

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

In the Matter of Transfer Application	)	PRELIMINARY DETERMINATION
T-14019, Jackson County	)	PROPOSING APPROVAL OF AN
	)	ADDITIONAL POINT OF DIVERSION,
	)	CHANGES IN PLACE OF USE, AND
	)	CHARACTER 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.

Applicants

DAVID F. DAVERN AND PAT MORACHE
793 NETHERLANDS RD
TRAIL, OR 97541

Findings of Fact

1. On May 26, 2022, DAVID F. DAVERN AND PAT MORACHE filed an application for an additional point of diversion, to change the place of use and to change the character of use under Certificate 47402. The Department assigned the application number T-14019.
2. Notice of the application for transfer was published on June 14, 2022, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On August 7, 2023, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-14019 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of September 7, 2023, 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.

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.

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

Certificate: 47402 in the name of HAROLD M. VON STEIN (confirmed by Rogue River (F) in Volume 16, at Page 523)

Use: STOCK AND IRRIGATION of 1.20 ACRES

Priority Date: 1908

Rate: 0.024 CUBIC FOOT PER SECOND

Source: VINE MAPLE CREEK, tributary of BIG BUTTE CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
34 S	1 E	WM	11	NE SW

Authorized Place of Use:

STOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
34 S	1 E	WM	11	NW SW	0.00

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
34 S	1 E	WM	11	NW SW	1.20

5. The applicant has provided information that further describes the point of diversion as being:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
34 S	1 E	WM	11	NE SW	POD 1 - 726 FEET SOUTH AND 1244 FEET WEST FROM THE CENTER OF SECTION 11

6. Transfer Application T-14019 proposes an additional point of diversion approximately 1146.0 feet downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
34 S	1 E	WM	11	SW NW	POD 2 - 108 FEET NORTH AND 2028 FEET WEST FROM THE CENTER OF SECTION 11

7. Transfer Application T-14019 proposes to change the character of use to Domestic Use.
8. Transfer Application T-14019 also proposes to change the place of use of the right to:

DOMESTIC USE				
Twp	Rng	Mer	Sec	Q-Q
34 S	1 E	WM	11	SW NW

9. Certificate 47402 does not specify an irrigation season. However, consistent with the Rogue River Decree, the irrigation season is April 1 through October 31.

10. Certificate 47402 does not specify a period of use for stock use. However, consistent with the Rogue River Decree, stock use is considered a year-round use except during the irrigation season, where water diverted for irrigation purposes includes water for stock use.
11. Certificate 47402 does not specify an annual duty for irrigation use. The best currently available information from the Medford AgriMet station indicates that the net crop water use of the reference crop (alfalfa) during the time period of April 1 to October 31 is 3.5 acre-feet. The proposed acreage to be transferred is 1.2 acres, so the calculated maximum quantity of water that could have been used for irrigation during the period April 1 to October 31 would be 4.2 acre-feet (1.2 acres X 3.5 acre feet).
12. Certificate 47402 does not specify a rate nor an annual duty for stock use. The Rogue River decree authorizes the amount of water diverted outside the irrigation season "as shall be reasonably necessary" for stock use. The applicant has proposed an overall rate of 0.0525 cfs for stock use for 7.4 acres. Proportioned for the number of acres being transferred (1.2 acres), the applicant's proposed rate for stock use would be 0.009 cfs ($0.0525 \text{ cfs} / 7.4 \text{ acres} \times 1.2 \text{ acres} = 0.009 \text{ cfs}$) during the time period outside the irrigation season, being November 1 to March 31.
13. 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 690-380-0100(14), 690-380-4010(2) and 690-380-2110(2)]

14. 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 right is subject to forfeiture under ORS 540.610.
15. A water delivery system sufficient to use the full amount of water allowed under the existing right was present within the five-year period prior to submittal of Transfer Application T-14019.
16. The water right is subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14).
17. The proposed additional 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).

18. The proposed changes would not result in enlargement of the right if conditioned as follows:
 - a. The rate of diversion for the proposed domestic use during the time period November 1 to March 31 of each year shall be limited to a rate of diversion of 0.009 cubic foot per second and further limited to a total quantity diverted of 2.7 acre-feet $((0.009 \text{ cfs} \times 60 \text{ sec/min} \times 60 \text{ min/hr} \times 24 \text{ hr/day} \times 151 \text{ days}) \div 43560 \text{ ft}^2 \text{ per acre})$.
 - b. The rate of diversion for the proposed domestic use during the time period April 1 to October 31 of each year shall be limited to a rate of diversion of 0.024 cubic foot per second and further limited to a total quantity diverted of 4.2 acre-feet (3.5 feet x 1.2 acres).
19. The proposed changes, as conditioned, would not result in injury to other water rights.
20. All other application requirements are met.

Determination and Proposed Action

The additional point of diversion, change in place of use, and change in character of use proposed in Transfer Application T-14019, as conditioned, 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.

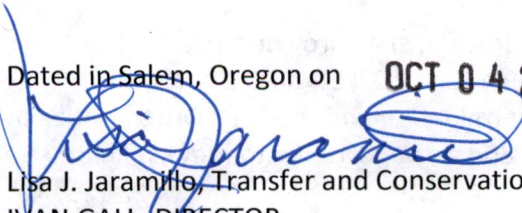
If Transfer Application T-14019 is approved, the final order will include the following:

1. *The additional point of diversion, change in place of use, and change in character of use proposed in Transfer Application T-14019 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 47402 and any related decree.*
3. *Water right Certificate 47402 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer.*
4. *The rate of diversion for the proposed domestic use during the time period November 1 to March 31 of each year shall be limited to a rate of diversion of 0.009 cubic foot per second and further limited to a total quantity diverted of 2.7 acre-feet.*
5. *The rate of diversion for the proposed domestic use during the time period April 1 to October 31 of each year shall be limited to a rate of diversion of 0.024 cubic foot per second and further limited to a total quantity diverted of 4.2 acre-feet.*

6. *The quantity of water diverted at the additional point of diversion, together with that quantity diverted at the original point of diversion, shall not exceed the quantity of water lawfully available at the original point of diversion.*
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 diversion (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. *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.*
9. *The former place of use of the transferred right shall no longer receive water under the right.*
10. *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.*
11. *After satisfactory proof of beneficial use is received, a new certificate confirming the right transferred will be issued.*

Dated in Salem, Oregon on

OCT 04 2024


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

This Preliminary Determination was prepared by Joan Smith. If you have questions about the information in this document, you may reach me at 503-986-0892 or Joan.M.Smith@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
Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

October 4, 2024

VIA CERTIFIED MAIL AND E-MAIL

DAVID F DAVERN AND PAT MORACHE
793 NETHERLANDS RD
TRAIL, OR 97541

SUBJECT: Water Right Transfer Application T-14019

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-14019. 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 **Mail Tribune** 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 do not hesitate to contact me at 503-986-0892 of Joan.M.Smith@water.oregon.gov if I may be of assistance.

Sincerely,

Joan Smith

Transfer Specialist

Transfer and Conservation Section

cc: T-14019
Shavon L. Haynes, District 13 Watermaster (*via e-mail*)
Evan Malepsy, Agent for the applicant (*via e-mail*)

encs