



Oregon

Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

March 10, 2016

Applicants

Roy Milton
PO Box 104
Monument, OR 97864

Dannie and Wanda Derowitsch
50300 Hwy 402
Monument, OR 97864

Agent

Monument Soil & Water Conservation
District
Bryan Vogt
PO Box 95
Monument, OR 97864

SUBJECT: Water Right Transfer Application T-11971

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department has concluded that approval of the changes in points of diversion proposed in T-11971 would result in injury to instream water right Certificate 63251. Consistent with your request that we seek recommendations 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 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 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 if I may be of assistance.

Sincerely,



Kelly Starnes
Transfer Program Analyst
Transfer and Conservation Section

cc: Transfer Application file T-11971
Eric Julsrud, Watermaster District 4
encs

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-11971, Grant County)	PROPOSING DENIAL OF CHANGES
)	IN POINTS OF DIVERSION, PLACE
)	OF USE, PARTIAL CANCELLATION
)	OF A WATER RIGHT AND PARTIAL
)	DIMINUTION 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 Rules (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.

Applicants

Roy Milton
PO Box 104
Monument, OR 97864

Dannie and Wanda Derowitsch
50300 Hwy 402
Monument, OR 97864

Agent

Monument Soil & Water Conservation District
Bryan Vogt
PO Box 95
Monument, OR 97864

Findings of Fact

1. On January 23, 2015, Dannie and Wanda Derowitsch, and Roy Milton filed an application to change the points of diversion and place of use under Certificates 80230, 36481 and 17283. The Department assigned the application number T-11971.
2. 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 point of diversion to prevent fish from entering the diversion and that the diversion is currently equipped with an appropriate fish screen.

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.
--

3. On November 30, 2015, the Department sent a copy of the draft Preliminary Determination proposing to deny Transfer Application T-11971 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of December 30, 2015, 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.
4. On December 23, 2015, 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.

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

Certificate: 80230 in the name of RODNEY POTTER, EARL SWEEK AND JACQUELINE OAKLEY, TERRANCE AND DEBORAH KILBY (perfected under Permit S-44380)
Use: IRRIGATION OF 2.8 ACRES
Priority Date: JULY 5, 1979
Rate: 0.07 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 ONE-FORTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated 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.
Source: COTTONWOOD CREEK, tributary to the NORTH FORK JOHN DAY RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
9 S	28 E	WM	18	SE NW	POD 4 - 1450 FEET SOUTH AND 1500 FEET EAST FROM THE NW CORNER OF SECTION 18

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
9 S	27 E	WM	12	NE SE	2.8

6. Transfer Application T-11971 proposes to change the point of diversion for the above described right upstream approximately 700 feet to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
9 S	28 E	WM	18	SE NW	2090 FEET SOUTH AND 1160 FEET WEST FROM THE N¼ CORNER OF SECTION 18

7. The second right to be transferred is as follows:

Certificate: 36481 in the name of NEWTON ROBERTSON (perfected under Permit S-3638)
Use: PRIMARY IRRIGATION OF 22.0 ACRES
Priority Date: DECEMBER 9, 1917
Rate: 0.28 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, shall be limited to ONE-EIGHTIETH of one cfs per acre per acre
Source: COTTONWOOD CREEK, tributary to the (NORTH FORK) JOHN DAY RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
9 S	28 E	WM	18	SW NW

Authorized Place of use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Change Requested	Acres
9 S	27 E	WM	12	SE NE	POD	22.0
9 S	27 E	WM	12	SE NE	POU	5.5

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

Certificate: 17283 in the name of EARNEST W. JOHNSON AND ELIZABETH S. JOHNSON (perfected under Permit S-15762)
Use: IRRIGATION OF 20.0 ACRES AND DOMESTIC
Priority Date: APRIL 20, 1944
Rate: 0.51 CUBIC FOOT PER SECOND (CFS), BEING 0.50 CFS FOR IRRIGATION AND 0.01 CFS FOR DOMESTIC
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-FORTIETH of one cfs for each acre irrigated prior to June 1 and thereafter 1/80 of one cfs or its equivalent for each acre irrigated and shall be limited to a diversion of not to exceed 1.0 acre-foot per acre for each acre irrigated during any month prior to June 1st and shall be further limited to a total diversion of not to exceed 4.0 acre-feet per acre for each acre irrigated during the irrigation season from April 1st to September 30th of each year.
Source: COTTONWOOD CREEK, tributary to the (NORTH FORK) JOHN DAY RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
9 S	28 E	WM	18	SE NW

Authorized Place of Use:

IRRIGATION AND DOMESTIC						
Twp	Rng	Mer	Sec	Q-Q	Change Requested	Acres
9 S	27 E	WM	12	SE NE	POD	14.5
9 S	27 E	WM	12	SE NE	POD and POU	5.5

9. Certificates 36481 and 17283 described above were both issued for primary irrigation. Pursuant to OAR 690-380-5120, the agent stated on November 4, 2015, that they request to diminish all of Certificate 17283 to supplemental irrigation. On November 25, 2015, the agent for the applicants submitted a notarized affidavit for the diminution of Certificate 17283 from primary irrigation to supplemental irrigation and is further described below in Finding of Fact No. 22.

10. Certificates 36481 and 17283 both describe Cottonwood Creek as the source of water for the rights. However, both certificates describe Cottonwood Creek as being tributary to the John Day River (mainstem). The location of Cottonwood Creek meets up with the North Fork of the John Day River, not the mainstem John Day River, at the town of Monument, Oregon. It is in fact the North Fork of the John Day River that parallels the town on Monument on the east side. The confluence of the North Fork of the John Day River with the mainstem John Day River is located approximately 15½ miles downstream from Cottonwood Creek’s confluence with the North Fork of the John Day River. Thus, the Department is led to correct the stream name described in Certificates 36481 and 17283 to “Cottonwood Creek, tributary to the **North Fork** John Day River.”

11. Certificate 36481 describes the location of the point of diversion for the water use within the SW¼ NW¼ of Section 18, in T9S, R28E, W.M. Certificate 17283 describes the same point of diversion location within the SE¼ NW¼ of Section 18, T9S, R28E, W.M. However, information is available from the applicant’s Certified Water Rights Examiner (Bagett/2014) current map based on a recent field visit and subsequent survey more precisely indicating that the old Robertson Ditch point of diversion on Cottonwood Creek, common to both these rights is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
9 S	28 E	WM	18	SE NW	1450 FEET SOUTH AND 1450 FEET EAST FROM THE NW CORNER OF SECTION 18

12. Transfer application T-11971 proposes to change the point of diversion for Certificates 36481 and 17283, described in Finding of Fact No. 11 above, upstream approximately 700 feet to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
9 S	28 E	WM	18	SE NW	2090 FEET SOUTH AND 1160 FEET WEST FROM THE N¼ CORNER OF SECTION 18

13. Transfer application T-11971 also proposes to change the place of use of 5.5 acres described above in Findings of Fact Nos. 7 and 8 within the same quarter quarter of the original authorized place of use:

IRRIGATION(IR), SUPPLEMENTAL IRRIGATION(IS) and DOMESTIC(DOM)						
Twp	Rng	Mer	Sec	Q-Q	Acres (Certificate)	
					C#36481 (IR)	C#17283 (IS) (DOM)
9 S	27 E	WM	12	SE NE	5.5	5.5

14. 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 for the expansion of salmonid rearing habitat, screening irrigation diversions and providing for fish passage in the John Day River system has been a priority of ODFW's for decades. Letters of support were 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 these four Cottonwood Creek permanent transfers (T-11971, T-11972, T-11973 and T-12148) 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 their 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 these fish passage improvements. 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)]

15. 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 record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
16. 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-11971.
17. The Watermaster has made a statement that there is typically ample flow in the Cottonwood Creek where there are not shortages for senior appropriator's rights and has not received calls for regulation from the water users. The Watermaster also stated he has not witnessed a summer where regulation on the Cottonwood Creek was required since the year 2000.

18. 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

19. The proposed changes would not result in enlargement of the rights.
20. 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

21. On January 23, 2015, land owners (applicants) Melvin Joe and Alice Duncan and Roy Milton submitted two affidavits meeting the requirements of ORS 540.621 for partial cancellation of an existing water right. The partial cancellation is a portion of Certificate 80230. The irrigation portion that has been abandoned is described as follows:

Certificate: 80230 in the name of RODNEY POTTER, EARL SWECK AND JACQUELINE OAKLEY, TERRANCE AND DEBORAH KILBY (perfected under Permit S-44380)

Use: IRRIGATION OF 0.6 ACRES

Priority Date: JULY 5, 1979

Rate: 0.015 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 ONE-FORTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated 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.

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

Authorized Place of Use to be Cancelled:

IRRIGATION					
Twp	Rng	Mer	Sec	Q - Q	Acres
9 S	27 E	WM	12	NE SE	0.6

Diminution of a Certain Water Right

22. As described above in Findings of Fact Nos. 5, 7, and 8, pursuant to OAR 690-380-5120, it was determined that there were two stacked primary water rights on the same lands, and the landowners have stated they want to keep water right Certificate 36841, having a more senior priority date as their primary water right. On November 25, 2015, land owners Dannie and Wanda Derowitsch submitted an affidavit for the Diminution of Certificate 17283, requesting to diminish the 20.0 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: 17283 in the name of EARNEST W. JOHNSON AND ELIZABETH S. JOHNSON (perfected under Permit S-15762)

Use: IRRIGATION OF 20.0 ACRES

Priority Date: APRIL 20, 1944

Rate: 0.5 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, shall be limited to ONE-FORTIETH of one cubic foot per second per acre, for each acre irrigated prior to June 1st and thereafter 1/80 of one cubic foot per second or its equivalent for each acre irrigated and shall be limited to a total diversion of not to exceed 1.0 acre-foot per acre for each acre irrigated during any month prior to June 1st and shall be further limited to a total diversion of not to exceed 4.0 acre-feet per acre irrigated during the irrigation season from April 1st to September 30th of each year

Source: COTTONWOOD CREEK, tributary to (North Fork) JOHN DAY RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
9 S	28 E	WM	18	SE NW

Place of Use to be Diminished:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
9 S	27 E	WM	12	SE NE	20.0

Determination and Proposed Action


The change in points of diversion and change in place of use proposed in Transfer Application T-11971 cannot be effected without injury to an existing instream water right. Thus, Transfer Application T-11971 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-11971 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 80230, 36481 and 17283 and any related decree.*
- 3. 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.*
- 4. Water Right Certificates 80230, 36481, and 17283 are cancelled. A new certificate will be issued describing that portion of Certificate 80230 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. *The former place of use of the transferred rights shall no longer receive water under the rights.*
9. *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.*
10. *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@ wrd.state.or.us.

Notice Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <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.