

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-12448, Jackson County)	PROPOSING APPROVAL OF AN
)	ADDITIONAL POINT OF DIVERSION
)	AND A CHANGE IN 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

CHRISTOPHER S. AND THERESA L. SILER
PO BOX 1957
ASHLAND, OR 97520

Findings of Fact

1. On July 27, 2016, CHRISTOPHER S. AND THERESA L. SILER filed an application for an additional point of diversion and a change in place of use under Certificate 14336. The Department assigned the application number T-12448.
2. Notice of the application for transfer was published on August 9, 2016, pursuant to OAR 690-380-4000. The following are comments that were filed in response to the notice:
 - a) On September 2, 2016, Douglas Hormel submitted the following comment:

“This is a comment in reference to file number T12448, an application for permanent water right transfer submitted 7/27/16. I have concerns regarding this water right transfer request. I would like to present a different view concerning the historical synopsis accompanying this application. I have lived at 850 Neil Creek Road (tax lot #2100) adjacent to the applicant's property since 1967. I have operated a nursery on this property since 1981 and my water rights enable me to operate my business. The drainage and seepage of the east, middle, and west draws in this application for certificate #14336 originate entirely on my property and drain to the applicants property. The buried pipes referenced in this application are visible and convey Neil Creek water from the Hill Ditch, over the Talent Irrigation District (TID) canal, to

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.
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irrigate my land. The maps accompanying the original application from 1941 are quite clear showing the three major draws traversing my property. To my knowledge, there was never a dam or pond where the draws converge as claimed by the applicant; the water was diverted through open ditches. I did not research the Final Rogue River Decree referenced in this application, but I do know the east side ditch certificate #15980 did deliver water to part of tax lot #1904 historically. The Siskiyou Dairy was located at 800 Neil Creek Road during the 1950's and 1960's. The dairy irrigated their property with the east side ditch. The dairy property was then subdivided into six parcels which include the applicant's property, parcel #1904. The accompanying map drawn by Scott Fein is not accurate regarding the recent use of water on this property. This property has not used water from certificate #15980 since 1978, nor does it currently have access to this source. One could claim that five years of non-use constitutes forfeiture of the right. The water from certificate #15980 has never been delivered to this property through tax lots #2105 and #123 via pipelines as stated by the applicant's. The applicants installed pipes in July of this year through the two adjacent tax lots (#2105 & #123) and now claim this was how water from certificate #15980 was delivered to their property historically. In the late 1970's and early 1980's Keith Corp installed a large gravity flow irrigation system for Corp Ranch. The waters from Neil Creek were combined with the Talent Irrigation District water at the intake box of this system. The intake box has a design flaw, water not used in the system backs up and overflows as waste water. Corp Ranch solved their problem by obtaining permission to pipe the overflow waste water onto my property where it ran down the west draw. Last year I withdrew permission for Corp Ranch to run overflow water through my property. I did not want to facilitate wasting water given our recent several years of drought. The large volume of water was also creating erosion problems on my property. As a comparison, residents of Corp Ranch Road (not connected with Corp Ranch) created a water district and installed a gravity flow system with an intake box adjacent to Corp Ranch's box. Their intake box is designed so all unused water remains in the canal. There is no overflow. Page 2 comment on file #T12448 This application is a desire to redefine the existing water right #14336 to include water from the Corp Ranch intake box. The applicants have installed piping that will connect to the intake box and redirect water to their property. They will be taking co-mingled TID and Hill Ditch water to irrigate their property and fill a pond. This is clearly not drainage and seepage water and not the original water right #14336. If the applicants are allowed to connect their piping to the Corp Ranch box, they will be using Neil Creek water that is not a part of their water right. Neil Creek water would be taken from neighboring property owners with priority rights to that water. TID water users will not be happy to see water redirected to a property that currently does not pay for TID water. If the applicants purchase TID water, it should be metered and delivered without comingling with Neil Creek water. I believe the water source for this transfer application should be carefully reviewed and denied based on the information given in this comment. Thank you for your consideration.”

b) On September 2, 2016, Ted A. Loftus submitted the following comment:

“We submit this letter in response to the Application for Permanent Water Right Transfer Certificate T12448. There are erroneous statements with respect to the history of water use on (Tax Lot 1904), purchased by Silers’ in 2015. My wife and I purchased and have lived on Tax Lot 1902 since 2011. Our property is adjacent to Tax Lot 1904. We are concerned that our water right 15980, dating back to 1873, could be negatively impacted, especially during low water years, if this transfer is approved. I recently retired from a 35 year career as a licensed landscape/irrigation contractor in Jackson County and as a result, have developed a strong background in how water flows by way of gravity and/or pumping. Neil Creek water flows year round but on low snow pack years only owners of senior water rights receive late season water. Because our water right is not a senior right, our Neil Creek water is generally cut off in late summer. Our water comes through a spur ditch off Neil Creek known as the East Neil Ditch. Corp Ranch also used this spur for water until the late 1970s when they transferred their right and point of connection upstream approximately 1/2 mile. This transferred water goes into a cistern and is co-mingled with TID water that Corp Ranch has and continues to pay for. Corp built the cistern below the TID ditch and uses the water to water his hay fields. When Corp Ranch doesn't use all the water flowing into their cistern it goes into an overflow pipe. That overflow water until recently, travelled across a neighbor's property and eventually onto the property that the Silers' purchased. The water flowing across the neighbor's property was causing erosion and was thought to be wasteful. As a result, the neighbor requested that Corp Ranch stop sending water across this neighbor's property in the spring of 2016. When the flow of that water stopped, the Siler's complained to TID and asked that the water be turned back on. Their request was denied because the property owner who asked it be turned off had the legal right to do so. In July, 2016 the Silers reached an agreement with Corp Ranch to divert this overflow water to Silers' property. Siler's immediately installed a 6" pipe to transport this water to their property. Siler's application, if approved, would allow the Silers to access Neil Creek and TID water that flows thru Corp's system. This would decrease the amount of water that flows down Neil Creek, resulting in less available water to all property owners downstream. Noted below are two of the most erroneous statements in the application T12448: In reference to TL1904, it is stated that “a wooden head gate on a corrugated metal pipe crossing under an existing road was historically used to impound water...”. No one who has lived adjacent to TL1904 remembers a head gate or any impounded water as far back as 1950. 2. With respect to the alleged impounded water it is stated that, “...enough hydraulic head was built through gravity flow to siphon water from the confluence of the draws to the most westerly portion of TL 1904.” The elevation gain from the confluence of the draws to the most westerly portion of TL1904 is greater than 80 ft.. It is not possible to siphon water via gravity flow uphill with an 80 foot elevation gain. Other questionable statements are more difficult to explain without walking the site. We hope the above information and history will facilitate your understanding of the situation surrounding Certificate T 12448. Our goal is to protect existing water rights to our property (Tax Lot 1902) and to the property of surrounding neighbors.”

- c) On September 4, 2016, John and Kathy Sager submitted the following comment:

“Submitting this comment in reference to file number T12448. An application for permanent water transfer submitted this summer.

We live at 600 Neil Creek Road in Ashland, OR. Tax lot #1901. We have lived here since 1998 and use our water right 15980 as water flow thru what is called the East Neil Ditch.

We have pasture with livestock that requires water from this ditch and we have used this water every summer since purchasing this home at that time. Prior to this, the former owner also used the water to flood irrigate this same pasture.

Recently, the Silers bought and developed property adjacent to ours (lot #1904). I have since learned that unbeknownst to us and other neighbors, they have applied for water right transfer which we all feel will negatively impact our historic usage of this water. How they went about this without any discussion with neighbors, and erroneous facts in the application, are very disturbing to those of us involved.

My goal is to protect our existing water right to our property and our neighbors. If this application is approved it would decrease water flow down Neil Creek, resulting in less available water to all of us downstream from the diversion. This would impact not only our livestock but also property values.

Thank you for your time and consideration.”

- d) On September 5, 2016, Bryan Frazier submitted the following comment:

“My concerns with this transfer is that water is being transferred from eastside ditch 1941 rights to hill ditch 1860's rights are as follows. The Eastside ditch usually is one of first ditches to be shut off in dry years where as Hill ditch normally never is shut off. The applicant should not be able to us Neil creek water if eastside ditch is shut off because of lack of water in Neil creek, as that would affect others with more senior water rights on Neil creek including my property and the other 22 properties that are members of West Side Neil Creek Ditch. In addition the comingle box where T.I.D. and hill ditch comingle has a design flaw, when Corp Ranch isn't using water to irrigate the box over flows sending Neil creek water down through applicants property. This is a waste of water that Neil Creek and other water users on Neil Creek could use. The comingle box was installed the summer of 1978 I helped Keith Corp along with a couple friends pour the concrete box that summer when we were hauling hay for Keith. This applications shows transferred water being used to water around house and along driveway. but applicants storage pond application number R88268 shows water will be used for livestock only. which is it? Thank you for your consideration in this matter.”

3. On August 24, 2016, the Department's Watermaster for District 13 determined that because the application, as submitted, would identify Certificate 15980 as the primary irrigation right, and Certificate 14336 would be supplemental. The landowner has no access to the water diverted under Certificate 15980 and if approved as applied this will result in regulation of the actual water used for irrigation under Certificate 14336 until the flows of Neil Creek decrease to a level that allows the supplemental right to be exercised. Furthermore the description in the application detailing the erroneous relationship between Certificate 14336 and 15980 does not describe the current irrigation system but alleges past systems (i.e. greater than 5 years ago).

The Watermaster also determined that to address these issues the applicant needed to clarify that Certificate 14336 as the primary right and that they have no current documentation to detail how water from Certificate 15980 is or has been applied to the land. Certificate 14336 is a run-off/seepage right so run-off/seepage from Certificate 15980 may have occurred, but to his knowledge they have no ability to utilize water directly from Certificate 15980.

4. On February 9, 2017, the Department contacted the applicant by written correspondence to notify the applicant and the applicant's agent of the deficiencies in the application. The Department requested that the deficiencies be resolved by April 6, 2017.
5. On April 25, 2017, the applicant's agent submitted a revised Table 2, map, and description of the water system operation. The agent also submitted a Supplemental Form D (Water Right Transfers Within the Boundaries of or Served by an Irrigation or Other District), and supporting documentation for evidence of use.
6. On November 15, 2017, the Department contacted the applicant by written correspondence to notify the applicant and the applicant's agent of remaining deficiencies in the application. The Department requested that the deficiencies be resolved by December 15, 2017.
7. On March 13, 2018, the applicant's agent submitted a revised map.
8. On July 25, 2018, the applicant submitted an Affidavit for the Voluntary Partial Diminution of a Water Right Certificate.
9. On October 4, 2018, the applicant's agent submitted a revised Table 2, correcting the deficiencies.
10. On October 12, 2018, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-12448 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of November 13, 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 applicant is authorized to pursue the transfer.

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

Certificate: 14336 in the name of HENRY KERBY (perfected under Permit S-14857)
Use: IRRIGATION of 7.23 ACRES
Priority Date: APRIL 8, 1941
Rate: 0.09 CUBIC FOOT PER SECOND, BEING 0.04 CFS FROM WEST DRAW, 0.03 CFS FROM MIDDLE DRAW, AND 0.022 CFS FROM EAST DRAW
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 4.5 acre-feet per acre for each acre irrigated during the irrigation season from April 2 to October 31 of each year, and shall also be limited to the water available at the proposed point of diversion, and shall not carry with it the right to compel the continuance of the waste water, and shall conform to such reasonable rotation system as may be ordered by the proper state officer.
Source: DRAINAGE and SEEPAGE WATER from WEST, MIDDLE AND EAST DRAWS in NEIL CREEK WATERSHED, a tributary of BEAR CREEK

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q
39 S	2 E	WM	30	NE SW
39 S	2 E	WM	30	SE SW

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	2 E	WM	30	NE SW	7.23

12. The Department received information from the applicant that better describes the location of the authorized points of diversion for Certificate 14336 as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	2 E	WM	30	NE SW	EAST DRAW - 1337 FEET NORTH AND 404 FEET WEST FROM THE S1/4 CORNER OF SECTION 30
39 S	2 E	WM	30	NE SW	MIDDLE DRAW - 1317 FEET NORTH AND 455 FEET WEST FROM THE S1/4 CORNER OF SECTION 30
39 S	2 E	WM	30	NE SW	WEST DRAW - 1304 FEET NORTH AND 727 FEET WEST FROM THE S1/4 CORNER OF SECTION 30

13. Transfer Application T-12448 proposes an additional point of diversion for 5.3 acres under Certificate 14336 downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances	Approximate distance from authorized points of diversion in feet (ft)		
						WEST	MIDDLE	EAST
39 S	2 E	WM	30	NE SW	1870 FEET NORTH AND 400 FEET WEST FROM THE S1/4 CORNER OF SECTION 30	716 ft NE	923 ft NE	972 ft N

14. Transfer Application T-12448 also proposes to change the place of use of the right within:

Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	2 E	WM	30	NE SW	2.0

15. The Department has determined that the lands to which a portion of Certificate 14336 are to be moved would be layered with another water right for primary irrigation, being Certificate 15980.
16. 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)]

17. 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.
18. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right was present within the five-year period prior to submittal of Transfer Application T-12448.
19. The proposed changes would not result in enlargement of the right.
20. The proposed changes would not result in injury to other water rights.
21. All other application requirements are met.

Partial Diminution of a Water Right

22. On July 25, 2018, the applicant submitted an Affidavit for the Voluntary Partial Diminution of a Water Right Certificate. The portion of the water right to be diminished is as follows:

Certificate: 15980 in the name of R. I. Stuart (confirmed by Rogue River Final Decree)
Use: Irrigation of 5.23 acres
Priority Date: 1873
Rate: 0.07 cubic foot per second
Source: Neil Creek, a tributary of Bear Creek

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
NONE GIVEN						

Authorized Place of Use to be Diminished:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	2 E	WM	30	NE SW	5.23

Determination and Proposed Action


The additional point of diversion and change in place of use proposed in Transfer Application T-12448 appears 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-12448 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-12448 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 14336 and any related decree.*
3. *Water right Certificate 14336 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer.*
4. *The water right for irrigation of 5.23 acres as described by Certificate 15980 is diminished from a right for primary irrigation to a right for supplemental irrigation. The Department shall issue Certificate 94057, a new and superseding certificate, to confirm the partial diminution of the right.*
5. *The quantity of water diverted at the additional point 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.*

6. *Water use measurement conditions:*
 - a. *Before water use may begin under this order, the water user shall install a weir or 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.*
7. *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 screen and/or by-pass device, as appropriate, at the point of diversion consistent with ODFW's operational and maintenance standards.*
8. *The former place of use of the transferred rights shall no longer receive water under the right.*
9. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2020**. 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.*
10. *After satisfactory proof of beneficial use is received, a new certificate confirming the right transferred will be issued.*

Dated at Salem, Oregon this NOV 21 2018,



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

This Preliminary Determination was prepared by Corey Courchane. If you have questions about the information in this document, you may reach me at 503-986-0825 or corey.a.courchane@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>



Oregon

Kate Brown, Governor

Water Resources Department

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(503) 986-0900

Fax (503) 986-0904

November 21, 2018

CHRISTOPHER S. AND THERESA L. SILER
PO BOX 1957
ASHLAND, OR 97520

SUBJECT: Water Right Transfer Application T-12448

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-12448. 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, 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 Department's notice.

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 corey.a.courchane@oregon.gov or (503) 986-0825, if I may be of assistance.

Sincerely,

Corey Courchane
Transfer Specialist
Transfer and Conservation Section

cc: T-12448
Shavon L. Haynes, District 13 Watermaster (*via e-mail*)
Scott D. Fein, Agent for the applicant (*via e-mail*)
Talent Irrigation District

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