

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

In the Matter of Transfer Application)
T-12798, Marion, Polk, and Yamhill)
Counties)

REVISED PRELIMINARY
DETERMINATION PROPOSING
APPROVAL FOR AN ADDITIONAL
POINT OF DIVERSION AND A
CHANGE IN PLACE OF USE AND
INCORPORATING A SETTLEMENT
AGREEMENT)

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

CARLTON NURSERY CO. LLC
C/O ALLAN ELLIOTT
PO BOX 398
DAYTON, OR 97114

Findings of Fact

1. On December 22, 2017, CARLTON NURSERY CO. LLC, c/o ALLAN ELLIOTT filed an application for an additional point of diversion under Certificates 64748, 87769, and 89032. The Department assigned the application number T-12798.
2. Certificates 64748, 87769, and 89032 are in the name of Palmer Creek Water District Improvement Company, however, Carlton Nursery Co. LLC, c/o Allan Elliott, will be responsible for completion of the changes.
3. Notice of the application for transfer was published on January 2, 2018, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
4. On May 23, 2019, the Department contacted the applicant by written correspondence to notify the applicant and the applicant's agent of the deficiencies in the application. The application did not correctly identify the authorized point of diversion under Certificates 64748, 87769, and 89032. The application maps identifying the current place of use under

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.

Certificates 64748 and 87769 do not match the place of use as identified by Department records. The Department requested that the deficiencies be resolved by June 21, 2019.

5. On June 19, 2019, the applicant's agent submitted revised tables and a map, correctly identifying the authorized point of diversion for Certificates 64748, 87769, and 89032. The applicant's agent also informed the Department that the Palmer Creek Water District Improvement Company (PCWDIC) had revised maps for all water rights involved, and that the maps would be submitted to the Department as part of a District reconciliation of irrigated acres and quarter-quarter lines. The maps submitted with the application were simply a re-description of Certificates 64748 and 87769.
6. On June 24, 2019, the applicant's agent informed the Department that PCWDIC never completed re-mapping that was allowed under House Bill (HB) 3111, as the maps were done but the acreages needed to be added.
7. On July 18, 2019, the Department informed the applicant's agent that the Department was unable to locate a petition for PCWDIC, as was required under ORS 541.327. The Department determined that PCWDIC was not eligible for re-description under HB 3111, since a petition was not on file with the Department. The Department also determined that a change in place of use had taken place, and that the application would need to be revised, or a new transfer application would need to be submitted. The Department requested that the deficiencies be resolved by August 2, 2019. The Department did not receive a response.
8. On August 29, 2019, the Department mailed a copy of the draft Preliminary Determination proposing to deny Transfer Application T-12798 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of September 27, 2019, for the applicant to respond. The Department did not receive a response.
9. On October 23, 2019, the Department issued a Preliminary Determination proposing to deny Transfer T-12798 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 October 29, 2019, pursuant to ORS 540.520 and OAR 690-380-4020.
10. On November 8, 2019, a protest was received from Pacific Hydro-Geology, Inc., 18487 S. Valley Vista Rd., Mulino, OR, 97042. The Department also received revisions to the application which included a request to change the place of use under Certificates 19875 and 87769.
11. On November 22, 2019, the Department contacted the applicant by written correspondence to notify the applicant and the applicant's agent of deficiencies in the revisions submitted on November 8, 2019. Table 2 and the map under Certificate 19875 identified 45.7 acres, whereas Certificate 19875 authorizes only 45.0 acres. The Department requested that the deficiencies be resolved by December 24, 2019.
12. On December 3, 2019, the Department determined that Certificate 19875 is layered with Certificate 87769. Certificate 19875 is identified as the underlying primary right for portions of Certificate 87769 that are identified as supplemental irrigation. Certificate 87769 authorizes supplemental irrigation on 3.1 acres in the NWNE of Section 8, T5S, R3W, WM.

Certificate 19875 authorizes primary irrigation on only 2.4 acres NWNE of Section 8, T5S, R3W, WM. The Department has determined that 0.7 acres designated for supplemental irrigation under Certificate 87769 located in the NWNE of Section 8, does not have an underlying primary right. The applicant is requesting to identify the 0.7 acres in the NWNE of Section 8, T5S, R3W, WM as primary irrigation.

13. On December 6 and December 18, 2019, the Department received revisions under Certificate 19875, resolving the deficiencies identified in Findings of Fact #11 and #12.
14. On March 5, 2020, the Department evaluated the submitted revisions described in Finding of Fact #13 and determined the application is complete, as all issues and deficiencies have been addressed. The Department, therefore, is now able to proceed with a determination proposing to approve T-12798.
15. The portion of the first right to be transferred is as follows:

Certificate: 19875 in the name of BRUCE V. MILLAM (perfected under Permit S-18352)
Use: IRRIGATION of 45.0 ACRES
Priority Date: JUNE 29, 1948
Rate: 0.562 CUBIC FOOT PER SECOND
Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to ONE-EIGHTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year, and shall be subject to such reasonable rotation system as may be ordered by the proper state officer. When in the distribution of water it becomes necessary to install headgates and measuring devices, the applicant or his successor in interest will be required to install these so as not to restrict the natural channel of the stream or interfere with the flow of the water therein.
Source: PALMER CREEK, a tributary of YAMHILL RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
5 S	3 W	WM	5	SW SE

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	5	SE SW	43	1.0
5 S	3 W	WM	5	NW SE	43	18.0
5 S	3 W	WM	5	SW SE	43	23.4
5 S	3 W	WM	8	NW NE	43	2.4
5 S	3 W	WM	8	NE NW	43	0.2
Total						45.0

16. Transfer Application T-12798 proposes to change the place of use of the right to:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	5	SE SW	43	1.4
5 S	3 W	WM	5	NE SE	43	18.0
5 S	3 W	WM	5	SW SE	43	23.0
5 S	3 W	WM	8	NW NE	43	2.3
5 S	3 W	WM	8	NE NW	51	0.3
Total						45.0

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

Certificate: 64748 in the name of PALMER CREEK WATER DISTRICT IMPROVEMENT COMPANY (perfected under Permit S-32243)
Use: PRIMARY IRRIGATION of 47.9 ACRES AND SUPPLEMENTAL IRRIGATION of 306.5 ACRES
Priority Date: APRIL 14, 1967
Rate: 4.43 CUBIC FEET PER SECOND
Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second (or its equivalent) and 2.5 acre-feet for each acre irrigated during the irrigation season of each year. The right allowed herein is limited to any deficiency in the available supply of any prior right existing for the same land and shall not exceed the limitation allowed herein.
Source: WILLAMETTE RIVER, a tributary of the COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
6 S	3 W	WM	4	NW SW	58	PCWDIC POD - 4700 FEET NORTH AND 1290 FEET EAST FROM THE SE CORNER OF DLC 58

Authorized Place of Use:

PRIMARY IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	4	SW NW	51	0.4
5 S	3 W	WM	4	NW SW	51	1.4
5 S	3 W	WM	5	SW NE	51	0.3
5 S	3 W	WM	5	SE NE	51	2.0
5 S	3 W	WM	5	NE SW	43	23.6
5 S	3 W	WM	5	NW SW	43	2.3
5 S	3 W	WM	5	SW SW	43	0.8
5 S	3 W	WM	5	SE SW	43	7.4
5 S	3 W	WM	5	NE SE	51	5.2
5 S	3 W	WM	5	NW SE	51	0.5
5 S	3 W	WM	5	NW SE	43	0.5
5 S	3 W	WM	5	SW SE	43	0.1
5 S	3 W	WM	9	SW NW	51	3.4
Total:						47.9

SUPPLEMENTAL IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	4	NE SW	52	24.4
5 S	3 W	WM	4	NW SW	51	13.3
5 S	3 W	WM	4	SW SW	51	17.1
5 S	3 W	WM	4	SE SW	51	1.0
5 S	3 W	WM	4	SE SW	52	5.0
5 S	3 W	WM	4	SE SW	53	30.0
5 S	3 W	WM	4	NW SE	52	3.4
5 S	3 W	WM	4	SW SE	52	0.4
5 S	3 W	WM	4	SW SE	53	30.4
5 S	3 W	WM	5	NE SE	51	34.4
5 S	3 W	WM	5	NW SE	51	6.5
5 S	3 W	WM	5	SW SE	51	7.2
5 S	3 W	WM	5	SE SE	51	15.0
5 S	3 W	WM	9	NW NE	53	30.8
5 S	3 W	WM	9	SW NE	53	12.6
5 S	3 W	WM	9	NE NW	53	35.6
5 S	3 W	WM	9	NE NW	51	0.6
5 S	3 W	WM	9	NW NW	51	24.8
5 S	3 W	WM	9	SW NW	51	0.1
5 S	3 W	WM	9	SE NW	53	13.9
Total:						306.5

18. Transfer Application T-12798 proposes an additional point of diversion approximately 7.1 miles downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 S	3 W	WM	10	NW NW	CP POD - 608 FEET NORTH AND 40 FEET WEST FROM THE NORTHERLY NW CORNER OF DLC 54

19. The applicant's agent identified a mapping error regarding 0.1 acre of supplemental irrigation located in SW NW of Section 9. The agent states the 0.1 acre was never located in the SW NW, and was actually part of the acres located in NW NW of Section 9, therefore Transfer Application T-12798 also proposes to change the place of use of the right to:

SUPPLEMENTAL IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	9	NW NW	51	0.1

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

Certificate: 87769 in the name of PALMER CREEK WATER DISTRICT IMPROVEMENT CO. (perfected under Permit S-51959)

Use: IRRIGATION of 79.3 and SUPPLEMENTAL IRRIGATION of 45.7 ACRES

Priority Date: OCTOBER 10, 1990

Rate: 1.6 CUBIC FEET PER SECOND

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second, or its equivalent for

each acre irrigated, and shall be further limited to a diversion of not to exceed 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Period of Use: MARCH 1 through OCTOBER 31

Source: WILLAMETTE RIVER, a tributary to the COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
6 S	3 W	WM	4	NW SW	58	PCWDIC POD - 4700 FEET NORTH AND 1290 FEET EAST FROM THE SE CORNER OF DLC 58

Authorized Place of Use:

PRIMARY IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	5	SW NE	43	8.3
5 S	3 W	WM	5	SW NW	43	1.4
5 S	3 W	WM	5	SE NW	43	29.2
5 S	3 W	WM	5	NE SW	43	17.0
5 S	3 W	WM	5	NW SW	43	0.9
5 S	3 W	WM	5	NW SE	43	16.7
5 S	3 W	WM	5	SW SE	43	5.8
Total:						79.3

SUPPLEMENTAL IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	5	SE SW	43	1.0
5 S	3 W	WM	5	NW SE	43	18.0
5 S	3 W	WM	5	SW SE	43	23.4
5 S	3 W	WM	8	NW NE	43	3.1
5 S	3 W	WM	8	NE NW	43	0.2
Total:						45.7

21. Transfer Application T-12798 proposes an additional point of diversion approximately 7.1 miles downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 S	3 W	WM	10	NW NW	CP POD - 608 FEET NORTH AND 40 FEET WEST FROM THE NORTHERLY NW CORNER OF DLC 54

22. Based on Finding of Fact No. 12, Transfer Application T-12798 proposes to identify the following as primary irrigation:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	8	NW NE	43	0.7

23. Transfer Application T-12798 also proposes to change the place of use of the right to:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	5	SW NE	43	8.3
5 S	3 W	WM	5	SW NW	43	1.4
5 S	3 W	WM	5	SE NW	43	29.2
5 S	3 W	WM	5	NE SW	43	17.0
5 S	3 W	WM	5	NW SW	43	0.9
5 S	3 W	WM	5	NW SE	43	16.7
5 S	3 W	WM	5	SW SE	43	6.0
5 S	3 W	WM	8	NW NE	43	0.5
Total						80.0

SUPPLEMENTAL IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	5	SE SW	43	1.4
5 S	3 W	WM	5	NW SE	43	18.0
5 S	3 W	WM	5	SW SE	43	23.0
5 S	3 W	WM	8	NW NE	43	2.3
5 S	3 W	WM	8	NE NW	43	0.3
Total:						45.0

24. The portion of the fourth right to be transferred is as follows:

Certificate 89032 in the name of PALMER CREEK WATER DISTRICT IMPROVEMENT COMPANY (perfected under Permit S-43379)
Use: SUPPLEMENTAL IRRIGATION of 160.0 ACRES
Priority Date: MAY 11, 1977
Rate: 400.0 ACRE-FEET STORED WATER ONLY
Limit/Duty: For irrigation, a diversion of 2.5 acre-feet of stored water only for each acre irrigated during the irrigation season of each year, and is subject to the terms and conditions of contract No. 3-07-10-W0479, or a satisfactory replacement between the Bureau of Reclamation and the water right holder, a copy of which is on file in the records of the Water Resources Department.
Source: WILLAMETTE BASIN PROJECT RESERVOIRS, CONSTRUCTED UNDER PERMITS R-1625 AND R-5363, tributaries of the WILLAMETTE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
6 S	3 W	WM	4	NW SW	PCWDIC POD - 690 FEET SOUTH AND 110 FEET WEST FROM THE NE CORNER OF DLC 58

Authorized Place of Use:

SUPPLEMENTAL IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	4	NE SW	51	0.6
5 S	3 W	WM	4	NE SW	52	23.3
5 S	3 W	WM	4	SW SW	51	16.1

SUPPLEMENTAL IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	3 W	WM	4	SE SW	51	1.2
5 S	3 W	WM	4	SE SW	52	0.4
5 S	3 W	WM	4	SE SW	53	34.1
5 S	3 W	WM	4	NW SE	52	2.6
5 S	3 W	WM	4	SW SE	53	28.0
5 S	3 W	WM	9	NW NE	53	16.2
5 S	3 W	WM	9	NE NW	51	0.3
5 S	3 W	WM	9	NE NW	53	20.0
5 S	3 W	WM	9	NW NW	51	17.2
Total:						160.0

25. Transfer Application T-12798 proposes an additional point of diversion approximately 7.1 miles downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 S	3 W	WM	10	NW NW	CP POD - 608 FEET NORTH AND 40 FEET WEST FROM THE NORTHERLY NW CORNER OF DLC 54

26. 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)]

27. Water has been used within the last five year period prior to submittal of the transfer application 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.
28. 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-12798.
29. The proposed change as conditioned would not result in enlargement of the rights.
30. The proposed change would not result in injury to other water rights.
31. All other application requirements are met.

Conclusions of Law

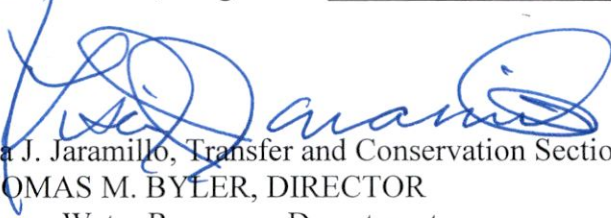
The additional point of diversion and change in places of use proposed in Transfer Application T-12798 appear to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be approved.

If Transfer Application T-12798 is approved, the final order will include the following:

- 1. The additional point of diversion and changes in place of use proposed in Transfer Application T-12798 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 19875, 64748, 87769, 89032, and any related decree.*
- 3. Water right Certificate 19875 is cancelled.*
- 4. Water right Certificates 64748, 87769, and 89032 are cancelled. New certificates will be issued describing that portion of the rights not affected by this transfer.*
- 5. The quantity of water diverted at the new additional point of diversion (CP POD), together with that diverted at the original points of diversion (PCWDIC), shall not exceed the quantity of water lawfully available at the original points of diversion (PCWDIC).*
- 6. 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.*
 - 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.*
- 7. 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.*
- 8. 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 change and full beneficial use of the water.*

9. *After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred under Certificates 64748, 87769, and 89032 be issued in the name of Palmer Creek Water District Improvement Company.*

Dated at Salem, Oregon this SEP 03 2020,



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

This revised 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 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 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

September 3, 2020

CARLTON NURSERY CO. LLC
C/O ALLAN ELLIOTT
PO BOX 398
DAYTON, OR 97114

SUBJECT: Water Right Transfer Application T-12798

Please find enclosed the revised Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-12798. 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 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 McMinnville News Review newspaper, simultaneously with issuance of the revised 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 revised 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 revised 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 revised Preliminary Determination to present information and arguments supporting their position in a quasi-judicial proceeding.

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.

Please do not hesitate to contact me, at corey.a.courchane@oregon.gov or (503) 986-0825, if I may be of assistance.

Sincerely,

A handwritten signature in blue ink, appearing to read "Corey Courchane".

Corey Courchane
Transfer Specialist
Transfer and Conservation Section

cc: T-12798
Joel Plahn, District 16 Watermaster (*via e-mail*)
Malia Kupillas, Agent for the applicant (*via e-mail*)

encs