



4. On January 20, 2005, the Department notified Mr. Zweifel that the order would be reconsidered and that the Department would seek a recommendation from ODFW on whether to consent to the injury.
5. In its letter of March 7, 2005, ODFW recommended that the Department consent to the injury of instream water right Certificate 59627. The information provided by ODFW in the letter demonstrates that:
  - a) Approximately 3 miles of Habitat Category 2 stream reach would be impacted by the proposed transfer of 0.34 cfs under Certificate 21634. The impacted stream reach on the Kilchis River is spawning, rearing and passage habitat to winter steelhead, coho, spring and fall Chinook, chum salmon and sea-run and resident cutthroat trout, as well as numerous other resident fish species.
  - b) The Kilchis River could benefit from the addition of 0.17 cfs leased to instream use as mitigation during the temporary transfer and the potential increase of an additional 0.114 cfs that will not be diverted under the right.
  - c) Oregon Department of State Lands (DSL) lists head of tide at river mile two; this is roughly mid-way between the proposed point of diversion and the mouth of the Kilchis River. Although the reaches to benefit from the additional water instream are tidally-influenced, the proposed transfer would provide up to an additional 0.284 cfs of increased flow compared to withdrawal of 0.340 cfs under the existing water right certificate at the current point of diversion.
  - d) The total area to be re-vegetated (riparian buffer strip plantings) equal 34,250 square feet. This will provide a benefit long after the end of the temporary transfer.
6. ODFW's recommendation identifies the following conditions as necessary to ensure that the proposed changes will be consistent with the recommendation and that the net benefits will continue:
  - a) Notwithstanding the rate prescribed under the right, the maximum quantity of water withdrawn at the new point of diversion shall be limited to 0.056 cfs.
  - b) The applicant must size the diversion pipe to withdraw no more than this amount. Alternatively, a means to track water use must be installed and a report of water use submitted on at least an annual basis to the Watermaster and available to the public upon request through the Department.
  - c) The remaining 14.6 acres will be leased to an instream water right on a temporary basis for at least the four year duration of the out-of-stream temporary transfer. This will allow the remainder of the water right to be protected downstream from the existing point of diversion to the mouth of the Kilchis River. This is presuming that the Department has conducted an injury analysis and found that the 14.6 acres allowing the use of 0.17 cfs of the existing water right can be transferred to instream use without further injury to other water rights. The balance of 0.114 cfs allowed under Certificate

21634 shall not be used and, given the absence of other rights that could appropriate the water, will provide a benefit to the Kilchis River.

- d) The new diversion pipe will be screened according to ODFW standards.
  - e) The upper proposed point of diversion must be removed from the from the water right transfer.
  - f) Irrigation will be limited to a maximum of 60 hours/week.
  - g) To provide water quality mitigation, within the first year of the transfer the applicant must plant:
    - i) Two 10' riparian buffer strips of willows and alder (2' on center) along 550' of the east and west banks of Myrtle Creek totaling 1,100'.
    - ii) A 10' riparian buffer strip of willows and alder (2' on center) along the Kilchis River from the confluence of Myrtle Creek to a point 1,500' downstream.
    - iii) A 10' riparian buffer strip of willows and alder (2' on center) along the Kilchis River from the confluence of Myrtle Creek to a point 825' upstream.
  - h) Criteria for riparian planting success shall be 80% survival by species after three years. All newly planted vegetation shall be maintained and monitored for a period of five years, or until they reach a stage where they are considered free to grow.
  - i) The mitigation included as conditions of this temporary transfer covers impacts during use of this temporary transfer only. Any future applications may require additional mitigation.
7. After receipt of the recommendation from ODFW to consent to injury, the Department provided notice of the opportunity to comment on the recommendation pursuant to OAR 690-380-5050(4). No comments were received.

### **Conclusions of Law**

The proposed temporary changes in place of use and point of diversion proposed in application T-9744 will result in injury to the instream water right. However, based on the recommendation of the Oregon Department of Fish and Wildlife to consent to the injury the Department approves the changes as conditioned consistent with the recommendation.

### **Now, therefore, it is ORDERED:**

1. The order denying application T-9744 and entered at Special Order Volume 61, Pages 613 to 615 is withdrawn, modified as described herein and issues.

2. The temporary change in place of use and the temporary change in point of diversion to the SE $\frac{1}{4}$  SE $\frac{1}{4}$  Section 31, T1N, R9W, W.M., 200 feet north and 200 feet west from the SE $\frac{1}{4}$  corner of Section 31 proposed in application T-9744 are approved. The temporary change in point of diversion to the SE $\frac{1}{4}$  SW $\frac{1}{4}$  Section 32, T1N, R9W, W.M., 800 feet north and 1700 feet east from the SE $\frac{1}{4}$  corner of Section 31 is **not** approved.
3. The former place of use **shall not** be irrigated as part of this water right during the 2005, 2006, 2007 and 2008 irrigation seasons.
4. The use shall revert to the authorized place of use at the end of the 2008 irrigation season.
5. Notwithstanding the rate prescribed under the right, the maximum quantity of water withdrawn at the new point of diversion shall be limited to 0.056 cfs.
6. The applicant must size the diversion pipe to withdraw no more than this amount. Alternatively, a means to track water use must be installed and a report of water use submitted on at least an annual basis to the Watermaster and available to the public upon request through the Department.
7. The use of water under this temporary transfer is contingent on an instream lease of 14.6 acres of water right. If Lease L-605, or a successor lease determined by the Oregon Department of Fish and Wildlife to be equivalent, does not remain in effect for the duration of this temporary transfer, the use of water under the temporary transfer shall be discontinued. The balance of 0.114 cfs allowed under Certificate 21634 shall not be used and, given the absence of other rights that could appropriate the water, will provide a benefit to the Kilchis River.
8. The new diversion pipe will be screened according to ODFW standards.
9. Irrigation will be limited to a maximum of 60 hours/week.
10. To provide water quality mitigation, within the first year of the transfer the applicant must plant:
  - a) Two 10' riparian buffer strips of willows and alder (2' on center) along 550' of the east and west banks of Myrtle Creek totaling 1,100'.
  - b) A 10' riparian buffer strip of willows and alder (2' on center) along the Kilchis River from the confluence of Myrtle Creek to a point 1,500' downstream.
  - c) A 10' riparian buffer strip of willows and alder (2' on center) along the Kilchis River from the confluence of Myrtle Creek to a point 825' upstream.
  - d) Criteria for riparian planting success shall be 80% survival by species after three years. All newly planted vegetation shall be maintained and monitored for a period of five years, or until they reach a stage where they are considered free to grow.

11. The use of water under this temporary transfer shall be discontinued on written notification by the Oregon Department of Fish and Wildlife to the applicant and to the watermaster that the applicant is not in compliance with the mitigation conditions of this temporary transfer. The mitigation included as conditions of this temporary transfer covers impacts during use of this temporary transfer only. Any future applications may require additional mitigation.
12. The approval of this temporary transfer may be revoked or modified if the Department finds the change causes injury to any existing water right.
13. A subsequent application for permanent transfer of Certificate 21634 shall be subject to a full and complete review to determine consistency with the requirements of OAR Chapter 690, Division 380. Approval of this temporary transfer does not establish a precedent for approval of a subsequent application filed for a permanent transfer.
14. The time during which water is used under this approved temporary transfer does not apply toward a finding of forfeiture under ORS 540.610.

Dated at Salem, Oregon this 28<sup>th</sup> day of April, 2005.

  
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Phillip C. Ward, Director

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Mailing date: MAY 0 2 2005