

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

In the Matter of Instream Transfer	)	PRELIMINARY DETERMINATION
Application T-11217, Jackson County	)	PROPOSING APPROVAL 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

OREGON DEPARTMENT OF FISH AND WILDLIFE
3406 CHERRY AVENUE NE
SALEM, OR 97303

Findings of Fact

Background

1. On March 29, 2011, Oregon Department of Fish and Wildlife (ODFW) filed an application to change the place of use and character of use under Certificate 6751 to instream use. The Department assigned the application number T-11217.
2. On July 28, 2011, ODFW submitted an amended application to reduce the portion of the right proposed for transfer to instream use. The original application proposed to transfer the entire certificate to instream use (15.5 cubic feet per second (CFS)). ODFW is now proposing to transfer 15.0 CFS to instream use.
3. On September 28, 2011, ODFW clarified the requested relationship of this proposed instream right and future instream water rights.
4. The portion of the right to be transferred is as follows:

Certificate: 6751 in the name of OREGON STATE GAME COMMISSION (perfected under Permit S-5903)

Use: PROPAGATING FISH

Priority Date: JANUARY 23, 1923

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.
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Rate: 15.0 CUBIC FEET PER SECOND

Source: SOUTH FORK BIG BUTTE CREEK, tributary to the ROGUE RIVER

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q
35 S	2 E	WM	11	SE SW

5. Certificate 6751 describes the source of water as South Fork Big Butte Creek, a tributary of the Rogue River. However, a more accurate description of the source of water is South Fork Big Butte Creek, a tributary of Big Butte Creek.

6. Certificate 6751 does not describe the specific location of the point of diversion; however, information is available from the applicant and the original survey conducted in 1922 indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distance
35 S	2 E	WM	11	SE SE	55 FEET NORTH AND 900 FEET WEST FROM THE SE CORNER OF SECTION 11

7. The water right does not include an annual volume limit. Based upon the rate, up to a total of 10,859.5 acre-feet of water may be beneficially used annually under the existing right.
8. Transfer Application T-11217 proposes to change the character of use to instream use for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values; and pollution abatement.
9. Transfer Application T-11217 proposes to change the place of use of the right to create an instream reach from the point of diversion (as described in Finding of Fact No. 6) to the confluence with Ginger Creek located in the NE SW of Section 11, Township 35 South, Range 2 East, W.M.
10. The applicant proposes the quantities water to be transferred instream to be protected follows:

Period	Rate (cfs)	Volume (acre-feet)
January 1 to December 31	15.0	10,859.5

11. 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 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.

12. The applicant provided notice of the intent to transfer Certificate 6751 to instream use to Jackson County prior to submitting the transfer application. Additionally, the Department provided notification of the proposed action to this local government upon receipt of Transfer Application T-11217.
13. Notice of the application for transfer was published on April 5, 2011, pursuant to OAR 690-380-4000. Comments supporting the instream transfer were received from WaterWatch of Oregon and the Native Fish Society. The City of Butte Falls also commented on the transfer but did not raise any injury or enlargement issues associated with the application.
14. On October 5, 2011, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11217 to the applicant. A letter dated October 6, 2011, set forth a deadline of November 7, 2011, for the applicant to respond. The applicant requested that 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.

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

15. 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.
16. 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-11217.
17. The proposed change would not result in enlargement of the right.
18. The proposed change would not result in injury to other water rights.
19. The amount and timing of the proposed instream flow are allowable within the limits and use of the original water right.
20. 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.

Water under this right is currently diverted at the authorized point of diversion in the SE¼ SE¼, Sec. 11, T 35 S, R 2 E. W.M. and flows through the fish hatchery where it is returned to Ginger Creek above the confluence with the South Fork of Big Butte Creek.

21. There are no existing instream water rights on the South Fork Big Butte Creek.
22. If any instream water rights are established in the future, an instream use created as a result of this transfer may replace a portion of any 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. Any instream use created as a result of this transfer may also add to any other instream water rights created for the same location pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process).
23. South Fork Big Butte Creek is within a flow restoration priority watershed for restoration of anadromous Salmonids for the time period April through November.
24. Big Butte Creek, into which the South Fork Big Butte Creek flows, is also on the Oregon Department of Environmental Qualities list of water quality limited streams and a Total Maximum Daily Load (TMDL) was approved for the Rogue River and its tributaries (with the exception of previously designated TMDL's in the Basin) on December 29, 2008.
25. A new instream water right established by this transfer would provide protection for streamflows necessary for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values; and pollution abatement.
26. The total monthly quantities of water to be protected under the proposed instream rights in the reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in Transfer Application T-11217 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. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved.

If Transfer Application T-11217 is approved, the final order will include the following:

1. *The changes in character of use and place of use to instream use proposed in Transfer Application T-11217 are approved.*
2. *Water right certificate 6751 is cancelled. A new certificate confirming the instream water right shall be issued.*

3. *The instream water right shall provide for the protection of streamflows from the point of diversion on the South Fork of Big Butte Creek as described in Finding of Fact No. 6 to the confluence with Ginger Creek in the NE¼ SW¼, Sec. 11, T 35 S, R 2 E, W.M.*

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

<i>Period</i>	<i>Rate (cfs)</i>	<i>Volume (acre-feet)</i>
<i>January 1 to December 31</i>	<i>15.0</i>	<i>10,859.5</i>

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.*

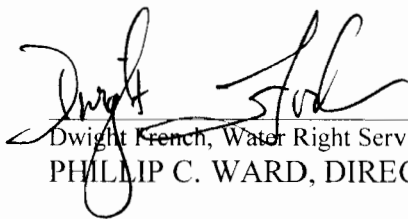
6. *Within the specified stream reach, the amount of water to which this right is entitled shall not exceed the quantity of water legally available at the original point of diversion.*

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 identified in a subsequent order establishing 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 6751 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 17 day of November 2011.



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

This Preliminary Determination was prepared by Teri Hranac. If you have questions about the information in this document, you may reach me at 503-986-0881 or Teri.K.Hranac@wrд.state.or.us.

Protests should be addressed to the attention of Transfer and Conservation Section, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.