



Oregon
Kate Brown, Governor

Water Resources Department
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September ~~28~~²⁹, 2017

Gordon C. Jones for
Lake Creek Lodge
13375 SW Forest Service RD.
Camp Sherman, OR 97730

Adam Sussman for
GSI Water Solutions
1600 SW Western Blvd.
Corvallis, OR 97333

SUBJECT: Water Right Transfer Application T-11891

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11891. 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 Bend Bulletin 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 503-986-0890 or Sarah.A.Henderson@oregon.gov if I may be of assistance.

Sincerely,

Sarah Henderson
Transfer and Conservation Section

cc: File T-11891
Jeremy Giffin, District 11 Watermaster

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

| | | |
|---------------------------------------|---|------------------------------|
| In the Matter of Instream Transfer |) | PRELIMINARY DETERMINATION |
| Application T-11891, and Mitigation |) | PROPOSING APPROVAL OF A |
| Project MP-192 for Groundwater Permit |) | CHANGE IN PLACE OF USE AND |
| Application G-17871, Jefferson County |) | CHARACTER OF USE AND PARTIAL |
| |) | CANCELLATION OF A WATER |
| |) | RIGHT AND APPROVAL OF A |
| |) | MITIGATION PROJECT |

Authority

Oregon Revised Statute (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.

OAR 690-505-0500 to 690-505-0630 establishes the process in which anyone may submit a ground water mitigation project to the Department for the purpose of providing mitigation for a ground water permit application in the Deschutes Ground Water Study Area.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicant

LAKE CREEK LODGE
ATTN: GORDON C. JONES
13375 SW FOREST SERVICE RD.
CAMP SHERMAN, OR 97730

Agent

GSI WATER SOLUTIONS
ATTN: ADAM SUSSMAN
1600 SW WESTERN BLVD
CORVALLIS, OR 97333

Findings of Fact

1. On September 22, 2014, Gordon Jones for Lake Creek Lodge filed an application to change the place of use and character of use of a portion of Certificate 82275 to instream use. The Department assigned the application number T-11891.
2. The applicant has requested that the approval of the transfer application and partial cancellation of a remaining portion of Certificate 82275 be contingent upon approval of Groundwater Permit Application G-17871. This transfer application is requested to provide mitigation for that permit application.

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| 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. Notice of the application for transfer was published on September 30, 2014, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
5. Consistent with land use requirements, prior to submitting the instream transfer application, the applicant provided notification of the intent to file the instream transfer application to Jefferson County. Additionally, the Department provided notice of the proposed action to Jefferson County upon receipt of Transfer Application T-11891.
6. On October 25, 2016, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11891 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of November 23, 2016, for the applicant to respond.
7. Between February 9, 2017 and August 14, 2017, the applicant requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
8. On August 14, 2017, the applicant submitted an amended application page, amended map and amended affidavit of cancellation, reducing the area of acreage being transferred and being cancelled.
9. On August 30, 2017, the Department mailed a copy of the Revised Draft Preliminary Determination proposing to approve Transfer Application T-11891 to the applicant. The Revised Draft Preliminary Determination cover letter set forth a deadline of September 29, 2017, for the applicant to respond. The applicant requested that the Department proceed with issuance of a Preliminary Determination.
10. The portion of the right to be transferred is as follows:

Certificate: 82275 in the name of MARGARET LUMPKIN; LAKE CREEK LODGE (confirmed by Deschutes River Decree of record at Salem, in the Order Record of the Water Resources Director, in Volume 12, at page 13625)

Use: IRRIGATION of 9.11 ACRES

Priority Date: 1888

Rate: 0.15 CUBIC FOOT PER SECOND (CFS) if available at the original point of diversion

Original Point of Diversion:

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|-----|-----|-----|-------|---------------------------------------------------------------------|
| 13 S | 9 E | WM | 16 | SE NE | 2320 FEET SOUTH AND 1120 FEET WEST FROM THE NW CORNER OF SECTION 16 |

Limit/Duty: The amount of water diverted shall not exceed 3.0 acre-feet per acre, measured at the point of diversion from the source, which may be diverted at a rate not to exceed one-sixtieth of one cubic foot per second per acre during the irrigation season from May 1 to September 15.

Period of Use: May 1 to September 15

Source: LAKE CREEK, tributary to the Metolius River

Authorized Point of Diversion:

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|-----|-----|-----|-------|--------------------------------------------------------------------|
| 13 S | 9 E | WM | 15 | SW NW | 2320 FEET SOUTH AND 100 FEET EAST FROM THE NW CORNER OF SECTION 15 |

Authorized Place of Use:

| Twp | Rng | Mer | Sec | Q-Q | Acres |
|------|-----|-----|-----|-------|-------|
| 13 S | 9 E | WM | 15 | SW NW | 9.11 |

11. A total of 27.3 Acre-Feet (AF) of water may be beneficially used annually under the portion of the existing right being transferred.
12. The agent for the applicant has identified that the location of the authorized point of diversion specified on Certificate 82275 does not appear to be accurate. This may be due to improved mapping tools. Based upon evaluation of the transfer application, it appears that the authorized point of diversion may be more accurately located as follows:

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|-----|-----|-----|-------|----------------------------------------------------------------|
| 13 S | 9 E | WM | 15 | SW NW | 1980 FEET SOUTH AND 100 FEET EAST FROM NW CORNER OF SECTION 15 |

13. The Department’s Watermaster has clarified that the source is actually the South Fork of Lake Creek, tributary to the Metolius River. Above the proposed reach, Lake Creek has branched into the South, Middle and North Forks.
14. Transfer Application T-11891 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, recreation, pollution abatement, and to establish mitigation in the Deschutes Ground Water Study Area for Groundwater Permit Application G-17871.
15. Transfer Application T-11891 proposes to change the place of use of the right to create an instream reach from the authorized point of diversion to the mouth of Lake Creek.
16. The amended application proposes the quantities of water to be transferred instream be protected as follows:

| Instream Period | Instream Rate (CFS) | Instream Volume (AF) |
|----------------------------|---------------------|----------------------|
| May 1 through September 15 | 0.15 | 27.3 |

17. The applicant has requested 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)

18. Water has been used within the last five years 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.
19. A pump, pipeline, and sprinkler system 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-11891.
20. To prevent enlargement, the rate for the water to be protected instream must be adjusted so the volume limitation is not exceeded. The Department has determined the requested instream use requires modification to prevent injury and enlargement and is as follows:

Instream Reach: From the authorized POD (as described in Finding of Fact No. 12) on the South Fork of Lake Creek to the confluence with the Metolius River

| Certificate | Priority Date | Rate Instream (CFS) | Volume Instream (AF) | Instream Period |
|-------------|---------------|---------------------|----------------------|----------------------------|
| 82275 | 1888 | 0.10 | 27.3 | May 1 through September 15 |

21. The proposed change, as modified, would not result in enlargement of the right.
22. The proposed change, as modified, would not result in injury to other water rights.
23. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
24. 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.
25. Within the proposed reach on the South Fork of Lake Creek, there are two existing instream water rights. There is one instream water right, Certificate 76416, established under ORS 537.341 (state agency application process) for the purposes of providing required streamflow for Rainbow and Brown Trout, Kokanee Salmon, and White Fish for migration, spawning, egg incubation, fry emergence, and juvenile rearing and carries a priority date of October 11, 1990. There is also one instream water right, Certificate 59795, established under ORS 537.346 (conversion of minimum streamflow) for the purposes of supporting aquatic life and carries a priority date of February 20, 1962.

26. Certificate 76416 was established under Instream Water Right Application IS-70751 filed by the Oregon Department of Fish and Wildlife (ODFW). As part of the instream water right application, ODFW requested higher flows than what were granted during the months of July, August, and September. ODFW has also identified Lake Creek (including its forks) as an area needing flow restoration for recovery of salmonids during the summer months.
27. The South Fork of Lake Creek is tributary to the Metolius River, which is a state designated Scenic Waterway. The protection of flows necessary to maintain the free flowing character of the Metolius River for fish and wildlife habitat, and recreation is a matter of statutory policy.
28. Portions of the proposed reach on the South Fork of Lake Creek are also on the Oregon Department of Environmental Quality's (DEQ) 303d list of water quality limited streams and are part of a DEQ Total Maximum Daily Load (TMDL) study.
29. The existing instream water rights, established under and ORS 537.341 (state agency application process) and ORS 537.346 (conversion of minimum streamflow), within the proposed reach on the South Fork of Lake Creek may be sufficient to protect the monthly quantities of water necessary for supporting aquatic life and providing streamflows for life stages of various fish species, but may not always be met. By replacing a portion of these instream water rights, any instream water right created as a result of this transfer will provide protection of stream flows identified as necessary for supporting aquatic life and providing streamflows for various fish life stages under an earlier priority date.
30. During the period May 1 through September 15, any instream water right established by this transfer application may replace a portion of instream water rights established pursuant to ORS 537.341 or ORS 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or ORS 537.470, unless otherwise specified in an order approving a new instream water right under these statutes.
31. By adding to other instream water rights, that may be established pursuant to ORS 537.348 (instream transfer process and instream lease) and ORS 537.470 (allocation of conserved water process), located within the proposed reach, any new instream water right established by this transfer would provide protection for additional flows identified as necessary for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values, pollution abatement, and recreation.
32. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

Partial Cancellation of a Water Right

33. The applicant has submitted an affidavit certifying that a 9.9 acre portion of Certificate 82275 not being transferred has been abandoned.

34. The portion of the water right to be cancelled is as follows:

Certificate: 82275 in the name of MARGARET LUMPKIN; LAKE CREEK LODGE (confirmed by Deschutes River Decree of record at Salem, in the Order Record of the Water Resources Director, in Volume 12, at page 13625)
Use: IRRIGATION of 9.9 ACRES
Priority Date: 1888
Rate: 0.16 CUBIC FOOT PER SECOND (CFS), if available at the original point of diversion

Original Point of Diversion:

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|-----|-----|-----|-------|---------------------------------------------------------------------|
| 13 S | 9 E | WM | 16 | SE NE | 2320 FEET SOUTH AND 1120 FEET WEST FROM THE NW CORNER OF SECTION 16 |

Limit/Duty: The amount of water diverted shall not exceed 3.0 acre-feet per acre, measured at the point of diversion from the source, which may be diverted at a rate not to exceed one-sixtieth of one cubic foot per second per acre during the irrigation season from May 1 to September 15.

Period of Use: May 1 to September 15

Source: LAKE CREEK, tributary to the Metolius River

Authorized Point of Diversion:

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|-----|-----|-----|-------|--------------------------------------------------------------------|
| 13 S | 9 E | WM | 15 | SW NW | 2320 FEET SOUTH AND 100 FEET EAST FROM THE NW CORNER OF SECTION 15 |

Authorized Place of Use:

| Twp | Rng | Mer | Sec | Q-Q | Acres |
|------|-----|-----|-----|-------|-------|
| 13 S | 9 E | WM | 15 | SW NW | 9.9 |

Mitigation Project Review Criteria

- 35. Lake Creek Lodge (the Applicant) has requested this instream transfer application be used to establish mitigation water for Groundwater Permit Application G-17871, filed by Lake Creek Lodge.
- 36. The Department assigned this mitigation credit project number MP-192.
- 37. The Department consulted with representatives from ODFW, DEQ, Oregon Parks and Recreation Department, Oregon Department of State Lands, the Oregon Department of Agriculture, and the Department's Watermaster pursuant to OAR 690-521-0300 (7) and OAR 690-505-0630 (2) on May 3, 2016. No comments were received in response to this notice.
- 38. Groundwater Permit Application G-17871 has been determined to have a mitigation obligation of 17.0 AF in the Metolius River Zone of Impact, as described in the Initial Review issued proposing to deny the application on August 15, 2014. Mitigation must be provided in the Metolius River subbasin above River Mile 28 of the Metolius River.

39. On July 10, 2017, the applicant submitted a revised application and a revised application map to reduce the area proposed for irrigation in Groundwater Permit Application G-17871. The mitigation obligation is now determined to be 16.3 AF in the Metolius River Zone of Impact, and the mitigation must be provided in the Metolius River subbasin above River Mile 28 of the Metolius River.
40. The proposed transfer of 9.11 acres of irrigation use with a priority date of 1888 to instream use will provide 16.3 AF of mitigation water.
41. The proposed instream reach would protect flows in the South Fork of Lake Creek within the Metolius River Zone of Impact. The proposed instream reach does not extend into the Metolius River. However, a review completed by the Department's Groundwater Section identified that the closest likely downgradient groundwater discharge area is at the lower reaches of Lake Creek and tributary springs to the Metolius River.
42. Based upon review of Groundwater Permit Application G-17871 and Instream Transfer Application T-11891, there is nothing in the review, thus far, that suggests this project would not meet the requirements for the mitigation needed for Groundwater Permit Application G-17871.
43. Based upon Findings of Fact Nos. 38 through 42, the Department has determined that the proposed mitigation project will satisfy the mitigation obligation of Groundwater Permit Application G-17871.
44. A total of 27.3 AF is proposed to be transferred to instream use and 16.3 AF of that, as identified above, may be used for mitigation purposes. The amount of water transferred instream and not used for mitigation purposes will benefit instream flow.
45. Mitigation water generated by this project may be used to satisfy the mitigation obligation of Groundwater Permit Application G-17871 upon completion of the approved project (the instream transfer) by the applicant and verification by the Department that the project is complete. The issuance of a certificate for the proposed instream water right shall result in completion of the project and verification that the project is complete.
46. Mitigation water generated by this project may be available for mitigation use the first calendar year that water is protected instream under a new instream water right certificate. A permit may be issued for Groundwater Permit Application G-17871 after water has been protected instream under a new instream water right certificate established by this transfer (provided that other conditions of Permit Application G-17871 have also been met).

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-11891 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 and the abandoned right should be cancelled. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved and the abandoned right will be cancelled.

This mitigation project appears to result in mitigation pursuant to ORS 537.746 and OAR 690-505-0610.

If Transfer Application T-11891 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 application T-11891 are approved. The portion of the right that has been abandoned is cancelled.*
2. *Water right certificate 82275 is cancelled. A new certificate shall be issued for that portion of the right not modified or cancelled by this transfer. A new certificate confirming the instream water right shall also be issued.*

3. *The instream right shall provide for the protection of streamflows as follows:*

Instream Reach: *From the authorized POD (as described in Finding of Fact No. 12) on the South Fork of Lake Creek to the confluence with the Metolius River*

| <i>Certificate</i> | <i>Priority Date</i> | <i>Rate Instream (CFS)</i> | <i>Volume Instream (AF)</i> | <i>Instream Period</i> |
|--------------------|----------------------|----------------------------|-----------------------------|----------------------------|
| 82275 | 1888 | 0.10 | 27.3 | May 1 through September 15 |

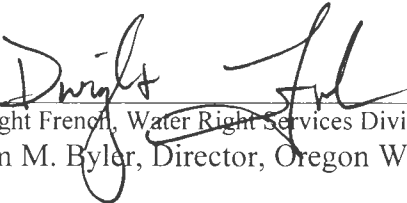
4. *Water rights upstream of the original point of diversion shall not be subject to regulation for flows in excess of the quantities to which this instream water right is entitled at the original point of diversion.*
5. *Within the specified stream reach, the amount of water to which this right is entitled shall not exceed the quantity of water legally available at the original point of diversion. Stream channel losses and gains calculated based on available data and the use of senior appropriators will determine the amount of water to which this right is entitled downstream from the original point of diversion within the specified stream reach.*
6. *The original point of diversion is located as follows:*

| <i>Twp</i> | <i>Rng</i> | <i>Mer</i> | <i>Sec</i> | <i>Q-Q</i> | <i>Measured Distances</i> |
|------------|------------|------------|------------|------------|---------------------------------------------------------------------|
| 13 S | 9 E | WM | 16 | SE NE | 2320 FEET SOUTH AND 1120 FEET WEST FROM THE NW CORNER OF SECTION 16 |

7. *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.*
8. *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 82275 and any related decree.*
9. *The former place of use of the transferred water shall no longer receive water as part of this right.*

10. **Mitigation Water:** *Mitigation water generated by this project will be used to satisfy the mitigation obligation for Groundwater Permit Application G-17871 upon completion of the project and verification by the Department that the project has been completed as proposed. Issuance of a new instream water right certificate, as described herein, will result in completion of the project and verification by the Department that the project is complete. If completed as proposed, mitigation water, in the amount of 16.3 AF, as described herein, will be generated by this project in the Metolius River Zone of Impact. Mitigation water generated by this project will be available for use as mitigation water beginning the first calendar year that water will be protected instream under a new instream water right.*
11. *A permit for Groundwater Permit Application G-17871 may not be issued until after water has legally been protected instream following approval of this instream transfer.*
12. *The instream certificate created as a result of the approval of this transfer shall be identified as a mitigation project/source for Groundwater Permit Application G-17871. Within the instream certificate, the amount of mitigation water, the zone of impact in which the mitigation water was generated and may be used, and the volume of water dedicated instream solely for instream benefits shall also be specified.*

Dated at Salem, Oregon this 28 day of September, 2017.


Dwight French, Water Right Services Division Administrator, for
Tom 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@oregon.gov.

Protests should be addressed to the attention of Water Rights 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>