

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-12718, Grant County)	PROPOSING APPROVAL OF A
)	CHANGE 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

GORDON AND JULIE LARSON
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CANYON CITY, OR 97820
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Agent

KYLE SULLIVAN, GRANT SWCD
721 S. CANYON BLVD.
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Findings of Fact

1. On July 21, 2017, GORDON AND JULIE LARSON filed an application to change the points of diversion and change the place of use under Certificates 25341, 17372, and 7692. The Department assigned the application number T-12718.
2. Notice of the application for transfer was published on August 1, 2017, pursuant to OAR 690-380-4000. No timely comments were filed in response to the notice by the deadline of September 1, 2017.
3. On October 10, 2017, the watermaster completed a review and determined that the transfer application as proposed would cause injury and enlargement.
4. On April 11, 2018, current meter measurements taken in Berry Creek between the Upper Berry Creek POD and the pump station during June, July, August and October of 2017 by various parties were provided to OWRD.
5. On May 11, 2018, the watermaster submitted a revised watermaster review and determined the transfer application as proposed could still result in enlargement and be injurious.

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. The issues of injury and enlargement from the watermaster's review are outlined below:
 - a. After the proposed change, the watermaster concluded that distribution of water rights could result in regulation of other water rights that would not have occurred if use under the original rights were maximized under the full quantity authorized. It is not clear if the reach between the old POD and the new POD gains or loses water. Pumping water at the new PODs that was not available at the existing PODs could result in additional water diverted from the system and could result in regulation of other users not previously regulated.
 - b. It is likely the original place of use could continue to receive water from the same source. The irrigation system installed for this transfer can potentially be operated to blend water from Berry Creek and Canyon Creek to all lands involved. The John Day decree does not delineate which source serves which portions of the place of use. The State Engineer's Map for the John Day Decree does show how the original delivery system worked and what acreage was served by each source and diversion.
 - c. The State Engineer's Map does not identify a location for the domestic use under Certificate 25341. The John Day River Adjudication Proof of Claims has no discussions or clarifying information about the domestic use source. The watermaster requests the caseworker for this transfer to request information and proof of the domestic water use.
7. On April 2, 2018, the Department contacted the agent, Kyle Sullivan, requesting an evidence of use affidavit with supporting documentation for the domestic and stock portion of water under Certificate 25341.
8. On April 4, 2018, the applicant sent in a signed evidence of use affidavit for the domestic and stock water portion of Certificate 25341, along with photos of the pump house used to deliver the domestic right.
9. On May 1, 2018, the department issued a draft preliminary determination proposing denial of T-12718 to the applicants.
10. On May 15, 2018, the department issued an amended draft preliminary determination proposing denial of T-12718 to the applicants.
11. On May 17, 2018, the department received the requested responses to the draft preliminary determination with the appropriate conditions for approval of this transfer.
12. On May 21, 2018, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-12718 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of June 21, 2018, 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.

13. The portion of the first right to be transferred is as follows:

Certificate: 25341 in the name of BUD HINTON; SUCCESSOR IN INTEREST TO MARY HALL (confirmed by John Day River (F) Decree)
Use: IRRIGATION, DOMESTIC AND STOCK OF 47.8 ACRES
Priority Date: JULY 3, 1883
Rate: 1.20 CUBIC FEET PER SECOND
Limit/Duty: The amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed 1/40 cubic foot per second per acre irrigated to June 1 and 1/80 cubic foot per second per acre there-after; further limited to 1.0 acre-foot per calendar month to June 1 and 4.0 acre feet per acre during the season April 1 to Sept. 30.
Source: BERRY CREEK, tributary to CANYON CREEK and CANYON CREEK

Authorized Place of Use:

IRRIGATION, DOMESTIC, AND STOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	31 E	WM	36	SW NW	23.3
14 S	31 E	WM	36	NW SW	18.8
14 S	31 E	WM	36	SW SW	5.7
Total					47.8

14. Certificate 25341 does not describe the location of the authorized points of diversion, however information is available from the adjudication map and the CWRE's survey indicating that the authorized points of diversion are located as follows:

Twp	Rng	Mer	Sec	Q-Q	Ditch Name
14 S	31 E	WM	36	NW SE	UPPER BERRY CREEK
14 S	31 E	WM	36	NE SW	MIDDLE BERRY CREEK
14 S	31 E	WM	36	NW SW	LOWER BERRY CREEK
15 S	31 E	WM	1	NW NW	CANYON CREEK

15. Certificate 25341 lists both Berry Creek and Canyon Creek as sources for this right. Neither the water right certificate nor the tabulation in the decree depicts how many acres are irrigated from each source. However, the adjudication map does show the approximate acres historically irrigated from each source.

16. Transfer Application T-12718 proposes to move the authorized points of diversion over ¼ mile downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	31 E	WM	35	SE NE	BERRY CREEK PUMP - 140 FEET NORTH AND 170 FEET WEST FROM THE EAST 1/4 CORNER OF SECTION 35
14 S	31 E	WM	35	SE NE	CANYON CREEK PUMP - 140 FEET NORTH AND 190 FEET WEST FROM THE EAST 1/4 CORNER OF SECTION 35

17. Transfer Application T-12718 also proposes to change the place of use of the right to:

IRRIGATION, DOMESTIC, AND STOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	31 E	WM	35	SE NE	0.4
14 S	31 E	WM	35	NE SE	0.5
14 S	31 E	WM	36	SW NW	24.7
14 S	31 E	WM	36	NE SW	0.1
14 S	31 E	WM	36	NW SW	14.8
14 S	31 E	WM	36	SW SW	7.3
Total					47.8

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

Certificate: 17372 in the name of JESS T. ILER (perfected under Permit S-18205)

Use: IRRIGATION OF 1.8 ACRES

Priority Date: MARCH 8, 1948

Rate: 0.045 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-FORTIETH of one cubic foot per second per acre, for each acre irrigated prior to June 1st and thereafter 1/80th of one cubic foot per second or its equivalent for each acre irrigated and shall be limited to a diversion of not to exceed 1 acre foot per acre for each acre irrigated during any month prior to June 1st and shall be further limited to a total diversion of not to exceed 4 acre feet per acre for each acre irrigated during the irrigation season from April 1st to September 30th of each year.

Source: CANYON CREEK, tributary to the JOHN DAY RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
14 S	31 E	WM	36	SW SW

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	31 E	WM	36	NW SW	1.0
14 S	31 E	WM	36	SW SW	0.8
Total					1.8

19. Certificate 17372 describes the authorized place of use as 1.0 acre in the NWSW and 0.8 acre in the SWSW of Section 36, Township 14 S, Range 31 E, Willamette Meridian, Grant County, Oregon.
- The transfer application depicts the place of use under Certificate 17372 as being 1.8 acres in the NWSW of Section 36, Township 14 S, Range 31 E, Willamette Meridian, Grant County, Oregon.
 - The final proof survey indicates the basis for locating the irrigated lands was a fence intersection described on the map with "said to be cor." Review of historic aerial photos depicts what is likely the fence intersection referenced to be well north of any PLS corner. Also, the overall shape of the irrigated field as depicted in the Final Proof Survey does not match the topographical characteristics of the land. When the field is shifted to the north by aligning the mapped fence intersection with the historic fence intersection depicted on the aerial photo, the final proof survey better matches the terrain and the irrigation system. Based on the review of aerial photos, historic maps, LiDAR data, and the resurvey performed by the county surveyor in 2015, the department concluded the right should be re-described as being 1.8 acres in the NWSW of Section 36, Township 14 S, Range 31 E, Willamette Meridian, Grant County, Oregon.

The following table lists the place of use as described in existing certificate 17372 and a proposed re-description based on the above findings:

Twp	Rng	Sec	Original Description of Place of Use		Proposed Re-Description of Place of Use		
			Q-Q	Acres	Q-Q	Acres	Current Tax Lot [<i>optional</i>]
14 S	31 E	36	NW SW	1.0	NW SW	1.8	5315
14 S	31 E	36	SW SW	0.8			

20. Transfer Application T-12718 proposes to move the authorized point of diversion approximately 3100 feet downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	31 E	WM	35	SE NE	CANYON CREEK PUMP - 140 FEET NORTH AND 190 FEET WEST FROM THE EAST 1/4 CORNER OF SECTION 35

21. Transfer Application T-12718 also proposes to change the place of use of the right to:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	31 E	WM	36	SW NW	1.8

22. The third right to be transferred is as follows:

Certificate: 7692 in the name of BUD HINTON (perfected under Permit S-8025)
Use: SUPPLEMENTAL IRRIGATION OF 5.7 ACRES
Priority Date: JUNE 24, 1927
Rate: 0.08 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 in case of rotation.
Source: CANYON CREEK, tributary to the JOHN DAY RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
15 S	31 E	WM	1	NW NW

Authorized Place of Use:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	31 E	WM	36	SW SW	5.7

23. Transfer Application T-12718 proposes to move the authorized point of diversion approximately 3100 feet downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	31 E	WM	35	SE NE	CANYON CREEK PUMP - 140 FEET NORTH AND 190 FEET WEST FROM THE EAST 1/4 CORNER OF SECTION 35

24. Transfer Application T-12718 also proposes to change the place of use of the right to:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	31 E	WM	36	SW NW	5.7

25. 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)]

26. Water has been used within the last five years according to the terms and conditions of the rights. There is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.

27. A diversion structure and ditch 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-12718.

28. Water Right Certificate 25341, as well as the John Day River decree, do not delineate which source serves which ground. Diverting more water from one source than was historically used to irrigate the entire place of use would be an enlargement of the right. The proposed changes, as conditioned, would not result in enlargement of the rights.
29. Diverting more water from one source than what was originally allowed could be injurious to Water Right Certificates 25340, 65150, and T-6410. The proposed changes, as conditioned, would not result in injury to other water rights.

Determination and Proposed Action

The change in points of diversion and change in place of use proposed in Transfer Application T-12718 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-12718 is approved, the final order may include the following:

1. *The change in points of diversion and change in place of use proposed in Transfer Application T-12718 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 25341, 17372, and 7692 and any related decree.*
3. *Water Right Certificate 25341 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer.*
4. *Water Right Certificates 17372 and 7692 are cancelled.*
5. *The quantity of water diverted at the new points of diversion, shall not exceed the quantity of water lawfully available at the original points of diversion.*
6. *The maximum amount of water to be diverted from Berry Creek will be at a rate of 1.04 cfs up to June 1st and 0.52 cfs to September 30th. The maximum amount of water to be diverted from Canyon Creek will be at a rate of 0.285 cfs up to June 1st and 0.183 cfs to September 30th.*
7. *To protect Canyon Creek water users, the watermaster staff must have access to the original (authorized) points of diversion to compare the amount of water that is available at the original points of diversion with what is being diverted from the proposed points of diversion. If access is restricted, a measuring device capable of continuous measurement and recording with telemetry may be required at the Berry Creek #2 point of diversion. The landowner will be notified by the Department prior to accessing the property. The landowner will provide the necessary information to access the property through the locked gates.*

8. *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.*
9. *Watermaster office staff shall have unrestricted access during the irrigation season to the respective measuring devices at the proposed points of diversion.*
10. *The water user shall operate and maintain an approved fish screen at the new point of diversion. If Oregon Department of Fish and Wildlife (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.*
11. *The former place of use of the transferred rights shall no longer receive water under the rights.*
12. *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.*

13. After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.

Dated at Salem, Oregon this AUG 14 2018,



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>