



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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November 7, 2011

STEPHEN E. KEBBE
CLEAN WATER SERVICES
2550 SW HILLSBORO HIGHWAY
HILLSBORO, OR 97123

SUBJECT: Transfer Application T-10785

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to deny application T-10785. At this point you may either accept the Department's determination or file a protest pursuant to OAR 690-380-4030.

A public notice is being published in the Department's weekly publication simultaneously with issuance of the Preliminary Determination. The notice initiates a 30-day period in which any person may file either a protest opposing the decision proposed by the Department in the Preliminary Determination or a standing statement supporting the Department's decision.

Because there is a change in character of use, the applicant is responsible for giving public notice of the transfer changes in a local newspaper having a general circulation in the area of the water right. If you choose to continue pursuit of the transfer by filing a protest, and in order to satisfy the statutory notice requirements, you will need to arrange for publication of a public notice in your local newspaper, *concurrent* with your filing a protest. The notice must be published at least once a week for three consecutive weeks. We have prepared the notice for you (enclosed). The deadline for individuals to file protests or standing statements is 30 days after the date of last publication. Please have the newspaper insert the date of last publication in the proper place.

After publication, the Department needs to receive an affidavit specifying the dates the notice was published. Please have the newspaper prepare and mail an original affidavit of publication to me at the address shown in the letterhead, by December 21, 2011.

If no protest is filed, the Department will issue a Final Order consistent with the Preliminary Determination. You should receive a copy of the Final Order about 30 days after the close of the protest period.

If a protest is filed, the application may be referred to a contested case proceeding. A contested case provides an opportunity for the proponents and opponents of the decision proposed in the Preliminary Determination to present information and arguments supporting their position in a quasi-judicial proceeding.

Please do not hesitate to contact me at 503-986-0884 or Laura.K.Wilke@wrd.state.or.us if I may be of assistance.

Sincerely,

Laura Wilke
Flow Restoration Program Coordinator
Transfer and Conservation Section

cc: Darrell C. Hedin, District 18 Watermaster
Martha Pagel, Schwabe, Williamson & Wyatt, P.C.
Jeffrey Jones, CWRE #450

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

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Application T-10785, Washington County)	PROPOSING DENIAL OF A
)	CHANGE 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
CLEAN WATER SERVICES
ATTN: STEPHEN KEBBE
2550 SW HILLSBORO HWY
HILLSBORO, OR 97123

Agent
SCHWABE, WILLIAMSON & WYATT, P.C.
ATTN: MARTHA O. PAGEL
530 CENTER STREET NE, SUITE 400
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.
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
 - Maximum Limit/Duty that can be applied to an acre:**
 - 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

Pursuant to OAR 690-380-4030, any person may file a protest or standing statement within 30 days after the last date of publication of notice of this preliminary determination.

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 Point 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:

IRRIGATION						
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 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 PODs (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). This is the rate by which Certificate 20013 would be reduced, if this transfer is approved.
6. A total of 47.5 acre-feet of water may be beneficially used annually under the existing right.
7. 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.
8. 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

9. 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	0.24	47.5

10. 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.
11. 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.
12. 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.
13. 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. The applicant failed to provide the additional information requested by the Department by the October 31, 2011, deadline.

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

14. 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).
15. 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 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 is subject to forfeiture. The applicant has asserted that reclaimed water has been used on the place of use in lieu of diverting water under Certificate 20013 and is therefore not subject to forfeiture.

16. 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.
17. A registration for use of reclaimed water may be recognized by the Department under ORS 537.132.
18. The registration for use of reclaimed water submitted with transfer application T-10785 identifies that water was used for irrigation of wetlands plants under NPDES permit 101143.

The additional documentation for use of reclaimed water submitted on September 21, 2010, identifies a different NPDES permit (Permit 101142). The cover letter provided with the additional documentation identifies that the same NPDES permits as those associated with another Registration for Reclaimed Water also cover this current registration. The previous Registration for Use of Reclaimed water was submitted to the Department on November 25, 2009, in association with instream transfer T-7408, approved by the Department on May 26, 2010, as evidenced by Special Order Volume 80, Page 1127. That Registration identifies that reclaimed water was used on other lands under NPDES permit 101142.

19. The Registration for Reclaimed Water associated with NPDES permit 101142 and T-7408 also appears to show a conflict with how water has been used on the place of use for Certificate 20013 proposed for transfer under T-10785. According to that Registration, NPDES permits, and supporting documentation submitted in association with T-7408, the place of use proposed for transfer under T-10785 is covered by a holding pond. In addition, the Department's Watermaster has also identified that the place of use is covered with a holding pond and that there does not appear to be any irrigation or use of water during the irrigation season.
20. It does not appear that reclaimed water has been used on the place of use described in Finding of Fact #3 for irrigation (in lieu of Certificate 20013) and that the presumption that the water right is not subject to forfeiture under ORS 540. 610 (2) (h) has not been satisfied.
21. In addition, the Department has evaluated the Registration for Reclaimed water submitted with transfer application T-10785 and has determined that it does not fit the criteria for a registration under ORS 537.131 or ORS 537.132 as identified in a letter sent to the applicant on December 23, 2010.
22. No information was submitted with the transfer application to establish that a water delivery system sufficient to use the full amount of water allowed under the existing right is present.
23. Therefore, based on Findings #14 through #22, the transfer application does not meet standards for completeness as per OAR Chapter 690, Division 380.
24. The applicant has requested to transfer 19.0 acres of irrigation use to instream use at a rate of 0.24 CFS. The rate proposed for transfer (0.24 CFS) exceeds the rate of 0.19 CFS allowed to be diverted by the right at the point of diversion for 19.0 acres of irrigation, as described in Finding of Fact #5.

25. The proposed change, as described in Finding of Fact #9, would result in enlargement of the right.
26. The proposed change, as described in Finding of Fact #9, would result in injury to other water rights.
27. The amount of the proposed instream flow and the timing of the proposed instream flow is not allowable within the limits and use of the original water right.
28. If this transfer were approved, the protection of flows within the proposed reach would be 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.
29. 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.
30. The proposed instream use is senior in priority date to each of the existing instream water rights.
31. If this transfer is approved, 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.

Determination and Proposed Action

As described in Finding of Fact #23, #24, #25, and #26, the changes in character of use and place of use to instream use proposed in Application T-10785 do not 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 because the proposed change would result in injury and enlargement. Additionally, Transfer Application T-10785 does **not** meet the requirements of ORS 540 and OAR 690-380-3000 for completeness (as described in Finding #22), and cannot be processed. If protests are not filed pursuant to OAR 690-380-4030, the application will be denied unless the application is withdrawn or amended and the application deficiencies are resolved.

Dated at Salem, Oregon this 7 day of November, 2011.



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

Protests should be addressed to the attention of Field Services Division, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.

This Preliminary Determination was prepared by Laura Wilke. If you have questions about the information in this document, you may reach me at 503-986-0884 or Laura.K.Wilke@wrds.state.or.us.

**Notice of Preliminary Determination for
Water Right Transfer T-10785**

T-10785 filed by Stephen E. Kebbe of Clean Water Services (2550 SW Hillsboro Highway, Hillsboro, OR 97123), proposes a change in place of use and a change in character of use under Certificate 20013. The right allows the use of 0.19 Cubic Foot per Second (CFS) (priority date March 5, 1946) from the Tualatin River in Sec. 8, T1S, R3W, W.M. for Irrigation in Sec. 8. The applicant proposes create an instream use in the Tualatin River (from the point of diversion to the mouth of the Tualatin River) at a maximum of 0.24 CFS. The Water Resources Department has concluded that the proposed transfer **does not** appear to be consistent with the requirements of ORS Chapter 540, OAR 690-380-5000, and OAR 690-077-0075.

Any person may file, jointly or severally, with the Department a protest or standing statement within 30 days after the date of final publication of notice in the Department's weekly notice or of this newspaper notice, whichever is later. A protest form and additional information on filing protests may be obtained by calling (503) 986-0883. The last date of newspaper publication is [INSERT DATE OF LAST PUBLICATION]. If no protests are filed, the Department will issue a final order consistent with the preliminary determination.

