



# Oregon

Kate Brown, Governor

## Water Resources Department

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August 31, 2016

James W. and Helen M. Christopherson  
489 Hamilton Rd  
Jacksonville OR 97530

Melissa J. Yager  
700 Upper Applegate Rd  
Jacksonville OR 97530

David M. and Pamela F. Palmer  
8035 Highway 238  
Jacksonville OR 97530

SUBJECT: Time-Limited Instream Transfer Application T-11690

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11690. 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 Medford Mail Tribune 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 Tracy.L.Fox@ wrd.state.or.us or 503-986-0827 if I may be of assistance.

Sincerely,

Ms. Tracy Fox  
Transfer Specialist  
Transfer and Conservation Section

cc: T-11690  
Travis N. Kelly, District 13 Watermaster (via e-mail)  
Larry Mentee, Southwest Region Manager (via e-mail)  
Janelle Dunlevy, Applegate Partnership & Watershed Council (via e-mail)  
Bob Hunter, WaterWatch (via e-mail)  
Almond Brothers LP, 20493 Yosemite Blvd, Waterford CA 95386, Landowner  
enclosure

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

In the Matter of Time-Limited Instream        )  
Transfer Application T-11690, Jackson        )  
County    )  
  )  
  )        **PRELIMINARY DETERMINATION  
PROPOSING APPROVAL OF A  
CHANGE IN PLACE OF USE AND  
CHARACTER OF USE**

Oregon Revised Statutes (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. Oregon Administrative Rule (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.

**Applicants**

James W. and Helen M. Christopherson  
489 Hamilton Rd  
Jacksonville, OR 97530

Melissa J. Yager  
700 Upper Applegate Rd  
Jacksonville, OR 97530

David M. and Pamela F. Palmer  
8035 Highway 238  
Jacksonville, OR 97530

**Findings of Fact**

1. On October 23, 2013, James W. and Helen M. Christopherson, David M. and Pamela F. Palmer and Melissa J. Yager, filed a time-limited instream transfer application to change the character of use and place of use of the water right under Transfer T-8934, approved by the Oregon Water Resources Department (Department) on June 29, 2009, as evidenced by Special Order Volume 78, Page 258, to instream use until such time that conditions for termination of a stored water use contract agreement between the applicants and the Bureau of Reclamation (BOR) are met. The Department assigned the transfer application number T-11690.
2. The applicants have requested that approval of this time-limited instream transfer be contingent upon the applicants entering into a stored water use contract with the BOR and approval by the Department of a permit to use stored water.

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.

3. Consistent with land use requirements, prior to submitting the time-limited instream transfer application, the applicants 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-11690.
4. Notice of the application for transfer was published on November 12, 2013, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
5. A new certificate was issued November 13, 2015, for the water right evidenced by Special Order Volume 78, Page 258 (T-8934). The new certificate is 90908.
6. On October 23 and 24, 2013, a surface water permit application to use stored water, application number S-87938, and a signed contract with the BOR were submitted to the Department. The permit application is being processed concurrently with this time-limited instream transfer application.
7. On March 3, 2016, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11690 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of April 4, 2016, for the applicants to respond. That deadline was later extended. The applicants, and current landowner, requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicants are authorized to pursue the transfer.
8. On August 9, 2016, the Department received a "Consent by Deeded Landowner" from the Almond Brothers, LP, Brian Wahlbrink. Between when the application was submitted and when the draft Preliminary Determination was issued, the Almond Brothers, LP purchased the property referenced by Twp 38S Rng 3W Sec. 27c tax lot 1500 and Twp 38S Rng 3W Sec. 28 tax lot 2800.
9. The right to be transferred is as follows:
 

<b>Certificate:</b>	90908 in the name of JAMES W. CHRISTOPHERSON, SR, HELEN M. CHRISTOPHERSON, DAVID M. PALMER, PAMELA F. PALMER, AND MELISSA J. YAGER (perfected under Permit S-6030)
<b>Use:</b>	IRRIGATION OF 74.23 ACRES
<b>Priority Date:</b>	SEPTEMBER 13, 1923
<b>Rate:</b>	0.93 CUBIC FOOT PER SECOND (CFS)
<b>Limit/Duty:</b>	The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated.
<b>Source:</b>	LITTLE APPLGATE RIVER, a tributary of the APPLGATE RIVER

**Authorized Points of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	DLC	Gov't Lot	Measured Distances
38 S	3 W	WM	33	NE NW		9	ADDITIONAL - 820 FEET SOUTH AND 110 FEET EAST FROM THE SW CORNER OF DLC 40
39 S	3 W	WM	13	NW NW	40		ORIGINAL - 930 FEET SOUTH AND 10 FEET EAST FROM THE NW CORNER OF SECTION 13

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	DLC	Acres	Owner at time of application
38 S	3 W	WM	27	NE SW	40	5.00	Christopherson
38 S	3 W	WM	27	NW SW	40	6.00	Christopherson
38 S	3 W	WM	27	NW SW	40	2.00	Palmer
38 S	3 W	WM	27	SW SW	40	25.94	Christopherson
38 S	3 W	WM	27	SW SW	40	5.00	Yager
38 S	3 W	WM	27	SE SW	40	6.00	Christopherson
38 S	3 W	WM	28	SE SE	40	12.00	Christopherson
38 S	3 W	WM	33	NE NE	40	8.30	Christopherson
38 S	3 W	WM	34	NW NW	40	3.99	Christopherson
Total:						74.23	

10. Certificate 90908 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 for the rights described in that decree. While Certificate 90908 is not a decreed water right, the Department's Watermaster has identified that water may be diverted at a continuous rate under this right, given its rate limitation, for the existing use considering beneficial use without waste.
11. Certificate 90908 does not specify the irrigation season. The irrigation season, as established by the Rogue River Decree, is April 1 through October 31.
12. In a May 29, 1931, Jackson County Circuit Court ruling, the court ruled that the rate for the originating water right (Permit S-6030) for certificate 90908 is split with the full rate prior to July 1 and a reduced rate after July 1 of each year. The second part of the season the rate is to be reduced for seepage/evaporation by 42%.
13. The Final Order for the transfer (T-8934) adding an additional point of diversion to this right includes the reduced rate after July 1, as does the Claim of Beneficial Use submitted for Certificate 90908. When Certificate 90908 was issued, it inadvertently did not include the split season rates. For purposes of this instream time-limited transfer, the split season rates will be used and are as follows:

Before July 1	After July 1
0.93 CFS	0.54 CFS

14. Diversion of water under Certificate 90908 from the original point of diversion on the Little Applegate River, based upon the May 29, 1931, Jackson County Circuit Court ruling, is senior to diversion of water from Farmers Ditch.

15. The applicants have entered into a 25-year agreement with the BOR to provide stored water for irrigation of the places of use as described in Finding of Fact No. 9. This agreement automatically renews for additional 25-year periods unless otherwise terminated by the parties. The applicants request that the water right described in Finding of Fact No. 9, revert to the authorized use and places of use upon termination of a stored water contract with the BOR or if the agreement between the applicants and the BOR is not renewed. The termination request may either be received from both the BOR and the applicants or from the applicants along with evidence that the stored water contract has been terminated or that the agreement with the BOR has not been renewed.
16. Transfer Application T-11690 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 on a time-limited basis.
17. Transfer Application T-11690 proposes to change the place of use of the right to create an instream reach from the "Original" point of diversion (as described in Finding of Fact No. 9) to the mouth of the Little Applegate River.
18. The applicant proposed that the quantities of water to be transferred instream be protected as follows:

Certificate	Priority Date	Instream Rate (CFS)	
		April 1 through June 30	July 1 through October 31
90908	9/13/1923	0.93	0.54

19. There are several existing instream water rights established through time-limited instream transfers within the same reach as that proposed for the new instream water right. In addition, there is an existing instream water right (Certificate 75996) with a priority date of December 7, 1990, established through an instream water right application filed by the Oregon Department of Fish and Wildlife (ODFW).
20. The applicant has requested that any instream water right established as a result of this instream transfer be additive to existing instream water rights for the same reach established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process). The applicant has also requested that any instream water rights established as a result of this instream transfer replace a portion of any existing instream rights established pursuant to ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency instream application process), with a more senior priority date.

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

21. Water has been used within the last five years according to the terms and conditions of the rights, and no evidence is available that would demonstrate that the rights are subject to forfeiture under ORS 540.610.

22. A diversion structure and ditch 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-11690.
23. There is a supplemental irrigation right, Certificate 82009, not included as part of the transfer application, that is appurtenant to a portion of the same place of use as Certificate 90908. The applicant has requested that this supplemental right be left in place for the duration of the time-limited instream transfer. The Department has reviewed the request and identified that the supplemental right may remain in place for the duration of the time-limited instream transfer and be used as supplemental to a permit issued under Application S-87938. Upon termination of this instream transfer, the supplemental right will revert to being supplemental to Certificate 90908.
24. Based upon review of the transfer application, water may be protected instream as follows:  
 Instream Reach: From the original pod (as described in Finding of Fact No. 9) to the mouth of the Little Applegate River (River Mile (RM) 0.0) at the confluence with the Applegate River.

Certificate	Priority Date	Instream Rate (CFS)		Instream Volume (AF)
		April 1 through June 30	July 1 through October 31	
90908	9/13/1923	0.93	0.54	299.6

25. The proposed changes would not result in enlargement of the right.
26. The proposed changes would not result in injury to other water rights.
27. 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.
28. The protection of flows within the proposed reach is appropriate, considering:
  - a) The instream water right begins at the recorded point of diversion on the Little Applegate River;
  - 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.
29. There is an existing instream water right Certificate 75996, with a priority date of December 7, 1990, within the same reach as that proposed for the new instream water right under this transfer application. This instream water right was established by an application for instream water right (IS-70982) filed by the ODFW to provide instream flows for various life stages of Coho, fall chinook salmon, summer and winter steelhead, and cutthroat trout.

The quantities that may be protected instream under this right are less than the quantities requested in the instream water right application filed by the ODFW. In addition, the instream rates approved for Certificate 75996 are not always met.

Instream Rate in CFS	April	May*	June	July	Aug.	Sept.*	Oct.*
Rate Requested	85.0	85.0/50.0	50.0	33.0	33.0	33.0/50.0	50.0/85.0
Rate Approved	75.9	73.2/50.0	50.0	14.6	2.01	1.51	11.5

\*The rate requested and/or approved for instream use is broken down by half month with the first rate listed being for the first half of the month and the second rate for the second half of the month.

30. There are several time-limited instream water rights with senior priority dates ranging from 1854 to 1971, within the same reach on the Little Applegate River established under the instream transfer process for fish and wildlife habitat. These time-limited instream water rights may be unwound under the same conditions as proposed in Finding of Fact No. 15.
31. Instream water rights established by instream transfer may be additive to other instream water rights and/or replace a portion of existing instream water rights with an earlier priority date. The combination of instream water rights for the same reach may not exceed the quantity needed to provide increased public benefit (OAR 690-077-0015(11)).
32. The existing time-limited instream water rights are additive to each other during the full instream period, April through October.
33. The existing time-limited instream water rights are additive to Certificate 75996 during April, the first half of May, and July through October and replace a portion of Certificate 75996 during the second half of May and June.
34. The instream water right additive/replacing relationship as requested by the applicant in Finding of Fact No. 20, is inconsistent with previous time-limited instream water rights within the same reach.
35. ODFW has indicated that providing for additional instream flows and protecting water instream up to the amounts requested by ODFW in Instream Water Right Application IS-70982 (see Finding of Fact No. 29), will provide a beneficial purpose for various life stages of Coho and Fall Chinook salmon, summer and winter steelhead and cutthroat trout. Additionally, Coho are listed as threatened under the Endangered Species Act.
36. Therefore, the Department has determined that the total monthly quantity of water to be protected instream under the existing and proposed instream rights within the same reach provide a beneficial purpose and may add to and replace other existing instream water rights as follows:

- a) During the second half of May and the month of June, any water right established by this time-limited instream transfer may add to other time-limited instream rights and replace a portion of Certificate 75996 with an earlier priority date.
  - b) During April, the first half of May, and July through October, any instream water right established under this time-limited instream transfer may be additive to any other instream water right within the same reach up to the flows requested by the ODFW in instream water right application IS-70982 (see Finding of Fact No. 29).
  - c) For April, the first half of May, and July through October, once the cumulative total of the proposed and existing instream water rights reaches the instream rates requested by the ODFW instream water right application IS-70982, any additional quantities protected instream as a result of a time-limited instream transfer, considering respective priority dates, may replace a portion of Certificate 75996 with an earlier priority date.
37. The quantity of water protected instream under the existing instream water rights currently exceeds the estimated average natural flows in April, the first half of May, and July through October. By adding the instream use proposed under this time-limited instream transfer, estimated average natural flows are further exceeded in these months and half month. By rule, the quantity of water that may be protected instream cannot exceed the estimated average natural flows unless certain criteria are met. OAR 690-077-0015(4) and (5).
38. The Department has determined that the estimated average natural flows may be exceeded under OAR 690-077-0015(4) and (5) due to the following:
- a) The quantity to be protected instream in July through October, together with other instream water rights within the same reach, will not exceed the amounts requested in the original instream water right application (IS-70982) filed by the ODFW (see Finding of Fact No. 29) and;
  - b) The water right proposed to be transferred to instream use on a time-limited basis is within an ODFW flow restoration priority watershed for July through October.
  - c) ODFW has indicated that exceeding the estimated average natural flows in April, the first half of May, and July through October, within the proposed reach, up to the amounts requested by ODFW in application IS-70982, are significant for the applied for public use, specifically for Coho and Fall Chinook salmon, summer and winter steelhead and cutthroat trout for migration, spawning, egg incubation, fry emergence and juvenile rearing.

### **Determination and Proposed Action**

The proposed changes in place of use and character of use in Time-Limited Instream Transfer Application T-11690 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. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved.



If Time-Limited Instream Transfer Application T-11690 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 Time-Limited Instream Transfer Application T-11690 are approved and become effective when this order is signed, or when the permit under Application S-87938 is issued, whichever happens later.
2. The exercise of the right evidenced by Certificate 90908 for Irrigation at the former place of use shall be *SUSPENDED*, without loss of priority, for the term of the transfer authorized herein.
3. During the term of this order, the portion of supplemental water right Certificate 82009 (or any superseding certificates) for supplemental irrigation, appurtenant to the portion of place of use also under Certificate 90908, shall remain in place and may only be used for supplemental irrigation to a permit issued under application S-87938. Upon termination of this instream transfer, the supplemental right will revert to being supplemental to Certificate 90908.
4. Water shall be protected instream for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.
5. The instream water right shall provide for the protection of streamflows from the diversion authorized under Certificate 90908, located at:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
39 S	3 W	WM	13	NW NW	40	ORIGINAL - 930 FEET SOUTH AND 10 FEET EAST FROM THE NW CORNER OF SECTION 13

To the mouth of the Little Applegate River (RM 0.0) at the confluence with the Applegate River.

6. The quantity of water to be protected under the instream water right is:

Certificate	Priority Date	Instream Rate (CFS)		Instream Volume (AF)
		April 1 through June 30	July 1 through October 31	
90908	9/13/1923	0.93	0.54	299.6

7. Water rights upstream of the original point of diversion shall not be subject to regulation for flows in excess of the quantity to which this instream water right is entitled at the original point of diversion.
8. For regulation purposes, protection of instream flows resulting from Certificate 87908 shall be senior to instream flows originating from Farmers Ditch.

9. *Within the specified stream reach, 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 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>
39 S	3 W	WM	13	NW NW	40	ORIGINAL - 930 FEET SOUTH AND 10 FEET EAST FROM THE NW CORNER OF SECTION 13

10. *During the term of this order and for the second half of May and the month of June 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.*
11. *During the term of this order and for April, the first half of May, and the months of July, August, September, and October the instream right established by this transfer shall be in addition to instream water rights established pursuant to ORS 537.341, 537.346, 537.348 or 537.470, but the quantity protected instream shall not exceed the rate in cfs shown below:*

<i>Rate in CFS</i>	<i>April</i>	<i>May</i>	<i>June</i>	<i>July</i>	<i>Aug.</i>	<i>Sept.</i>	<i>Oct.</i>
<i>1<sup>st</sup> half of month</i>	85.0	85.0	50.0	33.0	33.0	33.0	50.0
<i>2<sup>nd</sup> half of month</i>	85.0	50.0	50.0	33.0	33.0	50.0	85.0


*These months or partial months are shown to describe the maximum instream rate associated with the time-limited instream water right, in connection with other instream water rights for the same reach.*

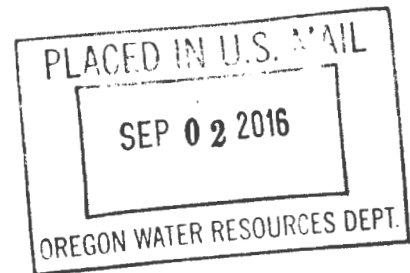
*Once the amounts protected instream as a result of this time-limited instream transfer, in combination with other time-limited instream transfers, exceeds the amounts listed above, any additional quantities protected instream as a result of a time-limited instream transfer, considering respective priority dates, shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346.*

12. *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 90908 and any related decree.*
13. *The term of this Final Order shall continue until terminated. Upon expiration of this transfer, the use of water shall revert to its original uses and places of use as described by Certificate 90908. The use shall revert to the authorized uses and places of use upon submission of a termination request from:*
- a) The Bureau of Reclamation and the applicants, or*
  - b) The applicants along with evidence that the stored water contract from Applegate Reservoir has been terminated or that the agreement between the applicants and the Bureau of Reclamation has not been renewed.*

14. This order may be terminated if a permit is not issued or is rescinded under Water Right Application S-87938.

Dated at Salem, Oregon this 31 day of August, 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 me at 503 986-0827 or Tracy.L.Fox@ wrd.state.or.us.

**NOTICE TO ACTIVE DUTY SERVICEMEMBERS:** Active duty service members have a right to stay these proceedings under the federal Service Members Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 800-452-7500 or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

Protests should be addressed to the Water Rights Services Division, Oregon Water Resources Department, 725 Summer Street, Suite A, Salem, OR 97301-1266.