



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

North Mall Office Building
725 Summer St. NE, Suite A
Salem, OR 97301
Phone 503-986-0900
FAX 503-986-0904
www.wrd.state.or.us

December 17, 2012

VIA E-MAIL: pwdirect@cityoftoledo.org

Applicant

CITY OF TOLEDO
C/O ADAM DENLINGER
PO BOX 220
TOLEDO, OR 97391

SUBJECT: Water Right Transfer Application T-11451

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department has concluded that approval of the changes in points of diversion proposed in T-11451 would result in injury to instream water right Certificates 67712 and 67713. Consistent with your request that we seek a recommendation from the Department of Fish and Wildlife (ODFW) and Oregon State Parks and Recreation Department (Parks) on whether we should consent to the injury to the instream water right, we are proceeding with that process concurrently with issuance of the preliminary determination.

The Water Resources Department holds instream water rights in trust for the benefit of the people of Oregon. Under ORS 540.530(c), we may approve the transfer only if the agency that requested the instream water right concludes that the changes proposed will result in net benefits to the resources protected by the instream water right, and recommends that we consent to the injury of the right. Please contact the agency staff person to whom the agency review letter has been sent, to discuss whether you may be able to assist in providing information needed for the analysis.

After we have received recommendations from the Oregon Department of Fish and Wildlife and Oregon State Parks and Recreation Department on whether to consent to the injury, provided no protests have been filed, and no meetings are requested during the 30 days following publication of notice of the recommendations, we will issue an order either:

- Approving the transfer with conditions, if any, identified in the agency recommendations as necessary to ensure that the change will result in net benefits, or
- Reaffirming our decision that the instream water right would be injured and denying the transfer.

The timing for issuance of the order will depend on the availability of information needed by ODFW and Parks to perform the net benefits analysis upon which their recommendation must be based, and the time necessary to allow public review and comment on the recommendation. You are not authorized to use water from the proposed points of diversion pending a final decision by the Department on your transfer application.

A public notice is being published in the Department's weekly publication 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 Department's notice.

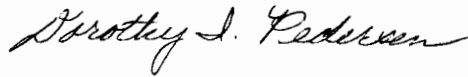


If no protest is filed, the Department will issue a Final Order consistent with the Preliminary Determination. You should receive a copy of the Final Order about 30 days after the close of the protest period.

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@wrд.state.or.us if I may be of assistance.

Sincerely,



Dorothy I. Pedersen
Transfer Program Advisor

cc: T-11451
Greg Beaman, District 1 Watermaster (*via e-mail*)
Adam Sussman, Agent for the applicant (*via e-mail: asussman@gsiws.com*)
Theodore Ressler, CWRE # 78185 (*via e-mail: tressler@gsiws.com*)

encs

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

In the Matter of Transfer Application	)	PRELIMINARY DETERMINATION
T-11451, Lincoln County	)	PROPOSING DENIAL OF CHANGES
	)	IN POINT OF DIVERSION and PLACE
	)	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.

Applicant

CITY OF TOLEDO
C/O ADAM DENLINGER
PO BOX 220
TOLEDO, OR 97391

Findings of Fact

Background

1. On July 25, 2012, CITY OF TOLEDO filed an application to change the points of diversion and to change the places of use under Certificates 87645 and 14396. The Department assigned the application number T-11451.
2. On August 31, 2012, the applicant's agent amended the transfer application to state "The City also proposes to change the places of use to match the City's service area".
3. In a letter dated November 19, 2012, the applicant's agent amended the transfer application by revising the location of the proposed point of diversion.
4. The first right to be transferred is as follows:

Certificate: 87645 in the name of CITY OF TOLEDO (perfected under Permit S-9370)
Use: MUNICIPAL SUPPLY
Priority Date: OCTOBER 24, 1929
Rate: 1.34 CUBIC FEET PER SECOND

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.
--

Limit/Duty: The amount of water to which this right is entitled is limited to an amount actually used beneficially, and shall not exceed 1.34 cubic feet per second, or its equivalent in case of rotation, measured at the point of diversion.

Source: SILETZ RIVER, tributary of the PACIFIC OCEAN

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
10 S	10 W	WM	9	NW SW	1380 FEET NORTH AND 50 FEET EAST FROM THE SW CORNER OF SECTION 9

Authorized Place of Use:

MUNICIPAL USES				
Twp	Rng	Mer	Sec	Q-Q
11 S	10 W	WM	7	NE NE
11 S	10 W	WM	7	NW NE
11 S	10 W	WM	7	SW NE
11 S	10 W	WM	7	SE NE
11 S	10 W	WM	7	SE NW
11 S	10 W	WM	7	NE SE
11 S	10 W	WM	7	NW SE
11 S	10 W	WM	7	SW SE
11 S	10 W	WM	7	SE SE
11 S	10 W	WM	8	NW NW
11 S	10 W	WM	8	SW NW
11 S	10 W	WM	8	SE NW
11 S	10 W	WM	8	NE SW
11 S	10 W	WM	8	NW SW
11 S	10 W	WM	8	SW SW
11 S	10 W	WM	8	SE SW
11 S	10 W	WM	8	NE SE
11 S	10 W	WM	8	NW SE
11 S	10 W	WM	8	SW SE
11 S	10 W	WM	16	NW SW
11 S	10 W	WM	16	SW SW
11 S	10 W	WM	17	NW NE
11 S	10 W	WM	17	SW NE
11 S	10 W	WM	17	SE NE
11 S	10 W	WM	17	NE NW
11 S	10 W	WM	17	NW NW
11 S	10 W	WM	17	SW NW
11 S	10 W	WM	17	SE NW
11 S	10 W	WM	17	NE SW
11 S	10 W	WM	17	NW SW
11 S	10 W	WM	17	SW SW
11 S	10 W	WM	17	SE SW
11 S	10 W	WM	17	NE SE
11 S	10 W	WM	17	NW SE
11 S	10 W	WM	17	SW SE
11 S	10 W	WM	17	SE SE
11 S	10 W	WM	18	NE NE
11 S	10 W	WM	18	NW NE

MUNICIPAL USES				
Twp	Rng	Mer	Sec	Q-Q
11 S	10 W	WM	18	SW NE
11 S	10 W	WM	18	SE NE
11 S	10 W	WM	18	NE SE
11 S	10 W	WM	18	NW SE
11 S	10 W	WM	18	SW SE
11 S	10 W	WM	19	NW NE
11 S	10 W	WM	20	NE NE
11 S	10 W	WM	20	NW NE
11 S	10 W	WM	20	SW NE
11 S	10 W	WM	20	SE NE
11 S	10 W	WM	20	NE NW

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

Certificate: 14396 in the name of CITY OF TOLEDO (perfected under Permit S-12553)

Use: MUNICIPAL USES

Priority Date: FEBRUARY 12, 1937

Rate: 1.75 CUBIC FEET PER SECOND

Limit/Duty: The amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually used beneficially for said purposes.

Source: SILETZ RIVER, tributary of SILETZ BAY, tributary of PACIFIC OCEAN

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	GLot
10 S	10 W	WM	9	NW SW	24

Authorized Place of Use:

MUNICIPAL USES					
Twp	Rng	Mer	Sec	Q-Q	GLot
11 S	10 W	WM	7	SW SE	4
11 S	10 W	WM	7	SE SE	
11 S	10 W	WM	8	NE SW	
11 S	10 W	WM	8	NW SW	
11 S	10 W	WM	8	SW SW	
11 S	10 W	WM	8	SE SW	
11 S	10 W	WM	17	NE NW	
11 S	10 W	WM	17	NW NW	
11 S	10 W	WM	17	SW NW	1
11 S	10 W	WM	17	SE NW	
11 S	10 W	WM	17	NE SW	
11 S	10 W	WM	17	NW SW	2
11 S	10 W	WM	17	SW SW	3
11 S	10 W	WM	17	SW SW	4
11 S	10 W	WM	17	SE SW	
11 S	10 W	WM	17	NW SE	
11 S	10 W	WM	17	SW SE	
11 S	10 W	WM	18	NE NE	2
11 S	10 W	WM	18	NW NE	1

MUNICIPAL USES					
Twp	Rng	Mer	Sec	Q-Q	GLot
11 S	10 W	WM	18	NW NE	7
11 S	10 W	WM	18	SW NE	6
11 S	10 W	WM	18	SE NE	3

6. Transfer Application T-11451 proposes to change the authorized points of diversion for Certificate 87645 and Certificate 14396 to a new location approximately 520 feet upstream:

Twp	Rng	Mer	Sec	Q-Q	GLot	Tax Lot	Measured Distances
10S	10W	WM	9	NW SW	24	106	1,545 FEET NORTH AND 540 FEET EAST FROM THE SW CORNER OF SECTION 9

7. Application T-11451 also proposes to change the places of Certificate 87645 and Certificate 14396 to:

MUNICIPAL USES
WITHIN THE SERVICE BOUNDARIES OF THE CITY OF TOLEDO

8. Notice of the application for transfer was published on July 31, 2012, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
9. Evidence demonstrating that Land Use approval has been requested, as required under OAR 690-380-3000(19), was provided to the Department. The Lincoln County Planning and Development Department indicated that the City of Toledo is pursuing a Conditional Use Permit under LCC 1.1355(2)(j) and LCC 1.1630(1)(4).
10. The Oregon Department of Fish and Wildlife (ODFW) have determined that a fish screen is necessary at the new point of diversion to prevent fish from entering the diversion and that the diversion is not currently equipped with an appropriate fish screen. This diversion may be eligible for screening cost-share funds.
11. On August 28, 2012, ODFW expressed concern that the proposed change in POD to a location 520 feet upstream from the authorized PODs will impact the available water, and thereby the available habitat for the native salmonid species, in this part of the Siletz River. ODFW requested mitigation for this impact.
12. ODFW proposed that an annual meeting between the City of Toledo and ODFW be held to discuss water flow options for the Mill Creek Reservoir, particularly with regards to spring smolt out-migration and fall/winter adult salmon spawning migration.
13. On October 1, 2012, the Department sent a copy of the draft Preliminary Determination proposing to deny Transfer Application T-11451 to the applicant, unless the application was withdrawn or ODFW and Oregon State Parks and Recreation Department (Parks) consent to injury of instream water rights. The draft Preliminary Determination cover letter set forth a deadline of October 31, 2012, for the applicant to respond. The applicant requested that the

Department put the application on administrative hold before proceeding with issuance of a Preliminary Determination and sending a request for recommendations from ODFW and Parks on consent to injury of the instream water rights.

14. On November 19, 2012, the applicant's agent amended the transfer application to change the location of the proposed point of diversion, suggested minor wording changes. The Department agreed to adjust the completion date, if the transfer is approved.
15. On December 11, 2012, the applicant's agent, Adam Sussman, requested that the administrative hold be removed and that the Department proceed with issuance of a Preliminary Determination, and requested 10 years for completing development of the changes, should the application be approved.

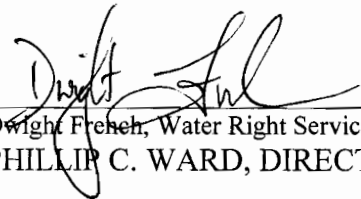
Transfer Review Criteria [OAR 690-380-4010(2)]

16. Water has been used within the last five years according to the terms and conditions of the rights. Further, the water rights are for use by a City for reasonable and usual municipal purposes. There is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
17. A diversion structure, pumps, pipelines, and a delivery system sufficient to use the full amount of water allowed under the existing rights were present within the five-year period prior to submittal of Transfer Application T-11451.
18. The proposed changes would not result in enlargement of the rights.
19. Instream water rights, Certificates 67712 and 67713 exist for the reach of the river in which the authorized point of diversion would be moved upstream, and streamflows within the reach are frequently below the flows to be protected under the instream water right. Thus, the instream water right would be injured as a result of the proposed change in point of diversion.
20. Findings of Fact #11 and #12 regard issues not directly related to criteria for approval of this transfer, except to the extent of injury to the instream water rights.

Determination and Proposed Action

The change in point of diversion and change in place of use proposed in Transfer Application T-11451 appear not to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000. The transfer application will be denied unless under OAR 690-380-5030 to 690-380-5050 the Oregon Department of Fish and Wildlife and the Oregon State Parks and Recreation Department recommend that the Department consent to injury of an instream water right, or protests are filed pursuant to OAR 690-380-4030, or the application is withdrawn.

Dated at Salem, Oregon this 19 day of December, 2012.


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

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