

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

In the Matter of Instream Transfer)	FINAL ORDER APPROVING
Application T-10087, Jackson County)	CHANGES IN PLACE OF USE AND
)	CHARACTER OF USE

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. OAR Chapter 690, Division 077 provides additional criteria for evaluating transfers to instream water rights.

Applicant

WILLIAM JAMES AND LORI McTAGGART
495 LITTLE APPLGATE RD.
JACKSONVILLE, OR 97530

Findings of Fact

Background

1. On January 30, 2006, William James and Lori McTaggart filed a time-limited instream transfer application to change the character of use and place of use under Transfer T-8975, approved by Special Order Volume 61, Page 434, to instream use until such time that conditions for termination of a stored water use contract agreement between the applicant and the Bureau of Reclamation are met. The Department assigned the application number T-10087.
2. A new certificate was issued on April 24, 2009, for the water right evidenced by Special Order Volume 61, Page 434. The new certificate number is 85461.
3. The applicant has requested that approval of this time-limited instream transfer be contingent upon the applicant entering into a stored water use contract with the Bureau of Reclamation and approval by the Oregon Water Resources Department of a permit to use stored water.

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.

4. The right to be transferred is as follows:

Certificate: 85461 in the name of WILLIAM JAMES AND LORI MCTAGGART
Use: STOCK USE AND IRRIGATION of 61.29 ACRES
Priority Date: 1908
Rate: 1.23 CUBIC FEET PER SECOND (CFS)
Limit: If available at the original point of diversion: Buck & Jones Ditch and Farmer's Ditch Located in the NW¹/₄ SE¹/₄, Section 13 and NE¹/₄ NE¹/₄, Section 14, T 39 S, R 3 W, W.M.
Source: LITTLE APPLGATE RIVER, tributary to the APPLGATE RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	3 W	WM	3	SE SW	ADDITIONAL POD: 230 FEET NORTH AND 480 FEET WEST FROM SOUTH 1/4 CORNER OF SECTION 3
39 S	3 W	WM	13	NW SE	BUCK & JONES DITCH: GPS COORDINATES: LATITUDE 42.17508, LONGITUDE -123.0018
39 S	3 W	WM	14	NE NE	FARMER'S DITCH: 350 FEET SOUTH AND 900 FEET WEST FROM NE CORNER OF SECTION 14; ALSO LOCATED AS GPS COORDINATES: LATITUDE 42.18400, LONGITUDE -123.0174

Authorized Place of Use:

STOCK USE AND IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	3 W	WM	2	SW SW	5.00
39 S	3 W	WM	3	SW SE	26.00
39 S	3 W	WM	3	SE SE	28.40
39 S	3 W	WM	10	NE NE	1.89

5. The irrigation season, as established by the Rogue River Decree, is April 1 through October 31.
6. Application T-10087 proposes to change the character of use to instream use for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values on a time limited basis.
7. The applicant has entered into a 25-year agreement with the Bureau of Reclamation to provide stored water for irrigation of the place of use described in Finding of Fact #4. This agreement automatically renews for additional 25-year periods unless otherwise terminated by the parties. The applicant requests that the water right described in Finding of Fact #4 revert to its authorized use and place of use upon termination of a stored water contract with the Bureau of Reclamation or if the agreement between the applicant and the Bureau of Reclamation is not renewed. The termination request may either be received from both the Bureau of Reclamation and the applicant or from the applicant along with evidence that the stored water contract has been terminated or that the agreement with the Bureau of Reclamation has not been renewed.

8. Application T-10087 proposes to change the place of use of the right to create an instream reach from the Farmers Ditch POD described in Finding of Fact #4 to the mouth of the Little Applegate River.
9. The applicant proposes the quantities of water to be transferred instream to be protected follows:

Period	Rate (CFS)
April 1 through October 31	1.23

10. Historically the applicant has diverted the full quantity allowed by the water right during the entire irrigation season. The right has been used as part of a rotation agreement.
11. There is an existing instream water right, Certificate 75996 (Application IS-70982), with a priority date of December 7, 1990, within the same reach as that proposed for the new instream water right.
12. During the instream period, April 1 through October 31, the applicant proposes that this time-limited instream transfer be additive to other instream water rights, including other time-limited instream transfers, for the same reach/point, up to the amounts requested in the original instream water right application filed by the Oregon Department of Fish and Wildlife under IS-70982, as shown below:

	APR	MAY	JUN	JUL	AUG	SEP	OCT
1 st ½*	85.0	85.0	50.0	33.0	33.0	33.0	50.0
2 nd ½*	85.0	50.0	50.0	33.0	33.0	50.0	85.0

* The rates in cfs by ½ month requested in instream water right application IS-70982.

Otherwise the applicant proposes that the time-limited instream transfer should replace a portion of the existing instream water right (Certificate 75996) with an earlier priority date.

13. An application to use stored water, application number S-87646 has been filed associated with this time-limited instream transfer application and is being processed concurrently.
14. Consistent with land use requirements, notice of the intent to file the instream transfer application was provided by the applicant to Jackson County. Additionally, the Department provided notification of the proposed action to this local government upon receipt of Transfer Application T-10087.
15. Notice of the application for transfer was published on February 28, 2006, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
16. On July 8, 2009, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10087 to the applicants. The cover letter to the draft Preliminary Determination set forth a deadline of August 6, 2009, for the

applicants to respond. On September 27, 2010, the Department mailed a reminder letter to the applicant and provided a deadline of October 27, 2010, for the applicants to respond. The applicants requested additional time to provide the required information. The additional information requested by the Department was received on January 24, 2011. The applicants also concurred with the findings of the draft Preliminary Determination and requested that the Department proceed with issuance of a Preliminary Determination.

17. There is one supplemental right (Certificate 20566), not included as part of the transfer application, appurtenant to a portion of the same place of use as the portion of Certificate 85461 proposed for transfer. Generally, supplemental rights must be included with the transfer application or cancelled. On January 24, 2011, the applicants requested that this supplemental right be left in place for the duration of the time-limited instream transfer.
18. On April 27, 2011, the Department mailed a copy of a revised draft Preliminary Determination addressing the supplemental rights and proposing to approve Transfer Application T-10087 to the applicant. The cover letter to the revised draft Preliminary Determination set forth a deadline of May 26, 2011, for the applicants to respond. On May 10, 2011, the applicants concurred with the findings of the revised draft Preliminary Determination and requested that the Department proceed with issuance of a Preliminary Determination.
19. On May 26, 2011, the Department issued a Preliminary Determination proposing to approve Transfer T-10087 and mailed a copy to the applicants. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on May 31, 2011, and in the Medford Mail Tribune newspaper on June 13, 23, and 27, 2011 pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.

Instream Transfer Review Criteria (OAR 690-77-0075 and 690-380-4010)

20. Water has been used within the last five years according to the terms and conditions of the right, and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
21. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Application T-10087.
22. As identified in Finding of Fact #17, there is one supplemental right associated with a portion of the place of use for Certificate 85461 proposed for transfer. The applicants have requested that the supplemental right be left in place and become supplemental to any permit issued as a result of approval of Permit Application S-87646, which requests the use of stored water for primary irrigation from Applegate Reservoir while Certificate 85461 is being protected instream under this time-limited instream transfer.

The Department has reviewed the request and identified that the supplemental right may remain in place for the duration of this time-limited instream transfer and be used as supplemental to a permit issued under Application S-87646.

Upon termination of this instream transfer (consistent with Finding of Fact #7), the supplemental right will revert to being supplemental to Certificate 85461.

23. Due to the quantity of water diverted, there have been return flows. These return flows have primarily entered the Applegate River downstream of its confluence with the Little Applegate River. However, a portion of the return flows may enter the Little Applegate River downstream of the point of diversion, described in Finding of Fact #4. There are no water users on the Little Applegate River downstream of this point of diversion.
24. The proposed change would not result in enlargement of the right.
25. The proposed change would not result in injury to other water rights.
26. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
27. The protection of flows within the proposed reach described in Finding of Fact #8 is appropriate, considering:
 - a) The instream water right begins at the recorded point of diversion;
 - b) The location of confluences with other streams downstream of the point of diversion;
 - c) There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
 - d) As described in Finding of Fact #23, any return flows resulting from the exercise of the existing water right would re-enter the Applegate River downstream of the reach of the proposed time-limited instream water right. If a portion of return flows would enter the Little Applegate River downstream of the point of diversion no injury would occur to downstream users, as there are none, and any potential enlargement or injury to upstream users can be prevented by further conditioning of the time-limited instream transfer so that water rights upstream of the original point of diversion shall not be subject to regulation for flows in excess of the quantities to which this time-limited instream water right is entitled at the original point of diversion.
28. By adding to existing instream water rights, including other time-limited instream transfers, for the same location, the total monthly quantities of water to be protected instream will exceed the estimated average natural flow. However, the Department has determined that the estimated average natural flows may be exceeded due to the following:

- a) The quantities to be protected instream will not exceed the amounts requested in the original instream water right application (IS-70982) filed by the Oregon Department of Fish and Wildlife (ODFW) (see Finding of Fact #12) and;
 - b) The water right proposed to be transferred to a time-limited instream water right is either in an Oregon Department of Fish and Wildlife (ODFW) flow restoration priority watershed or ODFW has indicated that exceeding the estimated average natural flow in the reach, up to the amount requested by the ODFW, will provide for a beneficial purpose and are significant for Coho and Fall Chinook salmon, summer and winter steelhead and cutthroat trout for migration, spawning, egg incubation, fry emergence and juvenile rearing.
29. By adding to other instream water rights established pursuant to ORS 537.341 (state agency application process) and ORS 537.348 (instream transfer process) for the same location, a new instream right established by this transfer will provide protection for additional streamflows necessary for fish and wildlife habitat.
 30. By replacing a portion of the instream water rights established under ORS 537.341 (state agency application process), any instream water right created as a result of this transfer will provide for protection of streamflows previously identified as necessary for fish and wildlife habitat under an earlier priority date.
 31. The quantity and timing of the proposed instream use will provided for a beneficial purpose.

Conclusions of Law

The changes in character of use and place of use to instream use proposed in application T-10087 are consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075.

Now, therefore, it is ORDERED:

1. The changes in character of use and place of use to instream use proposed in application T-10087 are approved, and become effective when this order is signed, or when the permit under Application S-87646 is issued, whichever happens later.
2. The exercise of the right evidenced by Certificate 85461 for Stock Use and Irrigation at the former place of use shall be SUSPENDED, without loss of priority, for the term of the transfer authorized herein.
3. Supplemental water right certificate 20566 shall remain in place for the term of this transfer and may be used as supplemental to any permit issued under application S-87646.

4. The instream water right shall provide for the protection of streamflows from the diversion authorized under Certificate 85461, located at:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	3 W	WM	14	NE NE	FARMER'S DITCH: 350 FEET SOUTH AND 900 FEET WEST FROM NE CORNER OF SECTION 14; ALSO LOCATED AS GPS COORDINATES: LATITUDE 42.18400, LONGITUDE -123.0174

to the mouth of the Little Applegate River (River Mile 0.0).

5. The quantities of water to be protected under the instream water right are:

Period	Rate (CFS)
April 1 through October 31	1.23

6. Water rights upstream of the original point of diversion shall not be subject to regulation for flows in excess of the quantities to which this instream water right is entitled at the original point of diversion.
7. Within the specified stream reach, the amount of water to which this right is entitled shall not exceed the quantity of water legally available at the original point of diversion.
8. During the term of this order and for the 2nd half of May and the month of June the instream right established by this transfer shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or 537.470.
9. During the term of this order and for April, the 1st half of May, and the months of July, August, September, and October the instream right established by this transfer shall be in addition to instream water rights established pursuant to ORS 537.341, 537.346, 537.348 or 537.470, but the quantity protected instream shall not exceed the rate in cfs shown below:


	APR	MAY	JUN	JUL	AUG	SEP	OCT
1 st 1/2	85.0	85.0	50.0 [†]	33.0	33.0	33.0	50.0
2 nd 1/2	85.0	50.0 [†]	50.0 [†]	33.0	33.0	50.0	85.0

[†] These months or partial months are shown to describe the maximum instream rate associated with the time-limited instream water right, in connection with other instream water rights for the same reach.

Once the amounts protected instream as a result of this time limited instream transfer, in combination with other time-limited instream transfers, exceed the amounts listed above, any additional quantities protected instream as a result of a time-limited instream transfer shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346.

10. 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 85461 and any related decree.
11. During the term of this order, Certificate 25066 for supplemental irrigation shall remain in place and may only be used for supplemental irrigation in association with a permit issued under Application S-87646. Upon termination of this transfer, Certificate 25066 shall revert to being supplemental to Certificate 85461.
12. The term of this order shall continue until terminated. Upon termination of this transfer, the use of water shall revert to its original use and place of use as described by Certificate 85461. The use shall revert to the authorized use and place of use upon submission of a termination request from:
 - a) The Bureau of Reclamation and the applicant, or
 - b) The applicant along with evidence that the stored water contract from Applegate Reservoir has been terminated or that the agreement between the applicant and the Bureau of Reclamation has not been renewed.
13. This order may also be terminated if a permit is not issued or is rescinded under Application S-87646.

Dated at Salem, Oregon this 12 day of August, 2011.



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

Mailing date: AUG 15 2011