



# Oregon

Kate Brown, Governor

## Water Resources Department

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August 31, 2016

James A. Armstrong  
475 Little Applegate Rd  
Jacksonville, OR 97530

Henry Seurer and Anne Kelly  
2514 East Calhoun St  
Seattle, WA 98112

SUBJECT: Time-Limited Instream Transfer Application T-11692

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11692. 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](mailto: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-11692  
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*)

enclosure

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

In the Matter of Time-Limited Instream	)	PRELIMINARY DETERMINATION
Transfer Application T-11692, Jackson	)	PROPOSING APPROVAL OF A
County	)	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 A. Armstrong  
475 Little Applegate Rd  
Jacksonville, OR 97530

Henry Seurer and Anne Kelly  
2514 East Calhoun St  
Seattle, WA 98112

**Findings of Fact**

1. On October 28, 2013, James A. Armstrong, filed a time-limited instream transfer application to change the character of use and place of use of the water right under Transfer T-8963, approved by the Oregon Water Resources Department (Department) on September 8, 2004, as evidenced by Special Order Volume 61, Pages 424-426, 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 (BOR) are met. The Department assigned the transfer application number T-11692.
2. The applicant has requested that approval of this time-limited instream transfer be contingent upon the applicant entering into a stored water use contract with the BOR and approval by the Department of a permit to use stored water.
3. 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-11692.
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.

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. A new certificate was issued January 25, 2016, for the water right evidenced by Special Order Volume 61, Page 424 (T-8963). The new certificate is 91038.
6. On October 24 and 28, 2013, a signed contract with the BOR and a surface water permit application to use stored water, application number S-87939, 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-11692 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of April 4, 2016, for the applicant to respond.
8. On March 30, 2016, Time-Limited Instream Transfer Application T-11692 was partially assigned to Henry Seurer and Anne Kelly.
9. The applicants 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.
10. The right to be transferred is as follows:

**Certificate:** 91038 in the name of JAMES A. ARMSTRONG (confirmed by Rogue River Decree, of record in the Order Record of the Water Resources Director in Volume 4, at Page 1)

**Use:** IRRIGATION OF 40.92 ACRES

**Priority Date:** 1854

**Rate:** 1.16 CUBIC FEET PER SECOND (CFS)

**Limit/Duty:** The amount of water to which this right is entitled is limited to an amount actually used beneficially, and shall not exceed 1.16 cfs, if available at the authorized point of diversion.

**Source:** LITTLE APPELGATE RIVER, a tributary of the APPELGATE RIVER

**Authorized Points of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
39 S	3 W	WM	11	SW SE	37	ORIGINAL – DAVIDSON DITCH – NORTH 39 DEGREES 02 MINUTES EAST, 1184 FEET FROM THE S1/4 CORNER OF SECTION 11
39 S	3 W	WM	3	SE SW	37	ADDITIONAL - 260 FEET NORTH AND 530 FEET WEST FROM THE S1/4 CORNER OF SECTION 3

The 1940 Rogue River Final and Supplemental Decree (Pages 197 and 198) also indicates that water may be diverted through the Farmers Ditch Diversion located at:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	3 W	WM	14	NE NE	FARMERS DITCH - 350 FEET SOUTH AND 900 FEET WEST FROM NE CORNER OF SECTION 14; ALSO LOCATED AS GPS COORDINATES: LATITUDE 42.18400, LONGITUDE -123.0174

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
39 S	3 W	WM	3	SE SW	37	0.20
39 S	3 W	WM	3	SW SE	37	2.40
39 S	3 W	WM	10	NE NE	37	19.33
39 S	3 W	WM	10	NW NE	37	16.40
39 S	3 W	WM	10	SE NE	37	2.59
Total:						40.92

11. Certificate 91038 does not specify a rate and 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.
12. Certificate 91038 does not specify the irrigation season. The irrigation season, as established by the Rogue River Decree, is April 1 through October 31.
13. The applicant has 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. 10. This agreement automatically renews for additional 25-year periods unless otherwise terminated by the parties. The applicant requests that the water right described in Finding of Fact No. 10, revert to the 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. The termination request may either be received from both the BOR and the applicant or from the applicant along with evidence that the stored water contract has been terminated or that the agreement with the BOR has not been renewed.
14. Transfer Application T-11692 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.
15. Transfer Application T-11692 proposes to change the place of use of the right to create an instream reach from the Davidson Ditch point of diversion (as described in Finding of Fact No. 10) to the mouth of the Little Applegate River.
16. The applicant proposed that the quantities of water to be transferred instream be protected as follows:

Certificate	Priority Date	Instream Period	Instream Rate (CFS)
91038	1854	April 1 through October 31	1.16

17. 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).

18. 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)***

- 19. 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.
- 20. A ditch and diversion structure 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-11692.
- 21. The applicant has requested to protect water instream from the Davidson Ditch point of diversion to the mouth of the Little Applegate River. However, consistent with other time-limited instream transfers involving Davidson Ditch, water may be protected instream from the Farmer’s Ditch point of diversion.
- 22. Based upon the transfer application, water may be protected instream as follows:  
 Instream Reach: From the Farmers Ditch point of diversion (as described in Finding of Fact No. 10) to the mouth of the Little Applegate River (River Mile (RM) 0.0) at the confluence with the Applegate River.

Certificate	Priority Date	Instream Period	Instream Rate (CFS)	Instream Volume (AF)
91038	1854	April 1 through October 31	1.16	492.38

- 23. The proposed changes, as modified, would not result in enlargement of the right.
- 24. The proposed changes, as modified, would not result in injury to other water rights.
- 25. 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.
- 26. 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.

27. 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.

- 28. 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. 13.
- 29. 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)).
- 30. The existing time-limited instream water rights are additive to each other during the full instream period, April through October.
- 31. With the exception of the instream right to be established under Transfer Application T-11691, 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.
- 32. A portion of the instream right to be established under Transfer Application T-11691, is additive to Certificate 75996 during April, the first half of May, and July through October and replaces a portion of Certificate 75996 during April, May and June.

33. The instream water right additive/replacing relationship as requested by the applicant in Finding of Fact No. 18, is inconsistent with previous time-limited instream water rights within the same reach.
34. 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. 27), 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.
35. The addition of the quantities proposed to be protected instream under this time-limited instream transfer in combination with other time-limited instream transfers may result in more water protected instream than requested under Instream Water Right Application IS-70982 during April and the first half of May. The Department has identified that any water protected instream under this time-limited instream transfer must replace a portion of instream flows under Certificate 75996 during April and the first half of May.
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 months of April through 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 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. 27).
  - c) For 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 Nos. 27 and 34) 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-11692 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-11692 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-11692 are approved and become effective when this order is signed, or when the permit under Application S-87939 is issued, whichever happens later.*
- 2. *The exercise of the right evidenced by Certificate 91038 for Irrigation at the former place of use shall be SUSPENDED, without loss of priority, for the term of the transfer authorized herein.*
- 3. *Water shall be protected instream for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.*
- 4. *The instream water right shall provide for the protection of streamflows from the Farmers Ditch diversion authorized under Certificate 91038, located at:*

<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>	<i>Measured Distances</i>
39 S	3 W	WM	14	NE NE	FARMERS DITCH - 350 FEET SOUTH AND 900 FEET WEST FROM THE NE CORNER OF SECTION 14; ALSO LOCATED AS GPS COORDINATES: LATITUDE 42.18400, LONGITUDE -123.0174

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



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

<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Period</i>	<i>Instream Rate (CFS)</i>
91038	1854	April 1 through October 31	1.16

6. *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 points of diversion.*
7. *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	11	SW SE	37	ORIGINAL – DAVIDSON DITCH – NORTH 39 DEGREES 02 MINUTES EAST, 1184 FEET FROM THE S1/4 CORNER OF SECTION 11
39 S	3 W	WM	14	NE NE		FARMERS DITCH - 350 FEET SOUTH AND 900 FEET WEST THE FROM NE CORNER OF SECTION 14; ALSO LOCATED AS GPS COORDINATES: LATITUDE 42.18400, LONGITUDE -123.0174

8. *During the term of this order and for the months of April through 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 unless otherwise specified by an order approving a new instream water right under these statutes.*
9. *During the term of this order and for 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

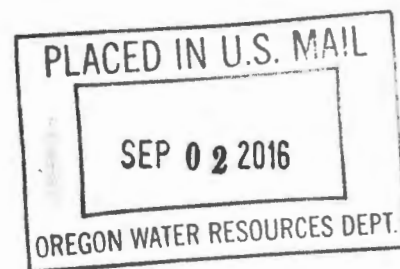
*These months or partial months are shown to describe the maximum instream rate associated with the time-limited instream water right, in connection with other instream water rights for the same reach.*

*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 unless otherwise specified by an order approving a new instream water right under these statutes.*

10. *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 91038 and any related decree.*
11. *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 91038. 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 applicant, or*
  - b) *The applicant along with evidence that the stored water contract from Applegate Reservoir has been terminated or that the agreement between the applicant and the Bureau of Reclamation has not been renewed.*
12. *This order may be terminated if a permit is not issued or is rescinded under Water Right Application S-87939.*

Dated at Salem, Oregon this 31 day of August, 2016.

  
Dwight French, Water Rights 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@wrđ.state.or.us](mailto:Tracy.L.Fox@wrđ.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