



# Oregon

John A. Kitzhaber, MD, Governor

## Water Resources Department

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December 16, 2014

VIA E-MAIL

### Applicant

DUANE BROWNING  
6909 POWDERHOUSE ROAD  
CHEYENNE, WY 82009

SUBJECT: Water Right Transfer Application T-10048

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to deny application T-10048. At this point, you may accept the Department's determination or file a protest pursuant to OAR 690-380-4030.

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 [Sarah.A.Henderson@ wrd.state.or.us](mailto:Sarah.A.Henderson@ wrd.state.or.us) if I may be of assistance.

Sincerely,

Sarah Henderson  
Transfer Specialist  
Transfer and Conservation Section

cc: Transfer Application file T-10048  
Travis Kelly, District 13 Watermaster (*via e-mail*)  
Daniel Newberry, Applegate Partnership & Watershed Council (*via e-mail*)  
Janelle Dunlevy, Applegate Partnership & Watershed Council (*via e-mail*)  
Harold Center, CWRE #152 (*via e-mail*)

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

In the Matter of Time Limited Instream	)	PRELIMINARY DETERMINATION
Transfer Application	)	PROPOSING DENIAL OF A CHANGE
T-10048, Jackson County	)	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**

DUANE BOWRING  
6909 POWDERHOUSE ROAD  
CHEYENNE, WY 82009

**Findings of Fact**

1. On December 19, 2005, Duane Browning filed a time-limited instream transfer application to change the character of use and place of use under Transfer T-8957, approved by Special Order Volume 59, at Page 410, to instream use until such time that conditions for termination of a stored water use contract agreement between the applicant and the Bureau of Reclamation are met. The Department assigned the application number T-10048.
2. Original signature pages for the affidavit of use and transfer application were received on December 30, 2005.
3. The applicant requested that approval of this time-limited instream transfer be contingent upon the applicant entering into a stored water use contract with the Bureau of Reclamation (BOR) and approval by the Oregon Water Resources Department of a permit to use stored water.
4. Consistent with land use requirements, prior to submitting the time-limited instream transfer application, the applicant provided notification of the intent to file the instream transfer application to Jackson County. Additionally, the Department provided notice of the proposed action to Jackson County upon receipt of Transfer Application T-10048.

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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5. Notice of the application for transfer was published on December 27, 2005, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
6. A new certificate was issued on July 8, 2011, for the water right evidenced by Special Order Volume 59, at Page 410. The new certificate is 81774.
7. On December 9, 2011, and February 1, 2013, the Department sent the applicant a letter requesting information on the status of the BOR contract, a permit application to use stored water, and whether the applicant was still interested in pursuing the time-limited instream transfer application. The applicant did not respond.
8. On July 21, 2014, the Department sent the applicant a letter asking the applicant if they intended to complete or withdraw the transfer application. The applicant did not respond.
9. On September 26, 2014, the Department mailed a copy of the draft Preliminary Determination proposing to deny Transfer Application T-10048 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of October 26, 2014, for the applicant to respond. As of November 5, 2014, no response was received from the applicant.
10. On November 5, 2014, the Department sent the applicant a letter asking for the fees needed for the newspaper publication. The letter set forth a deadline of December 5, 2014, for the applicant to respond. As of December 8, 2014, no response was received from the applicant.
11. The right to be transferred is as follows:

**Certificate:** 81774 in the name of DUANE L. AND JUDITH A. BOWRING (confirmed by Rogue River Decree Volume 4, at Page 1)

**Use:** IRRIGATION of 1.0 ACRE AND STOCK USE

**Priority Date:** SEPTEMBER 1, 1857

**Rate:** 0.025 CUBIC FOOT PER SECOND

**Limit/Duty:** The amount of water to which this right is entitled is limited to an amount actually beneficially used, and shall not exceed 0.025 CUBIC FOOT PER SECOND (IF AVAILABLE AT THE ORIGINAL POINT OF DIVERSION: FARMER'S DITCH LOCATED IN THE NE1/4 NE1/4, SECTION 14, T 39 S, R 3 W, W.M.; ORIGINAL COORDINATES: 350 FEET SOUTH AND 900 FEET WEST FROM NE CORNER OF SECTION 14) or its equivalent in case of rotation, measured at the point of diversion.

**Source:** LITTLE APPLGATE RIVER, tributary of the APPLGATE RIVER

**Authorized Points of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	3 W	WM	3	NW SW	100 FEET SOUTH AND 1630 FEET WEST FROM THE CENTER 1/4 CORNER OF SECTION 3
39 S	3 W	WM	14	NE NE	FARMER'S DITCH - ORIGINAL COORDINATES: 350 FEET SOUTH AND 900 FEET WEST FROM THE NE CORNER OF SECTION 14

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
39 S	3 W	WM	3	NE SW	1.0

12. Certificate 81774 does not specify the irrigation season. However, the Rogue River Decree establishes the irrigation season for the area as April 1 through October 31.
13. Certificate 81774 does not specify a duty limit per acre. However, the Rogue River Decree identifies that water may be used in a continuous flow throughout the irrigation season. The Department's Watermaster has concurred that water may be diverted at a continuous rate for the existing use considering beneficial use without waste.
14. Transfer Application T-10048 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 any other ecological values on a time-limited basis.
15. The applicant requested that the water use revert to its authorized use and place of use upon termination of a stored water contract with the BOR or if the agreement between the applicant and the BOR is not renewed. However, at this time the applicant has not entered into an agreement with the BOR to provide stored water for irrigation of the place of use described in Finding of Fact #11.
16. Transfer Application T-10048 proposes to change the place of use of the right to create an instream reach from the Farmers Ditch POD to the mouth of the Little Applegate River.
17. The applicant proposes the quantities water to be transferred instream be protected as follows:

Period	Rate (cfs)
April 1 to October 31	0.0575

18. There are existing instream water rights within the same reach as that proposed for the new instream water right.
19. The transfer application does not indicate whether the proposed instream transfer should add to and/or replace portions of existing instream water rights.
20. The applicant has not entered into a contract with the BOR to provide stored water for irrigation of the place of use described in Finding of Fact No. 11. Stored water under a BOR contract is intended based upon application materials, to be the source of water for the place of use when Certificate 81774 is transferred to instream use on a time-limited basis.
21. The applicant also has not filed a permit application to use stored water with the Department in association with this time-limited instream transfer.
22. The applicant has not responded to the request for fees for the publication of the notice in the newspaper, pursuant to ORS 540.520 and OAR 690-380-4020.
23. As identified in Findings of Fact #19, #20, #21 and #22 above, the transfer application does not meet standards for completeness as per ORS 540.520 and OAR Chapter 690, Division 380 completeness standards currently in effect.

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


24. Water has been used within the last five years prior to the submittal of Transfer Application T-10048 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.
25. 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 Transfer Application T-10048.
26. There is an existing instream water right, Certificate 75996 (established under the state agency instream water right application process, Application IS-70982), with a priority date of December 7, 1990, within the same reach as that proposed for the new instream water right, for the purpose of providing instream flows for various life stages of Coho, Fall Chinook Salmon, summer and winter steelhead and cutthroat trout. Flows for this right are not always met. There are also several existing instream water rights within the same reach established under the time-limited instream transfer process for fish and wildlife habitat purposes.
27. The protection of flows within the proposed reach would provide for a beneficial purpose.
29. The timing of the proposed instream use is allowable within the limits and use of the original water right.
30. The protection of flows within the proposed reach 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 reach of the instream water right.
31. The applicant has requested that 0.575 CFS be protected instream. The maximum rate allowed under Certificate 81774 is 0.025 CFS. The amount of the proposed instream flow is not allowable within the limits and use of the original water right and would result in enlargement of the right.
32. At this time, it is not clear whether the applicant intends to pursue this instream transfer. However, unless the applicant ceases to use water from the Little Applegate River on the authorized lands, the lands currently irrigated under the right would continue to receive water from the same source, resulting in enlargement of the right if this time-limited instream transfer were approved.

33. If the right is enlarged through continuing use on the lands as well as being protected instream, the Department cannot make a determination that proposed change would not result in injury to other water rights.
34. The total monthly quantities of water proposed to be protected instream will exceed the estimated average natural flow based upon protection in conjunction with other instream rights. Estimated average natural flows may not be exceeded unless certain conditions are met. The applicant has not identified whether the proposed instream right should add to other existing instream rights and/or replace portions of existing instream rights and the Department is unable to determine whether the proposed instream use may exceed estimated average natural flows.
35. It appears based upon evaluation of the application that the proposed transfer of Certificate 81774 to instream use on a time-limited basis would result in injury to other water rights and enlargement.

#### **Determination and Proposed Action**

The changes in character of use and place of use to instream use proposed in application T-10048 DO NOT 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 the application is withdrawn, or an application for a permit for stored water under contract with the Bureau of Reclamation is submitted, or if protests are not filed pursuant to OAR 690-380-4030, the application will be denied.

Dated at Salem, Oregon this 15 day of December, 2014.

  
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Dwight French, Water Right Services Division Administrator, for  
Thomas M. Byler, Director  
Oregon Water Resources Department

This Preliminary Determination was prepared by Sarah Henderson. If you have questions about the information in this document, you may reach me at 503-986-0890 or [Sarah.A.Henderson@wrđ.state.or.us](mailto:Sarah.A.Henderson@wrđ.state.or.us).

*Protests should be addressed to the attention of Water Right Services Division, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.*