has been used within the five-year period prior to submittal of the transfer application 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.
14. Diversion structures and ditches 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-11623.

15. The proposed changes would not result in enlargement of the right.
16. The proposed changes would not result in injury to other water rights.

### **Determination and Proposed Action**

The changes in place of use and point of diversion proposed in Transfer Application T-11623 appear 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.

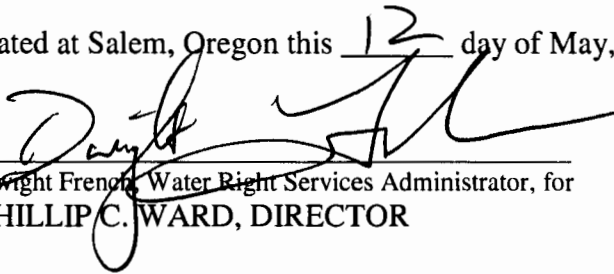
*If Transfer Application T-11623 is approved, the final order will include the following:*

1. *The changes in place of use and point of diversion proposed in Transfer Application T-11623 are 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 78513 and any related decree.*
3. *Water right certificate 78513 is cancelled. A new certificate will be issued describing that portion of the right 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. *By October 1, 2016 [Within two years after the date of this order] the water user shall install an approved fish screen at the new point of diversion. The water user may withdraw water at the new point of diversion without a screen until October 1, 2016. The water user shall provide to 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 maintain and operate 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. *The former place of use of the transferred right shall no longer receive water under the right.*
7. *Water use measurement conditions:*
  - a. *Before water use may begin under this order, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at the new point of diversion.*
  - b. *The water user shall maintain the meter or measuring device in good working order.*

*c. The water user shall allow the Watermaster access to the meter or measuring device; provided however, where the meter or measuring device is located within a private structure, the Watermaster shall request access upon reasonable notice.*

8. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2015**. 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, a new certificate confirming the right transferred will be issued.*

Dated at Salem, Oregon this 12 day of May, 2014.

  
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.Dowden@ wrd.state.or.us