

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-12252, Umatilla County)	PROPOSING APPROVAL OF
)	ADDITIONAL POINTS OF
)	DIVERSION, CHANGES IN POINTS
)	OF DIVERSION AND PLACE OF USE

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

CUNNINGHAM SHEEP CO.
C/O ROBERT LEVY
PO BOX 1186
PENDLETON, OR 97801

Agent

WILLIAM I. PORFILY
PO BOX 643
STANFIELD, OR 97875

Findings of Fact

1. On January 19, 2016, Cunningham Sheep Co. filed an application to change the points of diversion and to change the place of use under Certificates 2484, 28608, 87710, and 87711. All are layered with supplemental water Permit S-7400. The Department assigned the application number T-12252.
2. Notice of the application for transfer was published on January 26, 2016, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On December 10, 14, 15, 18, and 21, 2017, the agent for the applicant submitted new revised applications to clarify the authorized and proposed points of diversion under several water rights.
4. On December 22, 2017, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-12252 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of January 21, 2018, for the applicant to respond. On January 4, 2018, the agent for the applicant requested the Department proceed with issuance of the 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. On January 29, 2018, the applicant's agent submitted an amended application clarifying the proposed points of diversion for Certificates 87710 and 87711, along with the supplemental right under Permit S-7400.

6. The first primary right and its layered supplemental right to be transferred are as follows:

Certificate: 2484 in the name of JOS C. ASHWORTH (confirmed by the Umatilla River Decree Volume 3, at Page 127, as modified by Sp. Ord. Vol 7, Pg. 461)
Use: IRRIGATION of 15.0 ACRES
Priority Date: 1906
Rate: 0.20 CUBIC FOOT PER SECOND (cfs)
Limit/Duty: The amount of water to which such right is entitled, for the purposed aforesaid, is limited to an amount actually beneficially used for said purposes and shall not exceed 0.20 cfs, subject to provisions of Paragraph 33 of said decree, and all other conditions and limitations contained in said decree.

Source: UMATILLA RIVER, tributary to COLUMBIA RIVER

Authorized Point of Diversion: NONE LISTED

Permit: S-7400 in the name of U.S. BUREAU OF RECLAMATION (application S-9668)

Use: SUPPLEMENTAL IRRIGATION of 15.0 ACRES

Priority Date: July 1, 1924

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing of the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second, 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.

Source: McKAY RESERVOIR, tributary of McKAY CREEK. Water is diverted down the natural channels of McKay Creek and the Umatilla River and re-diverted at the applicant's point of diversion described under Bureau of Reclamation contract.

Authorized Points of Diversion and Point of Re-Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	32 E	WM	34	NW SE	McKay Dam
2 N	30 E	WM	5	SE SE	RE-DIVERSION: 2976 FEET NORTH AND 667.7 FEET WEST FROM THE E¼ CORNER OF SECTION 8

Authorized Places of Use:

Twp	Rng	Mer	Sec	Q - Q	Certificate (acres)	
					2484 (IR)	S-7400 (IS)
2 N	30 E	WM	5	SW SE	6.5	6.5
2 N	30 E	WM	5	SE SE	7.5	7.5
2 N	30 E	WM	8	NE NE	1.0	1.0
TOTAL:					15.0	15.0

7. Certificate 2484 does not describe the location of the point of diversion. However, based on information in Special Order Volume 7, Page 461, approving a change in point of diversion for the entire right, the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	30 E	WM	5	SE SE	2976 FEET NORTH AND 667.7 FEET WEST FROM THE E ¹ / ₄ CORNER OF SECTION 8

8. Transfer Application T-12252 proposes to change the point of diversion for Certificate 2484 and re-diversion point for Permit 7400 downstream 1500 feet to proposed POD 3, downstream 4500 feet to proposed POD 2, and 1½ miles to POD 1 located:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	30 E	WM	5	SE NW	POD 2: 1800 FEET SOUTH AND 1360 FEET EAST FROM THE NW CORNER OF SECTION 5
2 N	30 E	WM	5	NW SE	POD 3: 1670 FEET NORTH AND 1560 FEET WEST FROM THE SE CONRER OF SECTION 5
2 N	30 E	WM	6	NE NE	POD 1: 1020 FEET SOUTH AND 1070 FEET WEST FROM THE NE CORNER OF SECTION 6

9. Transfer Application T-12252 also proposes to change the place of use of the above described rights to:

Twp	Rng	Mer	Sec	Q - Q	Certificate (acres)	
					2484 (IR)	S-7400 (IS)
2 N	30 E	WM	5	NW SE	5.4	5.4
2 N	30 E	WM	5	SW SE	8.1	8.1
2 N	30 E	WM	5	SE SE	1.5	1.5
TOTAL:					15.0	15.0

10. The second primary right and its layered supplemental right to be transferred are as follows:

Certificate: 28608 in the name of CUNNINGHAM SHEEP COMPANY (Perfected under Permit S-21628)

Use: IRRIGATION and SUPPLEMENTAL IRRIGATION of 21.7 ACRES, STOCK and DOMESTIC

Priority Date: JULY 21, 1952

Rate: 0.17 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-FORTIETH 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 4.5 acre feet per acre for each acre irrigated during the irrigation season of each year.

Source: UMATILLA RIVER, tributary to COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distance
2 N	30 E	WM	5	SE SE	NONE GIVEN

Permit: S-7400 in the name of U.S. BUREAU OF RECLAMATION (application S-9668)

Use: SUPPLEMENTAL IRRIGATION of 21.7 ACRES

Priority Date: July 1, 1924

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing of the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second, 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.

Source: McKAY RESERVOIR, tributary of McKAY CREEK. Water is diverted down the natural channels of McKay Creek and the Umatilla River and re-diverted at the applicant's point of diversion described under Bureau of Reclamation contract.

Authorized Points of Diversion and Point of Re-Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	32 E	WM	34	NW SE	McKay Dam
2 N	30 E	WM	5	SE SE	RE-DIVERSION: NONE GIVEN

Authorized Places of Use:

Twp	Rng	Mer	Sec	Q - Q	Certificate (acres)		
					28608 (IR)	28608 (IS)	S-7400 (IS)
2 N	30 E	WM	5	SW SE	3.4	3.4	3.4
2 N	30 E	WM	5	SE SE	7.4	7.4	7.4
2 N	30 E	WM	8	NE NE	10.8	10.8	10.8
2 N	30 E	WM	8	NW NE	0.1	0.1	0.1
TOTAL:					21.7	21.7	21.7

11. Certificate 28608 does not describe the location of the point of diversion. However based on the Department's 1960 Final Proof Survey map for the right and other information available in the Department's records, the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	30 E	WM	5	SE SE	320 FEET NORTH AND 600 FEET WEST FROM THE SE CORNER OF SECTION 5

12. Transfer Application T-12252 proposes to change the point of diversion for Certificate 28608 and re-diversion point for Permit 7400 downstream approximately 1000 feet from the authorized point of diversion to:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	30 E	WM	5	SE NW	POD 2: 1800 FEET SOUTH AND 1360 FEET EAST FROM THE NW CORNER OF SECTION 5
2 N	30 E	WM	5	NW SE	POD 3: 1670 FEET NORTH AND 1560 FEET WEST FROM THE SE CORNER OF SECTION 5
2 N	30 E	WM	6	NE NE	POD 1: 1020 FEET SOUTH AND 1070 FEET WEST FROM THE NE CORNER OF SECTION 6

13. Transfer Application T-12252 also proposes to change the place of use to:

Twp	Rng	Mer	Sec	Q - Q	Certificate (acres)		
					28608 (IR)	28608 (IS)	S-7400 (IS)
2 N	30 E	WM	5	SW SE	11.0	11.0	11.0
2 N	30 E	WM	5	SE SE	9.3	9.3	9.3
2 N	30 E	WM	8	NE NE	1.4	1.4	1.4
TOTAL:					21.7	21.7	21.7

14. The third primary right and its layered supplemental right to be transferred are as follows:

Certificate: 87710 in the name of CUNNINGHAM SHEEP COMPANY (confirmed by the Umatilla River Decree Volume 3, at Page 240)

Use: IRRIGATION of 7.0 ACRES

Priority Date: 1902

Rate: 0.09 CUBIC FOOT PER SECOND (cfs)

Source: UMATILLA RIVER, tributary to COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	30 E	WM	5	SW SE	SOUTH 74 DEGREES 12 MINUTES EAST, 4150 FEET FROM THE W¼ CORNER OF SECTION 5
2 N	30 E	WM	5	SE NW	1800 FEET SOUTH AND 1360 FEET EAST FROM THE NW CORNER OF SECTION 5

Permit: S-7400 in the name of U.S. BUREAU OF RECLAMATION (application S-9668)

Use: SUPPLEMENTAL IRRIGATION of 7.0 ACRES

Priority Date: July 1, 1924

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing of the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second, 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.

Source: MCKAY RESERVOIR, tributary of MCKAY CREEK. Water is diverted down the natural channels of McKay Creek and the Umatilla River and re-diverted at the applicant's point of diversion described under Bureau of Reclamation contract.

Authorized Point of Diversion and Points of Re-Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	32 E	WM	34	NW SE	McKay Dam
2 N	30 E	WM	5	SW SE	RE-DIVERSION: SOUTH 74 DEGREES 12 MINUTES EAST, 4150 FEET FROM THE W¼ CORNER OF SECTION 5
2 N	30 E	WM	5	SE NW	RE-DIVERSION: 1800 FEET SOUTH AND 1360 FEET EAST FROM THE NW CORNER OF SECTION 5

Authorized Places of Use:

Twp	Rng	Mer	Sec	Q - Q	Certificate (acres)	
					87710 (IR)	S-7400 (IS)
2 N	30 E	WM	5	SW SE	7.0	7.0
TOTAL:					7.0	7.0

15. Transfer Application T-12252 proposes to change the points of diversion for Certificate 87710 and re-diversion points for Permit 7400 downstream 3200 feet to POD 2, 350 feet to POD 3, and ½ mile to POD 1 located:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	30 E	WM	5	SE NW	POD 2: 1800 FEET SOUTH AND 1360 FEET EAST FROM THE NW CORNER OF SECTION 5
2 N	30 E	WM	5	NW SE	POD 3: 1670 FEET NORTH AND 1560 FEET WEST FROM THE SE CORNER OF SECTION 5
2 N	30 E	WM	6	NE NE	POD 1: 1020 FEET SOUTH AND 1070 FEET WEST FROM THE NE CORNER OF SECTION 6

16. Transfer Application T-12252 also proposes to change the place of use of the above described rights to:

Twp	Rng	Mer	Sec	Q - Q	Certificate (acres)	
					87710 (IR)	S-7400 (IS)
2 N	30 E	WM	5	SW NW	4.2	4.2
2 N	30 E	WM	5	SE NW	0.3	0.3
2 N	30 E	WM	5	NW SW	2.5	2.5
TOTAL:					7.0	7.0

17. The fourth primary right and its layered supplemental right to be transferred are as follows:

Certificate: 87711 in the name of CUNNINGHAM SHEEP COMPANY (confirmed by the Umatilla River Decrees Volume 3, Page 240 and Volume 15, Page 430)
Use: IRRIGATION of 124.9 ACRES
Priority Date: 1902
Rate: 1.56 CUBIC FOOT PER SECOND (cfs), being 1.01 cfs for the September 9, 1916 Decreed lands and 0.55 cfs for the September 1, 1961 lands
Source: UMATILLA RIVER, tributary to COLUMBIA RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	30 E	WM	5	SE NW	1800 FEET SOUTH AND 1360 FEET EAST FROM THE NW CORNER OF SECTION 5
2 N	30 E	WM	5	SW SE	SOUTH 74 DEGREES 12 MINUTES EAST, 4150 FEET FROM THE W¼ CORNER OF SECTION 5
2 N	30 E	WM	6	NE NE	1020 FEET SOUTH AND 1150 FEET WEST FROM THE NE CORNER OF SECTION 6

Permit: S-7400 in the name of U.S. BUREAU OF RECLAMATION (application S-9668)
Use: SUPPLEMENTAL IRRIGATION of 124.9 ACRES

Priority Date: July 1, 1924

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing of the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second, 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.

Source: McKAY RESERVOIR, tributary of McKAY CREEK. Water is diverted down the natural channels of McKay Creek and the Umatilla River and re-diverted at the applicant's point of diversion described under Bureau of Reclamation contract.

Authorized Point of Diversion and Points of Re-Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	32 E	WM	34	NW SE	MCKAY DAM
2 N	30 E	WM	5	SE NW	RE-DIVERSION: 1800 FEET SOUTH AND 1360 FEET EAST FROM THE NW CORNER OF SECTION 5
2 N	30 E	WM	5	SW SE	RE-DIVERSION: SOUTH 74 DEGREES 12 MINUTES EAST, 4150 FEET FROM THE W¼ CORNER OF SECTION 5
2 N	30 E	WM	6	NE NE	RE-DIVERSION: 1020 FEET SOUTH AND 1070 FEET WEST FROM THE NE CORNER OF SECTION 6

Authorized Places of Use:

Twp	Rng	Mer	Sec	Q - Q	Certificate 87711 (acres)		Permit (acres)
					Priority Date 1902 (IR)		S-7400 (IS)
					Lands Confirmed by Decree 9/9/1916	Lands Confirmed by Supp. Decree 9/1/1961	
2 N	30 E	WM	5	NW NW	2.0	--	2.0
2 N	30 E	WM	5	SW NW	35.0	--	35.0
2 N	30 E	WM	5	SE NW	14.0	--	14.0
2 N	30 E	WM	5	NE SW	21.0	0.8	21.8
2 N	30 E	WM	5	NW SW	3.0	4.4	7.4
2 N	30 E	WM	5	NW SE	--	4.8	4.8
2 N	30 E	WM	6	NE NE	2.0	1.7	3.7
2 N	30 E	WM	6	NW NE	--	0.2	0.2
2 N	30 E	WM	6	SW NE	--	14.5	14.5
2 N	30 E	WM	6	SE NE	4.0	17.5	21.5
TOTAL:					81.0	43.9	124.9

18. Transfer Application T-12252 proposes to change the points of diversion for Certificate 87711 and re-diversion points for Permit 7400 downstream 3200 feet to POD 2, 350 feet to POD 3, and ½ mile to POD 1 located:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
2 N	30 E	WM	5	SE NW	POD 2: 1800 FEET SOUTH AND 1360 FEET EAST FROM THE NW CORNER OF SECTION 5
2 N	30 E	WM	5	NW SE	POD 3: 1670 FEET NORTH AND 1560 FEET WEST FROM THE SE CORNER OF SECTION 5
2 N	30 E	WM	6	NE NE	POD 1: 1020 FEET SOUTH AND 1070 FEET WEST FROM THE NE CORNER OF SECTION 6

19. Transfer Application T-12252 also proposes to change the place of use of the above described rights to:

Twp	Rng	Mer	Sec	Q - Q	Certificate (acres)	
					87711 (IR)	S-7400 (IS)
					Priority Date 1902	Priority Date July 1, 1924
2 N	30 E	WM	5	NW NW	2.5	2.5
2 N	30 E	WM	5	SW NW	35.3	35.3
2 N	30 E	WM	5	SE NW	7.7	7.7
2 N	30 E	WM	5	NE SW	25.0	25.0
2 N	30 E	WM	5	NW SW	4.5	4.5
2 N	30 E	WM	5	SE SW	0.3	0.3
2 N	30 E	WM	5	NW SE	10.7	10.7
2 N	30 E	WM	5	SW SE	3.7	3.7
2 N	30 E	WM	6	NE NE	0.8	0.8
2 N	30 E	WM	6	NW NE	0.4	0.4
2 N	30 E	WM	6	SW NE	13.1	13.1
2 N	30 E	WM	6	SE NE	20.9	20.9
TOTAL:					124.9	124.9

20. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening and/or by-pass device is necessary at the new point of diversion to prevent fish from entering the diversion and/or safely transport fish back to the body of water from which the fish were diverted and that the diversion is not currently equipped with an appropriate fish screening and/or by-pass device. This diversion may be eligible for screening cost share funds.

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

21. Water has been used within the five-year period prior to submittal of the transfer application 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.
22. Pumping structures, pumps, pipeline, wheel lines and sprinkler systems 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-12252.
23. The proposed changes would not result in enlargement of the rights.
24. The proposed changes would not result in injury to other water rights.

Determination and Proposed Action

The changes in points of diversion, additional points of diversion, and changes in place of use proposed in Transfer Application T-12252 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-12252 is approved, the final order will include the following:

- 1. The changes in points of diversion, additional points of diversion and changes in place of use proposed in Transfer Application T-12252 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 2484, 28608, 87710, and 87711 and any related decree.*
- 3. Water right Certificates 2484, 28608, 87710, and 87711 are cancelled. Permit 7400 is modified; the Department will issue a superseding permit describing the portions transferred when it is determined that it is necessary for record keeping.*
- 4. The quantity of water diverted at the additional points of diversion, together with that diverted at the original points of diversion, shall not exceed the quantity of water lawfully available at the original points 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.*
 - 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 a fish screening and/or by-pass device, as appropriate, at the new point of diversion consistent with the Oregon Department of Fish and Wildlife's (ODFW) design and construction standards. Prior to installation, the water user shall obtain written approval from ODFW that the required screen and/or by-pass device meets ODFW's criteria. Prior to submitting a Claim of Beneficial Use, the water user must obtain written approval from ODFW that the required screening and/or by-pass device was installed to the state's criteria. The water user shall maintain and operate the fish screens and/or by-pass devices, as appropriate, at the point of diversion consistent with ODFW's operational and maintenance standards.*
- 7. The former places 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, 2019**. 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, on MAY 21 2018.



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

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>