

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-13307, Harney County)	PROPOSING APPROVAL OF AN
)	ADDITIONAL 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.

Applicant

HOTCHKISS CO. INC.
30552 HOTCHKISS LANE
BURNS, OR 97720

Findings of Fact

1. On December 11, 2019, HOTCHKISS CO. INC. filed an application for an additional point of diversion under the 1926 Silvies River Decree; Volume 9 at Page 79, in the name of Hull Hotchkiss. The Department assigned the application number T-13307.
2. Notice of the application for transfer was published on December 17, 2019, pursuant to OAR 690-380-4000. Timely comments were filed in response to the notice.
3. On January 31, 2020, the Department contacted the applicant's agent, requesting an updated Land Use form. The applicant's agent replied the same day with the corrected form.
4. Timely comments were submitted to the Department in response to the notice. The issues raised by the comments focused primarily on concerns that:
 - a) Down-system users will sustain economic injury and loss.
 - b) The ditch capacity is deficient and unable to provide for this transfer.
 - c) This transfer goes against the 1926 Supreme Court decision because it is an impermissible change in source.

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. **IMPORTANT:** Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified above.

- d) - The applicant's water right should be revoked due to unlawful watering from a different ditch than what is called out in the Decree.
 - e) Application contains inaccuracies, thus it fails to meet statutes and regulations to qualify as an application for transfer.
 - f) The applicant does not prove to be "Ready, willing, and able".
5. Not all the issues raised by the commenters are relevant to the criteria for review of a water right transfer as per OAR 690-380-4010 and approval of a transfer application under OAR 690-380-5000. Many of the issues noted in Finding of Fact #4, though important to the residents and water resources of the area, do not directly relate to the transfer review criteria. Rather, the statutory basis for approving a water right transfer application is relatively narrow and confined to the Department finding or determining:
- a) The water right proposed for transfer is a water use subject to transfer;
 - b) The portion of the water right proposed for transfer is not cancelled due to forfeiture for non-use pursuant to ORS 540.610;
 - c) The proposed transfer would not result in enlargement of the water right proposed for transfer; and
 - d) The proposed transfer would not result in injury to other water rights.
6. If approved, the Final Order for T-13307 will contain conditions retaining the current rate limit of the right. The measurement devices in place will be monitored to ensure that enlargement of the right does not occur.
7. On April 24, 2020, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-13307 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of May 25, 2020, for the applicant to respond. 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.
8. The portion of the right to be transferred is as follows:
- Decree:** 1926 Silvies River Decree; Volume 9 at Page 79 in the name of HULL HOTCHKISS (confirmed by the Silvies River Decree, 1926)
- Use:** IRRIGATION of 152.7 ACRES
- Priority Date:** 1886
- Rate:** 1.91 CUBIC FEET PER SECOND (CFS)
- Limit/Duty:** 1/80 CFS PER ACRE, NOT TO EXCEED 2.5 ACRE FEET PER ACRE IN ANY ONE IRRIGATION SEASON
- Period of use:** MARCH 20 TO SEPTEMBER 1
- Source:** A DITCH, tributary to the WEST FORK SILVIES RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
23 S	31 E	WM	28	NE NW

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
23 S	31 E	WM	32	NE SW	38.1
23 S	31 E	WM	32	NW SW	40.0
23 S	31 E	WM	32	SW SW	36.5
23 S	31 E	WM	32	SE SW	38.1
TOTAL					152.7

9. Transfer Application T-13307 proposes an additional point of diversion approximately 3.0 miles upstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distance
23 S	31 E	WM	31	NE NW	POD #2 (PEOPLE'S DITCH) – 210 FEET SOUTH AND 680 FEET WEST FROM THE N ¼ CORNER OF SECTION 31

10. 1926 Silvies River Decree; Volume 9 at Page 79 does not describe the location of the point of diversion, however information is available from the applicant indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	G Lot	Survey Coordinates
23 S	31 E	WM	20	NE NW	1	POD #1 (HANLEY MACE HOTCHKISS DITCH) – 750 FEET SOUTH AND 1840 FEET EAST FROM THE NW CORNER OF SECTION 20

11. The Oregon Department of Fish and Wildlife has determined that the diversion is not currently equipped with an appropriate fish screen, but a fish screen may be required in the future at the new point of diversion to prevent fish from entering the diversion.

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

12. 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.
13. 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-13307.
14. The proposed change would not result in enlargement of the right.
15. The proposed change would not result in injury to other water rights.
16. All other application requirements are met.

Determination and Proposed Action

The additional point of diversion proposed in Transfer Application T-13307 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-13307 is approved, the final order will include the following:

- 1. The additional point of diversion proposed in Transfer Application T-13307 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 1926 Silvies River Decree; Volume 9, at Page 79.*
- 3. The 1926 Silvies River Decree, Volume 9, Page 79, contains a description of the right to be transferred; the right described and/or identified under the name Hull Hotchkiss is cancelled.*
- 4. The quantity of water diverted at the additional point of diversion, (POD #2), together with the original point of diversion, (POD #1), shall not exceed the quantity of water lawfully available at the original point of diversion (POD #1).*
- 5. The Oregon Department of Fish and Wildlife (ODFW) may require the water user to install an approved fish screen at the new point of diversion within one year after receiving written notification that a fish screen is required. Once installed the water user shall maintain and operate the fish screen at the new point of diversion according to 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.*
- 6. 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 change and full beneficial use of the water.*

7. *After satisfactory proof of beneficial use is received, a new certificate confirming the right transferred will be issued.*

JUL 15 2020

Dated in Salem, Oregon on _____



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
THOMAS M BYLER, DIRECTOR
Oregon Water Resources Department

This Preliminary Determination was prepared by: Tamera Smith. If you have any questions about the information in this document, you may reach me at 503-986-0864 or tamera.l.smith@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.

IMPORTANT: *Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified above.*

Notice Regarding Service Members: Active duty servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free number.



Oregon
Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

JULY 15, 2020

HOTCHKISS CO.
30552 HOTCHKISS LN
BURNS, OR 97720

SUBJECT: Water Right Transfer Application T-13307

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-13307. 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 and in the Burns Times-Herald 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.

IMPORTANT: Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified above.

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 if I may be of assistance.

Kindest regards,

Transfer Caseworker
Transfer and Conservation Section

cc: Transfer Application file T-13307
J.R. Johnson, District 10 Watermaster (via e-mail)

John A. Short, Agent for the applicant (*via e-mail*)

encs