

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

In the Matter of Transfer Application)	PRELIMINARY DETERMINATION
T-13839, Morrow County)	PROPOSING DENIAL OF AN ADDITIONAL
)	POINT OF APPROPRIATION AND A
)	CHANGE IN POINT 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.

Applicant

JOHN AND JANNA VANDEN BRINK
PO BOX 165
IONE, OR 97843

Findings of Fact

1. On October 4, 2021, JOHN AND JANNA VANDEN BRINK filed an application for an additional point of appropriation under Certificate 89128 and a change in appropriation under Certificate 48296. The Department assigned the application number T-13839.
2. Notice of the application for transfer was published on October 12, 2021, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. The existing point of appropriation MORR 51114 under Certificate 89128 develops at least two aquifers. The well must be reconstructed to meet current well construction standards. To meet current well construction standards, the well must be continuously cased and sealed from land surface to a depth of 205 feet bls. (Note: MORR 51114 is also an authorized POA on Permit G-17360. A condition listed on the permit requires the well to be cased and sealed to a depth of 205 feet.)
4. On December 13, 2021, the Department determined the proposed point of appropriation (POA) under Certificate 48296 and additional point of appropriation (APOA) under Certificate 89128 will not develop the same aquifers (sources) as the existing authorized POAs (MORR 1735 and MORR 51114).

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.

5. On March 21, 2022, the Department sent a copy of the draft Preliminary Determination proposing to deny Transfer Application T-13839 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of April 21, 2022, for the applicant to respond. The applicant requested that the Department proceed with issuance of a Preliminary Determination and did not provide the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
6. On July 15, 2022, the applicant submitted revised transfer application pages and supporting documentation for the Groundwater Section's re-review. In the supporting documentation, the applicant proposed to continuously case and seal POA MORR 51114 to 205 feet to prevent comingling aquifers, and meet current well standards.
7. On April 5, 2023, the Department determined the proposed point of appropriation (POA) under Certificate 48296 and additional point of appropriation (APOA) under Certificate 89128 will not develop the same aquifers (sources) as the existing authorized POAs (MORR 1735 and MORR 51114). If MORR 51114 is sealed at 205 feet, it will produce from a single aquifer, the upper primary aquifer. The proposed POA, MORR 52027, is open only to the lower aquifer therefore not produce from the same aquifer as the authorized POA (MORR 51114).
8. The authorized point of appropriation under Certificate 48296, MORR 1735, develops at least two aquifers. In order for MORR 1735 to produce from the same source as the proposed additional point of appropriation, the well will need to be reconstructed to seal off the upper primary aquifer. This will require MORR 1735 be cased and sealed to a minimum depth of 510 feet bls (current seal at 300 feet bls).
9. On November 9, 2023, the Department sent a copy of the revised draft Preliminary Determination proposing to deny Transfer Application T-13839 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of December 9, 2023, for the applicant to respond. The applicant requested that the Department proceed with issuance of a Preliminary Determination and did not provide the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
10. On January 25, 2024, the applicant's agent provided revised application pages to the Department removing Certificate 89128 from the application, but deficiencies still exist for Certificate 48296.
11. On May 31, 2024, the applicant's agent submitted to the Department an additional memo addressing the history of the applicant's water rights and wells, indicating that the authorized well for Certificate 48296 (MORR 1735) has not been used for the Certificate since at least March 16, 1982. The applicant indicated using water from MORR 51114 without authorization. This prompted a Groundwater re-review for the file.
12. On June 10, 2024, the Department determined that the authorized POA for Certificate 48296 (MORR 1735) produces water from the same aquifer (upper aquifer) as currently used POA (MORR 51114). However, the Department has also determined that the

Proposed POA (MORR 52027), once sealed, produces water from the lower aquifer and therefore does not produce water from the same aquifer (upper aquifer) as authorized POA (MORR 1735).

13. The first right to be transferred is as follows:

Certificate: 48296 in the name of DARRELL PADBERG (perfected under Permit G-6296)
Use: IRRIGATION of 191.9 ACRES
Priority Date: JANUARY 13, 1975
Rate: 2.23 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, 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 3.0 acre feet per acre for each acre irrigated during the irrigation season of each year.
Source: A WELL, a tributary of RHEA CREEK

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1S	24E	WM	35	NE NE	UNNAMED WELL (MORR 1735) - 1020 FEET SOUTH AND 300 FEET WEST FROM THE NE CORNER OF SECTION 35

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 S	24 E	WM	26	SW NW	6.3
1 S	24 E	WM	26	NE SW	3.3
1 S	24 E	WM	26	NW SW	38.4
1 S	24 E	WM	26	SW SW	21.0
1 S	24 E	WM	26	SE SW	0.5
1 S	24 E	WM	27	SW NE	7.6
1 S	24 E	WM	27	SE NE	14.0
1 S	24 E	WM	27	NE SE	40.0
1 S	24 E	WM	27	NW SE	34.4
1 S	24 E	WM	27	SW SE	7.6
1 S	24 E	WM	27	SE SE	18.8
TOTAL					191.9

14. Transfer Application T-13839 proposes to move the authorized point of appropriation approximately 2.17 miles northwest from the existing point of appropriation to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	24 E	WM	22	NE SE	NEW WELL (MORR 52027) – 2950 FEET SOUTH AND 950 FEET WEST FROM THE NE CORNER OF SECTION 22

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

15. 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.
16. Water delivery systems 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-13839.
17. The water rights are subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14).
18. The proposed point of appropriation (MORR 52027) does not develop groundwater from the same aquifer as the authorized point of appropriation (MORR 1735), as required by OAR 690-380-2110(2).
19. The proposed changes would not result in enlargement of the rights.
20. The proposed changes would not result in injury to other water rights.
21. The application is incomplete because the applicant has not submitted a Report of Ownership Information for the from lands, pursuant to OAR 690-380-4010(5). Therefore, all other application requirements are not met.

Determination and Proposed Action

The change in point of appropriation proposed in Transfer Application T-13839 appears to be NOT 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 denied.

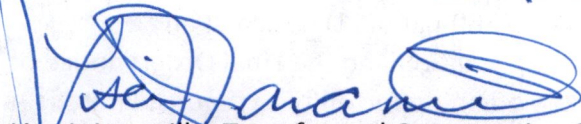
If the deficiencies are resolved and Transfer Application T-13839 is approved, the final order will include the following:

1. *The change in point of appropriation proposed in Transfer Application T-13839 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 48296 and any related decree.*
3. *Water right Certificate 48296 is cancelled.*
4. *Under Certificate 48296, the quantity of water diverted at the new point of appropriation (New Well), shall not exceed the quantity of water lawfully available at the original point of appropriation (Unnamed Well).*
5. *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.*
6. *Water shall be acquired from the same aquifer (water source) as the original point of appropriation.*
 7. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2026**. A Claim of Beneficial Use prepared by a Certified Water Right Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the changes and full beneficial use of the water.*
 8. *After satisfactory proof of beneficial use is received, a new certificate confirming the right transferred will be issued.*

Dated in Salem, Oregon on

SEP 13 2024



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
IVAN GALL, DIRECTOR
Oregon Water Resources Department

This Preliminary Determination was prepared by Dante Luongo. If you have any questions about the information in this document, you may reach me at 971-304-5006 or dante.j.luongo@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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September 13, 2024

VIA CERTIFIED MAIL AND E-MAIL

JOHN AND JANA VANDEN BRINK
PO BOX 165
IONE, OR 97843

SUBJECT: Water Right Transfer Application T-13839

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to deny application T-13839. This document is an intermediate step in the denial process; water may not be used legally as proposed in the transfer application until a Final Order approving 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, 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 Department's notice.

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 971 304-5006 or Dante.J.Luongo@water.oregon.gov, if I may be of assistance.

Sincerely,

Dante Luongo
Transfer Specialist
Transfer and Conservation Section

cc: Transfer Application file T-13839
Kenneth C. Thiemann, District 21 Watermaster (*via e-mail*)
William Porfily, Agent for the applicant (*via e-mail*)