

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-12907, Grant County)	PROPOSING DENIAL OF A CHANGE
)	IN POINT 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

ELMWOOD RANCH, INC.
RUSSELL RICCO
25880 GREEN HAVEN ROAD
PRAIRIE CITY, OR 97869

ROGER AND JANNA LEE
PO BOX 870
PRAIRIE CITY, OR 97869

Findings of Fact

1. On April 19, 2018, ELMWOOD RANCH, INC./ RUSSELL RICCO and ROGER AND JANNA LEE filed an application to change the point of diversion and to change the place of use under Certificates 25272, 25273, and 32398. The Department assigned the application number T-12907.
2. Notice of the application for transfer was published on April 24, 2018, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On October 18, 2018, the Department contacted the applicant by written correspondence to notify the applicant and applicant's agent of deficiencies in the application. The Department requested that deficiencies be resolved by November 16, 2018.
4. On October 18, 2018, the applicant's agent submitted a revised Table 2 for each certificate, and a revised application map, resolving the deficiencies.

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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5. On December 14, 2018, the Department mailed a copy of the draft Preliminary Determination proposing to deny Transfer Application T-12907 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of January 14, 2019, 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.

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

Certificate: 25272 in the name of JOHN W. HALL (confirmed by John Day River (F))

Use: IRRIGATION of 266.6 ACRES

Priority Date: 1863

Limit/duty: 6.67 CUBIC FEET PER SECOND, [BEING 1/40 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 ¾ ACRE-FOOT PER ACRE THEREAFTER; TOTAL FIVE ACRE-FEET PER ACRE FOR SEASON, MEASURED AT POINT OF DIVERSION]

Source: JOHN DAY RIVER, tributary of the COLUMBIA RIVER

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	17	NE NW	30.2
13 S	33 E	WM	17	NW NW	33.5
13 S	33 E	WM	17	SW NW	14.0
13 S	33 E	WM	17	SE NW	3.9
13 S	33 E	WM	18	NE NE	34.0
13 S	33 E	WM	18	NW NE	37.3
13 S	33 E	WM	18	SW NE	30.6
13 S	33 E	WM	18	SE NE	21.1
13 S	33 E	WM	18	NE NW	33.8
13 S	33 E	WM	18	SE NW	28.2
Total					266.6

7. The Department received information from the applicant that better describes the location of the authorized point of diversion for Certificate 25272 as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
13 S	33 E	WM	17	NE NE	NORTH 44.44271° WEST 118.75946°

8. Transfer Application T-12907 proposes to change the place of use of the right to:

Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	17	NW NE	5.9
13 S	33 E	WM	17	NE NW	34.9
13 S	33 E	WM	17	NW NW	37.9
13 S	33 E	WM	17	SW NW	14.5
13 S	33 E	WM	17	SE NW	0.7
13 S	33 E	WM	18	NE NE	37.7
13 S	33 E	WM	18	NW NE	39.7

Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	18	SW NE	19.7
13 S	33 E	WM	18	SE NE	23.5
13 S	33 E	WM	18	NE NW	35.9
13 S	33 E	WM	18	SE NW	16.2
Total					266.6

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

Certificate: 25273 in the name of JOHN W. HALL (confirmed by John Day River (F))
Use: SUPPLEMENTAL IRRIGATION of 185.0 ACRES
Priority Date: 1863
Limit/duty: 4.63 CUBIC FEET PER SECOND, [BEING 1/40 CUBIC FOOT PER SECOND PER ACRE IRRIGATED TO JUNE 1 AND 1/80 CUBIC FOOT PER SECOND PER ACRE THEREAFTER; FURTHER LIMITED TO ONE ACRE-FOOT PER CALENDAR MONTH TO JUNE 1 AND FOUR ACRE-FOOT PER ACRE DURING SEASON APRIL 1 TO SEPTEMBER 30, MEASURED AT POINT OF DIVERSION]
Source: BEAR CREEK, tributary of JOHN DAY RIVER

Authorized Place of Use:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	18	NE NE	34.00
13 S	33 E	WM	18	NW NE	37.30
13 S	33 E	WM	18	SW NE	30.60
13 S	33 E	WM	18	SE NE	21.10
13 S	33 E	WM	18	NE NW	33.80
13 S	33 E	WM	18	SE NW	28.20
Total					185.0

10. Transfer Application T-12907 proposes to change the place of use of the right to:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	17	NW NW	9.9
13 S	33 E	WM	17	SW NW	3.6
13 S	33 E	WM	18	NE NE	37.7
13 S	33 E	WM	18	NW NE	39.7
13 S	33 E	WM	18	SW NE	19.7
13 S	33 E	WM	18	SE NE	23.5
13 S	33 E	WM	18	NE NW	35.9
13 S	33 E	WM	18	SE NW	15.0
Total					185.0

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

Certificate: 32398 in the name of GEORGE H. AND WILLIAM HALL, JR. (confirmed by John Day River (F))
Use: IRRIGATION of 16.7 ACRES
Priority Date: 1863 – TRACT #1
Limit/duty: 0.42 CUBIC FOOT PER SECOND, [BEING 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 POINT OF DIVERSION]
Source: JOHN DAY RIVER, a tributary of COLUMBIA RIVER

Authorized Point of Diversion:

TRACT #1					
Twp	Rng	Mer	Sec	Q-Q	Ditch
13 S	33 E	WM	9	SE SE	
13 S	33 E	WM	17	NE NE	JOHN DAY RIVER

Authorized Place of Use:

IRRIGATION – TRACT #1					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	17	NW NE	16.7

12. Transfer Application T-12907 proposes to move the authorized point of diversion to:

TRACT #1							
Twp	Rng	Mer	Sec	Q-Q	Ditch	Survey Coordinates	Approximate distance from authorized point of diversion in feet (ft.)
13 S	33 E	WM	9	NE SE	HALL	NORTH 44. 45060 ° WEST 118.73739 °	1478 ft. upstream
13 S	33 E	WM	17	NE NE	JOHN DAY RIVER	NORTH 44. 44274 ° WEST 118.75946 °	959 ft. upstream

13. Transfer Application T-12907 also proposes to change the place of use of the right to:

IRRIGATION – TRACT #1					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	33 E	WM	17	NE NE	4.2
13 S	33 E	WM	17	NW NE	12.5
Total					16.7

14. 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 currently equipped with an appropriate fish screening and/or by-pass device.

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

15. 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.
16. 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-12907.
17. The proposed changes would not result in enlargement of the rights.
18. Instream water right Certificate 59788 exists for the reach of the river in which the authorized point 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.
19. Instream water right Certificate 59788 is for flows to be maintained in the John Day River between the mouth of Rail Creek (Section 24, T14S, R34E, WM) and USGS Gage No. 14-038530 (Section 19, T13S, R32E, WM).
20. All other application requirements are met.

Determination and Proposed Action

The change in point of diversion as proposed in Transfer Application T-12907 cannot be effected without injury to instream Water Right Certificate 59788. Pursuant to ORS 540.530, the application will be denied unless, on the recommendation of 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-12907 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 point of diversion and change in place of use proposed in Transfer Application T-12907 is 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 25272, 25273, and 32398 and any related decree.*
3. *Water right Certificates 25272, 25273, and 32398 are cancelled. A new certificate will be issued describing that portion of Certificate 32398 not affected by this transfer.*
4. *The quantity of water diverted at the new 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 flume, weir or other suitable open channel measuring device, at each new point of diversion.*
 - b. *The water user shall maintain the flume, weir or other suitable open channel measuring device 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 headgate to control and regulate the quantity of water diverted. The type and plans of the headgate must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department. The water user shall maintain the headgate as required by the Department.*
7. *The water user shall maintain and operate a fish screening and/or by-pass device, as appropriate, at the point of diversion consistent with the Oregon Department of Fish and Wildlife's operational and maintenance standards.*
8. *The former place of use of the transferred rights shall no longer receive water under the rights.*
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, new certificates confirming the rights transferred will be issued.*

Dated at Salem, Oregon this FEB 01 2019 ,



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

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February 1, 2019

ELMWOOD RANCH, INC.
RUSSELL RICCO
25880 GREEN HAVEN ROAD
PRAIRIE CITY, OR 97869

ROGER AND JANNA LEE
PO BOX 870
PRAIRIE CITY, OR 97869

SUBJECT: Water Right Transfer Application T-12907

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department has concluded that approval of the change in point of diversion proposed in T-12907 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.

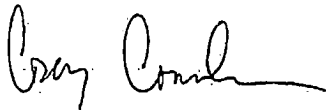
A public notice is being published in the Department's weekly publication and in the Blue Mountain Eagle newspaper, simultaneously with issuance of the Preliminary Determination. The notice initiates a period in which any person may file either a protest opposing the decision proposed by the Department 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 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: Transfer Application file T-12907
Eric Julsrud, District 4 Watermaster (*via e-mail*)
Kyle Sullivan, Agent (*via e-mail*)
Levi R. Voigt, CWRE

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