



Oregon

John A. Kitzhaber, MD, Governor

February 28, 2012

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

SUBJECT: Transfer Application T-11249

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11249. This document is an intermediate step in the approval process; water may not be used legally as proposed in the transfer application until a Final Order has been issued by the Department. Please read this entire letter carefully to determine your responsibility for additional action.

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.

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 503-986-0890 or Dorothy.I.Pedersen@wr.d.state.or.us if I may be of assistance.

Sincerely,

Dorothy Pedersen
Transfer Program Advisor

cc: Robert L. Wood, District 3 Watermaster (*via e-mail*)
William Otto, agent for the applicant (*via e-mail*)
Commenters

encs



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

In the Matter of Transfer Application) PRELIMINARY DETERMINATION
T-11249, Hood River County) PROPOSING APPROVAL OF
) ADDITIONAL POINTS OF DIVERSION

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.

Applicant

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

Findings of Fact

Background

1. On May 9, 2011, the OREGON DEPARTMENT OF FISH AND WILDLIFE filed an application for additional points of diversion under Certificate 24625. The Department assigned the application number T-11249.
2. The portion of the right to be transferred is as follows:

Certificate: 24625 in the name of the OREGON STATE FISH COMMISSION
(perfected under Permit S-20629)
Use: OPERATION OF SALMON HATCHERY
Priority Date: AUGUST 9, 1951
Rate: 9.5 CUBIC FEET PER SECOND
Source: LITTLE HERMAN CREEK, tributary to HERMAN CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	8 E	WM	7	NE NE	NONE SPECIFIED IN CERTIFICATE

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.

Authorized Place of Use:

OPERATION OF SALMON HATCHERY				
Twp	Rng	Mer	Sec	Q-Q
2 N	8 E	WM	8	NW NW

3. Certificate 24625 does not provide coordinates of the authorized point of diversion; however, information is available from the Oregon Department of Fish and Wildlife indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	8 E	WM	7	NE NE	LITTLE HERMAN CREEK - 450 FEET SOUTH AND 5 FEET WEST FROM THE NE CORNER OF SECTION 7

4. Transfer Application T-11249 proposes two additional points of diversion approximately 200 feet and 300 feet, respectively, upstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2N	8E	WM	7	NE NE	MIDDLE SPRING - 740 FEET SOUTH AND 125 FEET WEST FROM THE NW CORNER OF SECTION 8
2N	8E	WM	8	NW NW	EAST SPRING - 590 FEET SOUTH AND 50 FEET EAST FROM THE NW CORNER OF SECTION 8

5. This transfer proposes the additional points of diversion in order to allow diversion from two springs which contribute to Little Herman Creek in addition to continued diversion at the authorized point.
6. Notice of the application for transfer was published on May 31, 2011, pursuant to ORS 540.520 and OAR 690-380-4000.
7. Approximately 5,000 timely comments were submitted to the Department in response to the notice. The issues raised by the comments focused primarily on concerns that:
- This transfer should be considered along with T-11109 (a proposed water exchange), because both applications are meant to facilitate a proposed Nestle water bottling plant in Cascade Locks;
 - This transfer would result in enlargement of the original water right, because the proposed exchange T-11109 application states that the application is to provide an increase in water amounts during the summer months, thus allowing increased production;
 - The spring water Nestle wants to bottle and sell is currently being used to raise endangered salmon and the water belongs to all Oregonians; and
 - We should not allow a company that doesn't care about the people or community to drain our resources, export our spring and aquifer water outside our area, and then move on.

8. Not all of the issues raised by the commenters address the criteria for review of a water right transfer as per OAR 690-380-4010 and approval of a transfer application under OAR 690-380-5000. The comments described in Finding of Fact #7(c) and (d) raise public interest issues. Under Oregon law, water right transfers are not subject to a public interest review. Rather, the statutory basis for approving a water right transfer application is relatively narrow and confined to the Department finding or determining:
 - a) The water right proposed for transfer is a water use subject to transfer;
 - b) The portion of the water right proposed for transfer is not cancelled due to forfeiture for non-use pursuant to ORS 540.610;
 - c) The proposed transfer would not result in enlargement of the water right proposed for transfer; and
 - d) The proposed transfer would not result in injury to other water rights.
9. **This Transfer Application T-11249 is not involved in the proposed exchange (T-11109).**
10. On November 17, 2011, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11249 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of December 19, 2011, for the applicant to respond. The applicant requested that the Department change the date for completion of the changes to October 1, 2017, in order to allow adequate time for making improvements to the spring diversions and to increase the chance of proving up on the full amount of water, since flow in the springs varies significantly from year to year. With that modification of the completion date, the applicant requested the Department to proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
11. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screen may be required in the future at each new point of diversion and that the diversions are not currently equipped with appropriate fish screens.

Transfer Review Criteria [OAR 690-380-4010(2)]

12. Water has been used within the last five years according to the terms and conditions of the right. There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
13. Diversion structures and pipelines 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-11249.
14. No enlargement of the original Certificate 24625 right would result from adding the two proposed points of diversion, because the use of water at the proposed additional points of diversion can be conditioned to limit the quantity of water diverted at the proposed additional points of diversion, together with what is diverted from the authorized point, to no

more than the quantity lawfully available at the original point of diversion for this portion of the right (9.5 cfs).

15. Water diverted under T-11249 from the springs and creek would continue to be used for operating the salmon hatchery (a largely non-consumptive use) and then flow down the creek as it currently does.
16. This transfer application (for 9.5 cfs) is being processed concurrently with Transfer Application T-11108 (for 0.5 cfs), which together would affect the entire 10.0 cfs allowed under Certificate 24625. Administrative rule OAR 690-380-5000(1)(c) does not allow the Department to approve a change that would result in enlargement of a right. Together, the water allowed for the portions of the right included in T-11249 and T-11108 would not exceed the 10.0 cfs quantity authorized under Certificate 24625.
17. The proposed change, as conditioned below, would not result in enlargement of the right.
18. Adding the two points of diversion proposed in T-11249 would not deplete water from the Little Herman Creek system, since T-11249 does not propose changes to the use of the water, and the authorized use is largely non-consumptive, for benefit of fish production at the fish hatchery. Therefore, there would be no injury to other water rights, because no other water rights would fail to receive previously available water to which they are legally entitled.
19. The proposed change would not enlarge the water right beyond what is presently authorized nor result in injury to other water rights.

Determination and Proposed Action

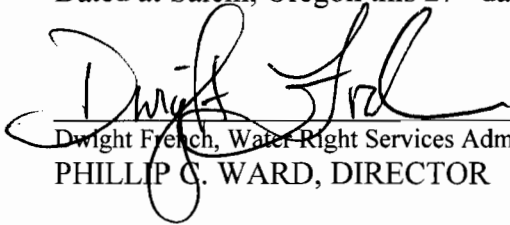
The additional points of diversion proposed in Transfer Application T-11249 appear to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be approved.

If Transfer Application T-11249 is approved, the final order will include the following:

1. *The additional points of diversion proposed in Transfer Application T-11249 are approved.*
2. *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 24625 and any related decree.*
3. *Water right certificate 24625 is cancelled.*
4. *The quantity of water diverted at the additional points of diversion, together with that diverted at the original point of diversion, shall not exceed the quantity of water lawfully available at the original point of diversion.*

5. *The Director may require the water user to install a totalizing flow meter or other suitable measuring device at each point of diversion. If the Director notifies the water user to install totalizing flow meters or other measuring devices, the water user shall install such devices specified by the Director within the period allowed in the notice. Once installed, the water user shall maintain the meters or measuring devices in good working order and shall allow the Watermaster access to the meters or measuring devices.*
6. *The water user shall maintain the existing headgate(s) and shall make such improvements as may be required by the Department.*
7. *Within one year after receiving written notification from the Oregon Department of Fish and Wildlife (ODFW) that a fish screen is required, the water user shall install a screen, as appropriate, at each new point of diversion. The water user shall obtain written approval from ODFW that the screens meet ODFW's criteria. Once installed the water user shall maintain and operate the fish screens at the points of diversion consistent with ODFW's operational and maintenance standards.*
8. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2017**. A Claim of Beneficial Use prepared by a Certified Water Right Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the change and full beneficial use of the water.*
9. *After satisfactory proof of beneficial use is received, a new certificate confirming the right transferred will be issued.*

Dated at Salem, Oregon this 27th day of February, 2012.



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

This Preliminary Determination was prepared by a Reimbursement Authority contractor. If you have questions about the information in this document, you may reach Dorothy Pedersen at 503-986-0890 or Dorothy.I.Pedersen@wrdd.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.

