



# Oregon

Kate Brown, Governor

**Water Resources Department**

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

May 4, 2016

*VIA EMAIL*

DON RATHBURN  
PO BOX 846  
BATTLE MOUNTAIN, NV 89820  
drathburn@undergroundmining.com

**SUBJECT:** Transfer Application T-12166

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department has concluded that approval of the change in point of diversion proposed in T-12166 would result in injury to instream water right Certificate 73068. Consistent with your request that we seek a recommendation from the Oregon Department of Fish and Wildlife (ODFW) that we seek 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 that requested the instream water right concludes that the change 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 from the ODFW 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 recommendation 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 to perform the net benefits analysis upon which their recommendation must be based, and the time necessary to allow public review and comment on the recommendation. You are not authorized to use water from the proposed point of diversion pending a final decision by the Department on your transfer application.

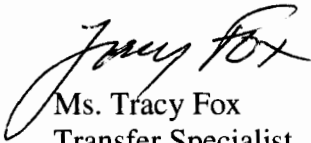
A public notice is being published in the Department's weekly publication simultaneously with issuance of the Preliminary Determination. The notice initiates a 30-day period in which any person may file either a protest opposing the decision proposed by the Department in the Preliminary Determination or a standing statement supporting the Department's decision.

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 will 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 Tracy.L.Fox@wrд.state.or.us or 503-986-0827 if I may be of assistance.

Sincerely,



Ms. Tracy Fox  
Transfer Specialist  
Transfer and Conservation Section

cc: Transfer Application T-12166  
David Williams, District 15 Watermaster (*via email*)  
Larry Menteer, Southwest Region Manager (*via email*)  
Nathan Reed, Agent for the applicants and CWRE (*via email*)  
Ed Bowles, ODFW (*via email*)  
Rich Kilbane, ODFW (*via email*)  
Jason Brandt, ODFW, Assistant District Fish Biologist (*via email*)  
Greg Huchko, ODFW, Fish Biologist (*via e-mail*)

Enclosure



# Oregon

Kate Brown, Governor

## Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

May 4, 2016

Ed Bowles, Administrator  
Fish Division  
Oregon Department of Fish and Wildlife  
4034 Fairview Industrial Dr SE  
Salem, Oregon 97302

REFERENCE: Transfer T-12166

Dear Mr. Bowles:

The Water Resources Department has determined that approval of Water Right Transfer T-12166 would result in injury to instream water right Certificate 73068 on the North Fork Myrtle Creek, due to reduction of flow within the reach between the authorized point of diversion (POD) and the proposed upstream POD, unless the transfer was conditioned so as to avoid or mitigate for injury. The transfer proposes to move the point of diversion on the North Fork Myrtle Creek upstream approximately 530 feet from the authorized diversion point located as follows:

### **Certificate 48868**

#### **Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
28 S	4 W	WM	33	SE SE	700 FEET WEST FROM THE SE CORNER OF SECTION 33

#### **Proposed Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
28 S	4 W	WM	33	SE SE	184 FEET WEST AND 152 FEET NORTH FROM THE SE CORNER OF SECTION 33

The Department's streamflow model predicts that natural flow in the North Fork Myrtle Creek is insufficient to meet the requirements of the instream rights. Based on potential impacts on the instream water rights, we issued a Preliminary Determination (enclosed) proposing to deny the transfer unless the ODFW recommends that the Water Resources Department consent to injury of the instream water rights as per OAR 690-380-5050.

The applicant has requested that we pursue an ODFW recommendation on whether we should consent to the injury of the instream water rights pursuant to ORS 540.530(c).

We hereby request a recommendation on whether we should consent to the injury to the instream water rights that would result if water right Transfer T-12166 were to be approved. We are enclosing a copy of the transfer application, our Preliminary Determination, and other supporting information to assist you in determining if the project would result in net benefits to the resource and in preparing a recommendation. Please send your recommendation c/o Tracy Fox at the address above. Do not hesitate to contact Tracy at 503-986-0827 or Tracy.L.Fox@ wrd.state.or.us if you have questions or need additional information about the proposed transfer.

Sincerely,



Dwight French  
Water Right Services Division Administrator

cc: Transfer Application file T-12166  
Don Rathburn, Transfer Applicant *(via e-mail)*  
Nathan R. Reed, Agent for the applicants and CWRE *(via e-mail)*  
Larry Menteer, OWRD Southwest Region Manager *(via e-mail)*  
David Williams, OWRD, District 15 Watermaster *(via e-mail)*  
Greg Huchko, ODFW, Fish Biologist *(via e-mail)*  
Rich Kilbane, ODFW *(via e-mail)*  
Jason Brandt, ODFW, Assistant District Fish Biologist *(via e-mail)*

enclosures

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

In the Matter of Transfer Application            )    **PRELIMINARY DETERMINATION**  
T-12166, Douglas County                        )    **PROPOSING DENIAL OF A CHANGE**  
  )    **IN POINT OF DIVERSION**

**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 implement the statutes and provides the Department’s procedures and criteria for evaluating transfer applications.

**Applicant**

DON RATHBURN  
PO BOX 846  
BATTLE MOUNTAIN, NV 89820

**Findings of Fact**

1. On September 25, 2015, DON RATHBURN filed an application for an additional point of diversion under Certificate 48868. The Department assigned the application number T-12166.
2. Notice of the application for transfer was published on October 6, 2015, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On March 2, 2016, the Department contacted the applicant’s agent by email to notify them of deficiencies in the application. The deficiencies were to clarify the type of transfer requested, location information and acreage on the map agreeing with the certificate. The Department requested that the deficiencies be resolved by April 1, 2016.
4. On March 8, 2016, the applicant’s agent submitted amended application pages resolving the deficiencies. At this time the type of change was changed from being an “additional point of diversion” to being a “change in point of diversion.”
5. On March 28, 2016, the Department sent a copy of the draft Preliminary Determination proposing to deny Transfer Application T-12166 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of April 28, 2016, for the applicant to respond. The applicant requested that the Department seek a recommendation from the Oregon Department of Fish and Wildlife (ODFW) as to whether the Department should

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.

consent to injury of the instream water right pursuant to OAR 690-380-5030, and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.

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

**Certificate:** 48868 in the name of DELBERT B. BLANCHARD (perfected under Permit S-36512)  
**Use:** IRRIGATION of 5.77 ACRES  
**Priority Date:** APRIL 11, 1972  
**Rate:** 0.07 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 cubic foot per second per acre irrigated and shall be further limited to a diversion of not to exceed 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.  
**Source:** NORTH MYRTLE CREEK, a tributary of MYRTLE CREEK

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
28 S	4 W	WM	33	SE SE	700 FEET WEST FROM THE SE CORNER OF SECTION 33

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
28 S	4 W	WM	33	SE SE	5.77

7. Transfer Application T-12166 proposes to move the authorized point of diversion approximately 530 feet upstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
28 S	4 W	WM	33	SE SE	184 FEET WEST AND 152 FEET NORTH FROM THE SE CORNER OF SECTION 33

8. 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. This diversion may be eligible for screening cost-share funds.

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

9. Water has been used within the last five years 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.
10. A pump, pipeline, and sprinkler system 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-12166.
11. The proposed change would not result in enlargement of the right.

12. Instream water right Certificate 73068 exists for the reach of the river 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. Thus, the instream water right would be injured as a result of the proposed change in point of diversion.
13. Instream water right Certificate 73068 is for flows to be maintained in the North Fork Myrtle Creek from Buck Creek, River Mile (RM) 13.9 (SESW, Section 13, T28S, R4W) to the mouth RM 0.0 (NW, Section 27, T29S, R5W).

### **Determination and Proposed Action**

The change in point of diversion proposed in Transfer Application T-12166 appears to be **not** 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 denied.

The proposed change in point of diversion in application T-12166 cannot be effected without injury to instream water right Certificate 73068. Pursuant to ORS 540.530, the application will be denied unless, on the recommendation of the Oregon Department of Fish and Wildlife, the Department consents to injury of instream water right Certificate 73068.

*If Transfer Application T-12166 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:*

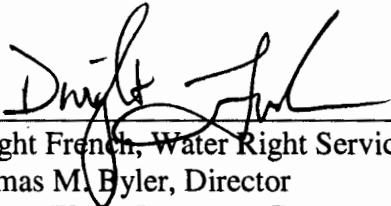
1. *The change in point of diversion proposed in Transfer Application T-12166 is approved.*
2. *The right to the use of the water is restricted to beneficial use at the place of use described, and is subject to all other conditions and limitations contained in Certificate 48868 and any related decree.*
3. *Water right Certificate 48868 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 point of diversion.*
5. *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 each 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.*

6. *Prior to diverting water, the water user shall install an approved fish screen at the new 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 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.*

7. *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 change and full beneficial use of the water.*
8. *After satisfactory proof of beneficial use is received, a new certificate confirming the right transferred will be issued.*

Dated at Salem, Oregon this 3 day of May, 2016.



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

This Preliminary Determination was prepared by Tracy Fox. If you have questions about the information in this document, you may reach me at 503 986-0827 or Tracy.L.Fox@wrds.state.or.us.

Protests should be addressed to the Water Rights Services Division, Oregon Water Resources Department, 725 Summer Street, Suite A, Salem, OR 97301-1266.

**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>