



Oregon

Kate Brown, Governor

Water Resources Department

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July 5, 2016

VIA E-MAIL

THOMAS AND LINDA MCELROY
3760 STAGE RD
VALE, OR 97918
bartlhorses@gmail.com

SUBJECT: Water Right Transfer Application T-12307

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-12307. 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 Malheur Enterprise 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-12307
Ronald K. Jacobs, District 9 Watermaster (via e-mail)
Nancy L. Rorick, Agent for the applicant (via e-mail)
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**BEFORE THE WATER RESOURCES DEPARTMENT
OF THE
STATE OF OREGON**

In the Matter of Transfer Application	)	PRELIMINARY DETERMINATION
T-12307, Malheur County	)	PROPOSING APPROVAL OF AN
	)	ADDITIONAL POINT OF DIVERSION,
	)	A CHANGE IN PLACE OF USE, A
	)	REDISCRPTION 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 implement the statutes and provides the Department's procedures and criteria for evaluating transfer applications.

Applicant

THOMAS AND LINDA MCELROY
3760 STAGE RD
VALE, OR 97918

Findings of Fact

1. On March 10, 2016, THOMAS AND LINDA MCELROY filed an application for an additional point of diversion and to change the place of use under Certificates 2729 and 31186. The Department assigned the application number T-12307.
2. Notice of the application for transfer was published on March 22, 2016, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On June 22, 2016, the department received a letter from ODFW stating the fish screen requirement had been met.
4. On June 23, 2016, the department sent out a revised DPD to the applicant with the information received from ODFW stating the fish screen requirement had been met.

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.
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5. On May 19, 2016, the Department sent a copy of the Draft Preliminary Determination proposing to approve Transfer Application T-12307 to the applicants. The Draft Preliminary Determination cover letter set forth a deadline of June 20, 2016, 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.
6. The first right to be transferred is as follows:

Certificate: 2729 in the name of R. F. CLAYPOOL (confirmed by Cottonwood Creek Decree)

Use: IRRIGATION OF 38.5 ACRES FROM MARCH 15TH TO JULY 15TH, DOMESTIC AND STOCK USE DURING ALL THE YEAR

Priority Date: 1885

Rate: 0.5 CUBIC FOOT PER SECOND

Source: COTTONWOOD CREEK, tributary to BULLY CREEK

Authorized Place of Use:

IRRIGATION, LIVESTOCK AND DOMESTIC						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
18 S	42 E	WM	1	NE NE	1	0.5
18 S	42 E	WM	1	NW NE	2	6.5
18 S	42 E	WM	1	SW NE		12.5
18 S	42 E	WM	1	SE NE		1.5
18 S	42 E	WM	1	NE NW	3	9.0
18 S	42 E	WM	1	SW NW		0.5
18 S	42 E	WM	1	SE NW		8.0
Total						38.5

7. Certificate 2729 does not describe the location of the point of diversion, however information is available from the Cottonwood Creek decree and this transfer application indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distance
18 S	42 E	WM	1	SW NW	1600 FEET SOUTH AND 1015 FEET EAST FROM THE NW CORNER OF SECTION 1

8. On March 10, 2016, the Certified Water Rights Examiner (CWRE) for T-12307 brought to the Department's attention that the authorized place of use for Certificate 2729 was incorrectly described and is depicted in a re-description map made part of the transfer application.

- a) The CWRE discovered a mapping error in surface water Certificate 2729. She explained in the application that, "In the original map, the acres were shifted south of the actual location. The field lies in a narrow valley, so it is unlikely that the actual place of use has changed. In 1963 the Department issued Certificate 31186. Certificate 31186 was layered over Certificate 2729 without correcting the mapping errors in Certificate 2729. The result is that Certificate 2729 covers acres south of the place of use that are not irrigated and there are no surface water rights on the northern portion of the field."

- b) The department used GIS technology, archived aerial photography, and historic U.S.G.S. Quadrangle maps to verify the CWRE's claim. The field shape, stream, and ditch locations have not changed and the Department confirms the CWRE's findings that the PLS lines describing the location of the place of use on Certificate 2729 were inaccurate and should be re-described.
- c) The following table lists the place of use as described in existing certificate 2729 and a proposed re-description based on the above findings:

Twp	Rng	Sec	GLot	Original Description of Place of Use		Proposed Re-Description of Place of Use		
				Q-Q	Acres	Q-Q	Acres	Current Tax Lot
18 S	42 E	1	1	NE NE	0.5	NE NE	0.7	200
18 S	42 E	1	2	NW NE	6.5	NW NE	11.3	200
18 S	42 E	1		SW NE	12.5	SW NE	8.7	200
18 S	42 E	1		SE NE	1.5	SE NE	1.0	200
18 S	42 E	1	3	NE NW	9.0	NE NW	11.5	200
18 S	42 E	1		SW NW	0.5	SW NW	-	200
18 S	42 E	1		SE NW	8.0	SE NW	5.3	200
Total					38.5	Total	38.5	

9. Transfer Application T-12307 proposes an additional point of diversion approximately 3000 feet downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
18 S	42 E	WM	1	SE NE	POD #2 - 1235 FEET WEST AND 1820 FEET SOUTH OF THE NE CORNER OF SECTION 1

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

Certificate: 31186 in the name of THOMAS C. MCELROY, JR. (perfected under Permit G-519)

Use: IRRIGATION OF 68.1 ACRES AND SUPPLEMENTAL IRRIGATION OF 27.0 ACRES

Priority Date: DECEMBER 24, 1956

Rate: 1.19 CUBIC FEET 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 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 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Sources: WELLS 1 and 2 within the MALHEUR RIVER BASIN

Authorized Points of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
18 S	42 E	WM	1	NE NW	WELL #1 - 780 FEET SOUTH AND 1875 FEET EAST FROM THE NW CORNER OF SECTION 1
18 S	42 E	WM	1	NE NW	WELL #2 - 1260 FEET SOUTH AND 1660 FEET EAST FROM THE NW CORNER OF SECTION 1

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
18 S	42 E	WM	1	NE NE	2.5
18 S	42 E	WM	1	NW NE	6.3
18 S	42 E	WM	1	SW NE	18.0
18 S	42 E	WM	1	SE NE	24.5
18 S	42 E	WM	1	NE NW	6.6
18 S	42 E	WM	1	NW NW	0.4
18 S	42 E	WM	1	SE NW	8.0
18 S	42 E	WM	1	NE SE	1.8
Total					68.1

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
18 S	42 E	WM	1	NE NE	0.3
18 S	42 E	WM	1	NW NE	6.5
18 S	42 E	WM	1	SW NE	6.8
18 S	42 E	WM	1	SE NE	1.5
18 S	42 E	WM	1	NE NW	9.0
18 S	42 E	WM	1	SE NW	2.9
Total					27.0

11. Transfer Application T-12307 proposes to change the place of use and diminish 11.5 acres of the right from primary irrigation to supplemental irrigation as a result of the re-description of Certificate 2729 to:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
18 S	42 E	WM	1	NE NE	1	2.7
18 S	42 E	WM	1	SW NE		14.5
18 S	42 E	WM	1	SE NE		28.2
18 S	42 E	WM	1	SE NW		3.9
18 S	42 E	WM	1	NE SE		7.3
Total						56.6

SUPPLEMENTAL IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
18 S	42 E	WM	1	NE NE	1	0.7
18 S	42 E	WM	1	NW NE	3	11.3
18 S	42 E	WM	1	SW NE		8.7
18 S	42 E	WM	1	SE NE		1.0
18 S	42 E	WM	1	NE NW	3	11.5
18 S	42 E	WM	1	SE NW		5.3
Total						38.5

12. The Oregon Department of Fish and Wildlife 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 currently equipped with an appropriate fish screen.

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

13. 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 rights are subject to forfeiture under ORS 540.610.
14. A diversion structure, ditch, pump, pipeline, and sprinkler system 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-12307.
15. The proposed changes would not result in enlargement of the rights.
16. The proposed changes would not result in injury to other water rights.

Determination and Proposed Action

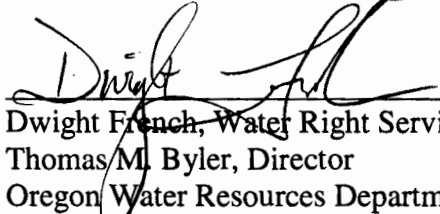
The additional point of diversion, change in place of use, partial diminution of a water right, and re-description of a water right proposed in Transfer Application T-12307 appear to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be approved.

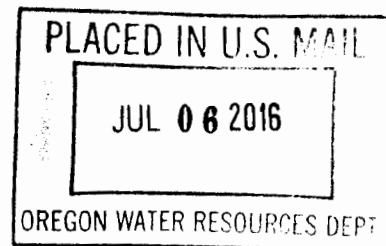
If Transfer Application T-12307 is approved, the final order will include the following:

1. *The additional point of diversion, change in place of use, partial diminution of a water right, and re-description of a water right proposed in Transfer Application T-12307 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 2729 and 31186 and any related decree.*
3. *Water Right Certificates 2729 and 31186 are cancelled.*
4. *The quantity of water diverted at the additional point of diversion, together with that diverted at the original 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 meters or measuring devices in good working order.*
 - c. *The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.*
- 6. *If it becomes necessary in the future to perform maintenance on the diversion that requires in-stream work, ODFW shall be notified prior to the commencement of in-stream work.*
 - 7. *The former place of use of the transferred rights shall no longer receive water under the rights.*
 - 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. *After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.*

Dated at Salem, Oregon this 5 day of July, 2016.


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



This Preliminary Determination was prepared by Marcy Osborn. If you have questions about the information in this document, you may reach me at 541-523-8224 ext.228 or marcy.j.osborn@wrdd.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.