

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-12774, Jackson County)	PROPOSING APPROVAL OF AN
)	ADDITIONAL POINT OF DIVERSION,
)	A CHANGE IN PLACE OF USE, AND
)	A CHANGE IN CHARACTER 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

GIN GUEI EBNESAJJAD
JOY LUCK FARM LLC
225 WEST RAPP RD
TALENT, OR 97540

Findings of Fact

1. On November 20, 2017, GIN GUEI EBNESAJJAD; JOY LUCK FARM, LLC filed an application for an additional point of appropriation and to change the place of use under Certificates 48966 and 74512, and to change the character of use under Certificate 74512. The Department assigned the application number T-12774.
2. Notice of the application for transfer was published on November 28, 2017, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On April 25, 2018, the Department contacted the applicant by written correspondence to notify the applicant of the deficiencies in the application. The Department requested that the deficiencies be resolved by May 25, 2018.
4. On May 18, 2018, the applicant requested additional time in order to respond to the deficiencies in the application. The Department requested that the deficiencies be resolved by June 25, 2018.

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 July 5, 2018, the Department contacted the applicant by telephone to clarify the process of completing a transfer regarding a decreed right which involves irrigation, stock, and domestic, and to discuss what options were available for the applicant. The Department requested that the deficiencies be resolved by August 31, 2018.
6. On August 29, 2018, the applicant requested additional time to allow for the Certified Water Rights Examiner to submit revised maps. The Department requested that the deficiencies be resolved by September 21, 2018.
7. On October 12, 2018, the applicant submitted revised tables and maps. After reviewing the revisions, the Department determined that 1.1 acres being transferred under Certificates 49866 and 74512 were layered in the SW NE of Section 26, T38S, R1W, WM, and had to either move together or be cancelled.
8. On November 6, 2018, the applicant submitted revised tables and maps, resolving the deficiencies.
9. On November 29, 2018, the Department determined evidence of use on 0.5 acres that is proposed to change character of use to nursery, was not sufficient enough in detailing beneficial use of water had been made within the five years prior to submittal of T-12774. The Department also determined the place of use under Certificates 48966 and 74512 are located within the Talent Irrigation District (TID), and that a Supplemental Form D from TID, granting consent to the changes requested under T-12774 would need to be submitted. The Department contacted the applicant by written correspondence to notify the applicant of the deficiencies in the application.
10. On February 6, 2019, the Department contacted the applicant by written correspondence to notify the applicant of the deficiencies in the application. The Department requested that the deficiencies be resolved by March 8, 2019. The applicant submitted the required Supplemental Form D the same day.
11. On March 8, 2019, the applicant submitted additional evidence of use supporting documentation.
12. On April 30, 2019, the Department determined that the additional evidence submitted, was not sufficient enough to suggest the 0.5 acre designated for change in character of use to nursery had been irrigated.
13. On May 8, 2019, the Department contacted the applicant by written correspondence to notify the applicant additional evidence was needed, or to withdraw the 0.5 acres from the application. The Department requested that the deficiencies be resolved by May 24, 2019.
14. On May 31, 2019, the Department received a written statement from a neighboring landowner, which described irrigation taking place on the place of use in question within the previous five years prior.
15. On June 21, 2019, the Department received a signed and notarized Evidence of Use Affidavit from the applicant, resolving the deficiencies.

16. On September 20, 2019, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-12774 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of October 21, 2019, for the applicant to respond.
17. On October 9, 2019, it was brought to the Department's attention that a scrivener's error existed in the draft Preliminary Determination issued on September 20, 2019. The rate and duty seasonal limitation for the change in character of use from domestic and stock to nursery use under Certificate 74512 was not included as a Finding of Fact.
18. On October 24, 2019, the applicant requested to extend the time to complete application of the water to full beneficial use to October 1, 2025.
19. On October 28, 2019, the Department mailed a copy of the revised draft Preliminary Determination proposing to approve Transfer Application T-12774 to the applicant. The revised draft Preliminary Determination cover letter set forth a deadline of December 2, 2019, for the applicant to respond.
20. On November 30, 2019, the applicant responded with questions seeking additional information on the Department's findings and determinations, essentially not agreeing with the Department's findings. The Department responded by informing the applicant the Department had made its determination and will proceed with the application process, and granted an extension to December 6, 2019, to receive the report of ownership from the title company.
21. On December 9, 2019, the applicant 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.

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

Certificate: 48966 in the name of OLIVER HELMS (confirmed by Rogue River (F) State Water Board)
Use: IRRIGATION of 1.1 ACRES and STOCK
Priority Date: 1854
Rate: 0.02 CUBIC FOOT PER SECOND
Source: WAGNER CREEK, a tributary of BEAR CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
38 S	1 W	WM	35	NW NW	880 FEET NORTH AND 475 FEET WEST FROM THE SE CORNER OF DLC 66

Authorized Place of Use:

IRRIGATION AND STOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
38 S	1 W	WM	26	SW NE	1.1

23. Transfer Application T-12774 proposes an additional point of diversion approximately 0.7 mile downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
38 S	1 W	WM	26	NE SW	2500 FEET NORTH AND 2450 FEET EAST FROM THE SW CORNER OF SECTION 26

24. Transfer Application T-12774 also proposes to change the place of use of the right to:

IRRIGATION AND STOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
38 S	1 W	WM	26	SW NE	0.2
38 S	1 W	WM	26	NE SW	0.4
38 S	1 W	WM	26	NW SE	0.5
Total					1.1

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

Certificate: 74512 in the name of FRED AND MARTHA RAPP (confirmed by Rogue River (F) State Water Board)

Use: DOMESTIC, STOCK, and IRRIGATION of 8.0 ACRES, BEING 0.6 ACRE WITH 1852 PRIORITY, 4.7 ACRES WITH 1854 PRIORITY, AND 2.7 ACRES WITH 1864 PRIORITY

Priority Date: 1852 – WAGNER AND THORNTON DITCH, 1854 – ROCKEFELLOW DITCH, AND 1864 – DAVENPORT DITCH

Rate: 0.01 CUBIC FOOT PER SECOND (CFS) WITH 1852 PRIORITY, 0.05 CFS WITH 1854 PRIORITY, AND 0.16 CFS WITH 1864 PRIORITY

Source: WAGNER CREEK, a tributary of BEAR CREEK

Authorized Points of Diversion:

DITCH
WAGNER AND THORNTON
ROCKEFELLOW
DAVENPORT

Authorized Place of Use:

IRRIGATION, DOMESTIC, AND STOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
38 S	1 W	WM	26	SW NE	1.1
38 S	1 W	WM	26	SE NW	0.6
38 S	1 W	WM	26	NE SW	3.6
38 S	1 W	WM	26	NW SE	2.7
Total					8.0

26. The Department received information from the applicant that better describes the location of the authorized point of diversion for Certificate 74512 as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
38 S	1 W	WM	35	NW NW	620 FEET SOUTH AND 900 FEET EAST FROM THE SW CORNER OF SECTION 26

27. Transfer Application T-12774 proposes an additional point of diversion approximately 0.7 mile downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
38 S	1 W	WM	26	SW NE	2500 FEET NORTH AND 2450 FEET EAST FROM THE SW CORNER OF SECTION 26

28. Transfer Application T-12774 proposes to change the character of use for a portion of the right to nursery.

29. Transfer Application T-12774 also proposes to change the place of use of the right to:

IRRIGATION, DOMESTIC, AND STOCK						
Twp	Rng	Mer	Sec	Q-Q	Acres	Priority Date
38 S	1 W	WM	26	SW NE	0.2	1854
38 S	1 W	WM	26	SE NW	0.1	1852
38 S	1 W	WM	26	NE SW	3.6	1854
38 S	1 W	WM	26	NE SW	0.4	1854
38 S	1 W	WM	26	NW SE	2.7	1864
38 S	1 W	WM	26	NW SE	0.5	1854
Total					7.5	

NURSERY						
Twp	Rng	Mer	Sec	Q-Q	Acres	Priority Date
38 S	1 W	WM	26	NW SE	0.5	1852

30. Certificates 48966 and 74512 do not specify a period of allowed use; however, domestic and stock use is generally considered a year-round use. Irrigation and nursery would be limited to the irrigation season. Certificates 48966 and 74512 do not specify an irrigation season; however, consistent with the Rogue River Decree, the irrigation season is April 1 through October 31. Information contained in the decree allows water to be diverted for domestic and stock year round; during the irrigation season water diverted for irrigation purposes includes water diverted for domestic and stock.
31. Certificate 74512 does not specify a total quantity of water to be diverted annually for domestic use; however, ORS 540.610 states "beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state." The Department recognizes 0.005 cubic foot per second (cfs) as an allowable rate for domestic use of one household during the period of November 1 through March 31. If the domestic use was diverted continuously at the authorized rate of 0.005 cfs for 365 days per year (0.005 cfs x 60 sec/min x 60 min/hr x 24 hr/day x 365 days/year ÷ 43,560 square feet per acre = 3.62 acre-feet per year), is the maximum that could have been diverted. However, water for domestic use is not continuously diverted for 24 hours per day, 365 days per year.
32. Use of more water per year than what could have been used for maximum beneficial use for the original domestic use would constitute enlargement of the right, which is not allowed. Therefore, to avoid enlarging the right under the proposed nursery use, an annual volume limit should be added to the right based on the best available estimate of the maximum amount of water that could have been beneficially diverted and used for domestic use during a year.

33. Estimates of in-house domestic use available from agencies such as the United States Geological Survey (USGS), American Water Works Association (AWWA) and Penn State Cooperative Extension indicate an average in-house domestic water use of approximately 70 gallons per person per day, or approximately 0.47 acre-feet per year for a household that includes six people. Therefore, the annual volume limitation to be placed on the domestic use for this right is 0.47 acre-feet per year (0.47 acre-feet per year x 1 home = 0.47 acre feet per year).
34. Certificate 74512 does not specify a total quantity of water to be diverted annually for stock use. If diverted continuously at the authorized rate of 0.005 cfs for 365 days per year (0.005 cfs x 60 sec/min x 60 min/hr x 24 hr/day x 365 days/year ÷ 43,560 square feet per acre = 3.62 acre-feet per year), is the maximum that could have been diverted for stock.
35. 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)]

36. 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.
37. 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-12774.
38. The proposed changes would not result in enlargement of the rights.
39. The proposed changes would not result in injury to other water rights.
40. All other application requirements are met..

Determination and Proposed Action

The additional point of diversion, change in place of use, and change in character of use proposed in Transfer Application T-12774 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-12774 is approved, the final order will include the following:

1. *The additional point of diversion, change in place of use, and change in character of use proposed in Transfer Application T-12774 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 48966 and 74512, and any related decree.*
3. *Water right Certificates 48966 and 74512 are cancelled. New certificates will be issued describing that portion of the rights not affected by this transfer.*
4. *The rate of diversion for the change in character of use from irrigation to the proposed nursery operation use shall be limited to 0.01 cubic foot per second and shall be further limited to a total volume diverted of 2.25 acre feet (0.5 acres x 4.5 acre feet per acre) during the original season of use, being April 1 to October 31.*
5. *The change in character of use from irrigation to the proposed nursery use shall be further limited such that:*
 - a) *The amount of water used for NURSERY OPERATIONS is limited to a diversion of 0.01 cubic foot per second per acre and 2.25 acre feet per acre during the irrigation season of each year.*
 - b) *For the irrigation of containerized nursery plants, the amount of water diverted is limited to 0.01 cubic foot per second (or its equivalent) and 2.25 acre feet per acre during the irrigation season of each year.*
 - c) *For the irrigation of in-ground nursery plants, the amount of water diverted is limited to 0.01 cubic foot per second (or its equivalent) and 2.25 acre feet per acre during the irrigation season of each year.*
 - d) *For the irrigation of any other crop, the amount of water diverted is limited to 0.01 cubic foot per second (or its equivalent) and 2.25 acre feet per acre during the irrigation season of each year. The use of water for irrigation of any other crop shall be limited to 0.5 acres.*
6. *The rate of diversion for the change in character of use from domestic use to the proposed nursery operations use shall be limited to 0.005 cubic foot per second and shall be further limited, as identified in Finding of Fact 27, to a total volume diverted of 0.47 acre-feet during the period of authorized use, being November 1 through March 31 of each year.*
7. *The change in character of use from domestic use to the proposed nursery use shall be further limited such that:*
 - a) *The amount of water used for NURSERY OPERATIONS is limited to a diversion of 0.005 cubic foot per second and 0.47 acre feet during the period of authorized use, being November 1 through March 31 of each year.*
 - b) *For the irrigation of containerized nursery plants, the amount of water diverted is limited to 0.005 cubic foot per second and 0.47 acre feet during the period of authorized use, being November 1 through March 31 of each year.*

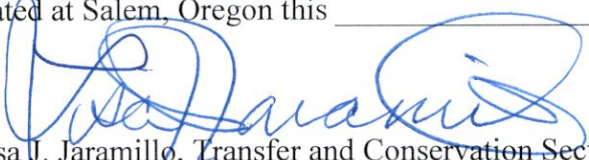
- c) *For the irrigation of in-ground nursery plants, the amount of water diverted is limited to 0.005 cubic foot per second (or its equivalent) and 0.47 acre feet during the period of authorized use, being November 1 through March 31 of each year.*
 - d) *For the irrigation of any other crop, the amount of water diverted is limited to 0.005 cubic foot per second and 0.47 acre feet during the period of authorized use, being November 1 through March 31 of each year.*
- 8. *The rate of diversion for the change in character of use from stock to the proposed nursery operations use shall be limited to 0.005 cubic foot per second and shall be further limited, as identified in Finding of Fact 28, to a total volume diverted of 3.62 acre-feet during the period of authorized use, being November 1 through March 31 of each year.*
- 9. *The change in character of use from stock to the proposed nursery use shall be further limited such that:*
 - a) *The amount of water used for NURSERY OPERATIONS is limited to a diversion of 0.005 cubic foot per second and 3.62 acre feet during the period of authorized use, being November 1 through March 31 of each year.*
 - b) *For the irrigation of containerized nursery plants, the amount of water diverted is limited to 0.005 cubic foot per second and 3.62 acre feet during the period of authorized use, being November 1 through March 31 of each year.*
 - c) *For the irrigation of in-ground nursery plants, the amount of water diverted is limited to 0.005 cubic foot per second (or its equivalent) and 3.62 acre feet during the period of authorized use, being November 1 through March 31 of each year.*
 - d) *For the irrigation of any other crop, the amount of water diverted is limited to 0.005 cubic foot per second and 3.62 acre feet during the period of authorized use, being November 1 through March 31 of each year.*
- 10. *The quantity of water diverted at the additional point of diversion (POD 2), together with that diverted at the original point of diversion (POD 1), shall not exceed the quantity of water lawfully available at the original point of diversion (POD 1).*
- 11. *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.*

12. *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.*
13. *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.*
14. *The former place of use of the transferred rights shall no longer receive water under the rights.*
15. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2025**. 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.*

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

JAN 28 2020

Dated at Salem, Oregon this _____,


Lisa J. Jaramillo, Transfer and Conservation Section Manager, 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
725 Summer St NE, Suite A
Salem, OR 97301
(503) 986-0900
Fax (503) 986-0904

January 28, 2020

GIN GUEI EBNEAJJAD
JOY LUCK FARM LLC
225 WEST RAPP RD
TALENT, OR 97540

SUBJECT: Water Right Transfer Application T-12774

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-12774. This document is an intermediate step in the denial process; water may not be used legally as proposed in the transfer application until a Final Order to approve the transfer 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 and in the Medford Mail Tribune, 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: T-12774
Shavon Haynes, District 13 Watermaster (*via e-mail*)

encs