



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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725 Summer St. NE, Suite A
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March 13, 2013

Applicant

PAUL SCHANNO
82163 DUFUR VALLEY RD
DUFUR, OR 97021-3142

SUBJECT: Water Right Transfer Application T-11121

Please find enclosed the public notice of the recommendations of the Oregon Department of Fish and Wildlife (ODFW) and the Oregon Department of Environmental Quality (DEQ), to consent to injury of instream water rights.

Copies of ODFW's and DEQ's recommendations are available for viewing at the Salem office of the Water Resources Department. Any person may review the recommendations and submit written comments or may submit a written request for a public meeting to review the recommendations. The comments or request for a meeting must be received by WRD on or before April 11, 2013.

WRD will provide copies of any comments submitted in response to this notice to ODFW and DEQ. If a meeting is requested, WRD will schedule a joint public meeting with ODFW and DEQ to review the recommendations.

To review the recommendations, contact Dorothy Pedersen at 503-986-0890 or e-mail Dorothy.I.Pedersen@wrд.state.or.us. Written comments and requests for a public meeting should be mailed to Attn: Dorothy Pedersen, Water Resources Department, 725 Summer St NE, Suite A, Salem, OR 97301-1271 or faxed to 503-986-0903.

If no comments or requests are received by the Department in response to the notice or if, after consideration of any written comments or the discussion during the meeting, the recommending agencies notify the Department that they will not withdraw their recommendations to consent to injury, the Department shall issue an order approving the transfer and consenting to the injury to the instream water rights. The order shall include any conditions necessary to ensure that the change will be consistent with the findings and will result in a continued net benefit to the resource.

Please do not hesitate to contact me at the phone number or email address above if you have any questions.

Sincerely,

Dorothy Pedersen
Transfer Program Advisor

cc: T-11121



Robert L. Wood, District 3 Watermaster *(via e-mail)*
Larry Toll, Agent for the applicant *(via e-mail: LToll@tennesoneng.com)*
Bruce McIntosh, ODFW Action Fish Division Administrator *(via e-mail:
bruce.a.mcintosh@state.or.us)*
Rod French, ODFW The Dalles office *(via e-mail: rod.a.french@state.or.us)*
Rick Kepler, ODFW Water Quality/Quantity Manager *(via e-mail:
rick.j.kepler@state.or.us)*
Bonnie Lamb, DEQ Basin Coordinator *(via e-mail: LAMB.Bonnie@deq.state.or.us)*
Greg Aldrich, DEQ Water Quality Program Manager *(via e-mail:
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Eric Nigg, DEQ Eastern Region Water Quality Manager *(via e-mail:
NIGG.Eric@deq.state.or.us)*

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John A. Kitzhaber, MD, Governor

Department of Fish and Wildlife

Fish Division
3406 Cherry Ave NE
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www.dfw.state.or.us

January 28, 2013

Dwight French
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301



REFERENCE: Transfer T-11121

Dear Mr. French:

The Department has received notification of your finding that transfer application T-11121 cannot be made without injury to an existing in-stream water right. You also indicated that the applicant intends to seek approval under ORS 540.530(1)(b) – (e). Based on this, you have requested ODFW make a recommendation on whether OWRD should consent to injury of an in-stream water right. For the ODFW to consent to injury of an in-stream water right, ODFW must find that the transfer will provide a net benefit to the resource consistent with the purposes of the in-stream water right, in this case fish and fish habitat.

The ODFW has evaluated the proposed transfer and finds that the over all benefits of the transfer provides a net benefit, which offsets the injury to the in-stream water right caused by the transfer. The attached analysis provides ODFW's reasoning for recommending the consent to injury of the in-stream water right.

Please note: the net benefit determination relies on a number of conditions proposed by the transfer applicant (see ODFW's analysis) which were previously discussed and concurred with by the OWRD local water master (Bob Wood) and the transfer to in-stream of three water rights.

If you have any questions please contact Rick Kepler in our Salem office (503-947-6084) or Rod French in the ODFW District office (541-296-4628 Ext. 322).

Sincerely,

Bruce McIntosh
Acting Fish Division Administrator
Fish Division

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Cc: Rod French, ODFW The Dalles Office
Rick Kepler, ODFW Salem

Attachment: ODFW's Discussion and Analysis of Transfer T-11121 (January 28, 2013)



Final ODFW's Discussion and Analysis of Transfer T-11121

January 26, 2013

Action

The water right certificate 5678 currently waters 41.32 acres at a rate of 1.033 cfs and has a point of diversion at river mile (RM) 24.5 with a priority date of 1869. The water right holder proposes to split the right into 3 components, moving one point of diversion (POD) downstream about one half mile to water one acre of land (.025 cfs), putting .02 cfs in-stream at RM 24.5 and then move the remaining right upstream 8.8 and 9.2 miles to two POD's at RM 33.3 and 33.7 to water 38.5 acres (.9625 cfs).

The Water Resources Department (WRD) has determined that transferring this POD upstream will injure in-stream water right Certificates 59678 and 64744 on Fifteen Mile Creek. ODFW applied for these in-stream water rights to support aquatic life in Fifteen Mile Creek. ORS 540.530 (1)(c) allows WRD to consent to injury of an in-stream water right if the agency that applied for the in-stream water right recommends that WRD consent to the injury. For the recommendation and consent to injury to occur, the applicant agency must find that the transfer will result in a net benefit to the resource. Below is ODFW's analysis of the transfer and determination whether a net benefit to aquatic resources in Fifteen Mile Creek will occur.

Background

Certificated water right 5678 has been leased in-stream since February 2005. However, the water right holder would now like to use the water to irrigate pasture land further up the creek.

Fifteen Mile Creek in the reach affected by this transfer supports important state sensitive, and federally protected fish species. Steelhead (*Oncorhynchus mykiss*), which are considered part of the Middle Columbia population Distinct Population Segment, are listed as a threatened species under the Endangered Species Act. Pacific lamprey (*Lampetra tridentata*) also inhabit this reach, are classified as a Oregon state sensitive species, and support important tribal subsistence fisheries in Fifteenmile Creek. Resident rainbow trout (*Oncorhynchus mykiss*), Cutthroat trout (*Oncorhynchus clarkii*), and Chinook salmon (*Oncorhynchus tshawytscha*), occasionally inhabit the reach, along with a variety of nongame fish.

Both steelhead and lamprey continuously inhabit the reach, as it is used for spawning and rearing for both of these species. Annual ODFW spawning surveys for steelhead in Fifteenmile Creek, has identified that approximately 21% of the steelhead spawning in the Fifteenmile Creek Subbasin utilize the reach that will be affected by this transfer. Additionally, this reach is part of an important juvenile and adult migration corridor for both steelhead and lamprey, as considerable spawning and rearing habitat is located upstream from the affected reach. Adults and juveniles of both species will be utilizing the reach for migration during the diversion period. Spawning through fry emergence for steelhead (and trout species) occurs from March through

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July with most occurring by July 1st. Chinook spawning through emergence occurs August through December with most occurring September through November. Flow reductions to stream flows in this reach will occur June (April) through September (October) when the transfer will affect the Expected Stream Flows in the reach.

In-stream Water Rights

Fifteen Mile Creek has two in-stream water rights. In-stream water right certificate 59678 is from USGS Gage 14104500 (at Rice) (river mile 24.0) and maintained to the mouth and has flows that vary between 4 and 20 cfs and has a priority date of 1983. In-stream water right certificate 64744 is from the Mount Hood National Forest Boundary at river mile 44.5 to the mouth of Fifteen Mile Creek and varies between 4 and 20 cf and has a priority date of 1990. In-stream water right 64744 is the most likely to be injured, because the entire transfer reach is within the in-stream water right reach. Discussions with the local water master (Bob Wood) reveal that normally he shuts off water rights in the basin with junior priority dates after 1960 by July 1st. There are also three in-stream water right transfers totaling .43 cfs (76220 priority date 1860, RM 19.5; 76771 priority date 1907, RM 39 and 767721 priority date 1907, RM 39). WRD's water availability tables show that no water is available in July and August. Therefore, transfer of the POD upstream has the potential to injure the in-stream water rights. WRD has asked for a recommendation from ODFW on whether a net benefit to the resource would occur and they should consent to injury to the in-stream water rights.

Injury

Water right certificate 5678 has a priority date of 1869 and moving it upstream 8.8 and 9.2 miles is likely to injure a number of in-stream water rights (In-stream certificate 64744 and in-stream transfers 76771 and 76772). Potential injury from the transfer would occur June (April) through September (October) when the transfer will affect the Expected Stream Flows in the reach. Adult and juvenile steelhead, lamprey, and resident rainbow trout use the habitat within the affected reach during the period of potential injury. Potential impacts to these species include:

- Reduced spawning habitat for adult steelhead and lamprey.
- Reduced availability of foraging habitat for rearing.
- Reduced availability of edge habitat (hiding cover provided by vegetation, log and rock structures along the stream banks) for fry, and juvenile steelhead.
- Reduced water depth affects both adult and juvenile.
- Reduced water quality (increased temperature or reduced dilution of sediment or pollutants)

Because of these impacts on the habitat in this stream reach; ODFW has determined that under ODFW's Mitigation Policy (OAR 635-415) the habitat would fall into Category 2 in the spring to July 1 when migration, spawning and incubation occurs. The reach then becomes Category 3 habitat in July and August when it is primarily for rearing and then becomes Category 2 habitat again in the fall for Chinook spawning and incubation. Category 2 habitat is essential habitat that is limited either on a physiographic province or site-specific basis. A net benefit in mitigation must be achieved in the reach being affected. Category 3 habitat is essential or important habitat that is limited on a physiographic province or on a site-specific basis. Mitigation must be in-kind

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and benefit the same population being affected. If impacts are unavoidable, ODFW requires in-kind, in-proximity replacement of impacted habitat and no net loss of habitat quantity or quality. In this case reduced flows have the potential to affect water quality, and to limit fish spawning migration, escape cover and forage opportunities for steelhead and lamprey.

Mitigating Measures

To compensate for the injury to the in-stream water rights the transfer applicant has proposed the following mitigating measures:

- the transfer of three water rights totaling .49 cfs to in-stream use,
 - Certificate 5678, priority date 1869 for .02 cfs from RM 24.5 to the mouth of Fifteenmile Creek
 - Certificate 48992, priority date 1972 for .4 cfs from RM 34.5 to the mouth of Fifteenmile Creek
 - Certificate 50112, priority date 1972 for .07 cfs from RM 34.5 to the mouth of Fifteenmile Creek

Additionally the transfer applicant asks that the following conditions be applied:

- *Condition #1 – Reducing the diversion rates of the transferred water right certificate 5678, priority date 1869 and certificate 48907, priority date 1861 to not exceed the 48907 right in combination of 0.76 cfs (1/80th rate of certificate 48907) when the 1972 in-stream water rights transferred under T-11120 are regulated off the system.*
- *Condition #2 – Limits the diversion of water under the 1869 priority date for the 38.5 acres transferred upstream to when instream water right certificates 59678 and 64744 are met at the gaging station (Fifteenmile Cr Nr The Dalles, 14105550) operated by OWRD. When instream water right is not met at listed gaging station, the water user may pump up to 0.76 cfs of water (Certificate 48907), which can be used to irrigated the 60.5 acres of 1861 (Certificate 48907) and the 38.5 acres with 1869 priority date transferred upstream.*

In order to offset times when the water flow oscillates back and forth between meeting and not meeting the instream water right, the applicant has also ask that a 7 day running average be used to calculate the instream water right flow for purposes of limiting or allowing water use under Condition #2.

Additionally, should the Watermaster during regulation of water call for 1869 priority date water rights to be shut off because of low creek flows, this 38.5 acres will not be irrigated until the Watermaster allows further irrigation by 1869 rights.

- *Condition #3 – Condition #2 will not apply to the 38.5 acres or the portion of the 38.5 acres if it is transferred back downstream to the original POD location or further downstream.*

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- *Condition #4 – If the holder of the 38.5 acres of 1869 priority date water right leases or causes any water rights to be leased instream a negotiation can occur between the holder, ODFW and OWRD to alter the restrictions under Condition #2.*

NOTE: These conditions do not apply to the 1.0 acre of 1869 priority date water right that remained in the original location, T 1 S, R 14 E, Section 5, SW ¼ of SW ¼.

Analysis

For the portion of 5678 that is being transferred up stream (.9625 cfs) there is an injury for 8.8 and 9.2 miles (from RM 24.5 to RM 33.3 and 33.7) (the assumption will be made that the upper POD would use the water so 9.2 miles of habitat would be affected). This reach of the creek is considered category 2 habitat before July 1st and category 3 in July and August and then Category 2 September 1st into the fall. The water right time period is March 1 to October 31.

The water right holder has proposed transferring 3 water rights to in-stream use to mitigate for the injury to the existing in-stream water rights.

- Certificated right 5678 will transfer in-stream .02 cfs at RM 25
- Certificated right 48992 will transfer in-stream .40 cfs at RM 33.7
- Certificated right 50112 will transfer in-stream .07 cfs at RM 33.3

WRD notes these rights are diminished by 50% at RM 29 because of a losing reach of the stream, otherwise the water can be protected in-stream to the mouth of Fifteenmile Creek.

Because of the change in habitat category the transfer will be analyzed in two parts September 1 to June 30th and July and August.

September 1st to June 30th

Habitat and fisheries resources during this time period include Chinook spawning through emergence mainly September through November and then Steelhead spawning through emergence mainly March through June. Because a high percent of spawning habitat (21%) is within the injured stream reach and additionally fish must migrate through this reach to gain access to much of the remaining spawning habitat in the watershed water must be available in this reach to support these life stages. Therefore, ODFW determines that during this time period the reach is Category 2 habitat (limited and essential within the reach being injured).

Three water rights are proposed to be transferred in-stream as mitigation for the injury to the in-stream water rights.

- 5678 will provide .01cfs (.02 cfs diminished by 50%) from RM 24.5 to mouth,
- 48992 will provide .40 cfs for 4.7 RMs (RMs 33.7 to 29) and then .2 cfs for 29 RMs (RM 29 to mouth),
- 50112 will provide .07 cfs for 4.3 RMs (RMs 33.3 to 29) and then .035 for 29 RMs (RM 29 to mouth),

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The ratio of habitat represented as water (cfs) lost to habitat gained is as follows:

- Habitat water lost as a result of transferring 5678 upstream by T-11121 is .9625 cfs X 9.2 RMs = 8.855 cfs
- Habitat water gained as the result of transferring 5678, 48992 and 50112 by T-11120 is:
 - .01 cfs X 24.5 RMs = .245 cfs for 5678, plus
 - .4 cfs X 4.7 RMs = 1.88 cfs for 48992 reach 1
 - .2 cfs X 29 RMs = 5.8 cfs for 48992 reach 2
 - .07 cfs X 4.3 RMs = .301 cfs for 50112 reach 1
 - .035 cfs X 29 RMs = 1.015 cfs for 50112 reach 2
 - Total = 9.241 cfs

Which means there is a potential net benefit for the transfer because the gain 9.241 cfs is greater than the loss of 8.855, however, because during this time period the reach is category 2 habitat (spawning, incubation and migration) the proposed mitigation leaves a water deficiency in the reach in April, May, June, September and October.

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By stream reach:

- Reach 1 is RM 33.7 to 29 and represents a loss of .556 cfs in-stream
- Reach 2 is RM 29 to RM 24.5 and represents a loss of .728 cfs in-stream
- Reach 3 is RM 24.5 to the mouth and represents a gain of .245 cfs in-stream

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So there is a reduction in stream flow between RM 33.7 and RM 24.5 and an increase in stream flow from RM 24.5 to the mouth. Because Category 2 habitat must be replaced in the same reach that the injury occurs to maintain the life stages of concern this would not be considered sufficient mitigation or a net benefit.

However, the transfer applicant has proposed to limit the use of the transferred water right when in-stream flows fall below the in-stream water right (see proposed conditions above). By limiting the use of the transferred water right to when the instream water right is being met injury to the in-stream water right from this water right transfer is eliminated and a net benefit of .235 cfs is realized from RM 24.5 to the mouth of Fifteenmile Creek.

July 1st to August 31st

For these months the transfer applicant has proposed reducing the diversion rate of 5678 so that certificates 5678 and 48907 combined do not exceed the 48907 diversion rate 0.76 cfs (1/80th rate of certificate 48907) when the 1972 in-stream water rights transferred under T-11120 are regulated off the system.

- So 5678 will provide .01cfs (.02 cfs diminished by 50%) from RM 24.5 to the mouth,
- 48992 will be regulated off so will not provide a benefit,
- 50112 will be regulated off so will not provide a benefit.

This proposed mitigation provides a no net loss of in-stream flow in July and August between RM 33.7 and RM 24.5 because the amount of water represented by 5678 is left in-stream through the rate reduction of 5678 and 48907 at the same time as the 1972 transfer rights are regulated off. A potential net increase in stream flow of .9625 cfs is possible from RM 24.5 to the mouth

of Fifteenmile Creek, however, because it is not protected in-stream and the stream has a negative water availability during this time it is likely to be withdrawn from the stream by other junior water rights so cannot be counted as a benefit.

During this time period there is a net benefit from the portion of 5678 that was transferred in-stream. The net benefit is .02 cfs (diminished by 50% to .01cfs) from RM 24.5 to the mouth or $.01 \text{ cfs} \times 24.5 = .245 \text{ cfs}$ over this reach.

Conclusion

The proposed mitigation meets the mitigation requirements of OAR 635-415.

For the time period September 1st to June 30th spawning and migration habitat are the concern and are considered Category 2 habitat which is essential habitat that is limited and needs to be replaced in the same reach as the injury. Although, there is a reduction in Category 2 habitat between RM 33.7 and RM 24.5, the conditions proposed above by the transfer applicant limit the use of the transferred water right when the in-stream flows fall below the in-stream water rights which eliminates the injury from this transfer and there is a net benefit of .245 to the stream reach from RM 24.5 to the mouth of Fifteenmile Creek.

For July and August the mitigation also provides a net benefit. During this time period, the reach is category 3 habitat which is essential and limited, but can be mitigated for by providing similar habitat that benefits the same population in-proximity to the habitat being injured. The main use of the injured reach during this time period is rearing and the reach below RM 24.5 provides similar habitat for rearing, so for the length of the Fifteenmile Creek encompassed by these transfers there is a gain in cfs to the stream of 9.246 cfs which is greater than the loss of 8.414 cfs represented by T-11121 therefore ODFW finds that there is a net benefit as required under ORS 540.530 (1)(c) for July and August.

Overall ODFW finds that the proposed mitigation provide the net benefit required under ORS 540.530 (1)(c) so ODFW would recommend to WRD that with the conditions outlined above that they concur with the injury to the in-stream rights.

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Department of Environmental Quality

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FEB 19 2013

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February 14, 2013

Dwight French
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Subject: Consent to Injury review for T-11121. Ref. Jan 28, 2013 letter from Dwight French to Bruce McIntosh

Dear Mr. French:

The Department of Environmental Quality concurs with ODFW in recommending consent to injury for instream water right Certificates 58678 and 64744 on Fifteenmile Creek, due to the proposed water right transfer T-11121.

Fifteenmile Creek has been listed as water quality impaired for temperature during both spawning and rearing periods of the year. A Total Maximum Daily Load (TMDL) for temperature was completed in 2008 for the Middle Columbia-Hood Subbasin (which includes Fifteenmile Creek). In this TMDL, riparian vegetation (shade) and stream flow were both identified as factors affecting stream temperature.

ODFW's consent recommendation was based on an extensive analysis they conducted, including an evaluation of mitigation measures. Because the proposed transfer appears to result in either no net-loss of stream flow or a net-increase in flow, stream temperatures should not be negatively impacted by this transfer. As noted in ODFW's letter, this determination relies on a number of mitigation measures and conditions as outlined in ODFW's analysis.

Thank you for the opportunity to review this transfer application. If you have any questions please feel free to contact me at (541) 633-2027.

Sincerely,

Bonnie Lamb
DEQ Basin Coordinator

cc: Dorothy Pedersen, OWRD (via email)
Bob Wood, OWRD (via email)
Rod French, ODFW (via email)
Rick Kepler, ODFW (via email)
Greg Aldrich, DEQ (via email)
Eric Nigg (via email)

