

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-10898, Grant County)	PROPOSING DENIAL OF CHANGES
)	IN POINTS OF DIVERSION, PLACE
)	OF USE AND THE PARTIAL
)	DIMINISHMENT OF A WATER RIGHT

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

BLUE MOUNTAIN ANGUS, LLC
STEVE & CAROLYN MULLIN
64444 INDIAN CREEK ROAD
PRAIRIE CITY, OR 97869

Agent

KIRK B. MAAG, STOEL RIVES LLP
760 SW NINTH AVENUE STE 3000
PORTLAND, OR 97205

Findings of Fact

1. On June 3, 2009, Steve and Carolyn Mullin of Blue Mountain Angus, LLC, filed an application to change the point of diversion and place of use under a portion of Certificate 25844. The Department assigned the application number T-10898.
2. Notice of the application for transfer was published on June 30, 2009, pursuant to OAR 690-380-4000. The Oregon Department of Fish and Wildlife (ODFW) filed a response determining 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 August 25, 2011, the Department mailed a copy of a Preliminary Determination to the applicants, proposing to deny Transfer Application T-10898 due to enlargement and injury concerns. The Preliminary Determination set forth a deadline of September 26, 2011, for the applicants to respond. On September 26, 2011, the Department received a request from the applicants to place the transfer on hold for additional time to resolve the concerns over the enlargement and injury issues raised. The applicants requested another hold until April 1, 2012 and authorized the Department to acquire information on flows

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.

needed to serve the maximum number of cows through the Hillis Ditch in the winter season.

4. On August 30, 2013, the Department issued a preliminary determination proposing to deny Transfer application T-10898 and mailed a copy to the applicant. Additionally, notice of the preliminary determination for the transfer application was published on the Department's weekly notice on September 3, 2013, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.
5. On October 14, 2013, the Department issued a Final Order denying Transfer application T-10898 and mailed a copy to the applicants. On December 16, 2013, the applicants filed a Request for Reconsideration of the Final Order. The petition was deemed denied after 60 days pursuant to ORS 183.484(2).
6. On April 15, 2014, the applicants filed a Petition for Judicial Review in the Oregon Court of Appeals, case number A156669.
7. On September 5, 2018, the Department and the applicants entered into a Settlement Agreement to revise the application and map to allow water to be brought to both places of use under Certificate 25844 and 25970, specifically for allowing Stockwater to be delivered in the wintertime (outside the irrigation season).
8. On October 28, 2019, the Department received new revised application maps from the CWRE. On December 12, 2019, the Department also received revised application pages from the agent on behalf of the applicants.
9. On December 23, 2019, the Department received a diminishment affidavit from the applicants requesting to diminish a portion of Certificate 85029 to supplemental irrigation, as further described below in Finding of Fact #28.
10. Notice of the revised application for transfer was published on January 7, 2020, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
11. On February 6, 2020, the Department sent a copy of the revised draft Preliminary Determination proposing to approve Transfer Application T-10898 to the applicant. The revised draft of the Preliminary Determination cover letter set forth a deadline of March 7, 2020, for the applicant to respond. On March 6, 2020, the agent for 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.

12. The portion of the first primary right and its layered supplemental water right to be transferred are as follows:

Certificate: 25844 in the name of ZOE A. STEPHENSON (confirmed by John Day River (F) decree)
Use: IRRIGATION of 40.0 ACRES, DOMESTIC and STOCK
Priority Date: 1877
Limit/Duty: The amount of water to which such right is entitled, for the purpose of irrigation is limited an amount actually beneficially used for said purposes, and shall not exceed 1/40th of one cubic foot per second (cfs) per acre irrigated to June 1 and 1/80th of one cfs per acre thereafter; further limited to 1.0 acre-foot per calendar month to June 1 and 4.0 acre-feet per acre during season April 1 to September 30, measured at the point of diversion.
Source: INDIAN CREEK, tributary to JOHN DAY RIVER

Certificate: 85029 in the name of DAN STEPHENSON AND C.L. MIER, DAVID MOYER AND O.J. MOYER (perfected under Enlargement Permit E-62)
Use: IRRIGATION of 24.7 ACRES
Priority Date: JUNE 1, 1910
Limit/Duty: The amount of water to which such right is entitled is limited to an amount actually used beneficially, and shall not exceed 0.20 CUBIC FOOT PER SECOND, or its equivalent in case of rotation, measured at the point of diversion.
Source: INDIAN CREEK, tributary to JOHN DAY RIVER

Authorized Places of Use:

IRRIGATION (IR), STOCK AND DOMESTIC						
Twp	Rng	Mer	Sec	Q - Q	Certificate (acres)	
					25844 (IR/STK/DOM)	85029* (IR)
13 S	33 E	WM	28	NE NW	10.0	4.7
13 S	33 E	WM	28	SE NW	30.0	20.0
TOTAL:					40.0	24.7

*Note: the above described lands have an existing layered water right Certificate 85029 for primary irrigation and shall be diminished as described below in Finding of Fact #28.

13. Certificate 25844 does not describe the location of the point of diversion, however information is available from the John Day River Decree and associated adjudication map indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q - Q	Ditch
14 S	33 E	WM	3	NW SW	Hillis Ditch

14. Certificate 85029 also does not describe the location of the point of diversion, however, information is available from the Department's E-62 permit map indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q - Q	Ditch
14 S	33 E	WM	3	NW SW	Snell & Co. Ditch (<i>aka - Hillis Ditch</i>)

15. Revised Transfer Application T-10898 proposes to change the place of use of the above described rights to:

IRRIGATION (IR), STOCK, DOMESTIC AND SUPPLEMENTAL IRRIGATION (IS)							
Twp	Rng	Mer	Sec	Gov't Lot	Q - Q	Certificate (acres)	
						25844 (IR/STK/DOM)	85029 (IS)
14 S	33 E	WM	3	-	NW SW	9.7	9.7
14 S	33 E	WM	4	1	SE NE	22.8	7.5
14 S	33 E	WM	4	-	NE SE	7.5	7.5
TOTAL:						40.0	24.7

16. Revised Transfer Application T-10898 also proposes to change the point of diversion upstream approximately ½ mile on Indian Creek to a diversion and ditch located:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
14 S	33 E	WM	10	NE NW	JOHN LONG DITCH - 9450 FEET SOUTH AND 3850 FEET EAST FROM THE NW CORNER OF SECTION 33, T13S, R33E, W.M.

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

Certificate: 25970 in the name of JAMES A. WALSH (confirmed by John Day River (F) decree)
Use: IRRIGATION of 40.0 ACRES
Priority Date: 1905 for Tract #2
Limit/Duty: The amount of water to which such right is entitled, for the purpose of irrigation is limited an amount actually beneficially used for said purposes, and shall not exceed 1/40th of one cubic foot per second (cfs) per acre irrigated to June 1 and 1/80th of one cfs per acre thereafter; further limited to 1.0 acre-foot per calendar month to June 1 and 4.0 acre-feet per acre during season April 1 to September 30, measured at the point of diversion.
Source: INDIAN CREEK, tributary to the JOHN DAY RIVER

Authorized Place of Use:

IRRIGATION (IR)						
Twp	Rng	Mer	Sec	Gov't Lot	Q - Q	Acres
14 S	33 E	WM	3	-	NW SW	9.7
14 S	33 E	WM	4	1	SE NE	22.8
14 S	33 E	WM	4	-	NE SE	7.5
TOTAL:						40.0

18. Certificate 25970 does not describe the location of the point of diversion, however, information is available from the John Day River Decree and associated adjudication map indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q - Q	Ditch
14 S	33 E	WM	15	NE NW	Cochran Ditch

19. Revised Transfer Application T-10898 proposes to change the place of use of the above described right to:

Twp	Rng	Mer	Sec	Q - Q	Acres
13 S	33 E	WM	28	NE NW	10.0
13 S	33 E	WM	28	SE NW	30.0
TOTAL:					40.0

20. Transfer Application T-10898 also proposes to change the point of diversion downstream approximately 5800 feet on Indian Creek to a diversion and ditch located:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
14 S	33 E	WM	3	NW SW	Hillis Ditch - 7070 FEET SOUTH AND 3130 FEET EAST FROM THE NW CORNER OF SECTION 33, T13S, R33E, W.M.

21. The John Day River decree stipulates that “outside the irrigation season, the right to use of water for stock and domestic purposes as herein confirmed shall entitle the owner thereof to one-tenth of a cubic foot per second per each one thousand head of stock measured at the place of use; provided that at no time shall more water be diverted for such purposes than is reasonably necessary for such purposes, and to prevent the ditches and channels use for such purposes from being completely frozen.” Thus, the use of stock water at the new place of use under Certificate 25844 shall be limited to one-tenth of a cubic foot per second per each one thousand head of stock.
22. During the winter of 2011-2012, Watermaster’s staff determined what rate and what amounts of water in the winter were necessary to deliver water to the place of use for stock purposes on Hillis Ditch. The amount of “carriage” water needed to get 0.10 cfs two miles to the place of use was found to require a maximum of 1.5 cfs at times in order to overcome the freezing conditions that prevailed that March. It is thus assumed that the same amount of water would be needed in order to provide stock water in the winter time to both places, albeit a shorter distance, down the John Long Ditch. No more than a total combined quantity of 1.5 cfs of water at any one time, or less depending upon weather conditions, for the Hillis Ditch and John Long Ditch or any one ditch will be allowed to transport stock water down the Hillis and John Long Ditches when freezing conditions require this amount of water to convey it to the livestock. A seasonal ditch blockage shall be installed outside of the irrigation season within the NWSW of Section 28, T. 13S R. 33 E W.M. further described as approximately 44 Deg 24’ 23.28” N by 118 Deg 45’ 11.63” W to prevent stock water from being delivered to lands without a stock water right outside of the irrigation season. The timing, location, and type and plans for the seasonal ditch blockage shall be approved by the Watermaster prior to installation.
23. ODFW has reviewed revised Transfer Application T-10898 and 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.

24. ODFW's review of revised Transfer Application T-10898 also noted the proposed transfer may injure instream water right Certificate 64193, priority of June 12, 1989, on Indian Creek, tributary to the John Day River.
25. There exists an instream water right 64193 for the reach of the creek 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 during several months of the year.

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

26. Water has been used within the five-year period prior to submittal of the transfer application according to the terms and conditions Certificates 25844 and 25970. There is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610. The Department's application/permit map for Certificate 85029 suggests that the Snell Ditch & Company Ditch, used as the delivery system is also known as the Hillis Ditch. The 24.7 acres from Certificate 85029 overlapping on Certificate 25844 are proposed to be diminished. The Department shall recognize that the water right holder was ready, willing and able to use water on these 24.7 acres under Certificate 85029. The information in the record simply is not sufficient to initiate cancellation proceedings under ORS 540.631 for this portion of Certificate 85029.
27. Diversion structures and ditches sufficient to use the full amount of water allowed under the existing rights were present within the last five-year period prior to submittal of Transfer Application T-10898.
28. The proposed changes would result in injury to instream water right Certificate 64193, which is for the reach of the creek in which the authorized point of diversion would be moved upstream. The Department's streamflow model indicates that flows in Indian Creek are insufficient to meet the requirements of the instream water right during most of the year, including the months outside the irrigation season. Thus, the instream water right would be injured as a result of the proposed changes in points of diversion.

Partial Diminution of a Water Right

29. On December 20, 2019, the applicants submitted an affidavit for the partial diminution of water right Certificate 85029. The following portion of an irrigation right is appurtenant to the same lands as the authorized place of use under existing water right Certificate 25844. The portion of the irrigation right to be diminished to supplemental irrigation is as follows:

Certificate: 85029 in the name of DAN STEPHENSON AND C.L. MIER, DAVID MOYER AND O.J. MOYER (perfected under Enlargement Permit E-62)

Use: IRRIGATION of 24.7 ACRES

Priority Date: JUNE 1, 1910

Limit: The amount of water to which such right is entitled is limited to an amount actually used beneficially, and shall not exceed 0.309 CUBIC FOOT PER SECOND, or its equivalent in case of rotation, measured at the point of diversion.

Source: INDIAN CREEK, tributary to the JOHN DAY RIVER

Authorized Place of Use to be diminished to supplemental irrigation:

SUPPLEMENTAL IRRIGATION (IS)					
Twp	Rng	Mer	Sec	Q - Q	Acres
13-S	33 E	WM	28	NE NW	4.7
13 S	33 E	WM	28	SE NW	20.0
TOTAL:					24.7

Determination and Proposed Action

The request to change the points of diversion and places of use proposed in revised Transfer Application T-10898 cannot be made without injury to existing instream water right Certificate 64193 within the immediate stretch of Indian Creek. Thus, the revised transfer application does NOT appear to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000. Pursuant to ORS 540.530, the transfer application will be denied unless the applicant notifies the Department that the applicant intends to pursue approval of the revised transfer under OAR 690-380-5030 to 690-380-5050, and the Oregon Department of Fish and Wildlife and Oregon Parks and Recreation Department recommend that the Department consent 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-10898 is approved, the final order will include the following:

- 1. The change in points of diversion and change in place of use proposed in Transfer Application T-10898 are approved and the portion of Certificate 85029 that has been diminished is diminished.*
- 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 25844, 85029 and 25970 and any related decree.*
- 3. Water right Certificates 25844, 85029 and 25970 are cancelled. New certificates will be issued describing those portions of the rights not affected by this transfer.*
- 4. The quantity of water diverted at the new points of diversion shall not exceed the quantity of water lawfully available at the original point of diversion.*
- 5. The use of stock water at the new place of use under Certificate 25844 shall be limited to one-tenth of a cubic foot per second per each one thousand head of stock.*
- 6. No more than a total combined quantity of 1.5 cfs of water at any one time, or less depending upon weather conditions, for the Hillis Ditch and John Long Ditch or any one ditch will be allowed to transport stock water down the Hillis and John Long Ditches when freezing conditions require this amount of water to convey it to the livestock. A seasonal ditch blockage shall be installed outside of the irrigation season within the NWSW of Section 28, T. 13S R. 33 E W.M. further described as approximately 44 Deg 24' 23.28" N by 118 Deg 45' 11.63" W to prevent stock water from being delivered to lands without a stock water right outside of the irrigation season. The timing, location, and type and plans for the seasonal ditch blockage shall be approved by the Watermaster prior to installation.*
- 7. Water shall be acquired from the same source as the original points of diversion.*
- 8. The former places of use of the transferred rights shall no longer receive water under the rights as conditioned herein.*


Prior to diverting water, the water user shall install and maintain an approved fish screening and/or by-pass device, as appropriate, at the new points of diversion consistent with the Oregon Department of Fish and Wildlife (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 points of diversion consistent with ODFW's operational and

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.

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.

9. *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.*
10. *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 the new point of diversion.*
 - 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.*
11. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2021**. 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.*
12. *After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.*

Dated at Salem, Oregon this **APR 06 2020**



Lisa J. Jaramillo, Transfer and Conservation Section Manager, 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 ken.d.dowden@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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April 2, 2020

Applicants

BLUE MOUNTAIN ANGUS, LLC
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PRAIRIE CITY, OR 97869

Agent

KIRK B. MAAG, STOEL RIVES LLP
760 SW NINTH AVENUE STE 3000
PORTLAND, OR 97205

SUBJECT: Water Right Transfer Application T-10898

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-10898 would result in injury to instream water right 64193. Consistent with your request that we seek a recommendation from the Oregon Department of Fish and Wildlife (ODFW) and the Oregon Parks and Recreation Department (OPRD) 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 OPRD 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 OPRD 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-10898
Eric Julsrud, District 4 Watermaster *(via e-mail)*
Robert D. Bagett, CWRE

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