



Oregon

Kate Brown, Governor

Water Resources Department

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August 15, 2017

JOHN McELHERAN
56531 JUNIPER FLAT ROAD
MAUPIN OR 79037

SUBJECT: Water Right Transfer Application T-12185

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-12185. 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 Dalles Chronicle 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@oregon.gov if I may be of assistance.

Sincerely,

Kelly Starnes

Transfer Program Analyst

Transfer and Conservation Section

cc: Transfer Application T-12185
Robert Wood, District 3 Watermaster *(via e-mail)*
Larry Toll, Tenneson Engineering Corp., Agent/CWRE 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-12185, Wasco County)	PROPOSING APPROVAL OF CHANGES IN
)	PLACE OF USE, A CHANGE IN
)	CHARACTER 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 Rules (OAR) Chapter 690, Division 380 implement 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.

Applicant

JOHN McELHERAN
56531 JUNIPER FLAT RD
MAUPIN OR 79037

Agent

TENNESON ENGINEERING CORPORATION
ATTN: LARRY TOLL, CWRE
3775 CRATES WAY
THE DALLES OR 97058

Findings of Fact

1. On October 13, 2015, John McElheran filed an application to change the place of use and character of use under portions of Certificates 77326, 77733 and 76971. The Department assigned the application number T-12185.
2. Notice of the application for transfer was published on October 20, 2015, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On April 27, 2017, and June 1, 2017, the agent for the applicant submitted a revised application to clarify the places of use. On June 22, 2017, the agent for the applicant submitted another revised application to describe the place of use.
4. On June 30, 2017, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-12185 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of July 31, 2017, for the applicant to respond. The applicant 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.

5. The portion of the first right and its layered supplemental right to be transferred are as follows:

Certificate: 77326 in the name of JUNIPER FLAT DISTRICT IMPROVEMENT CO.
(confirmed by White River Decree)
Use: IRRIGATION OF 4.1 ACRES AND STOCK
Priority Date: JULY 1, 1903 FOR DIRECT FLOW FROM CLEAR CREEK AND FROG CREEK; AUGUST 19, 1904 FROM STORAGE IN CLEAR LAKE RESERVOIR
Limit/Duty: ONE ACRE FOOT PER ACRE OR ACRE EQUIVALENT DURING ANY 30-DAY PERIOD UP TO JULY 1st OF EACH YEAR AND NOT TO EXCEED 3.0 ACRE FEET PER ACRE OR ACRE EQUIVALENT DURING ANY IRRIGATION SEASON; PROVIDED, THAT THE RATE OF FLOW SHALL NOT EXCEED 1/40th OF A SECOND FOOT PER ACRE OR ACRE EQUIVALENT UP TO JULY 1st OF EACH YEAR AND THEREAFTER NOT TO EXCEED 1/80th OF A SECOND FOOT PER ACRE OR ACRE EQUIVALENT, EXCEPT IN CASE OF ROTATION
Sources: DIRECT FLOW FROM CLEAR CREEK AND FROG CREEK AND STORAGE IN CLEAR LAKE RESERVOIR, a tributary of WHITE RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Source
4 S	9 E	WM	34	NE NE	FROG CREEK
5 S	9 E	WM	10	NW* SE	CLEAR CREEK
4 S	9 E	WM	32	SE SE	CLEAR LAKE RESERVOIR DAM

*Note: A scrivener's error was found in the POD description for the Clear Creek diversion. See Finding No. 12 below for correction.

Certificate: 77733 in the name of JUNIPER FLAT DISTRICT IMPROVEMENT CO.
(perfected under Permit S-25275)
Use: SUPPLEMENTAL IRRIGATION OF 4.1 ACRES
Priority Date: NOVEMBER 11, 1915
Quantity: 17.22 ACRE FEET STORED WATER ONLY
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 4.2 ACRE-FEET FOR EACH ACRE IRRIGATED OR ACRE EQUIVALENT DURING THE IRRIGATION SEASON OF EACH YEAR.
Source: CLEAR LAKE RESERVOIR (CONSTRUCTED UNDER PERMIT R-2106), a tributary of WHITE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	9 E	WM	32	SE SE	1390 FEET SOUTH AND 480 FEET WEST FROM THE E¼ CORNER OF SECTION 32

Authorized Places of Use:

IRRIGATION (IR)/SUPPLEMENTAL IRRIGATION (IS) AND STOCK (STK)						
Twp	Rng	Mer	Sec	Q-Q	Certificate (acres)	
					77326 (IR and STK)	77733 (IS)
4 S	13 E	WM	14	NE SE	1.5	1.5
4 S	13 E	WM	14	SW SE	2.2*	2.2
4 S	13 E	WM	14	SE SE	0.4	0.4
Total					4.1	4.1

*Note: there is a layered supplemental water right Certificate 76971 (1.4 acres) that exists on these lands and will be moved separately. See Findings Nos. 11 and 15 described below.

6. Transfer Application T-12185 proposes to change the place of use and character of use of the above described 4.1 acres (*acres equivalent*) to pond maintenance located:

POND MAINTENANCE						
Twp	Rng	Mer	Sec	Q-Q	Certificate (<i>acre equivalents</i>)	
					77326 (IR)	77733 (IS)
4 S	13 E	WM	14	SW SW	1.3	1.3
4 S	13 E	WM	23	NW NW	2.8	2.8
Total					4.1	4.1

7. The portion of the second right and its layered supplemental right to be transferred are as follows:

Certificate: 77326 in the name of JUNIPER FLAT DISTRICT IMPROVEMENT CO. (confirmed by White River Decree)

Use: IRRIGATION OF 0.9 ACRE AND STOCK

Priority Date: JULY 1, 1903 FOR DIRECT FLOW FROM CLEAR CREEK AND FROG CREEK, AND AUGUST 19, 1904, FROM STORAGE IN CLEAR LAKE RESERVOIR

Limit/Duty: ONE ACRE FOOT PER ACRE OR ACRE EQUIVALENT DURING ANY 30-DAY PERIOD UP TO JULY 1st OF EACH YEAR AND NOT TO EXCEED 3.0 ACRE FEET PER ACRE OR ACRE EQUIVALENT DURING ANY IRRIGATION SEASON; PROVIDED, THAT THE RATE OF FLOW SHALL NOT EXCEED 1/40th OF A SECOND FOOT PER ACRE OR ACRE EQUIVALENT UP TO JULY 1st OF EACH YEAR AND THEREAFTER NOT TO EXCEED 1/80th OF A SECOND FOOT PER ACRE OR ACRE EQUIVALENT, EXCEPT IN CASE OF ROTATION

Sources: DIRECT FLOW FROM CLEAR CREEK AND FROG CREEK AND STORAGE IN CLEAR LAKE RESERVOIR, a tributary of WHITE RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Source
4 S	9 E	WM	34	NE NE	FROG CREEK
5 S	9 E	WM	10	NW* SE	CLEAR CREEK
4 S	9 E	WM	32	SE SE	CLEAR LAKE RESERVOIR DAM

*Note: A scrivener's error was found in the POD description for the Clear Creek diversion. See Finding No. 12 below for correction.

Certificate: 77733 in the name of JUNIPER FLAT DISTRICT IMPROVEMENT CO.
(perfected under Permit S-25275)

Use: SUPPLEMENTAL IRRIGATION OF 0.9 ACRES

Priority Date: NOVEMBER 11, 1915

Quantity: 3.78 ACRE FEET

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 4.2 ACRE-FEET FOR EACH ACRE IRRIGATED OR ACRE EQUIVALENT DURING THE IRRIGATION SEASON OF EACH YEAR.

Source: CLEAR LAKE RESERVOIR (CONSTRUCTED UNDER PERMIT R-2106), a tributary of WHITE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	9 E	WM	32	SE SE	1390 FEET SOUTH AND 480 FEET WEST FROM THE E¼ CORNER OF SECTION 32

Authorized Places of Use:

IRRIGATION (IR)/SUPPLEMENTAL IRRIGATION (IS) AND STOCK (STK)						
Twp	Rng	Mer	Sec	Q-Q	Certificate (acres)	
					77326 (IR and STK)	77733 (IS)
4 S	13 E	WM	14	SE SE	0.4	0.4
4 S	13 E	WM	23	NE NE	0.5	0.5
Total					0.9	0.9

8. Transfer Application T-12185 proposes to change the place of use of the above described 0.9 acre to:

IRRIGATION (IR)/SUPPLEMENTAL IRRIGATION (IS) AND STOCK (STK)						
Twp	Rng	Mer	Sec	Q-Q	Certificate (acres)	
					77326 (IR and STK)	77733 (IS)
4 S	13 E	WM	14	SW SW	0.1	0.1
4 S	13 E	WM	23	NW NW	0.8	0.8
Total					0.9	0.9

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

Certificate: 76971 in the name of DORCAS AND MARSHALL MCELHERAN (perfected under Permit G-7958)
Use: IRRIGATION OF 7.1 ACRES
Priority Date: FEBRUARY 14, 1978
Rate: 0.069 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 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 for each acre irrigated during the irrigation season of each year.
Source: A WELL, within the WHITE RIVER BASIN

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	13 E	WM	23	NE NE	1360 FEET NORTH AND 80 FEET WEST FROM THE E¼ CORNER OF SECTION 23

Authorized Place of Use:

IRRIGATION (IR)					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	13 E	WM	14	NW SE	3.3
4 S	13 E	WM	14	SW SE	3.8
Total					7.1

10. Transfer Application T-12185 proposes to change the place of use of the above described 7.1 acres to:

IRRIGATION (IR)					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	13 E	WM	14	NE SE	1.5
4 S	13 E	WM	14	SE SE	5.6
Total					7.1

11. The portion of the fourth right to be transferred are as follows:

Certificate: 76971 in the name of DORCAS AND MARSHALL MCELHERAN (perfected under Permit G-7958)
Use: SUPPLEMENTAL IRRIGATION OF 1.4 ACRES
Priority Date: FEBRUARY 14, 1978
Rate: 0.014 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 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 for each acre irrigated during the irrigation season of each year.
Source: A WELL, within the WHITE RIVER BASIN

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	13 E	WM	23	NE NE	1360 FEET NORTH AND 80 FEET WEST FROM THE E¼ CORNER OF SECTION 23

Authorized Place of Use:

IRRIGATION (IR)					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	13 E	WM	14	SW SE	1.4

12. Transfer Application T-12185 proposes to change the place of use of a layered supplemental water right (Certificate 76971) from its primary water right to another place of use to be layered once again with the same primary water right located:

IRRIGATION (IR)					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	13 E	WM	14	SE SE	1.4

13. Certificate 77326 contains a scrivener’s error in its quarter-quarter description for the Point of Diversion (POD) for the Clear Creek diversion described above in Findings Nos. 4 and 6. The certificate incorrectly lists the quarter-quarter as the NW¼ SE¼, Section 10. Based on the Juniper Flat District Improvement Company’s HB3111 maps and the applicant’s Certified Water Rights Examiner’s current (Toll/2015) map based on a recent field visit and subsequent survey, the Department is led to conclude that Certificate 77326 should be corrected to reflect the correct quarter-quarter description within the NE¼ SE¼, Section 10.

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

14. Water has been used within the five-year period 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 these rights are subject to forfeiture under ORS 540.610.
15. Diversion structures, a well, ditches and district delivery 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-12185.
16. The proposed changes would not result in enlargement of the rights. The change in place of use of supplemental water right Certificate 76971 separately from its associated District primary water right to another place of use under the same District primary passes the “similar reliability” test and complies with OAR 690-380-2240(5).
17. The proposed changes would not result in injury to other water rights.

Partial Cancellation of a Water Right

18. On June 12, 2017, the Department received voluntary cancellation affidavits from John McElheran and Roseann McElheran, requesting to cancel a portion of Certificate 76971 appurtenant to Tax Lot 3000, within Sections 14 and 23, Township 4 South, Range 13 East, W.M.. The intent of the affidavits was to cancel the 45.4 acres without cancelling any quantity of water. Because Certificate 76971 authorizes a rate that is less than the full rate (i.e., 1/80 cfs per acre multiplied by the number of acres allowed under the certificate) and because the total allowed quantity of water (0.89 cfs) divided by the number of remaining acres (83.6) does not exceed 1/80 cfs per acre, the cancellation of 45.4 acres without reducing the total quantity of water may be authorized.

The portion of the right to be cancelled is described as follows:

- Certificate:** 76971 in the name of DORCAS AND MARSHALL McELHERAN (perfected under Permit G-7958)
- Use:** IRRIGATION OF 6.9 ACRES AND SUPPLEMENTAL IRRIGATION OF 38.5 ACRES
- Priority Date:** FEBRUARY 14, 1978
- 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 for each acre irrigated during the irrigation season of each year.
- Source:** A WELL within the WHITE RIVER BASIN

Authorized Places of Use to be Cancelled:

IRRIGATION (IR)					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	13 E	WM	14	NE SE	0.5
4 S	13 E	WM	14	NW SE	0.5
4 S	13 E	WM	14	SW SE	5.9
Total					6.9

SUPPLEMENTAL IRRIGATION (IS)					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	13 E	WM	14	NE SE	11.3
4 S	13 E	WM	14	NW SE	25.9
4 S	13 E	WM	14	SW SE	0.8
4 S	13 E	WM	23	NE NE	0.5
Total					38.5

Determination and Proposed Action

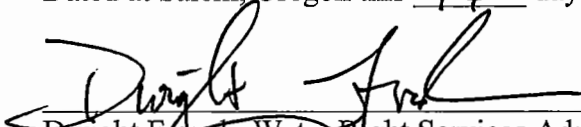
The changes in place of use and change in character of use proposed in Transfer Application T-12185 appear to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be approved and the abandoned water right portion will be cancelled.

If Transfer Application T-12185 is approved, the final order will include the following:

- 1. The changes in place of use and change in character of us proposed in Transfer Application T-12185 are approved. The portion of the water right that has been abandoned is cancelled.*
- 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 77326, 77733 and 76971, and any related decree.*
- 3. Water right Certificate 76791 is cancelled. A certificate will be issued for that portion of this certificate NOT affected by this transfer.*
- 4. Water right Certificates 77326 and 77733 are modified. The Department will issue superseding certificates describing the rights when it is determined that it is necessary for record keeping. The Department shall also make the needed revision to correct the POD description for the Clear Creek diversion in Certificate 77326 as described above in Finding No. 11 at that time.*
- 5. The Director requires all existing meters to be maintained by the district, consistent with all permitted and certificated water uses.*
- 6. The former places of use of the transferred rights shall no longer receive water under the rights.*
- 7. The approved changes shall be completed and full beneficial use of the water shall be made on or before **October 1, 2018**. 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.*

8. *After satisfactory proof of beneficial use is received, a new confirming right certificate shall be issued for Certificate 76971.*

Dated at Salem, Oregon this 16 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 Ken Dowden. If you have questions about the information in this document, you may reach me at 541-278-5456 or Ken.D.Dowden@oregon.gov. Ken Dowden. If you have questions about the information in this document, you may reach me at 541-278-5456 or Ken.D.Dowden@oregon.gov

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.

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>