

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

In the Matter of Instream Transfer) FINAL ORDER APPROVING
Application T-11279, Klamath 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.

Applicants

GREGORY BULKLEY
JACQUELINE GRAHAM
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BLY, OR 97622

Findings of Fact

Background

1. On August 10, 2011, Gregory Bulkley and Jacqueline Graham filed an application to change the place of use and character of use under Certificates 45158, 47296 and 68022 to instream use. The Department assigned the application number T-11279.
2. On November 27, 2012, the applicants’ agent submitted a declaration by Greg Bulkley related to the water use on the property under Certificate 68022, and agreement to withdraw the portion of Klamath Basin Adjudication claim KL 131 that covers lands included in T-11279 concurrent with issuance of a final order for T-11279, provided the order approves the transfer, with no protests having been received during the protest period, or any protests having been satisfactorily resolved. Withdrawal of the applicable portion of claim KL 131 is a condition of transfer approval.

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 first right to be transferred is as follows:

Certificate: 45158 in the name of HEATON STEEL & SUPPLY INC. (perfected under Permit S-27145)
Use: IRRIGATION of 67.2 ACRES
Priority Date: JANUARY 16, 1961
Rate: 1.68 CUBIC FEET PER SECOND
Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-FORTIETH of one cubic foot per second, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.
Source: FIVE MILE CREEK, tributary to the NORTH FORK SPRAGUE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	GLot
36 S	13 E	WM	2	NE NE	1

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
36 S	13 E	WM	1	NW NW		1.6
36 S	13 E	WM	1	SW NW		30.3
36 S	13 E	WM	1	SE NW		10.0
36 S	13 E	WM	2	NE NE	1	17.6
36 S	13 E	WM	2	SE NE		7.7

4. Certificate 45158 does not describe the location of the point of diversion more specifically than by ¼ ¼ section, however information is available from the transfer application and map, as well as from the map originally submitted for Application S-34563/Permit S-27145, indicating that the point of diversion is located as follows:

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	GLot	Survey Coordinates
36 S	13 E	WM	2	NE NE	1	NORTH 28 DEGREES 7¼ MINUTES WEST, 2488.8 FEET FROM THE SE CORNER OF THE SE NE OF SECTION 2

5. A total of 201.6 acre-feet of water may be beneficially used annually under this existing right.

6. The second right to be transferred is as follows:

Certificate: 47296 in the name of HEATON STEEL & SUPPLY INC. (perfected under Permit S-27145)
Use: IRRIGATION of 14.0 ACRES
Priority Date: JANUARY 16, 1961
Rate: 0.35 CUBIC FOOT PER SECOND

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-FORTIETH of one cubic foot per second, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: FIVE MILE CREEK, tributary to the NORTH FORK SPRAGUE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
36 S	13 E	WM	1	SE NW	536 FEET SOUTH AND 473 FEET WEST FROM THE NE CORNER OF THE SENW OF SECTION 1

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	13 E	WM	1	SE NW	14.0

7. A total of 42.0 acre-feet of water may be beneficially used annually under this existing right.

8. The third right to be transferred is as follows:

Certificate: 68022 in the name of PAUL WILLIAM SIMONSEN (perfected under Permit S-36624)

Use: IRRIGATION of 14.5 ACRES

Priority Date: DECEMBER 6, 1971

Rate: 0.36 CUBIC FOOT PER SECOND

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-FORTIETH of one cubic foot per second, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: FIVE MILE CREEK, tributary to the NORTH FORK SPRAGUE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
36 S	13 E	WM	1	SE NW	1850 FEET SOUTH AND 2150 FEET EAST FROM THE NW CORNER OF SECTION 1

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	13 E	WM	1	SE NW	14.5

9. The T-11279 application indicates that the points of diversion for Certificates 68022 and 47296 are actually the same location, as described from two different survey corners.

10. A total of 43.5 acre-feet of water may be beneficially used annually under this existing right.
11. Application T-11279 proposes to change the character of use of these three rights to instream use for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.
12. Application T-11279 proposes to change the places of use of the rights to create an instream reach from the points of diversion described in Findings of Fact #4, #6 and #8 to the confluence of Five Mile Creek with the North Fork Sprague River, through the North Fork Sprague River to its confluence with the mainstem Sprague River, if the transferred quantity would be measurable in the North Fork Sprague River.
13. The applicant proposes to transfer water instream at a reduced rate during the period July 1 through September 15 of each year. The quantities water proposed to be transferred instream would be protected as follows:

Originating Water Right Certificate	Period	Priority Date	Rate* (cfs)	Volume (acre-feet)
45158	7/1 through 9/15	1/16/1961	1.32	201.6
47296	7/1 through 9/15	1/16/1961	0.27	42.0
68022	7/1 through 9/15	12/6/1971	0.28	43.5
	Total Volume			287.1

* These rates have been reduced from the full face value rates of the rights, in order not to exceed the acre-foot annual volume limits of the rights during the requested period of use.

14. The applicant has requested that any instream water right established as a result of this instream transfer be additive to any 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.
15. Notice of the application for transfer was published on August 16, 2011, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
16. On September 18, 2012, the applicant was requested via e-mail to respond to remedy the inadequacy of information submitted with the transfer application to describe the beneficial use under Certificate 68022, as well as notifying the applicant that Department records indicate that the lands under Certificates 45158 and 47296 are layered with a portion of Klamath Adjudication claim KL 131 and that the Department would not be able to approve the transfer unless the portion of claim KL 131 was withdrawn. The claim is not subject to transfer, but to allow the existing rights to be transferred instream

with the claim continuing to allow irrigation of the “from” lands would constitute enlargement, which is not allowed.

17. On November 27, 2012, the applicant’s agent submitted a declaration by Greg Bulkley related to the water use on the property under Certificate 68022, and agreement to withdraw the portion of Klamath Basin Adjudication claim KL 131 that covers lands included in T-11279, concurrently with a Final Order for T-11279, provided the Department proposes to approve the transfer and no protests are filed.
18. On January 4, 2013, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11279 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of February 18, 2013, for the applicants to respond. The applicants requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicants are authorized to pursue the transfer.
19. On February 8, 2013, the Department issued a Preliminary Determination proposing to approve Transfer Application T-11279, and sent a copy to the applicants. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department’s weekly notice on February 12, 2013, and in the Herald and News newspaper on February 14, 21 and 28, 2013, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.
20. On April 16, 2013, the applicant submitted documentation (via e-mail) that a request to withdraw the pertinent portion of KL 131 had been filed with the Klamath County Circuit Court on April 16, 2013.

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

21. Water has been used within the last five years according to the terms and conditions of the Certificates 45158 and 47296 and 68022 and there is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
22. Pumps, pipelines, ditches and sprinkler systems sufficient to use the full amount of water allowed under the existing rights were present within the five-year period prior to submittal of Application T-11279.
23. Portions of the water rights proposed for transfer are appurtenant to the same lands that are included in Klamath Basin Adjudication claim KL 131. Transfer of the certificated water rights instream, while leaving the unadjudicated right on the land would result in enlargement of the transferred rights. The applicant has agreed to withdraw the portion of KL 131 on the lands proposed for transfer, concurrent with issuance of a Final Order approving T-11279, to prevent injury and enlargement.
24. The instream reach requested by the applicant for the right evidenced by Certificate 45158 will begin from the POD described in Finding of Fact #4. For consistency, the instream use proposed from the rights evidenced by Certificates 47296 and 68022, which

share a common POD that is differently described in Findings of Fact #6 and #8, will both begin at the POD location as described in Finding of Fact #8.

25. The instream reaches proposed by the applicant require modification. An instream reach may normally extend from the POD to the mouth of the source stream but may extend further if the quantity to be protected instream is measurable into the receiving stream (the North Fork Sprague River). The Department considered historical streamflows in the North Fork Sprague River and determined, based on the best available information, that the 1.87 cfs proposed for transfer would not be measurable in the North Fork Sprague River. Therefore, the reaches may not extend into the North Fork Sprague River and require modification as shown below:

Reach resulting from Certificate 45158: From the authorized POD on Five Mile Creek (as described in Finding of Fact #4) to the confluence of Five Mile Creek with the North Fork Sprague River.

Reach resulting from Certificate 47296: From the authorized POD on Five Mile Creek (as described in Finding of Fact #8) to the confluence of Five Mile Creek with the North Fork Sprague River.

Reach resulting from Certificate 68022: From the authorized POD on Five Mile Creeks (as described in Finding of Fact #8) to the confluence of Five Mile Creek with the North Fork Sprague.

26. The proposed changes, as modified, would not result in enlargement of the rights.
27. The proposed changes, as modified, would not result in injury to other water rights.
28. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water rights.
29. The protection of flows within the proposed reaches, as modified, is appropriate, considering:
 - a) The instream water rights begin at the recorded points of diversion;
 - b) The location of confluences with other streams downstream of the points of diversion. The reach for an instream water right is typically from the point of diversion on the source stream to the mouth of that source stream. However, water may be protected further downstream if the quantity of water is measurable in the receiving stream, in this case North Fork Sprague River. The quantity of water proposed to be protected instream is not measurable in North Fork Sprague River, consistent with OAR 690-077-0015(8), and therefore, the reaches may not extend into North Fork Sprague River to the mouth, but will end at the mouth of Five Mile Creek as described in Finding of Fact #25;

- c) There are no known areas of natural loss of streamflow to the river bed downstream from the points of diversion; and
 - d) Any return flows resulting from the exercise of the existing water rights would re-enter the river downstream of the reaches of the instream water rights.
30. There is a pending instream water right application, IS-70816, submitted by Oregon Department of Fish and Wildlife under ORS 537.341, for a reach of the North Fork Sprague River that includes the portion of the North Fork Sprague proposed for the new instream water rights. This application proposes to protect water instream for anadromous and resident fish habitat.
31. By replacing a portion of any instream right established in the future under the state agency application process (including a right that may be established under Application IS-70816), the instream right will provide protection for streamflows previously identified as necessary for anadromous and resident fish habitat under an earlier priority date unless otherwise identified in a subsequent order establishing a new instream water right under the state agency instream application process.
32. In addition, by adding to any instream water rights established in the future under the instream transfer or allocation of conserved water process for the same location, the instream right will provide protection for additional streamflows necessary for aquatic life and fish habitat, unless otherwise identified in a subsequent order establishing a new instream water right under those statutes.
33. The total monthly quantities of water to be protected under the proposed instream rights in the reaches will provide for a beneficial purpose and do not exceed the estimated average natural flow in Five Mile Creek.

Conclusions of Law

The changes in character of use and place of use to instream use proposed in application T-11279 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-11279 are approved.
2. Water right certificates 45158, 47296 and 68022 are cancelled. New certificates confirming the instream water rights shall be issued.
3. The instream water rights shall provide for the protection of streamflows from the points of diversion described in Findings of Fact #4 and #8 to the confluence of Five Mile Creek with the North Fork Sprague River.

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

Reach resulting from Certificate 45158: From the authorized POD on Five Mile Creek (as described in Finding of Fact #4) to the confluence of Five Mile Creek with the North Fork Sprague.

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Instream Period
45158	1/16/1961	1.32	201.6	7/1 through 9/15

Reach resulting from Certificate 47296: From the authorized POD on Five Mile Creek (as described in Finding of Fact #8) to the confluence of Five Mile Creek with the North Fork Sprague.

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Instream Period
47296	1/16/1961	0.27	42.0	7/1 through 9/15

Reach resulting from Certificate 68022: From the authorized POD on Five Mile Creek (as described in Finding of Fact #8) to the confluence of Five Mile Creek with the North Fork Sprague River.

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Instream Period
68022	12/6/1971	0.28	43.5	7/1 through 9/15

5. Water rights upstream of the original points of diversion shall not be subject to regulation for flows in excess of the quantities to which these instream water rights are entitled at the original points of diversion.
6. Within the specified stream reach, the amount of water to which these rights are entitled shall not exceed the quantity of water legally available at the original points of diversion
7. The instream rights 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 Certificates 45158, 47296, 68022 and any related decree.

9. The former places of use of the transferred water shall no longer receive water as part of these rights.

Dated at Salem, Oregon this 16 day of April, 2013.


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

Mailing Date APR 25 2013