BEFORE THE WATER RESOURCES DEPARTMENT
OF THE
STATE OF OREGON

In the Matter of Transfer Application	)	FINAL ORDER IN CONTESTED CASE
T-11249, Hood River County	)	APPROVING ADDITIONAL POINTS
	)	OF DIVERSION
	)	
	)	OAH Ref. No. WR 16-002
	)	OWRD Case No. T-11249

Authority

Oregon Revised Statutes (ORS) 540.505 to 540.580 establishes 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 implements the statutes and provides the Department's procedures and criteria for evaluating transfer applications.

Applicant

OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DRIVE SE
SALEM, OR 97302

Procedural History

On February 27, 2012, Oregon Water Resources Department (OWRD or Department) issued Preliminary Determination(s) Proposing Approval of Additional Points of Diversion for Transfer Applications T-11108 and T-11249 (Determinations) filed by Oregon Department of Fish and Wildlife (ODFW or Proponent). On March 29, 2012, Bark and Food and Water Watch (Protestants), through counsel Crag Law Center, filed protests to the Determinations. On December 23, 2015, OWRD referred this matter to the Office of Administrative Hearings (OAH) for a consolidated contested case hearing. On January 26, 2016, Protestants and OWRD submitted a Stipulated Issue Statement, and ODFW separately concurred with the Stipulated Issue Statement. The Stipulated Issue Statement identifies three issues for resolution in the contested case proceeding. These issues are identified and addressed in the Modifications to Discussion section, below.

In accordance with the schedule established by Senior Administrative Law Judge ("ALJ") Allen in this matter, OWRD and ODFW filed a joint motion for summary determination (motion) on April 11, 2016. On April 25, 2016, Protestants filed a response to the motion. ALJ Allen issued his Ruling on Oregon Water Resources Department and Oregon Department of Fish

This final order is subject to judicial review by the Court of Appeals under ORS 183.482. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.482(1). Pursuant to ORS 536.075 and OAR 137-003-0675, you may petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

and Wildlife's Joint Motion for Summary Determination and Proposed Order ("Proposed Order") on June 10, 2016. The Proposed Order granted OWRD's and ODFW's joint motion for summary determination, and concluded that OWRD's Determinations should be approved. Bark and Food and Water Watch ("Protestants") timely filed their Exceptions to the Proposed Order on July 7, 2016. No responses were filed to Protestants' Exceptions.

Adoption of Proposed Order in Contested Case

OWRD adopts the Procedural History, Issue, Documents Considered, Conclusion of Law, and Ruling and Proposed Order sections contained in the Proposed Order in their entirety, and the Findings of Fact and Discussion sections with modifications provided herein. The Proposed Order (Att. 1) is attached hereto and incorporated as is set forth fully herein with the modifications set forth below.

MODIFICATIONS TO PROPOSED FINDINGS OF FACT

OWRD modifies Proposed Finding of Fact #3 as follows (additions are shown in **bold**; deletions are shown in ~~strikethrough~~; the deleted portion of Finding of Fact #3 is a footnote):

> Proposed Finding of Fact #3: On or about August 27, 2010, Proponent filed Transfer Application T-11108 seeking to transfer 10 cfs from the authorized POD on Little Herman Creek to the POD in use at Middle and East Spring. (Ex. D at 1 through 3.) The period for public comment closed on October 14, 2010.~~[1]~~ (Ex. D at 3.) **T-11108 was later modified to propose to add Middle and East Spring as additional PODs for the specified quantity of water while maintaining the authorized POD on Little Herman Creek. (Ex. D at 3). The 30 day period for public comment on T-11108 was extended due to this modification. *Id.***
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> Reason for modification: This modification was requested by the Protestants in their Exceptions. The evidence in the record supports the modification.

MODIFICATIONS TO DISCUSSION

OWRD modifies the Discussion section to clarify the standard applicable to a motion for summary determination, to clarify and provide additional analysis supporting the conclusion that ODFW and OWRD met that standard with respect to each of the three contested-case issues identified in the Stipulated Issue Statement, and to provide additional interpretation of an OWRD administrative rule: OAR 690-380-4010(4). For convenience, the Proposed Order's Discussion

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~~1 The 30 day period for public comment was extended due a modification to T-11108 from a transfer to historic POD to transfer to additional POD. (Ex. D at 3.)~~

section is reprinted in its entirety below. Additions are shown in **bold**; deletions are shown in ~~strikethrough~~.

DISCUSSION

Summary Determination Standard

OAR 137-003-0580 is titled "Motion for Summary Determination" and provides, in relevant part:

> (6) The administrative law judge shall grant the motion for a summary determination if:
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> (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
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> (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
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> (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
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> (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing[.]
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> * * * * *
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> **(10) When a motion for summary determination is made and supported as provided in this rule, a non-moving party or non-moving agency may not rest upon the mere allegations or denials contained in that party's or agency's notice or answer, if any.**
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> * * * * *
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> (12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling or a final order in accordance with 137-003-0665 if the administrative law judge has authority to issue a final order without first issuing a proposed order.

Protestants in this matter filed protests to the Determinations asserting their opposition to OWRD's proposed approval of the transfer applications in issue.[2] ~~In a contested case hearing, the proponent of a fact or position has the burden of proving that fact or position by a preponderance of the evidence. ORS 183.450(2); Harris v. SAIF, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); Cook v. Employment Division, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. Riley Hill General Contractor v. Tandy Corp., 303 Or 390 (1987).~~

~~Here,~~ Protestants assert that the transfer applications must be denied because (1) the requested transfers seek a change in source that is not permitted by the relevant statute, (2) the transfer applications are invalid, and (3) OWRD failed to determine that the transfers comply with statewide planning goals as required by statue. ~~As the proponent of these challenges, Protestants bear the burden of proof. The burden of proof encompasses two burdens, the burden of production and the burden of persuasion. Marvin Wood Products v. Callow, 171 Or App 175 (2000) (Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (i.e., the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (i.e., the burden of persuasion)). Accordingly, Proponents bear the burdens of production and persuasion as to each stated challenge to the transfer applications.~~

In order to prevail on a motion for summary determination, ODFW and OWRD must establish that "there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought" and that they are "entitled to a favorable ruling as a matter of law." OAR 137-003-0580(6). As described in the "Documents Considered" section, ODFW and OWRD submitted evidence intended to demonstrate their entitlement to a favorable ruling as a matter of law and of the absence of a genuine issue as to any relevant, material fact, and the Protestants submitted evidence intending to establish the contrary. Per OAR 137-003-0580(7), the evidence is considered in a "manner most favorable" to the Protestants.

Requested transfers do not seek a change in source not permitted under the relevant statute or rule.

Under Certificate 24625, Proponent is authorized to divert 10 cfs from Little Herman Creek for operation of the Oxbow Fish Hatchery. Little Herman Creek is fed by springs located in close proximity to the authorized POD. For at least 10 years, Proponent has diverted water

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2 The original protests each contained approximately eight distinct bases for challenging the Determinations. On or about January 26, 2016, the parties filed a Stipulated Issue Statement reducing the number of issues for hearing to the three enumerated in this order.

directly from Middle and East Springs as the water emerges from underground as well as at the authorized POD. Transfer Applications T-11108 and T-11249 seek to add historically utilized PODs to the water right. Protestants claim the new PODs proposed in the transfer applications may be for groundwater rather than surface water and therefore are not permitted under the statutory scheme because Proponent also seeks to maintain the original POD on Little Herman Creek. Currently, ODFW diverts water from Middle and East Springs after it emerges from underground, resulting in the diversion of surface water while also diverting water from the original POD on Little Herman Creek.

OAR 690-380-2130 governs the change from a surface water POD to a groundwater appropriation and provides, in pertinent part:

> (1) As provided in ORS 540.531, an owner of a surface water use subject to transfer may apply for a transfer of the point of diversion to allow the appropriation of ground water, subject to the requirements for a transfer in point of diversion under this Division and the requirements under section (2) or (3) of this rule.
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> * * * * *
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> (7) The original point of diversion of surface water shall not be retained as an additional or supplemental point of diversion.

In evaluating the transfer applications, OWRD examined the proposed PODs and confirmed the diversion structures at East and Middle Springs take control of water above land surface and therefore divert surface water rather than appropriate groundwater. Nothing in the pending transfer applications requests a change from a surface water POD to a groundwater appropriation.

Protestants point to communications between OWRD, Proponent, and Nestle, as well as a separate transfer application not at issue in these proceedings[3], to support their claims that Proponent intends to make improvements to Oxbow Springs thereby converting at least a portion of the current surface water diversion to a groundwater appropriation while still maintaining the original surface water POD. See, Exs. 4 through 10. **Even when considered in a manner most favorable to Protestants, however, this evidence is not relevant to a resolution of this legal issue. Even assuming that ODFW or some other entity not a party to this proceeding has future plans to convert the points of diversion at Middle and East Springs to groundwater points of appropriation, the approval of T-11108 and T11249 does not permit the appropriation of groundwater.** ~~Nonetheless, all evidence offered in Protestants' response to the motion is based on a prospective agreement, between Proponent and entities not included as parties to this action, which may or may not come to fruition. As such, Protestants' assertions~~

3 Transfer Application T-11109, filed by Proponent, seeks to exchange a portion of the surface water right in issue with a groundwater right currently held by the City of Cascade Locks. (Ex. 1 at 1.)

~~constitute speculation. Nothing in statute or rule permits OWRD to deny a transfer application based on speculation regarding the applicant's future intentions, particularly where the transfer serves other legitimate purposes. Here, as identified in the motion, the transfer to historical PODs is necessary to provide clarity to the subject water right regardless of Proponent's future intent.~~

The applications in issue seek only to transfer portions of the water right to historically utilized PODs **that constitute diversions of surface water. The Protestants did not submit evidence contesting OWRD's determination that the present Middle and East Springs points of diversion are surface water diversions, and their Exceptions do not contest the Proposed Order's findings that "nothing in the pending transfer applications requests a change from a surface water POD to a groundwater appropriation," and that the points of diversion constitute diversions of surface water, not groundwater.**

Prior to converting either POD in issue to a groundwater point of appropriation, ODFW must file a separate transfer application with OWRD requesting the intended conversion. Nothing in the current Determinations will permit ODFW to convert the surface water PODs to groundwater appropriations. Protestants have failed to demonstrate that the proposed transfers are prohibited by OAR 690-380-2130(7) or any other provision of statute or rule. Therefore, considering the evidence in a light most favorable to the non-moving party, Protestants have failed to prove that either Transfer Application T-11108 or T-11249 seek a change in source not permitted by law.

Based on the above, OWRD and Proponent are entitled to a favorable ruling as a matter of law on this issue.

Transfer application T-11108 is valid.[4]

Next, Protestants allege transfer application T-11108 is invalid because Proponent requested, through emails with OWRD, that the quantity of water specified in the application be changed from 10 cfs to 0.5 cfs after close of the public comment period. Through the protests, and in the Stipulated Issue Statement, Protestants allege Proponent "did not amend its application for T-11108." Stipulated Issue Statement at 2. This argument appears to assert that Proponent was required to submit a separate application containing updates or changes to the initial application.

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4 Initially, Protestants claimed both transfer applications were invalid because, as originally submitted to OWRD, they sought to transfer a combined total of 19.5 cfs to the proposed PODs. Proponents argue that this results in an enlargement of Proponent's water right and is therefore impermissible. This argument is based on the assumption that the change to Transfer Application T-11108, after close of the public comment period, is not authorized by the statutory and regulatory scheme. Because this order finds the amendment is valid, it is unnecessary to address Protestants' enlargement argument with regard to Transfer Application T-11249. In addition, Protestants argue the transfer applications are invalid because the land use information contained within is incorrect. This argument is addressed in the discussion pertaining to compliance with statewide planning goals below and therefore is not addressed in this section.

As OWRD correctly points out, the term "amendment" is not defined by the relevant statutes or rules. Therefore, one must begin with the plain, ordinary meaning of the term. PGE v. Bureau of Labor and Industries, 317 Or 606, 611 (1993) ("[W]ords of common usage typically should be given their plain, natural, and ordinary meaning."). The usual source for determining the ordinary meaning of statutory terms is a dictionary of common usage. State v. Murray, 340 Or 599, 604, 136 P3d 10 (2006) ("Absent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense."). In this case, the operative term at issue is "amend." Merriam-Webster provides definitions of "amend" which include, in relevant part:

> **3 a:** to put right: CORRECT, RECTIFY * * *: to make emendations in (as a text) * * * **c** (1) **:** to change or modify in any way for the better * * * (2) **:** to change or alter in any way esp. in phraseology * * * specif **:** to alter (as a motion, bill, or law) formally by modification, deletion, or addition[.]

(Emphasis original.) Webster's Third New Int'l Dictionary, 68 (unabridged ed 2002).

The record demonstrates that Proponent requested, in writing, to revise Transfer Application T-11108 from 10 cfs to 0.5 cfs. OWRD interpreted that as a request to amend T-11108. That interpretation is reasonable according to the common definition of the term identified above. Accordingly, I find Proponent properly amended Transfer Application T-11108 to reflect a transfer to water in the amount of 0.5 cfs.

Additionally, Protestants assert that transfer applications may only be amended after the applicant receives the draft preliminary determination from ORWD. Moreover, Protestants argue that, Pursuant to OAR 690-380-4010(4), any such amendments are limited to those necessary to address issues identified in the draft preliminary determination. Response at 8. I disagree with Protestants' interpretation of the cited administrative rule.

OAR 690-380-4010 allows amendments to transfer applications and provides, in relevant part:

> (1) After the conclusion of the public comment period described in OAR 690-380-4000(4), the Department shall prepare a preliminary determination of whether the application should be approved or denied taking into account comments received in response to the notice provided under OAR 690-380-4000 and the considerations described in section (2) of this rule.
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> * * * * *
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> (4) The Department shall provide a copy of the draft preliminary determination to the applicant and provide the applicant a period of at least 30 days to amend the application to address any issues identified by the Department in the preliminary

determination, including the quantity of water to be transferred, or to withdraw the application.

Under the cited rule, the Department must prepare a draft preliminary determination after close of the public comment period. Thereafter, the Department must permit an applicant no less than 30 days to amend the application before denying the proposed transfer. Under the plain language of the rule, therefore, amendments are permitted after close of the public comment period. However, the rule is permissive rather than restrictive in allowing amendments to transfer applications. Nothing in the cited rule limits amendments to rigid framework proposed by Protestants. Rather, the rule allows a mechanism for applicants to address deficiencies in an application before OWRD is authorized to deny it and provides a minimum amount of time in which the applicant must be allowed to do so.[5] The permissive language or OAR 690-380-4010 supports a finding that applicants are permitted to amend transfer applications at any time, including at least 30 days after receipt of the draft preliminary determination. Accepting Protestants' interpretation that such amendments may only be made after OWRD issues a draft preliminary determination and then may only address issues identified within that determination requires the addition of language not found in the rule or its enabling statute.

The facts pertaining to this issue are not in dispute, and Protestants failed to demonstrate that Transfer Application T-11108 is invalid **as a matter of law**. As such, OWRD and Proponent are entitled to a favorable ruling as a matter of law on this issue.

The Department appropriately determined that the proposed transfers comply with statewide planning goals.

Finally, Protestants assert that OWRD failed to ensure the proposed transfers are compatible with statewide planning goals because the land use information contained in the transfer applications is incorrect.

Requirements for compliance with statewide planning goals are found in OAR Chapter 690 Division 005.

OAR 690-005-0010 identifies the purpose of the rule and provides, in part:

> As required by ORS 197.180, this rule establishes policies and procedures for: assuring agency compliance with statewide planning goals; assuring compatibility with local comprehensive land use plans; coordinating with local, state, and

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5 In their Exceptions, Protestants contend that an amendment may only be made under OAR 690-380-4010(4) in response to "address issues identified in the preliminary determination." (Exceptions at 6). The rule specifically addresses "the quantity of water to be transferred" as an issue that may serve as the basis for an amendment. As the Protestants have pointed out, OWRD's transfer rules do not permit an increase in the quantity of water diverted. As a result, OWRD's preliminary determination would necessarily have identified the quantity of water to be transferred as an issue in the preliminary determinations. It would be pointlessly formalistic to require an applicant to wait until the preliminary determination is issued to address such a concern, and, as described, herein, the rule does not mandate such a result.

federal governments and special districts in land use matters; and resolving land use disputes

OAR 690-005-0030 includes actions required by the Commission and the Department to ensure compliance with statewide planning goals and provides, in part:

(1) All Commission and Department actions pursuant to a program identified in OAR 690-005-0025 shall comply with the statewide planning goals.

* * * * *

(3) The Commission and Department shall achieve goal compliance directly by satisfying the requirements of section (4) of this rule and by adopting written findings as provided in OAR 690-005-0040(4)(c), when one or more of the following situations, or other situations identified in 660-030-0065(3), exists:

(a) An acknowledged comprehensive plan does not contain:

(A) Requirements or conditions specifically applicable to a Commission or Department action; or

(B) General provisions, purposes, or objectives which would be substantially affected by the action.

(b) The Commission or Department takes an action that is not compatible with an acknowledged comprehensive plan after implementing all applicable measures described in OAR 690-005-0035 (Compatibility with Acknowledged Comprehensive Plans).

(4) Prior to taking action pursuant to subsection (3)(a) of this rule, the Commission or Department shall notify the planning department of the affected local government:

(a) That, in the Department's assessment, the acknowledged comprehensive plan does not contain:

(A) Requirements or conditions specifically applicable to a Commission or Department action; or

(B) General provisions, purposes, or objectives which would be substantially affected by the action.

(b) That the Department intends to achieve goal compliance directly, not through compatibility with the applicable comprehensive plan; and

(c) That the planning department shall have 30 days to respond to the notification with a request to initiate dispute resolution procedures as described in OAR 690-005-0040.

Protestants' argument is based on assertions that ODFW will make improvements to one or more of the subject PODs. ~~As discussed above, ODFW asserts, and OWRD agrees, that no improvements are proposed in the applications or approved by the preliminary determination. OWRD's determination of compliance with statewide planning goals cannot be based on speculation over whether a prospective agreement between ODFW and other entities may one day be realized and, if so, whether improvements to the PODs may be undertaken at some unidentified future date. Rather, the framework established in OAR Chapter 690 Division 005 determines compliance.~~

~~The evidence in the record shows OWRD gave notice to local government entities pursuant to OAR 690-005-0030(4) and that local government entities for the City of Cascade Locks and Hood River County certified that land use affected by the proposed transfers are allowed outright or are not regulated by the applicable comprehensive plan. This is sufficient to establish land use contemplated by the proposed transfer complies with statewide planning goals. Protestants offer no reliable evidence to the contrary.~~

~~OWRD and ODFW have established, by a preponderance of the evidence, that the land use(s) to be served by the proposed water uses are allowed outright or not regulated by the comprehensive plans for either the City of Cascade Locks or Hood River County. As such, the transfer applications are compatible with statewide planning goals and the moving parties are entitled to a favorable ruling as a matter of law.~~

The evidence submitted by the Protestants is insufficient to establish a material issue of fact. Most of the exhibits submitted by Protestants refer to prospective plans by Nestle, not ODFW. Nestle is not a party to and therefore its future actions are irrelevant to this proceeding. In addition, the plans referred to are the conversion of the point of diversion from surface water to groundwater via well construction. As described above, the approval of this transfer does not permit the use of groundwater at Middle and East Springs. A separate application is required if any party in the future seeks to convert the works at Middle and East Springs from surface water points of diversion to groundwater points of appropriation.

There are only three documents in the Protestants' exhibits that potentially refer to *ODFW* making potential "improvements" at Middle and East Springs. Protestants' Exhibit 11 contains the following statement: "Then, because the springs are surface water and Nestle wants to capture the springs water before it hits the air and land surface (i.e., capture it underground), ODFW would have to file a SW to GW transfer application on at least one of the springs (under OAR 690-380-2130) to change it to a groundwater source. *[See: Definition of well – ORS 537.515(9)]*". (Emphasis in original). The Declaration of Maura C. Fahey states that Exhibit 11 was "obtained by Protestants from WRD and/or ODFW through discovery in this contested case proceeding." It is therefore unclear if Exhibit 11 reflects ODFW's or OWRD's position on this issue. Protestants' Exhibit 9 is a

presentation by ODFW employee Rick Kepler, in which he refers to an unstated entity's construction of new wells. Finally, Protestants' Exhibit 10 is a letter from Bill Otto seeking an extension of the deadline listed in the proposed permit to apply water to a beneficial use. As a rationale for seeking this extension, Mr. Otto states that ODFW "plans improvements to the springs." The letter itself is not clear as to what these improvements might be. However, the only "improvement" referred to in the exhibits submitted by the Protestants is the conversion of the point of diversion from surface water to groundwater via well construction.

Reviewing the evidence in a light most favorable to the Protestants, the most that Protestants established for the purposes of summary determination is that either ODFW or Nestle may seek to convert the point of diversion from surface to groundwater via well construction at some point in the future. As described above, a separate permit application would be required to do so, and the affected local governments would have an opportunity to weigh in on the land use requirements, if any, pertaining to well construction at that time. As a result ODFW and OWRD have established that "there is no genuine issue as to any material fact that is relevant to resolution" of this issue. OAR 137-003-0580(6)(a).

OWRD gave notice to the affected local governments consistent with the requirements of OAR 690-005-0030(4). The jurisdictions certified that "Land uses served by the proposed water uses (including proposed construction) are allowed outright or are not regulated by [the] comprehensive plan." (Ex. G). As described above, the evidence that the Protestants submitted is not material to the approval of a surface water transfer. As a result, ODFW and OWRD are entitled to a favorable ruling as a matter of law on this issue.

Transfer T-11249:

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

Certificate: 24625 in the name of the OREGON STATE FISH COMMISSION (perfected under Permit S-20629)
Use: OPERATION OF SALMON HATCHERY
Priority Date: AUGUST 9, 1951
Rate: 9.5 CUBIC FEET PER SECOND (CFS)
Source: LITTLE HERMAN CREEK, tributary to HERMAN CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	8 E	WM	7	NE NE	NONE SPECIFIED IN CERTIFICATE

Authorized Place of Use:

OPERATION OF SALMON HATCHERY				
Twp	Rng	Mer	Sec	Q-Q
2 N	8 E	WM	8	NW NW

2. Certificate 24625 does not provide coordinates of the authorized point of diversion; however, information is available from the Oregon Department of Fish and Wildlife indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	8 E	WM	7	NE NE	LITTLE HERMAN CREEK - 450 FEET SOUTH AND 5 FEET WEST FROM THE NE CORNER OF SECTION 7

3. Transfer Application T-11249 proposes two additional points of diversion approximately 200 feet and 300 feet, respectively, upstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2N	8E	WM	7	NE NE	MIDDLE SPRING - 740 FEET SOUTH AND 125 FEET WEST FROM THE NW CORNER OF SECTION 8
2N	8E	WM	8	NW NW	EAST SPRING - 590 FEET SOUTH AND 50 FEET EAST FROM THE NW CORNER OF SECTION 8

4. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screen may be required in the future at each new point of diversion and that the diversions are not currently equipped with appropriate fish screens.

Now, therefore, it is ORDERED:

1. OWRD's and ODFW's Joint Motion for Summary Determination is GRANTED.

2. Transfer T-11249 is APPROVED as provided in the Preliminary Determination Proposing Approval of Additional Points of Diversion, dated February 27, 2012, which is incorporated by reference as if set forth fully herein (Att. 2).

3. 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 24625 and any related decree.

4. Water right Certificate 24625 is cancelled.

5. The quantity of water diverted at the additional points of diversion, together with that diverted at the original point of diversion, shall not exceed the quantity of water lawfully available at the original point of diversion.

6. The Director may require the water user to install a totalizing flow meter or other suitable measuring device at each point of diversion. If the Director notifies the water user to install totalizing flow meters or other measuring devices, the water user shall install such devices specified by the Director within the period allowed in the notice. Once installed, the water user shall maintain the meters or measuring devices in good working order and shall allow the Watermaster access to the meters or measuring devices.

7. The water user shall maintain the existing headgate(s) and shall make such improvements as may be required by the Department.

8. Within one year after receiving written notification from the Oregon Department of Fish and Wildlife (ODFW) that a fish screen is required, the water user shall install a screen, as appropriate, at each new point of diversion. The water user shall obtain written approval from ODFW that the screens meet ODFW's criteria. Once installed the water user shall maintain and operate the fish screens at the points of diversion consistent with ODFW's operational and maintenance standards.

9. Full beneficial use of the water shall be made, consistent with the terms of this order, on or before October 1, 2018. 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 change 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 at Salem, Oregon this 28th day of October, 2016.

Dwight French, Water Right Services Administrator, for
Thomas M. Byler, Director
Oregon Water Resources Department

Mailing Date: 10-31-2016

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF THE WATER RIGHT TRANSFER APPLICATIONS T-11108 AND T-11249	)	**RULING ON OREGON WATER RESOURCES DEPARTMENT AND OREGON DEPARTMENT OF FISH AND WILDLIFE'S JOINT MOTION FOR SUMMARY DETERMINATION AND PROPOSED ORDER**
BARK AND FOOD AND WATER WATCH, *Protestants*	)	
OREGON DEPARTMENT OF FISH AND WILDLIFE, *Proponent/Applicant*	)	OAH Ref. Nos: WR-16-001 and WR-16-002 OWRD Case Nos: T-11108 and T-11249

PROCEDURAL HISTORY

On February 27, 2012, Oregon Water Resources Department (OWRD or Department) issued Preliminary Determination(s) Proposing Approval of Additional Points of Diversion for Transfer Applications T-11108 and T-11249 (Determinations) filed by Oregon Department of Fish and Wildlife (ODFW or Proponent). On March 29, 2012, Bark and Food and Water Watch (Protestants), through counsel Crag Law Center, filed protests to the Determinations. On December 23, 2015, OWRD referred this matter to the Office of Administrative Hearings (OAH) for a consolidated contested case hearing.

On January 19, 2016, a prehearing conference was held with Senior Administrative Law Judge Joe L. Allen presiding. At the prehearing conference, the participants agreed to a schedule of proceedings in this matter. In accordance with that schedule, OWRD and ODFW filed a joint motion for summary determination (motion) on April 11, 2016. On April 25, 2016, Protestants filed a response to the motion.

ISSUE

1. Whether there are genuine issues of material fact and, if not, whether OWRD and ODFW are entitled to a favorable ruling on their Joint Motion for Summary Determination. OAR 137-003-0580.

2. Whether the Department's Determinations should be approved.

DOCUMENTS CONSIDERED

In support of the motion, OWRD and ODFW submitted the affidavits of Patricia McCarty and Ivan Gall as well as Exhibits A through G. Protestants submitted the affidavit of Maura C. Fahey and Exhibits 1 through 16, in support of their responsive brief. The ALJ

considered these documents as well as the preliminary determinations issued by OWRD in ruling on the motion.

FINDINGS OF FACT

1. ODFW holds a certificated water right identified by Water Right Certificate 24625, issued by OWRD with a priority date of August 9, 1951. Under Certificate 24625, Proponent is authorized to divert up to 10 cubic feet per second (cfs) of water from Little Herman Creek for operation of the Oxbow Fish Hatchery. (Ex. C at 1.)

2. Little Herman Creek is a fed by the East, Middle, and West springs located in close proximity to the authorized point of diversion (POD). (Ex. C at 1 through 3.) For at least 10 years, Proponent has diverted water directly from Middle and East Springs, after the water emerges from underground, as well as at the authorized POD. (Exs. A at 3 and B at 5.)

3. On or about August 27, 2010, Proponent filed Transfer Application T-11108 seeking to transfer 10 cfs from the authorized POD on Little Herman Creek to the POD in use at Middle and East Spring. (Ex. D at 1 through 3.) The period for public comment closed on October 14, 2010.[1] (Ex. D at 3.)

4. On April 12, 2011, Proponent contacted OWRD and requested a revision to the amount of water specified in T-11108 from 10 cfs to 0.5 cfs. OWRD accepted Proponent's revision the same day. (Ex. F)

5. On or about May 9, 2011, Proponent filed Transfer Application T-11249 seeking to transfer 9.5 cfs from the authorized POD on Little Herman Creek to the PODs in use at Middle and East Spring. T-11249 proposed to add Middle and East Springs as additional PODs for the specified quantity of water while maintaining the authorized POD on Little Herman Creek. (Ex. E at 1 through 3.)

6. OWRD differentiates a surface water POD from a groundwater appropriation by the point at which water is controlled. A point of control above land surface is a diversion of surface water. Conversely, a point of control below land surface is an appropriation of groundwater. (Aff. of Gall at 1 and 2.)

7. In evaluating the transfer applications, OWRD examined the proposed PODs and confirmed the diversion structures at East and Middle Springs take control of water above land surface and therefore divert surface water rather than appropriate groundwater. (Ex. C at 1 through 7.)

8. Nothing in the pending transfer applications requests a change from a surface water POD to a groundwater appropriation. (Exs. D and E.)

9. After receipt of the transfer applications, OWRD gave notice of the proposed transfers to the City of Cascade Locks and Hood River County. In response, both government

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[1] The 30 day period for public comment was extended due a modification to T-11108 from a transfer to historic POD to transfer to additional POD. (Ex. D at 3.)

entities certified that land use affected by the proposed transfers are either allowed outright or are not regulated by any applicable comprehensive plan. (Ex. G at 1 and 2.)

CONCLUSION OF LAW

1. There are no genuine issues of material fact and OWRD and ODFW are entitled to a favorable ruling on their Joint Motion for Summary Determination.

2. The Department's Determinations should be approved.

DISCUSSION

Summary Determination Standard

OAR 137-003-0580 is titled "Motion for Summary Determination" and provides, in relevant part:

> (6) The administrative law judge shall grant the motion for a summary determination if:
>
> (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
>
> (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
>
> (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
>
> (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing[.]
>
> * * * * *
>
> (12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling or a final order in accordance with 137-003-0665 if the administrative law judge has authority to issue a final order without first issuing a proposed order.

Protestants in this matter filed protests to the Determinations asserting their opposition to OWRD's proposed approval of the transfer applications in issue.[2] In a contested case hearing, the proponent of a fact or position has the burden of proving that fact or position by a preponderance of the evidence. ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Division*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

Here, Protestants assert that the transfer applications must be denied because (1) the requested transfers seek a change in source that is not permitted by the relevant statute, (2) the transfer applications are invalid, and (3) OWRD failed to determine that the transfers comply with statewide planning goals as required by statue. As the proponent of these challenges, Protestants bear the burden of proof. The burden of proof encompasses two burdens, the burden of production and the burden of persuasion. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000) (Conceptually, the burden of proof encompasses two distinct burdens: the burden of producing evidence of a particular fact (*i.e.*, the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (*i.e.*, the burden of persuasion)). Accordingly, Proponents bear the burdens of production and persuasion as to each stated challenge to the transfer applications.

Requested transfers do not seek a change in source not permitted under the relevant statute or rule.

Under Certificate 24625, Proponent is authorized to divert 10 cfs from Little Herman Creek for operation of the Oxbow Fish Hatchery. Little Herman Creek is a fed by springs located in close proximity to the authorized POD. For at least 10 years, Proponent has diverted water directly from Middle and East Springs as the water emerges from underground as well as at the authorized POD. Transfer Applications T-11108 and T-11249 seek to add historically utilized PODs to the water right. Protestants claim the new PODs proposed in the transfer applications may be for groundwater rather than surface water and therefore are not permitted under the statutory scheme because Proponent also seeks to maintain the original POD on Little Herman Creek. Currently, ODFW diverts water from Middle and East Springs after it emerges from underground, resulting in the diversion of surface water while also diverting water from the original POD on Little Herman Creek.

OAR 690-380-2130 governs the change from a surface water POD to a groundwater appropriation and provides, in pertinent part:

> (1) As provided in ORS 540.531, an owner of a surface water use subject to transfer may apply for a transfer of the point of diversion to allow the

[2] The original protests each contained approximately eight distinct bases for challenging the Determinations. On or about January 26, 2016, the parties filed a Stipulated Issue Statement reducing the number of issues for hearing to the three enumerated in this order.

appropriation of ground water, subject to the requirements for a transfer in point of diversion under this Division and the requirements under section (2) or (3) of this rule.

* * * * *

(7) The original point of diversion of surface water shall not be retained as an additional or supplemental point of diversion.

In evaluating the transfer applications, OWRD examined the proposed PODs and confirmed the diversion structures at East and Middle Springs take control of water above land surface and therefore divert surface water rather than appropriate groundwater. Nothing in the pending transfer applications requests a change from a surface water POD to a groundwater appropriation.

Protestants point to communications between OWRD, Proponent, and Nestle, as well as a separate transfer application not at issue in these proceedings[3], to support their claims that Proponent intends to make improvements to Oxbow Springs thereby converting at least a portion of the current surface water diversion to a groundwater appropriation while still maintaining the original surface water POD. *See*, Exs. 4 through 10. Nonetheless, all evidence offered in Protestants' response to the motion is based on a prospective agreement, between Proponent and entities not included as parties to this action, which may or may not come to fruition. As such, Protestants' assertions constitute speculation. Nothing in statute or rule permits OWRD to deny a transfer application based on speculation regarding the applicant's future intentions, particularly where the transfer serves other legitimate purposes. Here, as identified in the motion, the transfer to historical PODs is necessary to provide clarity to the subject water right regardless of Proponent's future intent.

The applications in issue seek only to transfer portions of the water right to historically utilized PODs. Prior to converting either POD in issue to a groundwater point of appropriation, ODFW must file a separate transfer application with OWRD requesting the intended conversion. Nothing in the current Determinations will permit ODFW to convert the surface water PODs to groundwater appropriations. Protestants have failed to demonstrate that the proposed transfers are prohibited by OAR 690-380-2130(7) or any other provision of statute or rule. Therefore, considering the evidence in a light most favorable to the non-moving party, Protestants have failed to prove that either Transfer Application T-11108 or T-11249 seek a change in source not permitted by law.

Based on the above, OWRD and Proponent are entitled to a favorable ruling as a matter of law on this issue.

Transfer application T-11108 is valid.[4]

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[3] Transfer Application T-11109, filed by Proponent, seeks to exchange a portion of the surface water right in issue with a groundwater right currently held by the City of Cascade Locks. (Ex. 1 at 1.)

[4] Initially, Protestants claimed both transfer applications were invalid because, as originally submitted to OWRD, they sought to transfer a combined total of 19.5 cfs to the proposed PODs. Proponents argue that this results in an enlargement of Proponent's water right and is therefore impermissible. This argument is based on the assumption

Next, Protestants allege transfer application T-11108 is invalid because Proponent requested, through emails with OWRD, that the quantity of water specified in the application be changed from 10 cfs to 0.5 cfs after close of the public comment period. Through the protests, and in the Stipulated Issue Statement, Protestants allege Proponent "did not amend its application for T-11108." Stipulated Issue Statement at 2. This argument appears to assert that Proponent was required to submit a separate application containing updates or changes to the initial application.

As OWRD correctly points out, the term "amendment" is not defined by the relevant statutes or rules. Therefore, one must begin with the plain, ordinary meaning of the term. *PGE v. Bureau of Labor and Industries,* 317 Or 606, 611 (1993) ("[W]ords of common usage typically should be given their plain, natural, and ordinary meaning."). The usual source for determining the ordinary meaning of statutory terms is a dictionary of common usage. *State v. Murray,* 340 Or 599, 604, 136 P3d 10 (2006) ("Absent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense."). In this case, the operative term at issue is "amend." Merriam-Webster provides definitions of "amend" which include, in relevant part:

> **3 a:** to put right: CORRECT, RECTIFY * * *: to make emendations in (as a text) * * * **c** (1) : to change or modify in any way for the better * * * (2) : to change or alter in any way esp. in phraseology * * * *specif*: to alter (as a motion, bill, or law) formally by modification, deletion, or addition[.]

(Emphasis original.) *Webster's Third New Int'l Dictionary,* 68 (unabridged ed 2002).

The record demonstrates that Proponent requested, in writing, to revise Transfer Application T-11108 from 10 cfs to 0.5 cfs. OWRD interpreted that as a request to amend T-11108. That interpretation is reasonable according to the common definition of the term identified above. Accordingly, I find Proponent properly amended Transfer Application T-11108 to reflect a transfer to water in the amount of 0.5 cfs.

Additionally, Protestants assert that transfer applications may only be amended after the applicant receives the draft preliminary determination from ORWD. Moreover, Protestants argue that, Pursuant to OAR 690-380-4010(4), any such amendments are limited to those necessary to address issues identified in the draft preliminary determination. Response at 8. I disagree with Protestants' interpretation of the cited administrative rule.

OAR 690-380-4010 allows amendments to transfer applications and provides, in relevant part:

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that the change to Transfer Application T-11108, after close of the public comment period, is not authorized by the statutory and regulatory scheme. Because this order finds the amendment is valid, it is unnecessary to address Protestants' enlargement argument with regard to Transfer Application T-11249. In addition, Protestants argue the transfer applications are invalid because the land use information contained within is incorrect. This argument is addressed in the discussion pertaining to compliance with statewide planning goals below and therefore is not addressed in this section.

(1) After the conclusion of the public comment period described in OAR 690-380-4000(4), the Department shall prepare a preliminary determination of whether the application should be approved or denied taking into account comments received in response to the notice provided under OAR 690-380-4000 and the considerations described in section (2) of this rule.

* * * * *

(4) The Department shall provide a copy of the draft preliminary determination to the applicant and provide the applicant a period of at least 30 days to amend the application to address any issues identified by the Department in the preliminary determination, including the quantity of water to be transferred, or to withdraw the application.

Under the cited rule, the Department must prepare a draft preliminary determination after close of the public comment period. Thereafter, the Department must permit an applicant no less than 30 days to amend the application before denying the proposed transfer. Under the plain language of the rule, therefore, amendments are permitted after close of the public comment period. However, the rule is permissive rather than restrictive in allowing amendments to transfer applications. Nothing in the cited rule limits amendments to rigid framework proposed by Protestants. Rather, the rule allows a mechanism for applicants to address deficiencies in an application before OWRD is authorized to deny it and provides a minimum amount of time in which the applicant must be allowed to do so. The permissive language or OAR 690-380-4010 supports a finding that applicants are permitted to amend transfer applications at any time, including at least 30 days after receipt of the draft preliminary determination. Accepting Protestants' interpretation that such amendments may only be made after OWRD issues a draft preliminary determination and then may only address issues identified within that determination requires the addition of language not found in the rule or its enabling statute.

Protestants failed to demonstrate that Transfer Application T-11108 is invalid. As such, OWRD and Proponent are entitled to a favorable ruling as a matter of law on this issue.

The Department appropriately determined that the proposed transfers comply with statewide planning goals.

Finally, Protestants assert that OWRD failed to ensure the proposed transfers are compatible with statewide planning goals because the land use information contained in the transfer applications is incorrect.

Requirements for compliance with statewide planning goals are found in OAR Chapter 690 Division 005.

OAR 690-005-0010 identifies the purpose of the rule and provides, in part:

As required by ORS 197.180, this rule establishes policies and procedures for: assuring agency compliance with statewide planning goals; assuring compatibility with local comprehensive land use plans; coordinating with local, state, and

federal governments and special districts in land use matters; and resolving land use disputes

OAR 690-005-0030 includes actions required by the Commission and the Department to ensure compliance with statewide planning goals and provides, in part:

(1) All Commission and Department actions pursuant to a program identified in OAR 690-005-0025 shall comply with the statewide planning goals.

* * * * *

(3) The Commission and Department shall achieve goal compliance directly by satisfying the requirements of section (4) of this rule and by adopting written findings as provided in OAR 690-005-0040(4)(c), when one or more of the following situations, or other situations identified in 660-030-0065(3), exists:

(a) An acknowledged comprehensive plan does not contain:

(A) Requirements or conditions specifically applicable to a Commission or Department action; or

(B) General provisions, purposes, or objectives which would be substantially affected by the action.

(b) The Commission or Department takes an action that is not compatible with an acknowledged comprehensive plan after implementing all applicable measures described in OAR 690-005-0035 (Compatibility with Acknowledged Comprehensive Plans).

(4) Prior to taking action pursuant to subsection (3)(a) of this rule, the Commission or Department shall notify the planning department of the affected local government:

(a) That, in the Department's assessment, the acknowledged comprehensive plan does not contain:

(A) Requirements or conditions specifically applicable to a Commission or Department action; or

(B) General provisions, purposes, or objectives which would be substantially affected by the action.

(b) That the Department intends to achieve goal compliance directly, not through compatibility with the applicable comprehensive plan; and

(c) That the planning department shall have 30 days to respond to the notification with a request to initiate dispute resolution procedures as described in OAR 690-005-0040.

Protestants' argument is based on assertions that ODFW will make improvements to one or more of the subject PODs. As discussed above, ODFW asserts, and OWRD agrees, that no improvements are proposed in the applications or approved by the preliminary determination. OWRD's determination of compliance with statewide planning goals cannot be based on speculation over whether a prospective agreement between ODFW and other entities may one day be realized and, if so, whether improvements to the PODs may be undertaken at some unidentified future date. Rather, the framework established in OAR Chapter 690 Division 005 determines compliance.

The evidence in the record shows OWRD gave notice to local government entities pursuant to OAR 690-005-0030(4) and that local government entities for the City of Cascade Locks and Hood River County certified that land use affected by the proposed transfers are allowed outright or are not regulated by the applicable comprehensive plan. This is sufficient to establish land use contemplated by the proposed transfer complies with statewide planning goals. Protestants offer no reliable evidence to the contrary.

OWRD and ODFW have established, by a preponderance of the evidence, that the land use(s) to be served by the proposed water uses are allowed outright or not regulated by the comprehensive plans for either the City of Cascade Locks or Hood River County. As such, the transfer applications are compatible with statewide planning goals and the moving parties are entitled to a favorable ruling as a matter of law.

RULING AND PROPOSED ORDER

OWRD and ODFW's Joint Motion for Summary Determination is **GRANTED**.

I propose the Oregon Water Resources Department issue the following order:

The Preliminary Determinations for Transfer Application T-11108 and Transfer Application T-11249 are Affirmed.

Because this Ruling and Proposed Order is dispositive on all issues, the hearing currently scheduled for June 27, 2016 is cancelled.

Joe L. Allen, Senior Administrative Law Judge
Office of Administrative Hearings

Date: June 10, 2016

APPEAL PROCEDURE

NOTICE

This Proposed Order is issued by the administrative law judge pursuant to OAR 137-003-0645. As provided in ORS 537.445, OAR 137-003-0650 and OAR 690-002-0175, any party to this proceeding or the Department may file exceptions to this proposed order with the Oregon Water Resources Director. The exceptions must be in writing and received at the Water Resources Department no later than 30 days after the date of service (the date served according to the certificate of service) of this proposed order. You should also send a copy of your exceptions to any other party or parties to the contested case hearing. Send any exceptions to:

Oregon Water Resources Department
725 Summer Street N.E., Suite A
Salem, OR 97301

Exceptions are legal or factual arguments illustrating legal or factual error in the proposed order, as demonstrated by the record. Evidence not in the record may not be offered in exceptions. Exceptions must clearly and concisely identify the portion(s) of the proposed order excepted to, and cite to appropriate portions of the record or Commission policies to which modifications are sought in the exceptions.

If exceptions are filed, any party or the Department may respond to the exceptions. The Department must receive responses no later than 10 days after the date of service of the exceptions. An opportunity may be provided for making additional written or oral argument to the Director, at the Directors determination and discretion. After reviewing the record, the exceptions and any additional argument, the Director will issue a final order. The Director may issue a final order that differs from the proposed order or may adopt the proposed order as the final order.

If exceptions are not filed within the allowed period, the Director will issue a final order.

CERTIFICATE OF MAILING

On **June 10, 2016** I mailed the foregoing **RULING ON OREGON WATER RESOURCES DEPARTMENT AND OREGON DEPARTMENT OF FISH AND WILDLIFE'S JOINT MOTION FOR SUMMARY DETERMINATION AND PROPOSED ORDER** in **OAH Reference No. WR-16-001 and WR-16-002**

BY FIRST CLASS MAIL AND ELECTRONIC MAIL:

Oregon Department of Fish and Wildlife
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/s/ Cheryl L. Lien
for Rebecca Osborne, Administrative Specialist

BEFORE THE WATER RESOURCES DEPARTMENT
OF THE
STATE OF OREGON

In the Matter of Transfer Application	)	PRELIMINARY DETERMINATION
T-11108, Hood River County	)	PROPOSING APPROVAL OF
	)	ADDITIONAL POINTS OF DIVERSION

Authority

ORS 540.505 to 540.580 establishes 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. OAR Chapter 690, Division 380 implements the statutes and provides the Department's procedures and criteria for evaluating transfer applications.

Applicant

OREGON DEPARTMENT OF FISH AND WILDLIFE
3406 CHERRY AVE NE
SALEM, OR 97303

Findings of Fact

Background

1. On August 27, 2010, the OREGON DEPARTMENT OF FISH AND WILDLIFE filed an application for a historic point of diversion change under Certificate 24625. The Department assigned the application number T-11108.

2. On September 10, 2010, the Department received a request from the Oregon Department of Fish and Wildlife to amend the transfer from a historic point of diversion change, to propose additional points of diversion.

3. On April 12, 2011, the Department received a request from the Oregon Department of Fish and Wildlife to revise this transfer application to affect 0.5 cfs instead of the full authorized rate of 10.0 cfs.

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

Certificate:	24625 in the name of the OREGON STATE FISH COMMISSION (perfected under Permit S-20629)
Use:	OPERATION OF SALMON HATCHERY
Priority Date:	AUGUST 9, 1951
Rate:	0.5 CUBIC FOOT PER SECOND

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.

Source: LITTLE HERMAN CREEK, tributary to HERMAN CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	8 E	WM	7	NE NE	NONE SPECIFIED IN CERTIFICATE

Authorized Place of Use:

OPERATION OF SALMON HATCHERY				
Twp	Rng	Mer	Sec	Q-Q
2 N	8 E	WM	8	NW NW

5. Certificate 24625 does not provide coordinates of the point of diversion, however information is available from the Oregon Department of Fish and Wildlife indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	8 E	WM	7	NE NE	LITTLE HERMAN CREEK - 450 FEET SOUTH AND 5 FEET WEST FROM THE NE CORNER OF SECTION 7

6. Transfer Application T-11108 proposes two additional points of diversion approximately 200 feet and 300 feet, respectively, upstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2N	8E	WM	7	NE NE	MIDDLE SPRING - 740 FEET SOUTH AND 125 FEET WEST FROM THE NW CORNER OF SECTION 8
2N	8E	WM	8	NW NW	EAST SPRING - 590 FEET SOUTH AND 50 FEET EAST FROM THE NW CORNER OF SECTION 8

7. This transfer proposes the additional points of diversion in order to allow diversion from two springs which contribute to Little Herman Creek, in addition to diversion at the authorized point.

8. Notice of the application for transfer was published on August 31, 2010, pursuant to ORS 540.520 and OAR 690-380-4000.

9. On September 14, 2010, notice of the application was re-published on the Department's weekly Public Notice, due to modification of the application from a Historic Point of Diversion change to a regular permanent transfer proposing additional points of diversion.

10. Timely comments were submitted to the Department on October 14, 2010, by Food & Water Watch, in response to the notice. The issues raised by the comments included:

    a) Review of T-11108 should be reviewed jointly with Exchange Application T-11109, since the two applications are linked;

    b) If the transfer and the exchange were both to be approved, enlargement would result because ODFW would be able to use more water during the summer months than is legally available from the surface water source;

c) If the transfer and the exchange were both to be approved, using warmer well water from the City of Cascade Locks at the fish hatchery during the summer months would detrimentally impact the native fish habitat through raising the temperature in Little Herman Creek and the Columbia River; and

d) If the transfer and the exchange were both to be approved, the City of Cascade Locks would be allowed to sell its water to Nestle Waters North America for a water-bottling plant, resulting in sale of a public resource to a private entity. This might ultimately harm the ability of the City of Cascade Locks to provide water for its citizens, as well as harm critical salmon and steelhead recovery and the long-term sustainability of Oregon's water, thereby violating the mission of OWRD.

11. Not all of the issues raised by the commenters address the criteria for review of a water right transfer as per OAR 690-380-4010 and approval of a transfer application under OAR 690-380-5000. The comments described in Finding of Fact #10(c) and (d) raise public interest issues. Under Oregon law, water right transfers are not subject to a public interest review. Rather, the statutory basis for approving a water right transfer application is relatively narrow and confined to the Department finding or determining:

    a) The water right proposed for transfer is a water use subject to transfer;

    b) The portion of the water right proposed for transfer is not cancelled due to forfeiture for non-use pursuant to ORS 540.610;

    c) The proposed transfer would not result in enlargement of the water right proposed for transfer; and

    d) The proposed transfer would not result in injury to other water rights.

12. Application for exchange T-11109 cannot be processed unless and until T-11108 is approved.

13. On November 17, 2011, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11108 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of December 19, 2011, 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.

14. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screen may be required in the future at each new point of diversion and that the diversions are not currently equipped with appropriate fish screens.

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

15. 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.

16. Diversion structures and pipelines sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Transfer Application T-11108.

17. No enlargement of the original Certificate 24625 right would result from adding the two proposed points of diversion, because the use of water at the proposed additional points of diversion can be conditioned to limit the quantity of water diverted at the proposed additional points of diversion, together with what is diverted from the authorized point, to no more than the quantity lawfully available at the original point of diversion for this portion of the right (0.5 cfs).

18. Water diverted under T-11108 from the springs and creek would continue to be used for operating the salmon hatchery (a largely non-consumptive use) and then flow down the creek as it currently does.

19. This transfer application (for 0.5 cfs) is being processed concurrently with Transfer Application T-11249 (for 9.5 cfs), which together would affect the entire 10.0 cfs allowed under Certificate 24625. Administrative rule OAR 690-380-5000(1)(c) does not allow the Department to approve a change that would result in enlargement of a right. Together, the water allowed for the portions of the right included in T-11108 and T-11249 would not exceed the 10.0 cfs quantity authorized under Certificate 24625.

20. The proposed change, as conditioned below, would not result in enlargement of the right.

21. Adding the two points of diversion proposed in T-11108 would not deplete water from the Little Herman Creek system, since T-11108 does not propose changes to the use of the water, and the authorized use is largely non-consumptive, for benefit of fish production at the fish hatchery. Therefore, there would be no injury to other water rights, because no other water rights would fail to receive previously available water to which they are legally entitled.

22. The proposed change would not enlarge the water right beyond what is presently authorized nor result in injury to other water rights.

Determination and Proposed Action

The additional points of diversion proposed in Transfer Application T-11108 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-11108 is approved, the final order will include the following:

1. *The additional points of diversion proposed in Transfer Application T-11108 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 24625 and any related decree.*

3. *Water right certificate 24625 is cancelled.*
4. *The quantity of water diverted at the additional points of diversion, together with that diverted at the original point of diversion, shall not exceed the quantity of water lawfully available at the original point of diversion.*
5. *The Director may require the water user to install a totalizing flow meter or other suitable measuring devices at each point of diversion. If the Director notifies the water user to install totalizing flow meters or other measuring devices, the water user shall install such devices specified by the Director within the period allowed in the notice. Once installed, the water user shall maintain the meters or measuring devices in good working order and shall allow the Watermaster access to the meters or measuring devices.*
6. *The water user shall maintain the existing headgate(s) and shall make such improvements as may be required by the Department.*
7. *Within one year after receiving written notification from the Oregon Department of Fish and Wildlife (ODFW) that a fish screen is required, the water user shall install a screen, as appropriate, at each new point of diversion. The water user shall obtain written approval from ODFW that the screens meet ODFW's criteria. Once installed the water user shall maintain and operate the fish screens at the points of diversion consistent with ODFW's operational and maintenance standards*
8. *Beneficial use of the water shall be made, consistent with the terms of this order, on or before* ***October 1, 2013****. 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 change and full beneficial use of the water.*
9. *After satisfactory proof of beneficial use is received, a new certificate confirming the right transferred will be issued.*

Dated at Salem, Oregon this 27th day of February, 2012.

Dwight French, Water Right Services Administrator, for
PHILLIP C. WARD, DIRECTOR

This Preliminary Determination was prepared by a Reimbursement Authority contractor. If you have questions about the information in this document, you may reach Dorothy Pedersen at 503-986-0890 or Dorothy.I.Pedersen@wrd.state.or.us.

Protests should be addressed to the attention of Transfer and Conservation Section, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.