



# Oregon

John A. Kitzhaber, MD, Governor

## Water Resources Department

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November 27, 2012

CHOINARD FAMILY TRUST  
ATTEN: BOB CHOUINARD  
45944 HWY 26  
DAYVILLE, OR 97825

SUBJECT: Water Right Transfer Application T-11303

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11303. 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 and in the Blue Mountain Eagle newspaper, simultaneously with issuance of the Preliminary Determination. The notice initiates a 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. The protest period will end 30 days after the last date of newspaper publication.

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 503-986-0881 or [teri.k.hranac@wrd.state.or.us](mailto:teri.k.hranac@wrd.state.or.us), if I may be of assistance.

Sincerely,

Teri Hranac  
Transfer Specialist  
Transfer and Conservation Section

cc: T-11303  
Eric W. Julsrud, District 4 Watermaster (via e-mail)  
Kyle Sullivan, Agent for the applicant (via e-mail at [sullivan@ortelco.net](mailto:sullivan@ortelco.net))



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

In the Matter of Instream Transfer	)	PRELIMINARY DETERMINATION
Application T-11303, Grant County	)	PROPOSING APPROVAL OF
	)	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.

**Applicant**

BOB CHOUNARD, TRUSTEE  
CHOUNARD FAMILY TRUST  
45944 HWY 26  
DAYVILLE, OR 97825

**Agent**

GRANT SWCD  
ATTEN: KYLE SULLIVAN  
721 S CANYON BLVD  
JOHN DAY, OR 97845

**Findings of Fact**

**Background**

- On September 26, 2011, Bob Chouinard, Trustee of Chouinard Family Trust filed an application to change the place of use and character of use under Certificates 87511 (originally Certificate 2406) and 87510 (originally Certificate 59122) to instream use. The Department assigned the application number T-11303.
- The first right to be transferred is as follows:

<b>Certificate:</b>	87511 in the name of CHOUNARD FAMILY TRUST, ROBERT G. CHOUNARD, TRUSTEE (perfected under Permit S-2355)
<b>Use:</b>	IRRIGATION of 63.5 ACRES
<b>Priority Date:</b>	FEBRUARY 9, 1915
<b>Rate:</b>	0.79 CUBIC FOOT PER SECOND (CFS)
<b>Limit/Duty:</b>	Not listed Certificate
<b>Source:</b>	JOHN DAY RIVER, tributary to the COLUMBIA RIVER

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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**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	27 E	WM	3	SW SW	NORTH 59 DEGREES EAST, 260 FEET FROM THE SW CORNER OF SECTION 3

**Authorized Place of Use:**

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	27 E	WM	4	NE SW	33.0
13 S	27 E	WM	4	NW SW	13.0
13 S	27 E	WM	4	SE SW	6.0
13 S	27 E	WM	4	NW SE	11.5
Total					63.5

3. As identified above, Certificate 87511 lists a specific location for the point of diversion. However, based on the best information available from the Department's records and the Certified Water Right Examiner, the point of diversion may also be described as follows, which is also the same description for Certificate 87510:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	27 E	WM	3	SW SW	130 FEET NORTH AND 220 FEET EAST FROM THE SW CORNER OF SECTION 3

4. Certificate 87511 does not list an irrigation season. The John Day River Decree established an irrigation season of April 1 to September 30 for the John Day River and its tributaries.
5. Certificate 87511 does not identify a duty for the right. The general duty of the area consistent with the John Day Decree is 5.0 acre-feet per acre. Therefore, an annual total volume of up to 317.5 acre-feet of water may be beneficially used under the existing right in conjunction with the supplemental right described in Finding of Fact #7.
6. Certificate 87511 also does not identify a rate limit for the right. The general rate limit for the area is 1/40 CFS per acre. If allowed to divert up to 1/40 CFS per acre, a maximum of 1.59 CFS could be used for primary irrigation. However, Certificate 87511 is a deficient right and only allows the diversion of up to 0.79 CFS.
7. The second right to be transferred instream is as follows:

**Certificate:** 87510 in the name of CHOUINARD FAMILY TRUST, ROBERT G. CHOUINARD, TRUSTEE (perfected under Permit S-47691)

**Use:** IRRIGATION of 6.5 ACRES AND SUPPLEMENTAL IRRIGATION of 63.5 ACRES

**Priority Date:** JULY 18, 1983

**Rate:** 0.95 CFS

**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 5.0 acre-feet per acre for each acre irrigated during the irrigation

season of each year. The right shall be limited to any deficiency in the available supply of any prior right for the same land and shall not exceed the limitation allowed herein.

**Source:** JOHN DAY RIVER, tributary to the COLUMBIA RIVER

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	27 E	WM	3	SW SW	130 FEET NORTH AND 220 FEET EAST FROM THE SW CORNER OF SECTION 3

**Authorized Place of Use:**

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	27 E	WM	4	SW SW	1.5
13 S	27 E	WM	4	SE SW	4.0
13 S	27 E	WM	4	SW SE	1.0
Total					6.5

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	27 E	WM	4	NE SW	33.0
13 S	27 E	WM	4	NW SW	13.0
13 S	27 E	WM	4	SE SW	6.0
13 S	27 E	WM	4	NW SE	11.5
Total					63.5

8. Certificate 87510 is a deficient water right. If water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rates and duty allowed (described in Finding of Fact #7), the total rate and duty 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 point of diversion (0.95 CFS), the right involved in this transfer would be limited as described in the table below.

Use	Rate
Primary Irrigation	0.16 CFS (maximum rate at 1/40)
Supplemental Irrigation	0.79 CFS (remaining balance)

9. An annual total of 32.5 acre-feet (AF) of water may be beneficially used under the primary irrigation portion of Certificate 87510 (6.5 acres x 5.0 AF = 32.5 AF).
10. Under the maximum rate allowed of 0.79 cfs for the supplemental irrigation under Certificate 87510, a maximum annual total of 286.8 AF may be beneficially used under the existing right in conjunction with the primary right under Certificate 87510.
11. Application T-11303 proposes to change the character of use under Certificates 87511 and 87510 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-11303 proposes to change the place of use of Certificates 87511 and 87510 to an instream point located at the point of diversion described in Findings of Fact #3 and #7.
13. The applicant proposes the quantities water to be transferred instream be as protected follows:

Certificate	Period	Rate (cfs)	Volume (acre-feet)
87511	4/1 through 9/30	0.80	159.3
87510 (primary)	4/1 through 9/30	0.16	32.5
87510 (supplemental)	4/1 through 9/30	0.80	159.3
	Total		351.1

14. The applicant has requested 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 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. Consistent with land use requirements, notice of the intent to file the instream transfer application was provided by the applicant to Grant County. Additionally, the Department provided notification of the proposed action to this local government upon receipt of Transfer Application T-11303.
16. Notice of the application for transfer was published on October 1, 2011, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
17. On October 9, 2012, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11303 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of November 9, 2012, for the applicant to respond. The applicant's agent 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)***

18. 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.
19. 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 Application T-11303.

20. The quantity of water that may be protected instream under Certificate 87511 requires modification to prevent injury and enlargement and to maximize the instream use. The maximum instream rate is 0.79 CFS. The applicant had requested to protect 0.8 CFS instream. The applicant also identified that a duty of 2.5 AF per acre was used to calculate the instream volume identified in the application. Based on the general duty of the area consistent with the John Day Decree, the maximum instream volume would be 317.5 AF, while the application identified a total volume of 159.3 AF. Given a maximum rate (0.79 CFS) and the instream period requested (April 1 through September 30), which is equivalent to 183 days and is consistent with the irrigation season, up to 286.8 AF may be protected instream.
21. The quantity of water that may be protected instream under Certificate 87510 also requires modification to prevent injury and enlargement and to maximize the instream use. For the primary portion of this right, the maximum rate is 0.16 CFS, as requested by the applicant for the instream use. However, this right is also limited to a seasonal duty of 5.0 AF per acre, which is equivalent to 32.5 AF. Given the instream period requested by the applicant (April 1 through September 30), which is equivalent to 183 days, the maximum instream rate may not exceed 0.089 CFS.

For the supplemental portion of this right, up to 0.79 CFS is available for transfer to instream use as noted in Finding of Fact #20. The applicant had requested to protect 0.8 CFS instream. The applicant also requested an instream volume of 159.3 AF. At a rate of 0.79 CFS, up to 286.8 AF may be protected instream over the 183 day instream period (April 1 through September 30).

22. However, use of water under Certificate 87510, as supplemental irrigation, is limited to any deficiency in the available supply for any prior right for the same lands, and may only be protected instream when the primary right is not available or needed to make up a deficiency in supply under the primary right (Certificate 87511). Since Certificate 87511 is a deficient water right, a portion of Certificate 87510 may be protected instream as primary to make up the deficiency in Certificate 87510. The maximum volume that can be protected instream under both rights is 317.5 AF (63.5 x 5 AF). Since up to 286.8 AF may be protected instream under Certificate 87511, the volume that may be protected instream under Certificate 87510 to make up the deficiency under Certificate 87511 is 30.7 AF (317.5 AF – 286.8 AF (Certificate 87511) = 30.7 AF).

Given that the maximum volume to be transferred instream under Certificate 87511, to make up the deficiency in Certificate 87510, is 30.7 AF the maximum rate that can be protected instream is 0.08 CFS considering a 183 day instream period (April 1 through September 30).

23. Based on Findings of Fact #20 through #22, on November 5, 2012, the applicant agreed to modify the quantities to be transferred and protected instream as follows:

Certificate	Priority	Period	Rate (cfs)	Volume (acre-feet)
87511	Feb. 9, 1915	4/1 through 9/30	0.79	286.8
87510 (primary)	July 18, 1983	4/1 through 9/30	0.09	32.5
87510 (to make up deficiency in Certificate 87511)	July 18, 1983	4/1 through 9/30	0.08	30.7
Totals			0.97	350.0

24. The proposed changes, as modified, would not result in enlargement of the rights.
25. The proposed changes, as modified, would not result in injury to other water rights.
26. The amount and timing of the proposed instream flow, as modified, is allowable within the limits and use of the original water rights.
27. The protection of flows, as modified, at the authorized point of diversion 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 point of the instream water right.
28. There is an existing instream water right, Certificate 59787, for the same point as that proposed for the new instream water right. Certificate 59787 was established under ORS 537.346 (minimum streamflow conversion) and has a priority date of November 3, 1983. While this instream right is sufficient to protect the monthly quantities of water necessary for supporting aquatic life and minimizing pollution, its flows are not always met and has a priority date junior in comparison to other water rights on the John Day River.
29. By replacing a portion of Certificate 59787, the proposed instream rights will provide protection for streamflows previously identified as necessary for supporting aquatic life and minimizing pollution under an earlier priority date.
30. In addition, by adding to other water rights, established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process), that overlap with the proposed instream point, a new instream water right established by this transfer would provide protection for additional streamflows necessary for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values; recreation.

31. The total monthly quantities of water to be protected under the existing and proposed instream rights at the instream point 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 application T-11303 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-11303 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 application T-11303 are approved.*
2. *Water right certificates 87510 and 87511 are cancelled and new instream water right certificates shall be issued.*
3. *The instream water rights shall provide for the protection of streamflows at a point located in Township 13 South, Range 27 East, Section 3 in the SW SW at 130 Feet North and 200 Feet East from the SW Corner of Section 3.*
4. *The quantities of water to be protected under the instream water right are:*

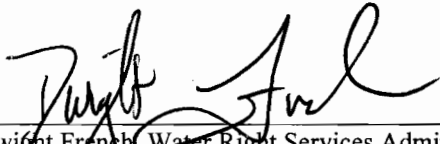
<i>Certificate</i>	<i>Period</i>	<i>Rate (cfs)</i>
<i>87511</i>	<i>April 1 through Sept. 30</i>	<i>0.79</i>
<i>87510</i>	<i>April 1 through Sept. 30</i>	<i>0.09</i>
<i>87510</i>	<i>April 1 through Sept. 30</i>	<i>0.08</i>

5. *At the specified point, 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.*
6. *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.*
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 Certificates 87510 and 87511, 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 27 day of November, 2012.



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Dwight French, Water Right Services Administrator, for  
PHILLIP 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@wrds.state.or.us](mailto:Teri.K.Hranac@wrds.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.