

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-13297, Harney County)	PROPOSING APPROVAL OF
)	ADDITIONAL POINTS 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

MARK DOVERSPIKE
30552 HOTCHKISS LN.
BURNS, OR 97720

Findings of Fact

1. On December 2, 2019, MARK DOVERSPIKE filed an application for additional points of diversion under an adjudicated, un-certificated right (Silvies River Decree, Harney County, Decree Volume 9, Page 79). The Department assigned the application number T-13297.
2. Notice of the application for transfer was published on December 10, 2019, pursuant to OAR 690-380-4000.
3. Timely comments were submitted to the Department in response to the notice. The issues raised by the comments focused primarily on concerns that:
 - a) Water in the ditches is being co-mingled.
 - b) Ditches have not been maintained.
 - c) The applicant has subjected his water right to forfeiture due to illegal irrigation practices.

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 transfer will produce a negative economic impact on down-system users.
 - e) The application contains inaccuracies, therefore failing to meet the statutes for applying for a transfer.
 - f) The applicant has failed to prove that he is “Ready, willing, and able” to apply the water beneficially.
 - g) Enlargement and injury are occurring.
4. 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 #3, 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.
5. If approved, the Final Order for T-13297 will contain conditions retaining the current rate limit of the right. Measurement devices are in place to ensure that enlargement of the right does not occur.
6. On February 5, 2020, the Department requested revisions to the map and Table 2 of the application. On February 7, 2020, the applicant’s agent responded with the revised map and Table 2.
7. On April 10, 2020, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-13297 to the applicant and agent. The draft Preliminary Determination cover letter set forth a deadline of June 6, 2020, for the applicant to respond. The applicant requested that the Department proceed with issuance of a Preliminary Determination, requested a completion date of October 1, 2026, 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:** Volume 9 at Page 79 IN THE NAME OF F L. MACE (CONFIRMED BY
SILVIES RIVER DECREE 1926)
- Use:** IRRIGATION of 224.7 ACRES
- Priority Date:** 1886

Rate: 2.81 CUBIC FEET PER SECOND
Limit/Duty: 1/80 CFS PER ACRE, NOT TO EXCEED 2 ACRE-FEET PER ACRE IN ANY ONE IRRIGATION SEASON.
Period of Use: MARCH 20 to SEPTEMBER 1
Source: A DITCH, tributary to the EAST FORK SILVIES RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
23 S	31 E	WM	20	NE NW

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
23 S	31 E	WM	28	NE NW	40.0
23 S	31 E	WM	28	NW NW	40.0
23 S	31 E	WM	28	SW NW	40.0
23 S	31 E	WM	28	SE NW	40.0
23 S	31 E	WM	28	NW SW	39.7
23 S	31 E	WM	28	SW SW	25.0
TOTAL					224.7

9. Silvies River Decree, 1926 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	Sec	Mer	Q-Q	GLot	Measured Distance
23 S	31 E	20	WM	NE NW	1	POD 1 - 750 FEET SOUTH AND 1840 FEET EAST OF THE NW CORNER OF SECTION 20

10. Transfer Application T-13297 proposes additional points of diversion downstream to:

Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances	Approximate distance from Authorized Point of Diversion in miles (mi.)
23 S	31 E	WM	20	SW NE	3	POD 2 - 1290 FEET SOUTH OF THE N¼ CORNER OF SECTION 20	0.3 mi.
23 S	31 E	WM	20	SW NE	3	POD 3 - 1220 FEET SOUTH AND 700 FEET EAST OF THE N¼ CORNER OF SECTION 20	0.4 mi.

11. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening and/or by-pass device may be required in the future 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.

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 were present within the five-year period prior to submittal of Transfer Application T-13297.
14. The proposed changes would not result in enlargement of the right.
15. The proposed changes would not result in injury to other water rights.
16. All other application requirements are met.

Determination and Proposed Action

The additional points of diversion proposed in Transfer Application T-13297 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-13297 is approved, the final order will include the following:

1. *The additional points of diversion proposed in Transfer Application T-13297 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 Sylvies River Decree; 1926 Sylvies River Decree, Volume 9, Page 79.*
3. *The Sylvies River Decree Volume 9, Page 79 contains a description of the right to be transferred; the right described and/or identified under the name F.L. Mace, is cancelled.*
4. *The quantity of water diverted at the additional new points of diversion (POD 2 and POD 3), 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).*
5. *Within one year after receiving written notification from the Oregon Department of Fish and Wildlife (ODFW) that a fish screening and/or by-pass device is required, the water user shall install a screening and/or by-pass device, as appropriate, at the new point of diversion. The fish screening and/or by-pass device must meet ODFW's design and construction standards. Prior to installation, the water user shall obtain written approval from ODFW that the required screening and/or by-pass device meets ODFW's criteria. Once installed the water user shall maintain and operate the fish screening and/or by-pass device, as appropriate, at the point of diversion consistent with ODFW's operational and maintenance standards.*
6. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before October 1, 2026. 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.*

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

Dated in Salem, Oregon on JUL 30 2020



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 service members have a right to stay these proceedings under the federal service members 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

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JULY 30, 2020

MARK DOVERSPIKE
30552 HOTCHKISS LN
BURNS, OR 97720

SUBJECT: Water Right Transfer Application T-13297

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-13297. 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 tamera.l.smith@oregon.gov or via phone at 503-986-0864, if I may be of assistance.

Kindest regards,

Transfer Caseworker
Transfer and Conservation Section

cc: T-13297
J.R. Johnson, District 10 Watermaster (via e-mail)
John A. Short, Agent for the applicant (via e-mail)
encs