



Oregon

Kate Brown, Governor

Water Resources Department

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March 11, 2016

Applicants

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Agent

Monument Soil & Water Conservation District
Bryan Vogt
PO Box 95
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SUBJECT: Water Right Transfer Application T-11973

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department has concluded that approval of the change in points of diversion proposed in T-11973 would result in injury to instream water right Certificate 63251. Consistent with your request that we seek a recommendation from Oregon Department of Fish and Wildlife and Oregon Parks and Recreation Department on whether we should consent to the injury to the instream water right, we are proceeding with that process concurrently with issuance of the preliminary determination.

The Water Resources Department holds instream water rights in trust for the benefit of the people of Oregon. Under ORS 540.530(c), we may approve the transfer only if the agency(s) that requested the instream water right concludes that the changes proposed will result in net benefits to the resources protected by the instream water right, and recommends that we consent to the injury of the right. Please contact the agency staff person to whom the agency review letter has been sent, to discuss whether you may be able to assist in providing information needed for the analysis.

After we have received a recommendation both the Oregon Department of Fish and Wildlife (ODFW) and Oregon Parks and Recreation Department (OPRD) on whether to consent to the injury, provided no protests have been filed, we will issue an order either:

- Approving the transfer with conditions, if any, identified in the agency recommendations as necessary to ensure that the change will result in net benefits, or
- Reaffirming our decision that the instream water right would be injured and denying the transfer.

The timing for issuance of the order will depend on the availability of information needed by ODFW and OPRD to perform the net benefits analysis upon which their recommendations must be based, and the time necessary to allow public review and comment on the recommendations. You are not authorized to use water from the proposed points of diversion pending a final decision by the Department on your transfer application.

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 503-986-0886 or Patrick.K.Starnes@wrд.state.or.us if I may be of assistance.

Sincerely,



Kelly Starnes
Transfer Program Analyst
Transfer and Conservation Section

cc: Transfer Application file T-11972
Eric Julsrud, Watermaster District 4

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

In the Matter of Transfer Application)
T-11973, Grant County)
)
)
)
)

**PRELIMINARY DETERMINATION
PROPOSING DENIAL OF CHANGES IN
POINTS OF DIVERSION, PLACE OF
USE AND PARTIAL CANCELLATION
OF A WATER RIGHT**

Authority

Oregon Revised Statutes (ORS) 540.505 to 540.580 establish 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. Oregon Administrative Rule (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.

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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.

Findings of Fact

1. On January 23, 2015, JOHN AND DEBORAH COLE, LEONARD P. OSBURN, ADA McMILLAN, MICHELE ENGLE AND DARYL ANDERSON filed an application to change the points of diversion and place of use under Certificates 24889, 24910 and 8419. The Department assigned the application number T-11973.
2. On September 25, 2015, the applicant amended the application with an updated the Land Use forms.
3. Notice of the application for transfer was published on February 3, 2015, pursuant to OAR 690-380-4000. The Oregon Department of Fish and Wildlife filed a response to the notice, stating that moving a proposed point of diversion upstream on Cottonwood Creek would injure instream water right Certificate 63251. The Oregon Department of Fish and Wildlife also determined that a fish screen is necessary at the new points of diversion to prevent fish from entering the diversion and that the diversion is currently equipped with an appropriate fish screen.
4. On January 27, 2016, the Department sent copies of the draft Preliminary Determination proposing to deny Transfer Application T-11973 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of February 25, 2016, for the applicants to respond. The agent for 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.
5. On February 23, 2016, the agent for the applicants requested that the Department seek a recommendation from the Oregon Department of Fish and Wildlife and Oregon Parks and Recreation Department as to whether the Department should consent to injury of the instream water right pursuant to OAR 690-380-5050.
6. The first portion of the first right to be transferred is as follows:
 - Certificate:** 24889 (as modified by Sp. Ord. Vol. 4, Pg 391) in the name of J. W. BEYMER (confirmed by John Day River Decree, Volume 15, Page 461)
 - Use:** IRRIGATION OF 8.0 ACRES, DOMESTIC AND STOCK
 - Priority Date:** 1879
 - Limit/Duty:** The amount of water to which such right is entitled, is limited to a diversion of ONE-FORTIETH of one cubic foot per second per acre irrigated to June 1 and ONE-EIGHTIETH of one cfs per acre thereafter; further limited to 1.0 acre-foot per calendar month to June 1 and 4.0 acre-feet per acre during the irrigation season from April 1st to September 30th of each year, measured at the point of diversion.
 - Source:** SPRING AND COTTONWOOD CREEK, tributary to NORTH FORK JOHN DAY RIVER

Authorized Place of Use: (Cole /TL 2100)

IRRIGATION, STOCK AND DOMESTIC					
Twp	Rng	Mer	Sec	Q-Q	Acres
9 S	27 E	WM	1	NW SE	0.5
9 S	27 E	WM	1	SW SE	5.3
9 S	27 E	WM	1	SE SE	2.2
Total					8.0

7. Certificate 24889 does not describe the point of diversion location that serves the lands described above in Finding of Fact #6. However, the Department's July 1926 adjudication map identifies a diversion dam structure and ditch within the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 18, within T9S, R28E, WM. In addition, information is available from the current Certified Water Rights Examiner's map based on a recent field visit and subsequent survey indicating that the original point of diversion (POD#5 on map) is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
9 S	28 E	WM	18	NE SW	POD #5 - 3470 FEET SOUTH AND 1420 FEET EAST FROM THE NW CORNER OF SECTION 18

8. Transfer application T-11973 proposes to change the point of diversion for the above described 8.0 acres upstream approximately 700 feet to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances (<i>Relocated Carris Ditch</i>)
9 S	28 E	WM	18	NE SW	POD #3 - 3830 FEET SOUTH AND 1250 FEET WEST FROM THE N $\frac{1}{4}$ CORNER OF SECTION 18

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

Certificate: 24889 (as modified by Sp. Ord. Vol. 4, Pg 391) in the name of J. W. BEYMER (confirmed by John Day River Decree, Volume 15, Page 461)

Use: IRRIGATION OF 125.9 ACRES, DOMESTIC AND STOCK

Priority Date: 1879

Limit/Duty: The amount of water to which such right is entitled, is limited to a diversion of ONE-FORTIETH of one cubic foot per second per acre irrigated to June 1 and ONE-EIGHTIETH of one cfs per acre thereafter; further limited to 1.0 acre-foot per calendar month to June 1 and 4.0 acre-feet per acre during the irrigation season from April 1st to September 30th of each year, measured at the point of diversion.

Source: SPRING AND COTTONWOOD CREEK, tributary to NORTH FORK JOHN DAY RIVER

Authorized Place of Use: (Osburn /TL 100)

IRRIGATION, STOCK AND DOMESTIC						
Twp	Rng	Mer	Sec	Q-Q	Change Requested	Acres
9 S	27 E	WM	1	SE NE	POD only	36.4
9 S	27 E	WM	1	NE SE	POD only	38.6
9 S	27 E	WM	1	NW SE	POD only	13.6
9 S	27 E	WM	1	SW SE	POU and POD	0.4
9 S	27 E	WM	1	SW SE	POD only	1.0
9 S	27 E	WM	1	SE SE	POD only	29.0
9 S	27 E	WM	12	NE NE	POD only	6.9
Total						125.9

10. Certificate 24889 does not describe the point of diversion location that serves the lands described above in Finding #9. However, the Department's July 1926 adjudication map identifies a diversion dam structure and ditch within the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 18, within T9S, R28E, WM. In addition, information is available from the current Certified Water Rights Examiner's map based on a recent field visit and subsequent survey indicating that the original point of diversion (POD#5 on map) is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
9 S	28 E	WM	18	NE SW	POD #5 - 3470 FEET SOUTH AND 1420 FEET EAST FROM THE NW CORNER OF SECTION 18

11. Transfer application T-11973 proposes to change the point of diversion for the above described 125.9 acres upstream approximately 700 feet to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances (<i>Relocated Carris Ditch</i>)
9 S	28 E	WM	18	NE SW	POD #3 - 3830 FEET SOUTH AND 1250 FEET WEST FROM THE N $\frac{1}{4}$ CORNER OF SECTION 18

12. Transfer application T-11973 also proposes to change the place of use of the above described 0.4 acres to:

Twp	Rng	Mer	Sec	Q-Q	Gov't Lot	Acres
9 S	28 E	WM	6	SW SW	11	0.2
9 S	28 E	WM	7	NW NW	1	0.2

13. The third right to be transferred is as follows:

Certificate: 24910 in the name of ROY C. BOGGS (confirmed by John Day River Decree, Volume 15, Page 461)

Use: IRRIGATION OF 14.0 ACRES

Priority Date: 1895

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 irrigated to June 1 and ONE-EIGHTIETH of one cfs per acre thereafter; further limited to 1.0 acre-foot per calendar month to June 1 and 4.0 acre-feet per acre during the irrigation season from April 1st to September 30th of each year, measured at the point of diversion.

Source: COTTONWOOD CREEK, tributary to the NORTH FORK JOHN DAY RIVER

Authorized Place of Use:

IRRIGATION (<i>Osburn / TL 100</i>)					
Twp	Rng	Mer	Sec	Q-Q	Acres
9 S	27 E	WM	12	NE NE	14.0

14. Certificate 24910 does not describe the point of diversion location that serves the lands described above in Finding #13. However, the Department's July 1926 adjudication map identifies a diversion dam structure and ditch within the NW¹/₄ NW¹/₄, Section 30, within T9S, R28E, WM. In addition, information is available from the current Certified Water Rights Examiner's map based on a recent field visit and subsequent survey indicating that the original point of diversion (POD#4 on map) is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Gov't Lot	Ditch
9 S	28 E	WM	30	NW NW	1	Beymer Ditch

15. Transfer application T-11973 proposes to change the point of diversion for the above described 14.0 acres downstream approximately 8000 feet to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances (<i>Relocated Carris Ditch</i>)
9 S	28 E	WM	18	NE SW	POD #3 - 3830 FEET SOUTH AND 1250 FEET WEST FROM THE N ¹ / ₄ CORNER OF SECTION 18

16. Certificates 24889 and 24910 were both issued for primary irrigation and a portion of Certificate 24910 is layered upon Certificate 24889. Pursuant to OAR 690-380-5120, the agent stated the landowner requests to diminish a portion of Certificate 24910 (priority date of 1895) to supplemental irrigation for 6.9 acres, (footprint of Certificate #24889). The remaining 7.1 acres will continue to be irrigated from Cottonwood Creek under a priority date of 1895. On January 26, 2016, the agent for the applicants submitted a notarized affidavit for the diminution of Certificate 24910 from primary irrigation to supplemental irrigation and is further described below in Findings of Fact #28.

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

Certificate: 8419 (as modified by Sp.Ord. Vol. 9, Pg 191) in the name of M.C. MERILL (perfected under Permit S-6686)
Use: IRRIGATION OF 14.0 ACRES
Priority Date: MARCH 12, 1925
Rate: 0.21 CUBIC FOOT PER SECOND (CFS)
Limit/Duty: 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-EIGHTIETH of one cfs per acre, or its equivalent in case of rotation.
Source: COTTONWOOD CREEK, tributary to NORTH FORK JOHN DAY RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances / Ditch
9 S	28 E	WM	18	NE SW	CARRIS DITCH
9 S	28 E	WM	18	SE NW	ROBERTSON DITCH - 1450 FEET SOUTH AND 1450 FEET EAST FROM THE NW CORNER OF SECTION 18

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Tax Lot/User	Acres
9 S	27 E	WM	12	SE NE	300 (McMillan)	0.7
9 S	27 E	WM	12	SE NE	400 (Andersen)	2.3
9 S	28 E	WM	7	NW SW	1201 (Engle)	11.0

18. Transfer application T-11973 proposes to change the point of diversion for the above described 3.0 acres (TL 300 & 400) upstream approximately 2560 feet to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances (Relocated Carris Ditch)
9 S	28 E	WM	18	NE SW	POD #3 - 3830 FEET SOUTH AND 1250 FEET WEST FROM THE N¼ CORNER OF SECTION 18

19. Transfer application T-11973 also proposes to change the point of diversion for the above described 11.0 acres (TL 1201) upstream approximately 765 feet to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances (Relocated Robertson Ditch #2)
9 S	28 E	WM	18	SE NW	POD #2 - 2090 FEET SOUTH AND 1160 FEET WEST FROM THE N¼ CORNER OF SECTION 18

20. Numerous letters of support from Oregon Department of Fish and Wildlife (ODFW) staff accompanied this transfer application (Jeff Neal, Fish Biologist, and Kelly Stokes, Program Manager, both of John Day; and Adrienne Averett, Eastside Implementation Coordinator, La Grande). Their letters state that this project has been a priority of ODFW's for decades because it will expand salmonid rearing habitat, screen irrigation diversions and provide for fish passage in the John Day River system. A letter of support was also received from Theresa DeBardelaben, Regional Water Quality Specialist with the Oregon Department of Agriculture, stating that the transfer would both improve and protect water quality. Dirk Renner, Project Biologist for US Fish & Wildlife, also submitted a letter in support of this Cottonwood Creek transfer for providing improved fish passage. Allen Gillette, Fish Biologist for the Confederated Tribes of the Warm Springs Reservation, supports the project because of the aquatic restoration and fish passage benefits which are high priorities in the Tribes' restoration goals. A letter was received from John Dvorsky with Waterways Consulting, Inc. stating that his company assisted the Monument Soil & Water Conversation District with a cost effective engineering design of the fish passage components of the project which would aid in accomplishing project goals. Lastly, Tony Malmberg, Flow Restoration Program Manager of The Freshwater Trust, expressed support for the project and the landowners' considerations of alternative management of the water while providing multiple benefits to the fishery. In conclusion, it is obvious the proposed project has much support and is focused on restoration efforts in improving fish passage and riparian function at existing irrigation diversion sites.

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

21. Water has been used within the last five years prior to submittal of the transfer application according to the terms and conditions of the rights. There is no information in the records that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
22. 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-11973.
23. The Watermaster has made a statement that there has not been regulation on Cottonwood Creek due to shortage since the year 2000.
24. The proposed changes would result in injury to an instream water right which exists for the reach of the river in which the authorized points of diversion would be moved upstream, and stream flows within the reach are frequently below the levels allocated under the instream water right. Certificate 63251, the instream water right applied for by the Oregon Department of Fish and Wildlife and the Oregon Parks and Recreation Department, exists to maintain instream flows for the purpose of anadromous and resident fish habitat and recreational fishing. The following table provides a comparison of monthly streamflows on Cottonwood Creek and the instream water right:

Month	Natural Stream Flow @ 80% Exceedance (cfs)	Instream Water Right Certificate 63251 (cfs) (Monthly period)		80% Flows minus any out-of-stream consumptive uses, reserved and instream requirements (net water available)
		1 st Half	2 nd Half	
January	9.31	25	25	-15.90
February	26.90	25	33	-6.35
March	51.20	33	33	17.90
April	100.00	33	33	62.30
May	74.20	33	33	31.10
June	29.70	25	25	-8.69
July	8.53	10	10	-21.20
August	3.75	6	6	-17.50
September	2.60	6	6	-13.40
October	2.14	6	6	-7.74
November	3.89	10	10	-6.24
December	6.37	25	25	-18.80

25. The proposed changes would not result in enlargement of the rights.
26. Notwithstanding injury to instream water right, the Oregon Department of Fish and Wildlife has stated that this project may create a net benefit to fish in Cottonwood Creek but reserves its final determination until a more thorough review of the transfer application can be conducted.

Partial Cancellation of a Water Right

27. On January 23, 2015, Michele Engle submitted an affidavit meeting the requirements of ORS 540.621 for partial cancellation of a water right. The partial cancellation is for the use of 0.0875 cfs from Cottonwood Creek for irrigation of 7.0 acres under a portion of Certificate 8419. The irrigated portion is located as follows:

Certificate: 8419 in the name of M.C. MERRILL (perfected under Permit S-6686)
Use: IRRIGATION OF 7.0 ACRES
Priority Date: March 12, 1925
Source: COTTONWOOD CREEK, tributary to NORTH FORK JOHN DAY RIVER

Authorized Place of Use to be Cancelled:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
9 S	28 E	WM	7	NW SW	7.0

Diminution of a Certain Water Right

28. As described above in Finding of Fact #16, pursuant to OAR 690-380-5120, it was determined that there were two stacked, layered primary water rights on the same lands. The landowner has stated he wants to keep water right Certificate 24889, having a more senior priority date as their primary water right. On January 26, 2016, Leonard Osburn submitted an affidavit for the Diminution of a portion of Certificate 24910, requesting to diminish the 6.9 acres of primary irrigation to supplemental irrigation. The portion of the right proposed to be diminished from primary irrigation to supplemental irrigation is described as follows:

Certificate: 24910 in the name of ROY C. BOGGS (John Day Decree, Vol 15, Pg 461)
Use: IRRIGATION OF 6.9 ACRES
Priority Date: 1895
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 irrigated to June 1 and ONE-EIGHTIETH of one cfs per acre thereafter; further limited to 1.0 acre-foot per calendar month to June 1 and 4.0 acre-feet per acre during the irrigation season from April 1st to September 30th of each year, measured at the point of diversion.
Source: COTTONWOOD CREEK, tributary to NORTH FORK JOHN DAY RIVER

Place of Use to be Diminished to Supplemental Irrigation:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
9 S	27 E	WM	12	NE NE	6.9

Determination and Proposed Action

The change in points of diversion and change in place of use of water as proposed in Transfer Application T-11973 cannot be effected without injury to an existing instream water right. Thus, Transfer Application T-11973 does **NOT** appear to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000. The transfer application will be denied unless the Oregon Department of Fish and Wildlife and Oregon State Parks and Recreation Department recommend that the Department consent to injury of the instream water right, pursuant to OAR 690-380-5050, or Protests are filed pursuant to OAR 690-380-4030.

If the transfer is approved notwithstanding the Department's preliminary determination that the transfer will result in injury, the change and subsequent use of water shall be subject to the following conditions:

- 1. The change in points of diversion and change in place of use proposed in Transfer Application T-11973 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 Certificates 24889, 24910, and 8419, and any related decree.*
- 3. The quantity of water diverted at the new points of diversion shall not exceed the quantity of water lawfully available at the original points of diversion.*
- 4. Water Right Certificates 24889, 24910, and 8419 are cancelled. New certificates will be issued describing those portions of Certificates 24889 and 8419, not affected by this transfer.*
- 5. 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 additional point of diversion. The water user shall maintain the meter or measuring devices in good working order. The water user shall allow the Watermaster access to the meter or measuring devices; provided however, where the meter or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.*
- 6. Prior to diverting water, the water user shall install a fish screening and/or fish by-pass device, as appropriate, at the new point of diversion consistent with the Oregon Department of Fish and Wildlife's (ODFW) design and construction standards. Prior to installation, the water user shall obtain written approval from ODFW that the required screen and/or by-pass device meets ODFW's criteria. Prior to submitting a Claim of Beneficial Use, the water user must obtain written approval from ODFW that the required screening and/or by-pass device was installed to the state's criteria. The water user shall maintain and operate the fish screen and/or by-pass device, as appropriate, at the point of diversion consistent with ODFW's operational and maintenance standards.*

7. *The water user shall install and maintain a headgate, an in-line flow meter, weir, or other suitable device for measuring and recording the quantity of water diverted. The type and plans of the headgate and measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.*
8. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2017**. 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. *When satisfactory proof of the completed changes is received, new certificates confirming the rights transferred will be issued.*

Dated at Salem, Oregon this 17 day of March 2016.



Dwight French, Water Right Services Administrator, for
Thomas M. Byler, Director
Oregon Water Resources Department

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.

NOTICE TO ACTIVE DUTY SERVICE MEMBERS: Active duty service members have a right to stay these proceedings under the federal Service members Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

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.