

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

In the Matter of Transfer Application
T-13271, Josephine County

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REVISED
PRELIMINARY DETERMINATION
PROPOSING APPROVAL OF A
CHANGE IN CHARACTER OF USE
FROM SUPPLEMENTAL USE TO
PRIMARY USE, A CHANGE IN
CHARACTER OF USE, A CHANGE IN
PLACE OF USE, AND PARTIAL
CANCELLATION 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.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicant

ROGUE VALLEY GROUP, LLC
2014 SE 9TH AVE
PORTLAND, OR 97214

Findings of Fact

1. On October 17, 2019, ROGUE VALLEY GROUP, LLC filed an application to change the character of use under Certificate 88901, to change the place of use, change the supplemental use to primary use, and change the character of use under Certificate 91039, and to voluntarily cancel a portion of water right Certificate 3737. The Department assigned the application number T-13271.

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.

2. Notice of the application for transfer was published on October 29, 2019, pursuant to OAR 690-380-4000. One timely comment was filed in response to the notice and summarized as follows:
 - T-13271 would constitute enlargement of the rights and season of use;
 - Can the original primary irrigation place of use be cancelled and still maintain the substitution transfer final order;
 - Certificate 76667 appears to be layered with the rights involved with T-13271;
 - domestic use expanded right from well 2 needs to be reviewed for change in use;
 - The remaining right under certificate 88901 is not shown on the transfer map; and
 - Can supplemental irrigation be transferred to nursery use?
3. On May 3, 2016, the Department issued a Final Order for Transfer Application T-12308, approving a Substitution of a Supplemental Groundwater Right under Certificate 91039 for a Primary Surface Water Right under Certificate 3737 and Partial Cancellation of Water Right Certificate 3737. The Department also issued remaining right Certificate 91419, which identified the remainder of Certificate 3737 after the partial cancellation.
4. On January 23, 2020, the Department determined that when Certificate 91419 was issued, Certificate 3737 was officially cancelled and therefore not subject to transfer. Cancelling Certificate 3737 subsequently made the Final Order for T-12308 invalid since the originating certificate was cancelled, and therefore the substitution between the two water rights was never established. The Department issued Certificate 91463 on May 17, 2016, correcting a scrivener's error in Certificate 91419, and subsequently became the official record of the remaining original lands as authorized by Certificate 3737. The 4.3 acres authorized for supplemental irrigation under Certificate 91039 are authorized for supplemental irrigation and not primary irrigation. Due to the substitution being invalid, the use of groundwater under Certificate 91039 for primary irrigation is considered to be illegal use of water. The Department also determined that the changes requested in T-13271 would not constitute enlargement of the rights or irrigation season, as T-13271 would be conditioned to prevent enlargement, and that Certificate 76667 is not layered with any of the rights involved in T-13271.
5. On January 27, 2020, the Department contacted the applicant by written correspondence to notify the applicant and the applicant's agent of deficiencies in the application. The Affidavits of Consent by Deeded Landowner submitted with the application appear to be copies. The Department informed the applicant the substitution under T-12308 was invalid. The Department does not have authorization to change from supplemental irrigation to nursery, as the applicant must first request to change from supplemental to primary irrigation, and then change the character of use to nursery, and that the application map did not identify the remaining right under Certificate 88901. The Department requested that the deficiencies be resolved by February 28, 2020.

6. On February 10, 2020, the Department met with the applicant's agent to discuss the deficiencies that need to be resolved, and identified solutions in order to proceed with an approval of T-13271. The Department identified that to move forward, the application needed to be revised, requesting a change from supplemental use to primary use and then a change in character of use under Certificate 91039. The Department explained that in order to request a change from supplemental use to primary use, a transfer will be allowed only to the extent the applicant can establish the quantity of water historically used under the supplemental water right, pursuant to OAR 690-380-2320.
7. On February 24, 2020, the agent submitted a revised application removing Certificate 88901 from T-13271.
8. On February 25, 2020, the Department notified the agent that the revisions submitted on February 24, 2020, could not be accepted for the following:
 - The revised application was not signed by the applicant; and
 - Table 2 for Certificate 91039 identified a total of 48.9 acres in the "TO" lands.

The Department identified that the amount of acres described in the "TO" lands in Table 2 cannot exceed the total amount authorized by Certificate 91039. The Department requested that the deficiencies be resolved by March 30, 2020.

9. On March 31, 2020, the agent contacted the Department by written correspondence, requesting if the Department had received the revisions that were required. As of March 31, 2020, the Department had not received the requested items, and granted additional time to receive the revisions to April 8, 2020.
10. On April 9, 2020, the Department received a revised application signed by the applicant, historical water use records for the change from supplemental use to primary use, as required by OAR 690-380-2320, Affidavits of Consent by Deeded Landowner, and Affidavits for the Voluntary Cancellation of a Portion of a Water Right Certificate. The revised Table 2 however still identified 48.9 acres for the "TO" lands, which identifies enlargement could take place.
11. On April 16, 2020, the applicant's agent submitted a revised Table 2, resolving the deficiencies.
12. On May 7, 2020, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-13271 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of June 8, 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.
13. On May 22, 2020, the Department revised the measurement condition to require a meter at each new point of appropriation, rather than new and existing, as the applicant does not have access at the original point of diversion.

14. On August 26, 2020, the Department issued a Preliminary Determination proposing to approve Transfer T-13271 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 1, 2020, and in the Grants Pass Daily Courier newspaper on September 1 and 8, 2020 pursuant to ORS 540.520 and OAR 690-380-4020. A comment was filed in response to the Preliminary Determination, however the comment period has already been completed and the Department determined the issue was already addressed in Finding of Facts (FOF) 3, 4, and 5 above.
15. On September 6, 2020, the Department identified a scrivener's error in FOF 19 of the Preliminary Determination. The maximum annual volume the irrigation portion of the right would be limited to after the changes, was identified as 28.8 AF (12.0 acres x 2.5 AF). The volume identified was calculated incorrectly, and should be identified as 30.0 AF. Therefore the combined maximum total allowed for irrigation is 0.103 cfs and 31.46 AF from March 1 through October 31. Consequently, the Department determined a revised Preliminary Determination shall be issued to identify the correct combined maximum total volume of water allowed for irrigation.
16. The right to be transferred is as follows::

Certificate: 91039 in the name of JEAN NOVOTNY and GRACE WELLS (perfected under Permit G-13893)

Use: PRIMARY IRRIGATION OF 12.0 ACRES, SUPPLEMENTAL IRRIGATION OF 4.3 ACRES AND DOMESTIC USE FOR ONE HOUSEHOLD INCLUDING LAWN AND NON-COMMERCIAL GARDEN NOT TO EXCEED ONE-HALF ACRES IN AREA

Priority Date: JULY 20, 2000

Rate: 0.133 CUBIC FOOT PER SECOND (CFS) FOR IRRIGATION AND 0.01 CFS FOR DOMESTIC USE EXPANDED, in any combination, further limited to 0.046 CFS from WELL #1, and 0.087 CFS from WELL #2

Limit/Duty: The amount of water used for irrigation under this right, 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.

Period of Use: MARCH 1 THROUGH OCTOBER 31 FOR IRRIGATION and YEAR ROUND FOR DOMESTIC EXPANDED

Source: TWO WELLS WITHIN THE MUNGER CREEK BASIN

Authorized Points of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	5 W	WM	6	SE SE	WELL #1 – 736 FEET NORTH AND 760 FEET WEST FROM THE SE CORNER OF SECTION 6
39 S	5 W	WM	6	SE SE	WELL #2 – 806 FEET NORTH AND 416 FEET WEST FROM THE SE CORNER OF SECTION 6

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	5 W	WM	6	SE SE	12.0

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	5 W	WM	6	SE SE	4.3

DOMESTIC EXPANDED					
Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	5 W	WM	6	SE SE	

17. Transfer application proposes to change the character of use of the supplemental irrigation to:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	5 W	WM	6	SE SE	4.3

18. Transfer application T-13271 proposes to change the character of use from irrigation of 16.3 acres and domestic use expanded to nursery use.

19. Transfer Application T-13271 also proposes to change the place of use of the right to cover the entirety of the property as follows:

NURSERY USE					
Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	5 W	WM	6	SE SE	32.6

20. Certificate 91039 describes the period of use as March 1 through October 31 for irrigation and year round for domestic expanded.
21. The change in character of use from supplemental irrigation shall be limited to the maximum amount of water used under the supplemental use, being 0.003 cfs (532,022 gallons used in 2017/245 days in the irrigation season/24 hours/60 minutes/448.83 gpm = 0.003 cfs). The change in character of use from supplemental irrigation shall be further limited to 1.46 AF (0.003 x 1.9835 AF/day x 245 days = 1.458). The remaining authorized rate is limited to 0.10 cfs (0.133 cfs/16.3 acres = 0.008 cfs/acre x 12.0 acres of primary irrigation = 0.098 cfs), and 30.0 AF (12.0 x 2.5 AF). Therefore, the combined maximum total allowed for irrigation is 0.103 cfs and 31.46 AF from March 1 through October 31.
22. Certificate 91039 authorizes a combined total of 0.01 cfs for domestic expanded use, which in addition to that allowed for domestic use, being 0.005 cfs, includes 0.005 cfs for irrigation of up to 1/2-acre of lawn or noncommercial garden. The annual volume limitation to be placed on the irrigation of up to 1/2-acre of lawn or noncommercial garden is 1.25 acre-feet per year (0.5 acre x 2.5 AF).

23. Certificate 91039 does not specify a maximum volume of water to be diverted annually for domestic expanded; 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 the authorized rate for domestic use of one household year round. If the domestic use was diverted continuously at the authorized rate of 0.005 cfs for 365 days per year ($0.005 \text{ cfs} \times 60 \text{ sec/min} \times 60 \text{ min/hr} \times 24 \text{ hr/day} \times 365 \text{ days/year} \div 43,560 \text{ square feet per acre} = 3.62 \text{ acre-feet per year}$), 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.
24. 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.
25. 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 ($0.47 \text{ acre-feet per year} \times 1 \text{ home} = 0.47 \text{ acre feet per year}$). The combined total annual volume limitation to be placed on the domestic use expanded is 1.72 acre-feet per year ($0.47 \text{ AF} + 1.25 \text{ AF}$)

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

26. 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 rights are subject to forfeiture under ORS 540.610.
27. A pump, pipeline, and sprinkler system 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-13271.
28. The proposed changes, as conditioned, would not result in enlargement of the right.
29. The proposed changes, as conditioned, would not result in injury to other water rights.
30. All other application requirements are met.

Partial Cancellation of a Water Right

31. On April 10, 2020, an affidavit certifying that a portion of a water right has been abandoned and requesting cancellation of the right was received from Joseph Bundy. The right to be cancelled is as follows:

Certificate: 88901 in the name of JEAN NOVOTNY and GRACE WELLS (perfected under Permit S-18096)
Use: SUPPLEMENTAL IRRIGATION of 2.4 ACRES
Priority Date: JANUARY 9, 1948
Rate: 0.030 CUBIC FOOT PER SECOND
Source: AN UNNAMED STREAM and RESERVOIR (CONSTRUCTED UNDER PERMIT R-919) tributaries of the WEST FORK WILLIAMS CREEK

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q - Q
39 S	5 W	WM	6	SW SE

Authorized Place of Use:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q - Q	Acres
39 S	5 W	WM	6	SE SE	2.4

32. The Department has received information from the applicant that better describes the location of the point of diversion under Certificate 88901 as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	5 W	WM	6	SW SE	66 FEET NORTH AND 3300 FEET EAST FROM THE SW CORNER OF SECTION 6

33. On April 10, 2020, an affidavit certifying that a portion of a water right has been abandoned and requesting cancellation of the right was received from Joseph Bundy. The right to be cancelled is as follows:

Certificate: 91463 in the name of DAVID VINYARD (perfected under Permit S-4253)
Use: IRRIGATION of 4.3 ACRES
Priority Date: OCTOBER 11, 1919
Rate: 0.05 CUBIC FOOT PER SECOND
Source: WILD CAT CREEK a tributary of WEST FORK WILLIAMS CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q - Q
<i>Not specified in certificate</i>				

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q - Q	Acres
39 S	5 W	WM	5	SE SE	4.3

Determination and Proposed Action

The change in place of use, change in character of use from supplemental use to primary use, and change in character of use to nursery proposed in Transfer Application T-13271 is 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 application will be approved.

If Transfer Application T-13271 is approved, the final order will include the following:

1. *The change in place of use, change in character of use from supplemental use to primary use, and change in character of use to nursery proposed in Transfer Application T-13271 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 Certificate 91039, and any related decree.*
3. *Water Right Certificates 88901, 91039, and 91463 are cancelled. New certificates will be issued describing those portions of the rights not affected by this transfer and cancellations.*
4. *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 new point of appropriation.*
 - 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.*
5. *The rate of diversion for the change in character of use from irrigation to the proposed nursery operation use shall be limited to 0.103 cubic foot per second, specified in Finding of Fact (FOF) 21, and shall be further limited to a total volume diverted of 31.46 acre feet (FOF 21) during the season of use, being March 1 to October 31.*
6. *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 0.103 cubic foot per second per acre and 2.5 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 0.103 cubic foot per second (or its equivalent) and 2.5 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 0.133 cubic foot per second (or its equivalent) and 2.5 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 0.103 cubic foot per second (or its equivalent) and 2.5 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 16.3 acres.*
- 7. *The rate of diversion for the change in character of use from domestic expanded to the proposed nursery operations use shall be limited to 0.01 cubic foot per second and shall be further limited, as specified in FOF 21, to a total volume diverted of 1.72 acre-feet during the period of authorized use, being year round.*
- 8. *The change in character of use from domestic use expanded 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 and 1.72 acre feet during the period of authorized use, being year round.*
 - b) *For the irrigation of containerized nursery plants, the amount of water diverted is limited to 0.01 cubic foot per second and 1.72 acre feet during the period of authorized use, being year round.*
 - 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 1.72 acre feet during the period of authorized use, being year round.*
 - d) *For the irrigation of any other crop, the amount of water diverted is limited to 0.01 cubic foot per second and 1.72 acre feet during the period of authorized use, being year round.*
- 9. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before October 1, 2022. 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.*

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

Dated in Salem, Oregon on

NOV 24 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 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

November 24, 2020

ROGUE VALLEY GROUP, LLC
2014 SE 9TH AVE
PORTLAND, OR 97214

SUBJECT: Water Right Transfer Application T-13271

Please find enclosed a revised Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-13271. 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, 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 Department's notice.

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,

Corey Courchane
Transfer Specialist
Transfer and Conservation Section

cc: T-13271
Scott C. Ceciliani, District 14 Watermaster (*via e-mail*)
John A. Short, Agent for the applicant (*via e-mail*)

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