

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

In the Matter of Instream Transfer	)	FINAL ORDER APPROVING A
Application T-10785, Washington County	)	CHANGE IN PLACE OF USE AND
	)	CHARACTER OF USE AND
	)	PARTIAL CANCELLATION OF A
	)	WATER RIGHT

**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.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicant  
CLEAN WATER SERVICES  
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Agent  
SCHWABE, WILLIAMSON & WYATT, P.C.  
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SALEM, OR 97301

**Findings of Fact**

**Background**

1. On February 20, 2009, Clean Water Services filed an application to change the place of use and character of use under a portion of Certificate 20013 to instream use. The Department assigned the application number T-10785.
2. On October 6, 2009, the applicant submitted a revised application map and modified the instream transfer application to resolve a discrepancy in the number of acres to be transferred instream.

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.

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

**Certificate:** 20013 in the name of J. W. NELSON (perfected under Permit S-16830)

**Use:** IRRIGATION of 19.0 ACRES

**Priority Date:** MARCH 5, 1946

**Limit/Duty:** The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to a diversion of ONE-EIGHTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 2.5 ACRE-FEET per acre for each acre irrigated during the irrigation season of each year.

**Source:** TUALATIN RIVER, tributary to the WILLAMETTE RIVER

**Authorized Points of Diversion:**

TWP	RNG	MER	SEC	Q-Q	DLC	GOV'T LOTS	MEASURED DISTANCES
1 S	3 W	WM	8	NE NW	44	3, 4 and 5	NONE SPECIFIED
1 S	3 W	WM	8	SW NW	44		
1 S	3 W	WM	8	SE NW	44		
1 S	3 W	WM	8	NE SW	44		
1 S	3 W	WM	8	NW SW	44		

**Authorized Place of Use:**

TWP	RNG	MER	SEC	Q-Q	DLC	ACRES
1 S	3 W	WM	8	NE NW	44	17.1
1 S	3 W	WM	8	NW NW	44	1.9
TOTAL:						19.0

4. The irrigation season is not specified in Certificate 20013. However, the irrigation season under the Tualatin River Decree for the area is May 1 through September 30.
5. Certificate 20013 is a deficient rate water right. If water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rate allowed (described in Finding of Fact #3), the total rate for the water right would be exceeded. In the event water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rate allowed at the Points of Diversion (described in Finding of Fact #3), the portion of the right involved in this transfer would be limited to 0.19 Cubic Foot Per Second (CFS).

**Voluntary Partial Cancellations of a Water Right**

6. The applicant has submitted an affidavit authorizing cancellation of a portion of the following right:

**Certificate:** 20013 in the name of J. W. NELSON (perfected under Permit S-16830)

**Use:** IRRIGATION of 10.0 ACRES

**Priority Date:** MARCH 5, 1946

**Limit/Duty:** The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to a diversion of ONE-EIGHTIETH of one cubic foot per second per acre, or its

equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 2.5 ACRE-FEET per acre for each acre irrigated during the irrigation season of each year.

**Source:** TUALATIN RIVER, tributary to the WILLAMETTE RIVER

**Authorized Points of Diversion:**

TWP	RNG	MER	SEC	Q-Q	DLC	GOV'T LOTS	MEASURED DISTANCES
1 S	3 W	WM	8	NE NW	44	3, 4 and 5	NONE SPECIFIED
1 S	3 W	WM	8	SW NW	44		
1 S	3 W	WM	8	SE NW	44		
1 S	3 W	WM	8	NE SW	44		
1 S	3 W	WM	8	NW SW	44		

**Authorized Place of Use:**

TWP	RNG	MER	SEC	Q-Q	DLC	ACRES
1 S	3 W	WM	8	NE NW	44	7.3
1 S	3 W	WM	8	NW NW	44	2.7
TOTAL:						10.0

- The partial cancellation of the water rights described in Finding of Fact #6 affects acres, but not rate. The water right is a deficient rate water right, thus no rate is cancelled. Based on the information displayed in the following table, the prorated rate subject to transfer is 0.21 cubic foot per second (CFS) as calculated by applying the authorized rate to remaining non-canceled acres and acres proposed for transfer.

Water Right Certificate	Authorized Rate (cfs)	Original Authorized Acres	Affidavit Canceled Acres	Non-Canceled Remaining Acres	Proposed Transfer Acres
20013	0.92	93.6	10.0	83.6	19.0

- A total of 41.65 acre-feet of water may be beneficially used annually under the transferred portion of the existing right.
- Transfer Application T-10785 proposes to change the character of use to instream use for pollution abatement and conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.
- Transfer application T-10785 proposes to change the place of use of the right to create an instream reach from the point of diversion to the mouth of the Tualatin River. Certificate 20013 has multiple points of diversion. Information submitted with the application identifies that the requested point of diversion at which to begin the instream use is more accurately located as follows:

TWP	RNG	MER	SEC	Q-Q	MEASURED DISTANCES
1 S	3 W	WM	8	NE NW	LOCATED APPROXIMATELY AT RIVER MILE 55

- The applicant proposes the quantities of water to be transferred instream be protected as follows:

Instream Period	Rate (cfs)	Volume (acre-feet)
June 23 through September 30	0.21	41.65

12. The applicant proposes 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 also proposes that any instream water right 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 an earlier priority date.
13. The application includes a Land Use Information form completed and signed by a representative of the City of Forest Grove planning department. Additionally, the Department provided notice of the proposed application to Washington County, Clackamas County, and the cities of Tigard, Tualatin, West Linn, Durham, Rivergrove, King City, Forest Grove, Cornelius and Hillsboro.
14. Notice of the application for transfer was published on March 3, 2009, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
15. On December 23, 2010, the Department mailed a copy of the draft Preliminary Determination proposing to deny Transfer Application T-10785 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of January 21, 2011, for the applicant to respond. The agent, on behalf of the applicant, requested that the deadline be extended. The latest extension of this deadline ended October 31, 2011. Before the end of the extension period the applicant requested additional time in which to provide the requested information, but the Department denied the request. The applicant failed to provide all of the additional information requested by the Department by the October 31, 2011, deadline.
16. On November 7, 2011, the Department issued a Preliminary Determination proposing to deny Transfer Application T-10785 and mailed a copy to the applicant. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on November, 8, 2011, and in the Daily Journal of Commerce on November 17 and 24 and December 1, 2011, pursuant to ORS 540.520 and OAR 690-380-4020.
17. On December 29, 2011, Clean Water Services through its agent Martha O. Pagel timely submitted a Protest of the Preliminary Determination.
18. On February 9, 2012, the Department received a Registration of Reclaimed Municipal Water Use under NPDES permit 101142, signed by both the applicant and the Oregon Department of Environmental Quality, for irrigation of 19.0 acres of wetland plants using reclaimed water in-lieu of the use of water authorized under Water Right Certificate 20013.

19. On May 16, 2012, Clean Water Services staff and agent met with Department staff on-site to review how reclaimed municipal water was delivered to the place of use and applied beneficially to irrigate wetland plants in-lieu of the use of water under Certificate 20013.
20. The on-site review showed: a) the applicant had a water delivery system in-place sufficient to deliver municipal reclaimed water from Hillsboro and Forest Grove to the place of use (Pond #2); and b) wetland plants were being propagated in Pond #2.
21. On June 15, 2012, the applicant submitted additional information about the delivery system and data and pumping records showing reclaimed municipal water was used to irrigate and maintain the wetland plants during the irrigation season of May 1 through September 30 in the five year period prior to submittal of the transfer application on February 20, 2009.
22. On July 23, 2012, and as amended on August 16, 2012, the applicant submitted an affidavit requesting partial cancellation of Certificate 20013 and amended the application to request transfer of the rate and volume as described in Findings of Fact #7, #8 and #11.

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

23. Under OAR 690-380-3000 (12) each transfer application is required to include evidence that the water right has been used in the past five years or, if the water right has not been used in the last five years, documentation that the presumption of forfeiture would be rebutted under ORS 540.610 (2).
24. In the Preliminary Determination issued November 7, 2011, the Department determined water was not used within the five years prior to submittal of the transfer application on February 20, 2009, according to the terms and conditions of the right. The applicant had submitted documentation with the application and additional documentation on September 21, 2010, under ORS 540.610 (2) to rebut the presumption that the water right was subject to forfeiture. The applicant asserted that reclaimed water had been used on the place of use in-lieu of diverting water under Certificate 20013 and therefore was not subject to forfeiture.
25. ORS 540.610 (2) (h) identifies that a water right is not subject to forfeiture if the non use occurred during a period of time within which the water right holder was using reclaimed water in lieu of using water under an existing right.
26. A registration for use of reclaimed water may be recognized by the Department under ORS 537.132.
27. The registration for use of municipal reclaimed water submitted on February 9, 2012, for transfer application T-10785 identifies the water was used for irrigation of wetlands plants in-lieu of Certificate 20013 is applied under NPDES permit 101142.
28. Subsequent to issuance of the Preliminary Determination the applicant submitted additional information establishing that a pump, pipeline and water delivery system 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-10785 (See Findings of Fact #18 through #21).

29. The applicant has requested to transfer 19.0 acres of irrigation use to instream use at a rate of 0.21 CFS. The rate proposed for transfer exceeds the rate of 0.19 CFS allowed to be diverted at the point of diversion for 19.0 acres of irrigation as described in Finding of Fact #5, but is consistent with the calculated rate described in Finding of Fact #7 based on the cancellation of an additional 10.0 acres of water right. Thus, the applicant proposes the quantities of water to be transferred instream to be protected as follows:

Instream Period	Rate (cfs)	Volume (acre-feet)
June 23 through September 30	0.21	41.65

30. The proposed change, as amended, would not result in enlargement of the right.
31. The proposed change, as amended, would not result in injury to other water rights.
32. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
33. 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 would re-enter the river downstream of the reach of the instream water right.
34. Within the proposed reach are several existing instream flow protections and instream water rights, which include the use of water for pollution abatement, supporting aquatic life, and fish and wildlife habitat. Two of the instream flow protections (MF-174 and MF-175) are minimum stream flows that have not yet been converted to instream water rights. Other instream rights include Certificate 59692, which was converted from a minimum stream flow (MF-173) under ORS 537.346, and Certificates 72960, 72961 and 80000, which were established as a result of the state agency instream application process (ORS 537.341). There are also two instream rights created as a result of the instream transfer process (ORS 537.348), Special Order Volume 76, Page 912, and Special Order Volume 80, Page 1127, which protect water instream on a time-limited basis.
35. The proposed instream use is senior in priority date to each of the existing instream water rights.
36. Any new instream water right established by this transfer:
- a) By replacing a portion of MF-174, MF-175, and the instream water rights established under ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency application process), will provide for protection of streamflows previously identified as

necessary for supporting aquatic life and pollution abatement under an earlier priority date.

- b) By adding to other instream water rights established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) for the same location, will provide protection for additional streamflows necessary for fish and wildlife habitat.
- c) Any instream water right established by this transfer may 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.
- d) The total monthly quantities of water to be protected under the proposed instream right, in addition to the existing instream water rights, within the proposed reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

**Conclusions of Law**

The changes in character of use and place of use to instream use proposed in application T-10785 appear to be consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075 and the abandoned portion of the right should be cancelled.

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

1. The changes in character of use and place of use to instream use proposed in application T-10785 are approved. The portion of the right that has been abandoned is cancelled.
2. Water Right Certificate 20013 is cancelled. Water Right Certificate 87718, a new certificate, confirms the instream water right established by this transfer. Water Right Certificate 87719, a new certificate, describes the remaining portion of the right not affected by this transfer and cancellation.
3. The instream water right shall provide for the protection of streamflows from the point of diversion to the mouth of the Tualatin River. The point of diversion is located as follows:

TWP	RNG	MER	SEC	Q-Q	MEASURED DISTANCES
1 S	3 W	WM	8	NE NW	LOCATED APPROXIMATELY AT RIVER MILE 55

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

<i>Period</i>	<i>Rate (cfs)</i>
June 23 through September 30	0.21

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 20013 and any related decree.
9. The former place of use of the transferred water shall no longer receive water as part of this right.
10. The approval of Transfer Application T-10785 provides mitigation of 0.21 CFS to be applied towards Transfer Application T-7012.

Dated at Salem, Oregon this 16 day of August, 2012.



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