

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-12132, Grant County)	PROPOSING DENIAL OF A CHANGE
)	IN POINT OF DIVERSION

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

Applicants

The Confederated Tribes of the
Warm Springs Reservation of Oregon
P.O. Box C
Warm Springs, OR 97761

Bobby Jack Harris, et al.
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Agent

Erik Rook
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The Confederated Tribes of the Warm Springs
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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.

Findings of Fact

1. On August 14, 2015, The Confederated Tribes of the Warm Spring Reservation filed an application to change the point of diversion under Certificates 24909, 82305, 25097, 25525 and 25885. The Department assigned the application number T-12132.
2. Notice of the application for transfer was published on August 18, 2015, pursuant to OAR 690-380-4000. The Oregon Department of Fish and Wildlife filed a response to the notice, stating that moving a proposed point of diversion 2800 feet upstream on the John Day River would injure an instream water right (Certificate 59788). The Oregon Department of Fish and Wildlife also 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.
3. On June 2, 2017, the Department sent a copy of the draft Preliminary Determination proposing to deny Transfer Application T-12132 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of July 3, 2017, for the applicant to respond. On July 20, 2017, the agent for the applicant requested the Department pursue consent to injury and proceed with issuance of the Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.

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

Certificate: 24909 in the name of NETTIE BLINN (confirmed by Decree of the Circuit Court of the State of Oregon for Grant County, Vol.15 at Pg. 461)
Use: IRRIGATION OF 38.7 ACRES
Priority Date: 1869 – Tract #1
Rate/Duty: ONE-FORTIETH of one cubic foot per second per acre irrigated from April 1 to September 30, further limited to ONE ACRE-FOOT per acre per calendar month to July 1 and 3/4 ACRE-FOOT per acre thereafter; total FIVE ACRE-FEET per acre for season, measured at the point of diversion
Source: JOHN DAY RIVER, tributary to the COLUMBIA RIVER

Authorized Place of Use:

IRRIGATION TRACT #1					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	1	SW SW	6.0
13 S	33 E	WM	12	NW NE	4.2
13 S	33 E	WM	12	NE NW	12.0
13 S	33 E	WM	12	NW NW	16.5
Total					38.7

5. Certificate 24909 does not describe the location of the point of diversion. However, information is available from the John Day River Decree tabulation and associated adjudication map which recognizes and identifies a ditch located:

Twp	Rng	Mer	Sec	Q-Q	Diversion
13 S	33 E	WM	12	SW NE	<i>original</i> Lower McHaley Ditch

6. Transfer Application T-12132 proposes to change the point of diversion for the above described right approximately 2,750 feet upstream from the authorized point of diversion to a screened intake structure site located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13S	34 E	WM	7	NW SW	370 FEET SOUTH AND 200 FEET EAST FROM THE W¼ CORNER OF SECTION 7

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

Certificate: 82305 in the name of JOHN FORREST (confirmed by Decree of the Circuit of the State of Oregon for Grant County, Volume 15 at page 461)

Use: IRRIGATION OF 17.0 ACRES

Priority Date: 1875

Rate/Duty: ONE-FORTIETH of one cubic foot per second per acre irrigated, or its equivalent for each acre irrigated from April 1 to September 30 and shall be further limited to ONE ACRE-FOOT per acre per calendar month to July 1 and 3/4 ACRE-FOOT per acre thereafter; for a diversion not to exceed FIVE ACRE-FEET per acre for each acre irrigated during the irrigation season of each year, (IF AVAILABLE AT THE ORIGINAL POINT OF DIVERSION: SMALL DITCH - NW¼ NW¼, SECTION 12, T13S, R33E, WM; 500 FEET SOUTH AND 200 FEET EAST FROM THE NW CORNER OF SECTION 12).

Source: JOHN DAY RIVER, a tributary of the COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	33 E	WM	12	SE NE	1660 FEET SOUTH AND 980 FEET WEST FROM THE NE CORNER OF SECTION 12

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	11	NE NE	17.0

8. Transfer Application T-12132 proposes to change the point of diversion for the above described right approximately 2,250 feet upstream from the authorized point of diversion to a screened intake structure site located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13S	34 E	WM	7	NW SW	370 FEET SOUTH AND 200 FEET EAST FROM THE W¼ CORNER OF SECTION 7

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

Certificate: 25097 in the name of W. W. DIXON (confirmed by John Day River (F) decree)

Use: IRRIGATION OF 1.84 ACRES, being within Lots 20, 21, 22, and 23 of the Kilbourns Addition to Prairie City, Oregon.

Priority Date: 1867

Rate: 0.071 CUBIC FOOT PER SECOND

Limit/Duty: ONE-FORTIETH cubic foot per second per acre irrigated from April 1 to September 30; further limited to ONE ACRE-FOOT per acre per calendar month to July 1 and 3/4 ACRE-FOOT per acre thereafter; total FIVE ACRE-FEET per acre for season, measured at point of diversion.

Source: JOHN DAY RIVER, tributary to the COLUMBIA RIVER

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	2	SE SW	2.85

10. Water right Certificate 25097 was issued based on the Department’s adjudication map (*dated November 1925*) and subsequent adjudication proceeding. Certificate 25097 describes the place of use of the 2.85 acres being within Lots 20, 21, 22 and 23 of the Kilbourns Addition to Prairie City, Oregon. However, two parcels, Phippen (TL 5105) and the Lake property (TL 5200), located within Lots 21 and 22 of the Kilbourns Addition, are located outside the SE¼ SW¼ described in Certificate 25097. These parcels laid out on a Grant County Tax Lot map and a topographic map clearly show the portions extend over the 1/16th line east into the SW¼ SE¼. The recent field survey by the applicant’s CWRE describes the irrigated lands as the same footprint as the original lots contained within this “Kilbourns Addition” described on Certificate 25097. This map also depicts the two decreed water rights consistent with that shown on the current Grant County tax assessor’s map 13S 33E 02CD. The 0.16 acres (TL 5105/Phippen) and 0.10 acres (TL 5200/Lake) of Certificate 25097 should be re-described as it becomes obvious how these small parcels fit together by viewing any of the maps described herein. These additional acreages are within the footprint under Certificate 25097 and do not change the valuation of the 2.85 acres in Section 2. The Government Land Office survey of 1869 also describes the layout of the road and the river consistent with the Grant County assessor’s office Tax Lot map for Section 2. This leads the Department to conclude that the land to which these rights have always been appurtenant should be re-described as follows:

The following table describes the place of use description in existing Certificate 25097, appurtenant to, among others, the Harris, Phippen, Richardson and Lake properties, and a proposed re-description based on the findings above:

Certificate 25097								
Original Description of Place of Use					Proposed Re-description			
Sec.	Q Q	Tax Lot	User/Lot [#] of Kilbourns Addition	Acres	User/Lot [#] of Kilbourns Addition	Q-Q	Estimated Acres	
2	SE SW	5100	Harris - Lots 20 & 21	2.85	Harris - Lots 20 & 21	SE SW	1.40	
		5101	Richardson - Lot 22		Richardson - Lot 22	SE SW	0.10	
		5105	Phippen - Lots 21 & 22		Phippen - Lot 21	SE SW	0.08	
		5200	Lake - Lot 22		Phippen - Lot 21	SW SE	0.16	
					Lake - Lot 22	Lake - Lot 22	SW SE	0.10
		5103 5104 5106	Lots 22 & 23		Lot 20, 21, 22, 23 (remainder of Kilbourns Addition)	SE SW	1.01*	
Total:				2.85	Total:		2.85	

*Note: these 1.01 acres shall be issued a remaining right. (*portions not involved in transfer*)

11. Certificate 25097 does not describe the location of the point of diversion. However, information is available from the John Day River Decree tabulation and associated adjudication map which recognizes and identifies a ditch located:

Twp	Rng	Mer	Sec	Q-Q	Diversion
13 S	33 E	WM	12	SW NE	<i>original</i> Lower McHaley Ditch

12. Transfer Application T-12132 proposes to change the point of diversion for the above described right approximately 2,750 feet upstream from the authorized point of diversion to a screened intake structure site located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	34 E	WM	7	NW SW	370 FEET SOUTH AND 200 FEET EAST FROM THE W¼ CORNER OF SECTION 7

13. The fourth right to be transferred is as follows:

Certificate: 25525 in the name of R. R. MCHALEY (confirmed by Decree of the Circuit Court of the State of Oregon for Grant County, Vol. 15 at Page 461)

Use: IRRIGATION OF 71.0 ACRES

Priority Date: 1869

Rate/Duty: ONE-FORTIETH cubic foot per second per acre irrigated from April 1 to September 30; further limited to ONE ACRE-FOOT per acre per calendar month to July 1 and 3/4 ACRE-FOOT per acre thereafter; total FIVE ACRE-FEET per acre for season, measured at point of diversion.

Source: JOHN DAY RIVER, tributary to the COLUMBIA RIVER

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	2	SW SE	25.2
13 S	33 E	WM	2	SE SE	25.0
13 S	33 E	WM	11	NW NE	16.0
13 S	33 E	WM	11	NE NW	4.8
Total					71.0

14. Certificate 25525 does not describe the location of the point of diversion. However, information is available from the John Day River Decree tabulation and associated adjudication map which recognizes and identifies a ditch located:

Twp	Rng	Mer	Sec	Q-Q	Diversion
13 S	33 E	WM	12	SW NE	<i>original</i> Lower McHaley Ditch

15. Transfer Application T-12132 proposes to change the point of diversion for the above described right approximately 2,750 feet upstream from the authorized point of diversion to a screened intake structure site located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	34 E	WM	7	NW SW	370 FEET SOUTH AND 200 FEET EAST FROM THE W¼ CORNER OF SECTION 7

16. The fifth right to be transferred is as follows:

Certificate: 25885 in the name of RUSSELL H. SULLENS (confirmed by Decree of the Circuit Court of the State of Oregon for Grant County, Volume 15 at Page 461)
Use: IRRIGATION OF 0.24 ACRE, being within Lot 25 of the Kilbourn Addition to Prairie City, Oregon.
Priority Date: December 26, 1877
Rate/Duty: ONE-FORTIETH cubic foot per second per acre irrigated from April 1 to September 30; further limited to ONE ACRE-FOOT per acre per calendar month to July 1 and 3/4 ACRE-FOOT per acre thereafter; total FIVE ACRE-FEET per acre for season, measured at point of diversion
Source: JOHN DAY RIVER, tributary to the COLUMBIA RIVER

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	2	SW SE	0.23
13 S	33 E	WM	11	NW NE	0.01

17. Certificate 25885 does not describe the location of the point of diversion. However, information is available from the John Day River Decree tabulation and associated adjudication map which recognizes and identifies a ditch located:

Twp	Rng	Mer	Sec	Q-Q	Diversion
13 S	33 E	WM	12	SW NE	<i>original</i> Lower McHaley Ditch

18. Transfer Application T-12132 proposes to change the point of diversion for the above described right approximately 2,750 feet upstream from the authorized point of diversion to a screened intake structure site located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	34 E	WM	7	NW SW	370 FEET SOUTH AND 200 FEET EAST FROM THE W¼ CORNER OF SECTION 7

19. In the late 2000's, the Department was consulted by the Confederated Tribes of the Warm Springs, land owners and other users on issues involving the Lower McHaley Ditch. The project was focused on the replacement of a gravel push-up dam in the river with an upstream, permanent "Fish Friendly" Lay-Flat structure, resolving fish passage problems. The Watermaster has reported that in the summer of 2001, a lay-flat stanchion dam with engineered fish passage and one Waterman type head gate was installed at the proposed (Upper McHaley) point of diversion.

20. The Oregon Department of Fish and Wildlife (ODFW) has also submitted a written letter of support that accompanied the application stating that this transfer has been one of several fish habitat improvement projects that has been proposed and implemented, mainly focusing on restoration efforts in improving fish passage and riparian function at irrigation diversion dams. This project would result in the elimination of another gravel push-up dam and would be converted to a scour pool where adequate water depth is available for pumping.

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 rights. There is no information in the record that would demonstrate that these rights are subject to forfeiture under ORS 540.610.
22. A ditch diversion structure, gravity flow ditches 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-12132.
23. The Watermaster has made a statement that the John Day River is typically regulated annually due to deficiencies in supply. The ditch that serves these water rights is also regulated annually.
24. The proposed change would not result in enlargement of the rights.
25. The proposed change would result in injury to an existing water right and one instream water right. An instream water right Certificate 59788, created under ORS 537.346, exists for the reach of the river in which the authorized points of diversion would be moved upstream, and stream flows within the reach are frequently below the levels allocated under the instream water right. Thus, the instream water right would be injured as a result of the proposed change in point of diversion. The proposed upstream movement of a point of diversion will also result in the movement past an intervening point of diversion under Certificate 24833 and will have the potential to be injured.
26. Certificate 24833 is held by the applicant, and by submission of this transfer application, consents to the potential injury to their own water right.

27. Streamflow in the reach of the mainstem John Day River covered by the instream water right Certificate 59788 is measured at the gage 14-038530 above the town of John Day, Oregon. Summary data for the period of record is available November 1968 to current year, is published in USGS Open-File Reports and is available at the Department's website. The following table provides a comparison of monthly John Day River streamflows at the gage above the town of John Day and the instream water right:

Month	80% Exceedance Flow - Natural Stream Flow (cfs)	ISWR (MF213) Cert. #59788 (in cfs)		80% Flows minus out-of-stream consumptive uses, reserved and instream requirements (net water available)
		split	month	
January	98.0	25		71.60
February	124.0	25		97.40
March	165.0	34		129.00
April	229.0	34		177.00
May	242.0	34		170.00
June	160.0	25		84.60
July	101.0	15		13.60
August	64.5	15	34	-25.70
September	55.2	34		-16.10
October	87.1	25		47.40
November	94.6	25		68.40
December	100.0	25		73.70

28. Notwithstanding injury to instream water right, the Oregon Department of Fish and Wildlife has stated that this project may create a net benefit to fish in the John Day River but reserves its final determination until a more thorough review of the transfer application can be conducted.

Determination and Proposed Action

The change the points of diversion as proposed in Transfer Application T-12132 cannot be effected without injury to instream Water Right Certificate 59788. Pursuant to ORS 540.530, the transfer application will be denied unless, on the recommendation of the the Oregon Department of Fish and Wildlife and the Department of Environmental Quality, the Department consents to injury of the instream water right, pursuant to OAR 690-380-5050, or protests are filed pursuant to OAR 690-380-4030.


If Transfer Application T-12132 is approved notwithstanding the Department's preliminary determination that the transfer will result in injury, the change and subsequent use of water shall be subject to the following conditions:

1. *The change in points of diversion proposed in Transfer Application T-12132 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 24909, 82305, 25097, 25525 and 25885 and any related decree.*
3. *Water right Certificates 82305 and 25525 are cancelled.*

4. *Water right Certificates 24909, 25097, and 25885 are cancelled. New certificates will be issued to describe those portions of these rights not affected by this transfer.*
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 water user shall operate and maintain an approved fish screen at the new point of diversion consistent with Oregon Department of Fish and Wildlife's operational and maintenance standards.*
7. *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 new point of diversion.*
 - b. *The water user shall maintain the meter or measuring device in good working order.*
 - c. *The water user shall allow the Watermaster access to the meter or measuring device; provided however, where the meter or measuring device is located within a private structure, the Watermaster shall request access upon reasonable notice.*
8. *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.*
8. *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 change 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 this JAN 14 2019,


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 by e-mail at Ken.D.Dowden@oregon.gov

Protests should be addressed to the Water Rights Services Division, Oregon Water Resources Department, 725 Summer Street, 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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Salem, OR 97301

(503) 986-0900

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January 3, 2019

Applicants

THE CONFEDERATED TRIBES
OF THE WARM SPRINGS RESERVATION
OF OREGON
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WARM SPRINGS, OR 97761

BONNIE M. NANCE,
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Agent

ERIK ROOK
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THE CONFEDERATED TRIBES
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68106 HIGHWAY 26
PRAIRIE CITY, OR 79869

SUBJECT: Water Right Transfer Application T-12132

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department has concluded that approval of the changes in points of diversion proposed in T-12132 would result in injury to instream water right 59788. Consistent with your request that we seek a recommendation from the Oregon Department of Fish and Wildlife (ODFW) and the Oregon Department of Environmental Quality (DEQ) on whether we should consent to the injury to the instream water right, we are proceeding with that process concurrently with issuance of the preliminary determination.

The Water Resources Department holds instream water rights in trust for the benefit of the people of Oregon. Under ORS 540.530(c), we may approve the transfer only if the agency that requested the instream water right concludes that the changes proposed will result in net benefits to the resources protected by the instream water right, and recommends that we consent to the injury of the right. Please contact the agency staff person to whom the agency review letter has been sent, to discuss whether you may be able to assist in providing information needed for the analysis.

After we have received recommendations from the ODFW and DEQ on whether to consent to the injury, provided no protests have been filed, we will issue an order either:

- Approving the transfer with conditions, if any, identified in the agency recommendations as necessary to ensure that the change will result in net benefits, or
- Reaffirming our decision that the instream water right would be injured and denying the transfer.

The timing for issuance of the order will depend on the availability of information needed by ODFW and DEQ to perform the net benefits analysis upon which their recommendation must be based, and the time necessary to allow public review and comment on the recommendation. You are not authorized to use water from the proposed points of diversion pending a final decision by the Department on your transfer application.

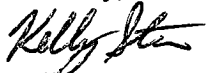
A public notice is being published in the Department's weekly publication and in the Blue Mountain Eagle newspaper, simultaneously with issuance of the Preliminary Determination. The notice initiates a period in which any person may file either a protest opposing the decision proposed by the Department 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 503-986-0866 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-12132
Eric Julsrud, District 4 Watermaster *(via e-mail)*
Robert D. Bagett, CWRE

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