



Oregon
Kate Brown, Governor

Water Resources Department

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August 15, 2017

JOHN B. FERGUSON
6451 WEST GOWEN RD
BOISE ID 83709

SUBJECT: Water Right Transfer Application T-12492

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-12492. 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 Argus Observer 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 file T-12492
Ronald K. Jacobs, District 9 Watermaster *(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-12492, Malheur County |) | PROPOSING APPROVAL OF AN |
| |) | ADDITIONAL POINT OF DIVERSION, |
| |) | A CHANGE IN PLACE OF USE, AND |
| |) | A 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 portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicant

JOHN B FERGUSON
6451 WEST GOWEN RD
BOISE ID 83709

Findings of Fact

1. On September 26, 2016, JOHN B. FERGUSON filed an application for an additional point of diversion and a change in place of use under Certificate 1412. The Department assigned the application number T-12492.
2. Notice of the application for transfer was published on October 4, 2016, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On June 15, 2017, the applicant submitted a copy of the ALS land survey of the ground involved in this transfer, confirming the re-description of the rights.
4. On June 23, 2017, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-12492 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of July 24, 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.

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.

5. The right to be transferred is as follows:

Certificate: 1412 in the name of F. CUSHING MOORE (perfected under Permit S-826)
Use: IRRIGATION OF 192.0 ACRES
Priority Date: AUGUST 26, 1911
Rate: 1.95 CUBIC FEET PER SECOND
Source: SNAKE RIVER, a tributary to the COLUMBIA RIVER

Authorized Place of Use:

| IRRIGATION | | | | | | | |
|------------|------|-----|-----|-------|------|-------|-----------------------|
| Twp | Rng | Mer | Sec | Q-Q | GLot | Acres | Type of Change |
| 16 S | 47 E | WM | 25 | | 1 | 32.4 | APOD |
| 16 S | 47 E | WM | 25 | | 2 | 23.5 | APOD |
| 16 S | 47 E | WM | 25 | | 2 | 1.6 | APOD & POU |
| 16 S | 47 E | WM | 25 | SW NE | | 39.0 | APOD & re-description |
| 16 S | 47 E | WM | 25 | SE NE | | 39.0 | APOD & re-description |
| 16 S | 47 E | WM | 25 | NW SE | | 40.0 | APOD & re-description |
| 16 S | 48 E | WM | 30 | | 2 | 17.0 | APOD |
| Total | | | | | | 192.5 | |

6. Certificate 1412 does not describe the location of the point of diversion, however information is available from a land survey conducted to prepare this transfer application indicating that the point of diversion is located as follows:

| Twp | Rng | Mer | Sec | Q-Q | GLot | Measured Distances |
|------|------|-----|-----|-------|------|--|
| 16 S | 47 E | WM | 25 | SW SE | 2 | NORTH 89°37'40" EAST 2674.30 FEET FROM THE SW CORNER OF SECTION 25 |

7. Certificate 1412 describes the authorized place of use as 118.0 acres in the SW NE, SE NE, and NW SE quarter-quarter sections, Section 25, T. 16S, R. 47E, Willamette Meridian, Malheur County, Oregon.

- a. A land survey completed by ALS Surveyors of Middleton, Idaho, in October 2007 found the acreage in some of the quarter-quarters within the authorized place of use in Section 25, T.16S, R. 47E, WM to be different from that shown in the final proof survey and in Certificate 1412, because of a difference in understanding of the location of the ¼ ¼ corners, as well as having newer technology for measuring the land area.

- b. The following table lists those portions of the place of use in Section 25, T. 16S, R. 47E, WM as described in existing Certificate 1412 and a proposed re-description based on the above findings:

| Original Description of Place of Use | | Proposed Re-Description of Place of Use | |
|--------------------------------------|-------|---|-------|
| ¼-¼ | Acres | ¼-¼ | Acres |
| SW NE | 39.0 | SW NE | 39.3 |
| SE NE | 39.0 | SE NE | 39.1 |
| NW SE | 40.0 | NW SE | 39.1 |
| Total | 118.0 | Total | 117.5 |

The re-description of the right results in a net measurement of the area that is 0.5 acre less than the original description. The area on the ground has not changed, leading the Department to conclude that the area of the water right in these ¼ ¼'s has always been 117.5 acres, rather than 118.0 acres.

8. Transfer Application T-12492 proposes to change the place of use of 1.6 acres identified in Finding of Fact No. 5 to:

| IRRIGATION | | | | | | |
|------------|------|-----|-----|-----|------|-------|
| Twp | Rng | Mer | Sec | Q-Q | GLot | Acres |
| 16 S | 48 E | WM | 30 | | 2 | 1.6 |

9. The proposed configuration of the transferred and re-described place of use for the right is:

| IRRIGATION | | | | | | |
|------------|------|-----|-----|-------|------|-------|
| Twp | Rng | Mer | Sec | Q-Q | GLot | Acres |
| 16 S | 47 E | WM | 25 | | 1 | 32.4 |
| 16 S | 47 E | WM | 25 | | 2 | 23.5 |
| 16 S | 47 E | WM | 25 | SW NE | | 39.3 |
| 16 S | 47 E | WM | 25 | SE NE | | 39.1 |
| 16 S | 47 E | WM | 25 | NW SE | | 39.1 |
| 16 S | 48 E | WM | 30 | | 2 | 18.6 |
| Total | | | | | | 192.0 |

10. Transfer Application T-12492 also proposes an additional point of diversion approximately 0.28 mile downstream located:

| Twp | Rng | Mer | Sec | Q-Q | GLot | Measured Distances |
|-----|-----|-----|-----|-------|------|---|
| 16S | 47E | WM | 25 | SW SE | 2 | NORTH 77°35'43" EAST 4010.52 FEET FROM THE SW CORNER OF SECTION 25 |

11. 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)]

- 12. 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.
- 13. 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-12492.
- 14. The proposed changes would not result in enlargement of the right.
- 15. The proposed changes would not result in injury to other water rights.

Partial Cancellation of a Water Right

- 16. On September 26, 2016, an affidavit certifying that a portion of a water right has been abandoned and requesting cancellation of the right was received from John B. Ferguson, landowner. The right to be cancelled is as follows:

Certificate: 1412 in the name of F. CUSHING MOORE (perfected under Permit S-826)
Use: IRRIGATION OF 4.1 ACRES
Priority Date: AUGUST 26, 1911
Rate: 0.05 CUBIC FOOT PER SECOND
Source: SNAKE RIVER, tributary to the COLUMBIA RIVER

Authorized Place of Use to be Cancelled:

| IRRIGATION | | | | | | |
|------------|------|-----|-----|-----|------|-------|
| Twp | Rng | Mér | Sec | Q-Q | GLot | Acres |
| 16 S | 47 E | WM | 25 | | 1 | 4.1 |

Determination and Proposed Action

The additional point of diversion and change in place of use proposed in Transfer Application T-12492 appear to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000 and the abandoned right should be cancelled. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be approved and the abandoned right will be cancelled.

If Transfer Application T-12492 is approved, the final order will include the following:

- 1. *The additional point of diversion and change in place of use proposed in Transfer Application T-12492 are approved. The portion of the 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 Certificate 1412 and any related decree.*

3. *Water right Certificate 1412 is 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 point of diversion (new and existing).*
 - 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. *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. *The former place of use of the transferred right shall no longer receive water under the right.*
8. *Full beneficial use of the water shall be made, consistent with the terms of this order, 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.*

9. *After satisfactory proof of beneficial use is received, a new certificate confirming the right transferred will be issued.*

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 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@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>