

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

In the Matter of Transfer Application	)	PRELIMINARY DETERMINATION
T-14298, LINCOLN County	)	PROPOSING APPROVAL OF CHANGES IN
	)	POINT OF DIVERSION AND CHANGE IN
	)	PLACE OF USE

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.

Oregon Revised Statute (ORS) 540.510, **Sec. 1**, establishes the process in which the holder of water right certificates 21358, 48627 and 89100, which authorize the storage of water for municipal use, may apply to change the authorized point of diversion and place of use, under the process described in ORS 540.520 and 540.530, and may change the authorized point of diversion and place of use, under the process described in ORS 540.510 (1)(a), without losing priority of the right if: (a) The water right certificate authorizes the storage of water for municipal use; and (b) The dam at the authorized point of diversion has been determined by the Water Resources Department to have a high hazard rating, as defined in ORS 540.443, and to be unsafe or potentially unsafe, as defined in ORS 540.443. (2) After making a change described in subsection (1) of this section, when constructing the resulting new dam and reservoir, the holder of the water right certificate must comply with other applicable state and federal environmental laws. [2023 c.535 §1]

Applicant

CITY OF NEWPORT
ATTN: SPENCER NEBEL, CITY MANAGER
169 SW COAST HWY
NEWPORT, OR 97365

Findings of Fact

1. On March 13, 2023, CITY OF NEWPORT, ATTN: SPENCER NEBEL, CITY MANAGER, filed an application to change the point of diversion and to change the place of use under Certificate 21358. The Department assigned the application number T-14298.

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 the newspaper notice or the Department's weekly notice as prescribed by OAR 690-380-4020, whichever is later, of this preliminary determination.

2. On March 13, 2023, Transfer Application T-14294 was also filed involving Certificates 48627 and 89100. Notice of the application for transfer was published on August 8, 2023, pursuant to OAR 690-380-4000.
3. One timely comment was submitted to the Department in response to the notice. The issues raised by the comment focused primarily on the following concerns:
 - a) The increased capacity of the new reservoir. OWRD must ensure that this additional storage will not be approved as part of the transfer. Any additional storage will require a new right.
 - b) Given that the new reservoir will have capacity to store more water than it can today, OWRD must ensure that there is no injury to existing rights, including instream rights, on all affected streams, including the Siletz.
 - c) The City will either need to provide fish passage or apply for a fish passage waiver, which would require mitigation. The application fails to meet statutory requirements.
4. In response to the issues raised by the timely comment received, the Department has determined:
 - a) The transfer affects the storage already authorized under Certificate 21358. No additional storage can be approved under this transfer.
 - b) The Department has determined that there is no injury to other water rights.
 - c) The Oregon Department of Fish and Wildlife (ODFW) is requiring fish screening at the new point of diversion (POD). Additionally, ORS 540.510, Sec. 1 requires the construction of the proposed dam meet all applicable state and federal environmental regulations. The transfer is conditioned so the applicant is required to follow these items.
5. On January 22, 2021, the Department notified the City of Newport of an Unsafe/Potentially Unsafe Dam, following a dam inspection performed on October 15, 2018. Notice was sent to the Interim City of Newport Engineer. The dam inspection included the following:
 - a. Corrosion of, and leakage through, the corrugated metal pipe (CMP) portion of the spillway. Subsequent inspections performed by the Department on May 29, 2019, and August 4, 2020, indicated the corrosion of the CMP portion of the overflow spillway continues to worsen with time.
 - b. A seismic stability analysis performed of both Big Creek dams indicated that both dams will deform significantly during a Cascadia Subduction Zone (CSZ) earthquake. The deformation could cause the dam crest to drop below the water line which could lead to overtopping of the dam crest and subsequent catastrophic failure of the dam.
6. On January 23, 2024, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-14298 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of February 23, 2024, for the applicant to respond. The applicant requested that the Department proceed with issuance of a Preliminary Determination.

7. On March 5, 2024, the agent for the application requested a longer completion date for Transfer Application T-14298 due to the scale and complexity of the project. Pursuant to OAR 690-380-5140(3), the Department has modified the completion date of Transfer Application T-14298 to October 1, 2045.

8. The right to be transferred is as follows:

Certificate: 21358 in the name of CITY OF NEWPORT (perfected under Permit R-1236)
Use: MUNICIPAL USE
Priority Date: AUGUST 1, 1951,
Limit: The amount of water entitled to be stored each year under such right, for the purposes aforesaid, shall not exceed 200.0 acre feet.
Source: BIG CREEK, a tributary of the PACIFIC OCEAN, to be appropriated under Application No. 26388, Permit No. 20703

The reservoir is located in:

STORAGE FOR MUNICIPAL USE				
Twp	Rng	Mer	Sec	Q-Q
10 S	11 W	WM	33	SW NE
10 S	11 W	WM	33	SE NW
10 S	11 W	WM	33	NW SE
10 S	11 W	WM	33	NE SW
10 S	11 W	WM	33	NW SW
10 S	11 W	WM	33	SW SW
10 S	11 W	WM	33	SE SW

9. Certificate 21358 does not include a description of the location of the authorized point of diversion. The applicant has provided information describing the location of the authorized point of diversion as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
10 S	11 W	WM	33	SW SW	BC 1 - 1100 FEET NORTH AND 4450 FEET WEST FROM THE SE CORNER OF SECTION 33

10. Transfer Application T-14298 proposes to move the authorized point of diversion approximately 0.59 mile upstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
10 S	11 W	WM	33	NW SE	BIG CREEK DAM - 3110 FEET SOUTH AND 1790 FEET WEST FROM THE NE CORNER OF SECTION 33

11. Transfer Application T-14298 also proposes to change the place of use of the right to:

STORAGE FOR MUNICIPAL USE				
Twp	Rng	Mer	Sec	Q-Q
10 S	11 W	WM	33	SE NE
10 S	11 W	WM	33	NE SE
10 S	11 W	WM	33	NW SE
10 S	11 W	WM	34	NW NW
10 S	11 W	WM	34	SW NW
10 S	11 W	WM	34	NE SW
10 S	11 W	WM	34	NW SW

STORAGE FOR MUNICIPAL USE				
Twp	Rng	Mer	Sec	Q-Q
10 S	11 W	WM	34	NW SE
10 S	11 W	WM	34	SW SE

12. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screen is necessary at the new point of diversion to prevent fish from entering the diversion and that the diversion is not currently equipped with an appropriate fish screen. This diversion may be eligible for screening cost-share funds.

Transfer Review Criteria [ORS 540.510, Sec. 1, OAR 690-380-0100(14), 690-380-4010(2) and 690-380-2110(2)]

13. Water has been used within the last five years 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.
14. Big Creek Reservoir No. 1 has a maximum height of 21 feet tall and is 315 feet long. It impounds up to 200 acre-feet. A water delivery 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-14298.
15. The water rights are subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14).
16. The water right certificate authorizes the storage of water for municipal use.
17. The dam at the authorized point of diversion has been determined by the Water Resources Department to have a high hazard rating, as defined in ORS 540.443, and to be unsafe or potentially unsafe, as defined in ORS 540.443.
18. The proposed point of diversion diverts water from the same source of surface water as the authorized point of diversion, as required by OAR 690-380-2110(2).
19. The proposed changes, as conditioned, would not result in enlargement of the rights.
20. The proposed changes, as conditioned, would not result in injury to other existing water rights.
21. All other application requirements are met.

Determination and Proposed Action

The change in point of diversion and change in place of use proposed in Transfer Application T-14298 appear to be consistent with the requirements of ORS 540.505 to 540.580, 540.510 Sec. 1 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-14298 is approved, the final order will include the following:

- 1. The change in point of diversion and change in place of use proposed in Transfer Application T-14298 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 Certificate 21358 and any related decree.*
- 3. Approval of this transfer application does not constitute nor grant legal access onto or through another person's property for purposes of accessing the new point of diversion or the new place of use.*
- 4. Water right Certificate 21358 is cancelled.*
- 5. The quantity of water diverted at the new point of diversion (BIG CREEK DAM) shall not exceed the quantity of water lawfully available at the original point of diversion.*
- 6. Water shall be acquired from the same source of surface water as the original point of diversion.*
- 7. Reservoir water use measurement:*
 - a. **Before water use may begin** under this order, the water user shall install staff gages, or, with prior approval of the Director, other suitable measuring devices, that measure the entire range and stage between empty and full in each reservoir. Staff gages shall be United States Geological Survey style.*
 - b. Before water use may begin under this order, if the reservoir is located in channel, suitable measuring devices must be installed to allow measurement of the amount of water flowing into and out of the reservoir, and an adjustable outlet valve must be installed. The water user shall maintain such devices in good working order. A written waiver may be obtained, if in the judgment of the Director, the installation of suitable measuring devices, or the adjustable outlet valve, will provide no public benefit.*
- 8. Prior to diverting water, the water user shall install an approved fish screen at the new point of diversion and shall provide to the OWRD a written statement from Oregon Department of Fish and Wildlife (ODFW) that the installed screen meets the state's criteria, or that ODFW has determined a screen is not necessary.*

The water user shall operate and maintain the fish screen at the new point of diversion consistent with 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.

- 9. When constructing the resulting new dam and reservoir, the holder of the water right certificate must comply with other applicable state and federal environmental laws.*

10. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2045**. 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.*
11. *After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.*

Dated in Salem, Oregon on **MAR 22 2024**



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
DOUGLAS E. WOODCOCK, ACTING DIRECTOR
Oregon Water Resources Department

This Preliminary Determination was prepared by Arla L Davis . if you have questions about the information in this document, you may reach me at 503-979-3129 or arla.l.davis@water.oregon.gov.

Protests

Under the provisions of ORS 540.520(6) & (7) and OAR 690-380-4030, within 30 days after the last date of publication of the newspaper notice or the Department's weekly notice as prescribed by OAR 690-380-4020, whichever is later, any person may file, jointly or severally, a protest expressing opposition of approval of the transfer application and disagreement with this Preliminary Determination or a standing statement in support of this Preliminary Determination. If this Preliminary Determination determines that a change in point of diversion or appropriation would result in injury, the applicant may file a notification of intent to pursue approval of the transfer under OAR 690-380-5030 to 690-380-5050. Protests and standing statements must be received by the Water Resources Department within 30 days after the last date of publication of the newspaper notice or the Department's weekly notice as prescribed by OAR 690-380-4020, whichever is later.

Protests must be in writing and received in hard copy form with the appropriate statutory protest filing fee; protests cannot be filed by electronic mail. [OAR 690-002-0025(3) and 690-380-0100(9)]. The protest must include the following:

- The person's name, address, and telephone number;
- All reasonably ascertainable issues and all reasonably available arguments supporting the person's position by the close of the protest period. Failure to raise a reasonably ascertainable issue in a protest or failure to provide sufficient specificity to afford the Department an opportunity to respond to the issue may preclude consideration of the issue during the hearing;

- If you are the applicant, a protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, a protest fee of \$950 required by ORS 536.050 and proof of service of the protest upon the applicant.

Requests for Standing

Under the provisions of OAR 690-380-4030(5), the Department shall provide to persons who have filed standing statements as defined under OAR 690-380-0100(11) notice of any differences between the Department's Preliminary Determination and the Final Order, notice of a hearing on the application under OAR 137-003-0535, and an opportunity to request limited party status or party status in the hearing.

Requests for standing must be received in the Water Resources Department no later than 30 days after the last date of publication of the newspaper notice or the Department's weekly notice as prescribed by OAR 690-380-4020, whichever is later. Requests for standing must be in writing, and must include the following:

- The requester's name, mailing address and telephone number;
- If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- A statement that the requester supports the preliminary determination as issued.

After the protest period has ended, the Director will either issue a Final Order or schedule a contested case hearing. The contested case hearing will be scheduled only if a protest has been filed under OAR 690-380-4030. In accordance with OAR 690-380-4200, notice and conduct of the hearing shall:

- Be under the applicable provisions of ORS 183.310 to 183.550, pertaining to contested cases, and the hearing shall be held in the area where the rights are located unless all parties stipulate otherwise; and
- If a protest has asserted that a water right to be transferred has been forfeited through non-use, include the notice and procedures described in OAR 690-017-0500 to 690-017-0900.

If after hearing the Department issues a proposed Final Order finding that a change in point of diversion or appropriation will result in injury, the applicant may file a notification of intent to pursue approval of the transfer under OAR 690-380-5030 to 690-380-5050 within 15 days of receipt of the proposed order. Notwithstanding 690-002-0175, if the applicant files a notification of intent to pursue approval of the transfer under 690-380-5030 to 690-380-5050, the deadline for filing exceptions to the proposed order shall be 30 days after the Department

provides notice to the parties that the transfer does not meet the requirements of 690-380-5030 to 690-380-5050.

If you do not request a hearing within 30 days after the close of the protest period, or if you withdraw a request for a hearing, notify the Department or the administrative law judge that you will not appear, or fail to appear at a scheduled hearing, the Director may issue a final order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials that you have submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

You may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions, or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 690-137-0555, an agency representative may represent partnerships, corporations, associations, governmental subdivisions or public, or private organizations if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

Notice Regarding Servicemembers: Active-duty servicemembers have a right to stay proceedings under the federal Servicemembers Civil Relief Act. 50 U.S.C. App. §§501-597b. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 971-355-4127, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Will Davidson at 503-507-2749.

If you have questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.

Address any correspondence to: Oregon Water Resources Department, Transfer and Conservation Section, 725 Summer Street NE, Suite A, Salem OR 97301-1266.



Oregon

Tina Kotek, Governor

Water Resources Department

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March 22, 2024

VIA CERTIFIED MAIL AND E-MAIL

Applicant

CITY OF NEWPORT
SPENCER NEBEL
169 SW COAST HWY
NEWPORT, OR 97365

SUBJECT: Water Right Transfer Application T-14298

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-14298. 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 Newport News Times 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 don't hesitate to contact me at 503-979-3129 or arla.l.davis@water.oregon.gov, if I may be of assistance.

Sincerely,

Arla L Davis

Arla L Davis
Transfer Specialist
Transfer and Conservation Section

cc: T-14298
Nikki M. Hendricks, District 1 Watermaster (*via e-mail*)
Adam Sussman, Agent for the applicant (*via e-mail*)
Kimberley Priestly, WaterWatch of Oregon, *commenter (via email)*

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