



# Oregon

Kate Brown, Governor

**Water Resources Department**

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August 4, 2017

Greg Silbernagel  
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3660 SW Houtama Rd  
Pendleton, OR 97801

**SUBJECT: Water Right Transfer Application T-12544**

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-12544. 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 Eastern Oregonian, 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.

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

In the Matter of Transfer Application            )  
T-12544, Umatilla County                        )  
  )  
  )    **PRELIMINARY DETERMINATION  
PROPOSING APPROVAL OF  
ADDITIONAL POINTS 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**

GREG SILBERNAGEL  
SARAH SILBERNAGEL  
3660 SW HOUTAMA RD  
PENDLETON, OR 97801

**Findings of Fact**

1. On December 19, 2016, GREG AND SARAH SILBERNAGEL filed an application for additional points of diversion under Certificate 81633. The Department assigned the application number T-12544.
2. Notice of the application for transfer was published on December 27, 2016, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On June 15, 2017, the Department contacted the applicants by written correspondence to inform them of discrepancies found within the application, with respect to the measured distances for the proposed points of diversion on the map and in Table 1 of the application.
4. On June 16, 2017, the applicants submitted a revised Table 1 of the application eliminating the deficiencies found in Table 1 of the application.
5. On June 22, 2017, Larry Toll, certified water rights examiner for the applicant, submitted a revised map electronically. The Department received the certified map on June 26, 2017.

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.

6. On June 26, 2017, the applicant requested to extend the completion date to October 1, 2022.
7. On July 7, 2017, the applicant brought to the Department's attention a scrivener's error in the duty limit listed for Certificate 81633. The duty limit is 4.5 acre-feet per acre per year, for tributaries below the City of Pendleton for irrigation.
8. On July 7, 2017, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-12544 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of August 8, 2017, 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 applicant is authorized to pursue the transfer.
9. The portion of the right to be transferred is as follows:

**Certificate:** 81633 in the name of T.J. CHENEY  
(confirmed by Umatilla River Decree at Volume 3, Page 127)

**Use:** IRRIGATION OF 31.2 ACRES OF LAND, DOMESTIC AND STOCK USE

**Priority Date:** 1880

**Rate:** 0.39 CUBIC FOOT PER SECOND

**Limit/Duty:** The amount of water for irrigation is subject to the provisions of paragraph 33 of said decree and all other conditions and limitations contained in said decree.

**Source:** MCKAY CREEK, tributary to the UMATILLA RIVER

**Authorized Place of Use:**

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
2 N	32 E	WM	8	SE SE	16.2
2 N	32 E	WM	9	SW SW	15.0
TOTAL					31.2

DOMESTIC AND STOCK USE				
Twp	Rng	Mer	Sec	Q-Q
2 N	32 E	WM	8	SE SE
2 N	32 E	WM	9	SW SW

10. Certificate 81633 does not describe the location of the point of diversion, however information is available from the applicant and Instream Lease IL-1538, indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
2 N	32 E	WM	16	NW NW	FANNING DITCH – 1300 FEET SOUTH AND 170 FEET WEST FROM THE SE CORNER OF DLC 38

11. Certificate 81633 does not describe the duty and rate limit per acre of the right, however information is available from the Umatilla River Decree indicating that the duty allowed for the right is 1/80<sup>th</sup> CFS per acre and the duty limit as 4.5 acre-feet per acre consistent with paragraph 33 of the Umatilla Decree and all other conditions and limitations contained in the decree.
12. Transfer Application T-12544 proposes additional points of diversion located:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances	Distance from original point of diversion location measured in feet (ft)
2 N	32 E	WM	8	SE SE	38	POD #1 - 70 FEET NORTH AND 1305 FEET WEST FROM THE SE CORNER OF DLC 38	1400
2 N	32 E	WM	8	SE SE	38	POD #2 - 340 FEET NORTH AND 1580 FEET WEST FROM THE SE CORNER OF DLC 38	1800
2 N	32 E	WM	8	SE SE	38	POD #3 - 480 FEET NORTH AND 1815 FEET WEST FROM THE SE CORNER OF DLC 38	2000

***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 right is subject to forfeiture under ORS 540.610.
14. A diversion structure and ditch 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-12544.
15. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening 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 screening. This diversion may be eligible for screening cost-share funds.
16. The proposed change would not result in enlargement of the right.
17. The proposed change would not result in injury to other water rights.

**Determination and Proposed Action**

The additional points of diversion proposed in Transfer Application T-12544 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-12544 is approved, the final order will include the following:*

- 1. The additional points of diversion proposed in Transfer Application T-12544 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 81633 and any related decree.*
- 3. Water right Certificate 81633 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 additional points 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. A head gate and staff plate exist on the Fanning Ditch POD, as described in Finding of Fact #10, these works shall be maintained and in good working order. However, should the Department find the devices ineffective, the Department may require additional measuring devices at this POD.*
- 6. 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. One flow meter is sufficient if the water user is using one portable pump on rotation between the POD's. However, if the applicant has 3 pump stations, then separate flow meters are required for each pump station.*
  - d. The water user shall allow the Department access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Department shall request access upon reasonable notice.*
- 7. Prior to diverting water, the water user shall install an approved fish screen at the new points 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 points 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.*

8. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2022**. 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.*
9. *After satisfactory proof of beneficial use is received, a new certificate confirming the right transferred will be issued.*

Dated at Salem, Oregon this 2 day of August, 2017.

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

This Preliminary Determination was prepared by Jessica Joye. If you have any questions about the information in this document, you may reach me at 503-986-0814 or [Jessica.L.Joye@oregon.gov](mailto:Jessica.L.Joye@oregon.gov).

*Protests should be addressed to the attention of Water Rights Services Division, Water Resources Department, 725 Summer St. NE, 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>