

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

In the Matter of Instream Transfer) FINAL ORDER APPROVING A CHANGE IN
Application T-13177, Jackson County) PLACE OF USE AND CHARACTER OF USE

Authority

Oregon Revised Statute (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 Rule (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

CAROL M. ROSS
100 6TH STREET
ASHLAND, OR 97520

Findings of Fact

1. On May 3, 2019, CAROL M. ROSS filed an application to change the place of use and character of use under Certificate 17204 to instream use. The Department assigned the application number T-13177.
2. Notice of the application for transfer was published on May 14, 2019, pursuant to OAR 690-380-4000. Numerous timely comments were filed in response to the notice and are summarized below. In making this determination, the Department has considered all comments received.

Commenter	Position	Summary
Rogue River Watershed Council	Support	Increased stream flow will lower summer water temperatures addressing the main limiting factor for Coho Salmon and other native fishes in the upper portions of the Little Butte Creek System
Oregon Dept. of Fish & Wildlife	Support	The project will improve water quality in Little Butte Creek. Restoration is critical for native 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.

Commenter	Position	Summary
WaterWatch of Oregon	Support	Project offers significant protection for subbasin and its fisheries. Should require full measurement and reporting.
Mike Dauenhauer	Oppose	The reallocation to instream use would restrict junior diversions and may cause economic hardship to ranchers and farms if the resource were to become limited. Water not used for approximately the last ten years.
LeRae Bullard	Oppose	Due process concerns regarding notification. Review overall process for appropriate notification to those directly impacted by such transfers from beneficial use to instream allocation.
Lee Bradshaw	Oppose	Has leased property in Section 22 for approximately 10 years. Water was not used while he leased the property. Certificate is subject to forfeiture and certificate should be canceled.
Talent Irrigation District	Oppose	Transfer will cause injury to existing Reclamation and District storage flow rights. The project relies on any waste, seepage or return flows from the use of the right. Possible non-use of the water. Some of the property appears to be on Reclamation property. The web-based mapping indicates the acreage under the right is wetlands.

3. In accordance with the Ridgeview agreement between the Department and the U.S. Bureau of Reclamation (BOR), the Department notified the BOR of the transfer application. The notification occurred on December 3, 2019, after the comment period had closed. On December 12, 2019, the BOR responded to the notification and did not take a position in support or opposing the transfer. BOR asserted it had been brought to its attention there was concern as to the historical use of the water right and requested the Department determine whether forfeiture may be an issue.
4. On March 5, 2020, the Applicant submitted an additional Evidence of Use form accompanied by aerial photos. Additional documentation of the use was also submitted. One of the documents is in the form of a Seller's Counter Offer dated April 18, 2018, and signed by J.G. Dauenhauer, Jr. which states: "The Seller or the tenant has beneficially applied the irrigation water over the last five years." In addition, the Evidence of Use form submitted with the application indicated the water was leased during the 2019 irrigation season.
5. Consistent with land use requirements, prior to submitting the instream transfer application, the applicant provided notification of the intent to file the instream transfer application to Jackson County Planning Department. Additionally, the Department provided notice of the proposed action to Jackson County upon receipt of Transfer Application T-13177.
6. On March 31, 2020, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-1317713177 to the applicant and all commenters. The draft Preliminary Determination cover letter set forth a deadline of May 1, 2020, for the applicant to respond. The applicant requested 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.

7. On June 4, 2020, the Department issued a Preliminary Determination proposing to approve Transfer Application T-1317713177 and sent a copy to the applicant. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on June 9, 2020, and in the Ashland Daily Tidings newspaper on June 6 and 18, 2020, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice. However, comments in support of the Preliminary Determination were submitted by Jacob Kann, Ph.D. of Aquatic Ecosystems Sciences, LLC on July 3, 2020, and by Mark Buktenica, Aquatic Ecologist on July 7, 2020.

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

Certificate: 17204 in the name of R.P. NEIL (confirmed by Little Butte Creek, 1949)
Use: IRRIGATION of 149.2 ACRES
Priority Dates: 1858 for 74.8 ACRES and 1888 for 74.4 ACRES
Rate: 2.49 CUBIC FEET PER SECOND (cfs), being 1.25 cfs under 1858 priority and 1.24 cfs under 1888 priority

Limit/Duty: The amount of water to which such right is entitled is limited to an amount actually beneficially used for said purposes, and shall not exceed 1.25 cubic feet per second for 74.8 acres and 1.24 cubic feet per second for 74.4 acres; measured at the head of the ditch or the point where the same leaves the natural stream.

Period of Use: April 1 to October 1

Source: DEAD INDIAN CREEK, tributary to the SOUTH FORK LITTLE BUTTE CREEK

Authorized Points of Diversion: None Listed

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
38 S	3 E	WM	15	NE SW	11.0
38 S	3 E	WM	15	NW SW	38.0
38 S	3 E	WM	15	SW SW	36.4
38 S	3 E	WM	15	SE SW	2.0
38 S	3 E	WM	16	SE SE	5.0
38 S	3 E	WM	21	NE NE	0.8
38 S	3 E	WM	21	SE NE	9.0
38 S	3 E	WM	21	NE SE	7.5
38 S	3 E	WM	22	NW NW	30.5
38 S	3 E	WM	22	SW NW	8.0
38 S	3 E	WM	22	NW SW	1.0
Total					149.2

9. Certificate 17204 does not specify the priority date for the lands. The Applicant specified the priority dates for the lands involved in the transfer as follows:

Priority	Twp	Rng	Mer	Sec	Q-Q	Acres
1858	38 S	3 E	WM	15	NE SW	11.0
1888	38 S	3 E	WM	15	NW SW	38.0
1888	38 S	3 E	WM	15	SW SW	36.4
1858	38 S	3 E	WM	15	SE SW	2.0
1858	38 S	3 E	WM	16	SE SE	5.0
1858	38 S	3 E	WM	21	NE NE	0.8
1858	38 S	3 E	WM	21	SE NE	9.0
1858	38 S	3 E	WM	21	NE SE	7.5
1858	38 S	3 E	WM	22	NW NW	30.5
1858	38 S	3 E	WM	22	SW NW	8.0
1858	38 S	3 E	WM	22	NW SW	1.0
Total						149.2

10. Certificate 17204 does not identify the location of the points of diversion. Information available from the applicant and the Watermaster indicates the points of diversion are located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
38 S	3 E	WM	15	NE SE	42 DEGREES 14 SECONDS 52.70 FEET NORTH AND 122 DEGREES 27 MINUTES 48.98 FEET WEST
38 S	3 E	WM	15	NE SE	42 DEGREES 14 MINUTES 50.68 FEET NORTH AND 122 DEGREES 28 MINUTES 03.97 FEET WEST

11. Certificate 17204 lists Spencer Creek as a source of water for this right. According to the Department's records and the local Watermaster, Spencer Creek has never been a source for this right. Therefore, any transferred water will not include Spencer Creek as a source.
12. Transfer Application T-13177 proposes to change the character of use to instream use for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.
13. Transfer Application T-13177 proposes to change the place of use of the right to create an instream reach from authorized points of diversion on Dead Indian Creek into the into South Fork Little Butte Creek into Little Butte Creek to the confluence with the Rogue River.
14. The applicant proposes the quantities water to be transferred instream be protected as follows:

Priority	Instream Period	Instream Rate (cfs)	Instream Volume (acre-feet)
1858	April 1 to October 1	1.25	451.0
1888	April 1 to October 1	1.25	451.0
Total		2.50	902.0

15. The applicant has requested that any instream water right established as a result of this instream transfer be additive to existing instream water rights for the same reach established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process). The applicant has also requested that any instream water rights established as a result of this instream transfer replace a portion of any existing instream rights established pursuant to ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency instream application process), with a more senior priority date.

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

16. The Department has reviewed and considered the comments received as follows:
 - a) Talent Irrigation District's assertion the property is wetlands. Certificate 17204 is for 168.0 acres, of which approximately 149.2 acres are proposed to be transferred instream. Some of the wetlands were not listed as acres to be transferred as part of this application. Additional acres were removed from approval of this application as listed in Finding of Fact #19 below.
 - b) The comments by Mr. Bradshaw and Mike Dauenhauer asserted that water had not been used and was subject to forfeiture. The aerial photos submitted by the Applicant on March 5, 2020, appear to show water has been used on the property within the last 5 years. In addition, the Seller's Counter Offer form, submitted as documentation of use of the water, states the water had been used within the last 5 years either by the Seller or the tenant.
 - c) Some commenters refer to injury due to a loss of waste, seepage, and return flows. This type of injury to downstream users can be mitigated by limiting the instream water right immediately below the point of diversion to the amount of consumptive use.
 - d) OAR 690-380-4010(2) sets forth the criteria for determination of the transfer of the right. The assertion of due process concerns and economic hardship for junior downstream users are not included in the criteria for reviewing a transfer application.
17. 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.
18. 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 Transfer Application T-13177.
19. Based on the review from the local Watermaster and Department records, an additional 4.67 acres of land are wetlands and cannot be "dried-up." Therefore, the lands to be transferred are as follows:

Certificate: 17204 in the name of R.P. NEIL (confirmed by Little Butte Creek, 1949)
Use: IRRIGATION of 144.53 ACRES
Priority Dates: 1858 for 73.49 ACRES and 1888 for 71.04 ACRES
Rate: 2.41 CUBIC FEET PER SECOND (cfs), being 1.23 cfs under 1858 priority and 1.18 cfs under 1888 priority
Limit/Duty: The amount of water to which such right is entitled is limited to an amount actually beneficially used for said purposes, and shall not exceed 1.23 cubic feet per second for 73.49 acres and 1.18 cubic feet per second for 71.04 acres; measured at the head of the ditch or the point where the same leaves the natural stream.
Source: DEAD INDIAN CREEK, tributary to the SOUTH FORK LITTLE BUTTE CREEK

Authorized Place of Use:

Priority	Twp	Rng	Mer	Sec	Q-Q	Acres
1858	38 S	3 E	WM	15	NE SW	11.00
1888	38 S	3 E	WM	15	NW SW	33.80
1888	38 S	3 E	WM	15	SW SW	37.24
1858	38 S	3 E	WM	15	SE SW	2.00
1858	38 S	3 E	WM	16	SE SE	5.00
1858	38 S	3 E	WM	21	NE NE	2.00
1858	38 S	3 E	WM	21	SE NE	9.62
1858	38 S	3 E	WM	21	NE SE	7.70
1858	38 S	3 E	WM	22	NW NW	31.15
1858	38 S	3 E	WM	22	SW NW	5.02
Total						144.53

20. The Applicant requested an instream use from April 1 to September 30. However, information available from the Watermaster indicates that water was not used during the early part of the irrigation season due to climatic conditions. The Watermaster reports beneficial use under Certificate 17204 historically did not occur until May 1. Therefore, the season of use of the instream right will be reduced to the following at the points of diversion:

Priority	Instream Period	Instream Rate (cfs)	Instream Volume (acre-feet)
1858	May 1 to October 1	1.23	373.27
1888	May 1 to October 1	1.18	358.10
Total		2.41	731.37

21. As defined by OAR 690-077-0077 (3) and (4), the proposed change could result in enlargement of the right if not conditioned to prevent use of more water than could have been beneficially used without waste for the existing authorized use. The best information currently available information indicates that the most consumptive crop in the area is apples with a net irrigation requirement of 3.06 acre feet per acre. (*Oregon Crop Water Use and Irrigation Requirements* (Cuenca, 1992)). Utilizing an evaporative loss

quantification of 10%, the maximum duty of water that could be transferred without enlargement would be 3.4 acre feet (af) per acre. Therefore, to prevent enlargement of this right, the maximum diverted annual volume of water for the new use under this right is limited to 249.87 acre feet for priority date 1858 (73.49 acres x 3.4 af = 249.87 af) and 241.54 acre feet for priority date 1888 (71.04 acres x 3.4 af = 241.54 af). Therefore, to prevent injury and enlargement, the rate of the instream water right must be reduced to consumptive use immediately below the point of diversion as follows:

Priority	Instream Period	Instream Rate (cfs)	Instream Volume (acre-feet)
1858	May 1 to October 1	0.82	249.87
1888	May 1 to October 1	0.80	241.54
Total		1.62	491.41

22. The transfer application requests to protect water instream from Dead Indian Creek (source stream) into South Fork Little Butte Creek (receiving stream) into Little Butte Creek to the confluence with the Rogue River. An instream reach is generally from the point of diversion to the mouth of the source stream (Dead Indian Creek) but may be protected further if measurable in the receiving stream (South Fork Little Butte Creek and Little Butte Creek) (OAR 690-077-0015(8)).
23. The quantity that may be transferred instream from Dead Indian Creek is measurable into the South Fork Little Butte Creek; the quantity that may be transferred instream from South Fork Little Butte Creek is not measurable into the Little Butte Creek. Therefore, the instream reach can be from the PODs on Dead Indian Creek to the mouth of Dead Indian Creek and then into South Fork Little Butte Creek to the mouth of South Fork Little Butte Creek at the confluence with Little Butte Creek.
24. Based on Findings of Fact Nos. 19, 20, 21, and 22, on March 30, 2020, the Applicant agreed to modify the quantities to be transferred and protected instream as follows:

Instream Point: At the authorized points of diversion (as described in Finding of Fact No. 10)

Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
1858	1.23	373.27	May 1 to October 1
1888	1.18	358.10	
Total	2.41	731.37	

Instream Reach: Immediately below the PODs to the mouth of South Fork Little Butte Creek

Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
1858	0.82	249.87	May 1 to October 1
1888	0.80	241.54	
Total	1.62	491.41	

25. The proposed change, as conditioned, would not result in enlargement of the right.
26. The proposed change, as conditioned in Finding of Fact No. 21, would not result in injury to other water rights.
27. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
28. The protection of flows within the proposed reach 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) Any return flows resulting from the exercise of the existing water right have been accounted for by reducing the amount of water protected immediately below the points of diversion to consumptive use.
29. Within the proposed reach on Dead Indian Creek, there are existing instream water rights. There are two instream water rights, Certificates 72736 and 72737 established under ORS 537.341 (state agency application process) for the purposes of providing stream flows for resident cutthroat and rainbow trout. The certificates carry priority dates of October 1, 1992.
30. By adding to other instream water rights, established pursuant to ORS 537.348 (instream transfer process and instream lease) and ORS 537.470 (allocation of conserved water process), located within the proposed reach, any new instream water right established by this transfer would provide protection for additional flows identified as necessary for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.
31. During the period May 1 to October 1, any instream water right established by this transfer application may replace a portion of instream water rights established pursuant to ORS 537.341 or ORS 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or ORS 537.470, unless otherwise specified in an order approving a new instream water right under these statutes.
32. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach will provide for a beneficial purpose.

Conclusions of Law

The changes in character of use and place of use to instream use proposed in application T-13177 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-13177 are approved.
2. Water right certificate 17204 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will be issued describing that portion of the right not affected by this transfer.
3. The instream water right shall provide for the protection of streamflows from the authorized points of diversion for Certificate 17204 (as described in Finding of Fact No. 10), to the mouth of Dead Indian Creek, and into the South Fork of Little Butte Creek to the mouth at the confluence with the Little Butte Creek.
4. The quantities of water to be protected under the instream water right are:

Instream Point: At the authorized points of diversion (as described in Finding of Fact No. 10)

Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
1858	1.23	373.27	May 1 to October 1
1888	1.18	358.10	
Total	2.41	731.37	

Instream Reach: Immediately below the PODs to the mouth of South Fork Little Butte Creek

Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
1858	0.82	249.87	May 1 to October 1
1888	0.80	241.54	
Total	1.62	491.41	

5. 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.
6. 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
7. 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 unless otherwise specified by an order approving a new instream water right under these statutes.

8. 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 17204 and any related decree.
9. The former place of use of the transferred water shall no longer receive water as part of this right.

DATED at Salem, Oregon this AUG 10 2020 .



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
Tom M. Byler, Director, Oregon Water Resources Department

Mailing Date: AUG 12 2020