



Oregon

Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

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May 26, 2016

OREGON DEPARTMENT OF FISH AND WILDLIFE
ATTN: DANETTE FAUCERA
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302
danette.l.faucera@state.or.us

SUBJECT: Transfer Application T-12160

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department has concluded that approval of the additional point of diversion proposed in T-12160 would result in injury to instream water right Certificate 59491.

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 change 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.

ODFW has already recommended that we consent to the injury. Provided no protests are filed, we will issue an order approving the transfer with the conditions identified in the agency recommendation as necessary to ensure that the change will result in net benefits.

You are not authorized to use water from the proposed point 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 and in the Portland Tribune newspaper, simultaneously with issuance of the Preliminary Determination. The notice initiates a 30-day 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 will 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 Tracy.L.Fox@wrд.state.or.us or 503-986-0827 if I may be of assistance.

Sincerely,

Ms. Tracy Fox
Transfer Specialist
Transfer and Conservation Section

cc: Transfer Application T-12160
Amy Kim, District 20 Watermaster (*via email*)
Perry Baker, CWRE #46713 (*via email*)
Ed Bowles, ODFW (*via email*)
Ryan McCormick, ODFW (*via email: ryan.l.mccormick@state.or.us*)

Enclosure

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

In the Matter of Transfer Application) **PRELIMINARY DETERMINATION**
T-12160, Clackamas County) **PROPOSING DENIAL OF AN**
) **ADDITIONAL POINT OF DIVERSION**

Authority

Oregon Revised Statutes (ORS) 540.505 to 540.580 establish 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. Oregon Administrative Rules (OAR) Chapter 690, Division 380 implement the statutes and provides the Department's procedures and criteria for evaluating transfer applications.

Applicant

OREGON DEPARTMENT OF FISH AND WILDLIFE
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302

Findings of Fact

1. On September 9, 2015, OREGON DEPARTMENT OF FISH AND WILDLIFE filed an application for an additional point of diversion under Certificates 53427 and 82966. The Department assigned the application number T-12160.
2. Notice of the application for transfer was published on September 15, 2015, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On March 16, 2016, the Department sent a copy of the draft Preliminary Determination proposing to deny Transfer Application T-12160 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of April 15, 2016, for the applicant to respond. The applicant requested that the Department seek a recommendation from the Oregon Department of Fish and Wildlife (ODFW) as to whether the Department should consent to injury of the instream water right pursuant to OAR 690-380-5030, and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.

4. The first right to be transferred is as follows:

Certificate: 53427 in the name of OREGON DEPARTMENT OF FISH AND WILDLIFE (perfected under Permit S-42105)

Use: FISH HATCHERY

Priority Date: AUGUST 4, 1977

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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Rate: 45.0 CUBIC FEET PER SECOND
Source: CLACKAMAS RIVER, tributary to the WILLAMETTE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Gov't Lot	Measured Distances
3 S	4 E	WM	19	NW NE	2	POD 1: 1100 FEET SOUTH AND 2100 FEET WEST FROM THE NE CORNER OF SECTION 19

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Gov't Lot
3 S	4 E	WM	19	SW NE	8

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

Certificate: 82966 in the name of OREGON DEPARTMENT OF FISH AND WILDLIFE (perfected under Permit S-49433)

Use: FISH CULTURE

Priority Date: SEPTEMBER 3, 1985

Rate: 5.0 CUBIC FEET PER SECOND

Source: CLACKAMAS RIVER, tributary to the WILLAMETTE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Gov't Lot	Measured Distances
3 S	4 E	WM	19	NW NE	2	POD 1: 1100 FEET SOUTH AND 2100 FEET WEST FROM THE NE CORNER OF SECTION 19

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Gov't Lot
3 S	4 E	WM	19	SW NE	8

6. Transfer Application T-12160 proposes an additional point of diversion approximately 0.6 mile upstream from the authorized point of diversion. The additional point of diversion is located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances/GPS Coordinates
3 S	4 E	WM	20	SW NW	POD 2: 1620 FEET SOUTH AND 760 FEET EAST FROM THE NW CORNER OF SECTION 20. FURTHER DESCRIBED AS: LATITUDE 45.29823 LONGITUDE -122.35020

7. The Oregon Department of Fish and Wildlife (ODFW) has 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.
8. Instream water right Certificate 59491 exists for the reach of the river in which the authorized point of diversion would be moved upstream, and streamflow's within the reach are frequently below the levels allocated under the instream water right. Thus, the instream water right would be injured as a result of the proposed additional point of diversion.

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

9. Water has been used within the last five years according to the terms and conditions of the right. There is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
10. A pump, pipeline, and sprinkler 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-12160.
11. The proposed change would not result in enlargement of the rights.
12. Instream water right Certificate 59491 is for flows to be maintained in the Clackamas River above USG GAGE NO. 14-2095, ABOVE THREE LYNX, (NE, Section 21, T5S, R6E) to the mouth RM 0.0 (NE, Section 30, T2S, R2E).
13. Instream water right Certificate 59491 exists for the reach of the river in which the authorized point of diversion would be moved upstream, and stream flows within the reach are frequently below the levels allocated under the instream water right. Thus, the instream water right would be injured as a result of the proposed additional point of diversion. The following table provides a comparison of monthly streamflows on the Clackamas River at Gage #14210000 and the instream water right:

Month	Natural Stream Flow @ 80% Exceedance (cfs)	Instream Water Right Certificate 59491 (cfs) (Monthly period)		80% Flows minus any out-of-stream consumptive uses, reserved and instream requirements (cfs) (net water available)
		1 st Half	2 nd Half	
January	2140.00	640	640	85.70
February	2350.00	640	640	260.00
March	2250.00	640	640	189.00
April	2440.00	640	640	311.00
May	2240.00	640	640	118.00
June	1390.00	640	640	314.00
July	855.00	400	400	-212.00
August	773.00	400	400	-173.00
September	781.00	400	640	-165.00
October	890.00	640	640	-164.00
November	1580.00	640	640	-474.00
December	2170.00	640	640	114.00

Determination and Proposed Action

The additional point of diversion proposed in Transfer Application T-12160 appears **not** to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000 due to injury to an instream water right. The application will be denied unless the Oregon Department of Fish and Wildlife recommends that the Department consent to injury of the instream water right, pursuant to OAR 690-380-5050, or protests are filed pursuant to OAR 690-380-4030.

If Transfer Application T-12160 is approved, notwithstanding the Department's preliminary determination that the transfer will result in injury, the change and subsequent use of water shall be subject to the following conditions:

- 1. The additional point of diversion proposed in Transfer Application T-12160 is approved.*
- 2. 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 53427 and 82966 and any related decree.*
- 3. Water right Certificates 53427 and 82966 are cancelled.*
- 4. The quantity of water diverted at the proposed additional point of diversion, together with that diverted at the original point of diversion, shall not exceed the quantity of water lawfully available at the original point of diversion.*
- 5. Water use measurement conditions:*
 - a. Before water use may begin under this order, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of diversion (new and existing).*
 - b. The water user shall maintain the meter or measuring device in good working order.*
 - c. The water user shall allow the Watermaster access to the meter or measuring device; provided however, where the meter or measuring device is located within a private structure, the Watermaster shall request access upon reasonable notice.*
- 6. Prior to diverting water, the water user shall install an approved fish screen at the new point of diversion and shall provide to the OWRD a written statement from Oregon Department of Fish and Wildlife (ODFW) that the installed screen meets the state's criteria, or that ODFW has determined a screen is not necessary.*

The water user shall operate and maintain the fish screen at the new point of diversion consistent with ODFW's operational and maintenance standards. If ODFW determines the screen is not functioning properly, and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that OWRD regulate the use of water until OWRD receives notification from ODFW that the fish screen is functioning properly.

- 7. Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2017**. A Claim of Beneficial Use prepared by a Certified Water Right Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the change and full beneficial use of the water.*

8. *After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.*

Dated at Salem, Oregon this 26 day of May, 2016.



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

This Preliminary Determination was prepared by Tracy Fox . If you have questions about the information in this document, you may reach Tracy at 503-986-0827 or Tracy.L.Fox@ wrd.state.or.us.

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

Notice Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>