



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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January 14, 2013

Applicant

SCAPPOOSE SAND & GRAVEL, CO.
33485 EAST CROWN ZELLERBACH ROAD
SCAPPOOSE, OR 97056

SUBJECT: Water Right Transfer Application T-10686

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-10686. 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 St. Helens Chronicle 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) 986-0890 or Dorothy.I.Pedersen@wrd.state.or.us if I may be of assistance.

Sincerely,

Dorothy Pedersen
Transfer Program Advisor

cc: T-10686
Cole Beaman, District 18 Watermaster (via e-mail)
J.H. Greenman, Agent for the applicant (via e-mail: jimg@hrs-engrs.com)
Steven Shropshire, Attorney for the applicant (via e-mail: steve.shropshire@gordanramis.com)

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

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Application T-10686, Columbia 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.

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Findings of Fact

Background

1. On July 31, 2008, Scappoose Sand & Gravel, Co. filed an application to change the place of use and character of use under Certificate 83470 to instream use. The Department assigned the application number T-10686.
2. On December 20, 2010, the application was modified to change the proposed type of instream beneficial from "navigation" to "conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values."
3. The portion of the right to be transferred is as follows:

Certificate:	83470 in the name of CHARLES T. PARKER CONSTRUCTION CO. (perfected under Permit S-28426)
Use:	WASHING GRAVEL
Priority Date:	JULY 31, 1962
Rate:	0.03 CUBIC FOOT PER SECOND (CFS) or its equivalent in case of rotation, measured at the point of diversion from the stream.
Source:	SOUTH SCAPPOOSE CREEK, 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	DLC	Measured Distances
3 N	2 W	WM	1	SE SW	42	589.5 FEET NORTH AND 2466.2 FEET EAST FROM THE SW CORNER OF SECTION 1

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	DLC
3 N	2 W	WM	12	NW NE	42

4. Certificate 83470 describes South Scappoose Creek as being a tributary of the Columbia River. However, South Scappoose Creek is actually a tributary of Scappoose Creek.
5. Certificate 83470 does not include an annual volume limitation.
6. Application T-10686 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.
7. Application T-10686 proposes to change the place of use of the right to an instream point at the authorized point of diversion.
8. The applicant originally proposed the quantities water to be transferred instream to be protected follows:

Instream Period	Rate (CFS)	Volume (Acre-Feet)
Not Specified	0.03	6.14

9. The applicant intends for this transfer to provide mitigation for groundwater Permit Application G-16921.
10. Year-round mitigation from South Scappoose Creek is needed for groundwater Permit Application G-16921.
11. The applicant proposes, if T-10686 is approved, the instream right created as a result of this instream transfer to be additive to other instream water rights established under ORS 537.348 and ORS 537.470 and to replace, with an earlier priority date, a portion of any instream water right established under ORS 537.431 and ORS 537.346.
12. Notice of the application for transfer was published on August 12, 2008, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
13. The applicant provided notice of the intent to transfer Certificate 83470 to instream use to Columbia County and the City of Scappoose prior to submitting the transfer application. Additionally, the Department provided notification of the proposed action to these local governments upon receipt of Transfer Application T-10686.
14. On October 6, 2010, the Department sent a letter to the applicant, requesting additional information regarding the use of water under the right in the five years prior to filing of

T-10686, information about the pumping and delivery system, requesting an original CWRE-stamped map, and clarification about the amount of water and beneficial purpose of the water proposed to be transferred instream.

15. On December 20, 2010, a letter was received from Scott Parker, with a cover letter from Jim Greenman, addressing a description of the use of water and the pumping and delivery system, an evidence of use affidavit, aerial photos, a revised Supplemental Form C to modify the beneficial instream use proposed to “conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values”, and a stamped and signed CWRE map.
16. The information about the pumping and delivery system did not document how water was diverted from the creek at the authorized diversion point, but has rather used a floating pump system that moved around the property as the gravel mining and reclamation process progressed, withdrawing water from several excavated ponds some distance from the creek.
17. On November 30, 2011, the Department mailed a copy of a draft Preliminary Determination proposing to deny Transfer Application T-10686 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of January 6, 2012, for the applicant to respond. The applicant requested a 180-day administrative hold, in order to provide the necessary information to demonstrate that the applicant had used water from South Fork Scappoose Creek for washing gravel at the place of use. The Department allowed until July 6, for the applicant to supply the requested information, but none was received by the deadline.
18. On July 24, 2012, Steven Shropshire, on behalf of the applicant, requested another 180-day administrative hold to allow the applicant to comply, however, the Department instead requested by phone that the information be submitted no later than October 31, 2012.
19. On October 30, 2012, additional information was received, documenting diversion of water from South Fork Scappoose Creek, which was conveyed by a pipeline to the pond, from which it was withdrawn for gravel washing.
20. On October 31, 2012, the Department mailed a copy of the revised draft Preliminary Determination proposing to approve Transfer Application T-10686 to the applicant. The revised draft Preliminary Determination cover letter set forth a deadline of November 30, 2012, 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.
21. On January 10, 2013, the applicant’s agent requested to modify the quantities to be transferred and protected instream to 8.35 AF, at a year-round rate of 0.012 cfs.

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

22. Water has been used within the last five years from South Scappoose Creek for the authorized use, according to the terms and conditions of the right, and the right is not subject to forfeiture under ORS 540.610.
23. A pump and delivery system sufficient to use the full amount of water allowed under the existing right were present within the last five years.
24. Use of water under the existing right for gravel washing is subject to beneficial use without waste in accordance with ORS 536.310. Absent the limitation that water may only be diverted as necessary to achieve the authorized beneficial use without waste, the total face value quantity appropriated at the place of use under the portion of the right proposed for transfer would be at the rate of 0.03 cfs, continuously 24 hours a day for 365 days a year: $(0.03 \text{ cfs} \times 60 \text{ seconds/minute} \times 60 \text{ minutes/hour} \times 24 \text{ hours/day} \times 365 \text{ days/year}) \div 43,560 \text{ ft}^2/\text{acre} = 21.7 \text{ AF}$. However, it is unlikely that water for gravel washing could be beneficially used continuously all year without waste.
25. The applicant has provided information about the actual volumes of gravel washed during the fiscal years from July 1, 2002 through June 30, 2009, and indicated that water was pumped 6 days per week for 10 to 12 hours per day from March through October, and 8 to 10 hours per day for 5 days per week from November through February. At the rate of 0.03 cfs, the maximum volume of water used for gravel washing would be:

March-October $(0.03 \text{ cfs} \times 60 \text{ seconds/minute} \times 60 \text{ minutes/hour} \times 12 \text{ hours/day} \times 6 \text{ days/week} \times 35 \text{ weeks}) \div 43,560 \text{ ft}^2/\text{acre} = 6.24 \text{ AF}$; and

November-February $((0.03 \text{ cfs} \times 60 \text{ seconds/minute} \times 60 \text{ minutes/hour} \times 10 \text{ hours/day} \times 5 \text{ days/week} \times 17 \text{ weeks}) \div 43,560 \text{ ft}^2/\text{acre} = 2.11 \text{ AF}$.

Based on the above, the total annual maximum beneficial use without waste is estimated to be 8.35 AF.
26. The applicant requested that 0.03 CFS be transferred to instream use and protected year round. However, the applicant also originally requested that the volume of water to be protected instream be limited to 6.14 AF per year.
27. At the rate and volume requested to be protected instream, transferred flows could not be protected continuously for more than 103 days per year without exceeding 6.14 AF.
28. Department staff determined that the instream use needs to be protected year-round. Therefore, the maximum continuous year-round diversion rate that would not exceed an annual volume of 6.14 AF would be 0.008 cfs.
29. The Department's review concluded, however, that based on Finding of Fact #24, the instream use of the 0.03 cfs portion of the right proposed for transfer could be raised

from 6.14 AF to 8.35 AF, which would maximize the rate that could be protected year-round from a rate of 0.008 cfs to a rate of 0.012 cfs.

30. Based on Finding of Fact #29, the following quantities proposed for transfer, as modified in Finding of Fact #21, are subject to transfer to instream use:

<i>Period</i>	<i>Instream Rate</i>	<i>Instream Volume</i>
Year-round	0.012 cfs	8.35 AF

31. The proposed change, as modified, would not result in enlargement of the right.
32. The proposed change, as modified, would not result in injury to other water rights.
33. The amount of the proposed instream flow and the timing of the proposed instream flow is allowable within the limits and use of the original water right, and would provide adequate year-round mitigation for Permit G-16921.
34. The protection of flows at the authorized point of diversion is appropriate, considering:
- The instream water right will be located at the recorded point of diversion;
 - The location of confluences with other streams downstream of the point of diversion;
 - There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
 - 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.
35. There are no existing instream water rights in South Scappoose Creek at the proposed point of diversion, however there are several instream rights on North Scappoose Creek and tributaries, and on South Scappoose Creek and tributaries upstream from the point proposed in T-10686, all issued for the purpose of “supporting aquatic life.”
36. South Scappoose Creek is a high priority watershed for flow restoration during the period July through September for recovery of salmonids.
37. By replacing a portion of any future instream water rights established under ORS 537.346 (minimum streamflow conversation) and ORS 537.341 (state agency application process), the instream right 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 under an earlier priority date. In addition, by adding to other instream water rights that may established in the future under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) for the same location, the instream right would provide protection for additional streamflows necessary for the proposed purposes.

38. The total monthly quantity of water to be protected under the proposed instream right at the point would provide for beneficial purposes and would 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-10686 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. Unless protests are filed pursuant to OAR 690-380-4030, the application will be approved.

If Transfer Application T-10686 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-10686 are approved.*
2. *Water right certificate 83470 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will be issued describing that portion of the right not affected by this transfer. Approval of this transfer shall reduce the amount of water lawfully available under the remaining portion of Certificate 83470 by 0.03 cfs.*
3. *The instream water right shall provide for the protection of streamflows year-round at a point located at:*

<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>	<i>DLC</i>	<i>Measured Distances</i>
<i>3 N</i>	<i>2 W</i>	<i>WM</i>	<i>1</i>	<i>SE SW</i>	<i>42</i>	<i>589.5 FEET NORTH AND 2466.2 FEET EAST FROM THE SW CORNER OF SECTION 1</i>

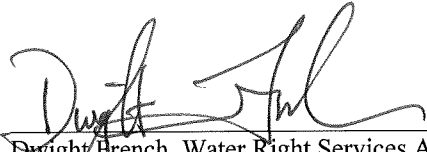
4. *The quantities of water to be protected under the instream water right are:*

<i>Period</i>	<i>Instream Rate</i>	<i>Instream Volume</i>
<i>January 1 through December 31</i>	<i>0.012 CFS</i>	<i>8.35 AF</i>

5. *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.*
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 amount of water to which this right is entitled shall not exceed the quantity of water legally available at the original point of diversion.*
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 83470 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 14 day of January, 2013.



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@wrд.state.or.us.

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

**Notice of Preliminary Determination for
Water Right Transfer T-10686**

T-10686 filed by Scappoose Sand & Gravel, Co., 33485 East Crown Zellerbach Road, Scappoose, OR 97056, proposes changes in use and place of use under Certificate 83470. The right allows the use of 0.03 cubic foot per second from South Scappoose Creek in Sec. 1, T 3 N, R 2 W, W.M. for washing gravel in Sec. 12. The applicant proposes to change the character of use and place of use to create an instream right, for 0.012 cfs, at the point of diversion in South Scappoose Creek. The Water Resources Department proposes to approve the transfer, based on the requirements of ORS Chapter 540, OAR 690-077-0075 and OAR 690-380-5000.

Any person may file, jointly or severally, a protest or standing statement within 30 days after the last date of newspaper publication of this notice, [DATE OF LAST PUBLICATION]. Call (503) 986-0883 to obtain additional information or a protest form. If no protests are filed, the Department will issue a final order consistent with the preliminary determination.