

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

In the Matter of Transfer Application)
T-14055, Umatilla County)
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)
)
)

REVISED PRELIMINARY
DETERMINATION PROPOSING APPROVAL
OF CHANGES IN POINTS OF
APPROPRIATION

Authority

Oregon Revised Statutes (ORS) 537.705 and 540.505 to 540.580 establish the process in which a water right holder may submit a request to transfer the point of appropriation, 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.

Applicants

JIM WHITNEY
PO BOX 1614
PENDLETON, OR 97801

GARY JELLUM
101 SE 3RD STREET
PENDLETON, OR 97801

Findings of Fact

1. On July 28, 2022, JIM WHITNEY AND GARY JELLUM filed an application to change the points of appropriation under Certificates 90235, 91881, and 95278. The Department assigned the application number T-14055.
2. Notice of the application for transfer was published on August 2, 2022, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On March 10, 2023, the Department contacted the applicant by written correspondence to notify the applicant and the applicant’s agent of deficiencies in the application. The application included a fee waiver of \$1,530.00, based on an endorsement in writing by the Oregon Department of Fish and Wildlife, that the changes proposed in the transfer would result in a net benefit to fish and wildlife habitat. The transfer application did not include the written endorsement, pursuant to OAR 690-380-3000(23). The application also did not include a description of the water delivery system, indicating ready, willing, and able, pursuant to 690-380-3000(10). The acres identified on the transfer application map did not

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.

match what was authorized under Certificates 90235 and 91881. The Department requested that the deficiencies be resolved by April 10, 2023.

4. On April 3, 2023, the Department received revisions to the application, resolving the deficiencies.
5. On February 15, 2024, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-14055 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of March 18, 2024, for the applicants to respond. The applicants 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.
6. On May 2, 2024, the Department issued a Preliminary Determination proposing to approve Transfer T-14055 and mailed a copy to the applicants. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on May 7, 2024.
7. On May 15, 2024, the Department determined that a revised Preliminary Determination should be issued, due to a scrivener's error. The Preliminary Determination issued on May 2, 2024, did not include the Department's standard protest language in the footer at the bottom of page 1. This revised Preliminary Determination is being issued to correct the error.
8. The first right to be transferred is as follows:

Certificate: 90235 in the name of CLEAR CREEK CATTLE COMPANY (perfected under Permit G-8483)

Use: IRRIGATION of 94.0 ACRES

Priority Date: FEBRUARY 1, 1979

Rate: 0.92 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, 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 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: WELL 1 AND WELL 2, within the MCKAY CREEK BASIN

Authorized Points of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	32 E	WM	17	SE SW	WELL 1 (ORIGINAL) - 90 FEET NORTH AND 120 FEET WEST FROM THE S1/4 CORNER OF SECTION 17
2 N	32 E	WM	19	NE SW	WELL 2 (ADDITIONAL) - 1150 FEET SOUTH AND 890 FEET WEST FROM THE C1/4 CORNER OF SECTION 19

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
2 N	32 E	WM	17	NW NE	10	1.5
2 N	32 E	WM	17	SW NE	9	4.6
2 N	32 E	WM	17	NE NW		13.2
2 N	32 E	WM	17	NW NW		2.9
2 N	32 E	WM	17	SW NW		5.4
2 N	32 E	WM	17	SE NW		28.1
2 N	32 E	WM	19	NE NE		3.5
2 N	32 E	WM	19	NW NE		3.9
2 N	32 E	WM	19	SW NE		2.9
2 N	32 E	WM	19	SE NE		2.0
2 N	32 E	WM	20	NE SE	3	4.0
2 N	32 E	WM	20	NW SE	3	2.3
2 N	32 E	WM	20	NW SE	6	1.2
2 N	32 E	WM	20	SW SE	4	1.3
2 N	32 E	WM	20	SW SE	5	7.4
2 N	32 E	WM	20	SE SE	5	0.3
2 N	32 E	WM	20	SE SE	4	9.5
					Total	94.0

9. The second right to be transferred is as follows:

Certificate: 91881 in the name of CLEAR CREEK CATTLE CO. (perfected under Permit G-8483)

Use: IRRIGATION OF 445.0 ACRES

Priority Date: FEBRUARY 1, 1979

Rate: 3.11 CUBIC FEET PER SECOND (CFS), further limited to no more than 3.11 CFS from Well 1 and no more than 2.36 CFS from Well 2, in any combination, or its equivalent in case of rotation, measured at the wells.

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 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: WELL 1 AND WELL 2, within the MCKAY CREEK BASIN

Authorized Points of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	32 E	WM	17	SE SW	WELL 1 (ORIGINAL) - 90 FEET NORTH AND 120 FEET WEST FROM THE S1/4 CORNER OF SECTION 17
2 N	32 E	WM	19	NE SW	WELL 2 (ADDITIONAL) - 1150 FEET SOUTH AND 890 FEET WEST FROM THE C1/4 CORNER OF SECTION 19

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
2 N	32 E	WM	17	SW NE	9	0.8
2 N	32 E	WM	17	SE NW		1.0
2 N	32 E	WM	17	NE SW		37.3
2 N	32 E	WM	17	NW SW		0.8
2 N	32 E	WM	17	SW SW		8.0
2 N	32 E	WM	17	SE SW		35.5
2 N	32 E	WM	17	NW SE		30.5
2 N	32 E	WM	17	SW SE	11	26.4
2 N	32 E	WM	18	SE SE		3.7
2 N	32 E	WM	19	NE NE		31.1
2 N	32 E	WM	19	SW NE		6.1
2 N	32 E	WM	19	SE NE		27.0
2 N	32 E	WM	20	NE NE	1	0.5
2 N	32 E	WM	20	NW NE	1	3.8
2 N	32 E	WM	20	NW NE	8	28.9
2 N	32 E	WM	20	SW NE	2	0.2
2 N	32 E	WM	20	SW NE	7	32.4
2 N	32 E	WM	20	SE NE	7	0.3
2 N	32 E	WM	20	SE NE	2	0.6
2 N	32 E	WM	20	NE NW		34.2
2 N	32 E	WM	20	NW NW		39.9
2 N	32 E	WM	20	SW NW		21.6
2 N	32 E	WM	20	SE NW		29.5
2 N	32 E	WM	20	NE SW		24.1
2 N	32 E	WM	20	NW SE	3	1.0
2 N	32 E	WM	20	NW SE	6	19.8
					Total	445.0

10. The third right to be transferred is as follows:

- Certificate:** 95278 in the name of CLEAR CREEK CATTLE CO. (perfected under Permit G-8483)
- Use:** IRRIGATION OF 10.2 ACRES
- Priority Date:** FEBRUARY 1, 1979
- Rate:** 0.07 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, 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 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.
- Source:** WELL 1 AND WELL 2 IN MCKAY CREEK BASIN

Authorized Points of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	32 E	WM	17	SE SW	WELL 1 (ORIGINAL) - 90 FEET NORTH AND 120 FEET WEST FROM THE S1/4 CORNER OF SECTION 17
2 N	32 E	WM	19	NE SW	WELL 2 (ADDITIONAL) - 1150 FEET SOUTH AND 890 FEET WEST FROM THE C1/4 CORNER OF SECTION 19

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
2 N	32 E	WM	20	SW SE	5	0.8
2 N	32 E	WM	20	SE SE	4	7.5
2 N	32 E	WM	20	SE SE	5	1.9
					Total	10.2

- Transfer Application T-14055 proposes to move the authorized point of appropriation for Well 2 (Additional) under all three rights approximately 1316 feet Southeast from the existing point of appropriation to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	32 E	WM	19	SW SE	POA 3 - 950 FEET NORTH AND 250 FEET EAST FROM THE S1/4 CORNER OF SECTION 19

Transfer Review Criteria [OAR 690-380-0100(14), 690-380-4010(2) and OAR 690-380-2110(2)]

- 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.
- 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-14055.
- The water rights are subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14).
- The proposed point of appropriation develops groundwater from the same aquifer as the authorized point of appropriation, as required by OAR 690-380-2110(2).
- The proposed change, as conditioned, would not result in enlargement of the rights.
- Construction of the proposed POA, as proposed, will likely result in an increase in interference with Birch Creek. Specifically, the proposed seal depth/interval (0-20 feet bgs) is not adequate to prevent hydraulic connection between shallow WBZs (water bearing zones) and the creek. The proposed POA will be located adjacent to the alluvial floodplain of Birch Creek, approximately 50 feet from and 15 feet above, the local reach of the creek. Although the applicant has proposed a well that will develop higher yielding WBZs found

several hundred feet below the creek; shallow, lower yielding WBZs are also present. These shallow zones likely include groundwater in alluvial floodplain sediments and in upper CRBG (Columbia River Basalt Group) units that underlie the sediments. Failure to seal the shallow WBZs can result in interference with Birch Creek and/or allow commingling of shallow and deep WBZs. To prevent injury to other surface water rights, the proposed POA should be constructed in a manner that eliminates hydraulic connection to and interference with Birch Creek. The proposed POA shall be cased and sealed to 80 feet below ground surface, a depth that is significantly below the elevation of the creek and below surficial alluvial sediments and upper CRBG units.

18. The proposed change, as conditioned in Finding of Fact No. 17 above, shall not cause injury to other water rights.
19. All other application requirements are met.

Determination and Proposed Action

The changes in point of appropriation proposed in Transfer Application T-14055 appear to be consistent with the requirements of ORS 537.705 and 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-14055 is approved, the final order will include the following:

1. *The changes in point of appropriation proposed in Transfer Application T-14055 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 Certificates 90235, 91881, and 95278, 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 appropriation.*
4. *Water right Certificates 90235, 91881, and 95278 are cancelled.*
5. *The quantity of water diverted at the new point of appropriation (POA 3) shall not exceed the quantity of water lawfully available at the original point of appropriation (Well 2 (Additional)).*
6. *Water shall be acquired from the same aquifer (water source) as the original point of appropriation.*

7. *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 appropriation (new and existing).*
 - 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.*
8. *The proposed POA shall be continuously cased and sealed to a depth of 80 feet below ground surface.*
9. *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 changes and full beneficial use of the water.*
10. *After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.*

Dated in Salem, Oregon on **MAY 28 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 Corey Courchane. If you have questions about the information in this document, you may reach me at 971 979-3107 or Corey.A.Courchane@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

North Mall Office Building
725 Summer St NE, Suite A
Salem, OR 97301
Phone 503 986-0900
Fax 503 986-0904
www.oregon.gov/owrd

May 28, 2024

VIA CERTIFIED MAIL AND E-MAIL

Applicants

JIM WHITNEY
PO BOX 1614
PENDLETON, OR 97801

GARY JELLUM
101 SE 3RD STREET
PENDLETON, OR 97801

SUBJECT: Water Right Transfer Application T-14055

Please find enclosed the revised Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-14055. 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.

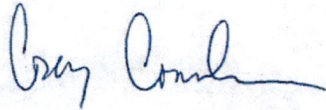
A public notice is being published in the Department's weekly publication, simultaneously with issuance of the revised Preliminary Determination. The notice initiates a period in which any person may file either a protest opposing the decision proposed by the Department in the revised Preliminary Determination 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.

Please do not hesitate to contact me, at corey.a.courchane@water.oregon.gov or (503) 979-3917, if I may be of assistance.

Sincerely,



Corey Courchane
Allocation of Conserved Water
Transfer and Conservation Section

cc: Transfer Application file T-14055
Gregory M. Silbernagel, District 5 Watermaster (*via e-mail*)
Rebecca Schwartz, Agent for the applicant (*via e-mail*)
Anton Chiono, Habitat Conservation Project Leader, CTUIR Department of Natural Resources
(*via e-mail*)
Jude Love, CTUIR Fish Habitat Biologist (*via e-mail*)

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