

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

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Instream Transfer Application T-12866,)	PROPOSING APPROVAL OF A CHANGE IN
Coos County)	PLACE OF USE AND CHARACTER OF USE

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.

Applicant

OREGON DEPARTMENT OF FISH AND WILDLIFE
ATTN: DANETTE FAUCERA
4034 FAIRVIEW INDUSTRIAL DR SE
SALEM, OR 97302

Findings of Fact

1. On March 12, 2018, OREGON DEPARTMENT OF FISH AND WILDLIFE (ODFW) filed an application to change the place of use and character of use under Certificate 8265 to instream use. The Department assigned the application number T-12866.
2. Notice of the application for transfer was published on March 20, 2018, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On November 6, 2019, the Department sent a deficiency letter to the applicant. On December 2, 2019, the Department sent an additional email to the applicant requesting the deficiencies outlined in the November 6, 2019 letter be rectified. The Department established January 3, 2019, as the deadline for submitting the requested documentation. No response had been received regarding the deficiencies.

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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4. On January 14, 2020, the Department issued a draft Preliminary Determination proposing to deny transfer application T-12866 unless the deficiencies were addressed. The draft Preliminary Determination cover letter established a deadline of February 14, 2020, for ODFW to submit the requested documentation.
5. On February 12, 2020, the Applicant submitted some of the requested documentation and requested a short extension of time of two weeks to provide the other requested documentation. The Department extended the deadline to February 28, 2020.
6. On February 24, 2020, ODFW provided the requested documentation and all deficiencies were resolved.
7. On March 3, 2020, an Amended Draft Preliminary Determination was issued. The Applicant has provided all the necessary information to confirm it is authorized to pursue the transfer.
8. The portion of the right to be transferred is as follows:

Certificate: 8265 in the name of BANDON TROUT FARM INC. (perfected under Permit S-8928)
Use: FISH POND FOR RAISING TROUT
Priority Date: FEBRUARY 23, 1929
Rate: 1.0 CUBIC FOOT PER SECOND
Source: FAIREY CREEK (aka FERRY CREEK), tributary to the COQUILLE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
28 S	14 W	WM	30	NE SW	NOT LISTED ON CERTIFICATE

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q
28 S	14 W	WM	30	NE SW

9. Certificate 8265 does not describe the measured distances for the point of diversion. However, information is available in the Department's records, namely Permit S-8928, that describes the point of diversion as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
28 S	14 W	WM	30	NE SW	NORTH 51 DEGREES 30 MINUTES 3373 FEET EAST FROM THE SW CORNER OF SECTION 30

10. A total of 724.0 acre-feet of water may be beneficially used annually under the existing right.
11. Transfer Application T-12866 proposes to change the character of use to instream use for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, and other ecological values.

12. Transfer Application T-12866 proposes to change the place of use of the right to create an instream reach in Ferry Creek from the authorized point of diversion for Certificate 8265. to the mouth at River Mile 0.0.
13. The applicant proposes the quantities water to be transferred instream be protected as follows:

Instream Period	Instream Rate (cfs)	Instream Volume (acre-feet)
January 1 through December 31	1.0	724.0

14. 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)

15. Water has been used within the last five years according to the terms and conditions of the right. There currently is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
16. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Transfer Application T-12866.
17. The Department proposes to protect the instream use as follows:

From the authorized point of diversion for Certificate 8265 as listed in Finding of Fact #9 to the mouth at RM 0.0. Due to tidal influence in this reach, measuring stream discharge for purpose of monitoring the instream water right will be done at a suitable location determined by Department staff.

Instream Period	Instream Rate (cfs)	Instream Volume (AF)
January 1 through December 31	1.0	724.0

18. The proposed change would not result in enlargement of the right.
19. The proposed change would not result in injury to other water rights.
20. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.

21. 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.
22. Within the proposed reach on Ferry Creek, there is an existing instream water right. Certificate 79554, established under ORS 537.341 (state agency application process) for required stream flows for fall chinook and coho salmon, cutthroat trout, and winter steelhead for migration, spawning, egg incubation, fry emergency, and juvenile rearing and carries a priority date of June 14, 1991.
23. The existing instream water right, established ORS 537.341 (state agency application process), within the proposed reach on Ferry Creek are sufficient to protect the monthly quantities of water necessary for supporting aquatic life and anadromous and resident fish habitat, but are not always met. By replacing a portion of this instream water right, 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 anadromous and resident fish habitat under earlier priority dates.
24. By adding to other instream water rights, 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.
25. During the period January 1 through December 31, 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.
26. The proposed instream water right will exceed the estimated natural flow during the months of August, September, and October.
27. As provided for by OAR 380-690-0077(15)(5), unless the Director determines otherwise, for instream water rights established through instream transfers, it is presumed that flows that exceed the estimated average natural flow are significant for the applied public use, if the criteria in Subsection (5)(a) and (b), are met as follows:

- The flow does not exceed the maximum amount of any instream water right application applied for under OAR 690-077-020 (state agency requested) for the same reach or portion thereof, and for the same public use.
 - For the specified time period that flows are requested to exceed the estimated average natural flow, the stream is in an ODFW flow restoration priority watershed.
28. The requested instream flow of 1.0 cfs does not exceed the flow requested by ODFW in Application S-71697 (Certificate 79554). ODFW's instream application S-71697 requested 7.0 cfs in each of the months of August, September, and October.
 29. Ferry Creek is in an ODFW high priority watershed for restoration in the South Coast basin.
 30. 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 exceed the estimated average natural flow, but are significant for providing the required stream flows for fall chinook and coho salmon, cutthroat trout, and winter steelhead for migration, spawning, egg incubation, fry emergency, and juvenile rearing of the instream right.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-12866 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.

1. *The changes in character of use and place of use to instream use proposed in application T-12866 are approved.*
2. *Water right certificate 8265 is cancelled. A new certificate confirming the instream water right shall be issued. The portion of certificate 8265 not affected by this transfer (2.5 cfs) is currently being processed under Transfer Application T-13536.*
3. *The instream water right shall provide for the protection of stream flows in Ferry Creek from January 1 through December 31 as follows:*

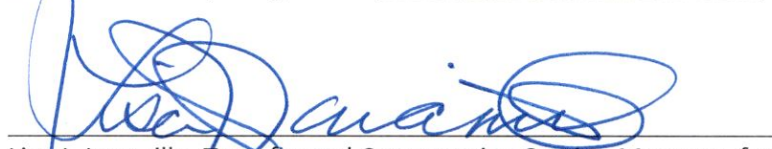
From the authorized point of diversion for Certificate 8265 as listed in Finding of Fact #9 to the mouth at RM 0.0. Due to tidal influence in this reach, measuring stream discharge for purpose of monitoring the instream water right will be done at a suitable location determined by Department staff.
4. *The quantity of water to be protected under the instream water right is:*

<i>Instream Period</i>	<i>Instream Rate (cfs)</i>	<i>Instream Volume (AF)</i>
<i>January 1 through December 31</i>	<i>1.0</i>	<i>724.0</i>

5. *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.*
6. *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.*
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 8265 and any related decree.*

MAR 17 2021

Dated at Salem, Oregon this _____.



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
THOMAS M. BYLER, Director
Oregon Water Resources Department

This Preliminary Determination was prepared by Teri Hranac. If you have questions about the information in this document, you may reach me at 503-986-0881 or Teri.K.Hranac@wrdd.state.or.us.

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

IMPORTANT: Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. Mail. Please consider mailing early to ensure the Department receives the protest by the deadline.

Notice Regarding Service Members: Active duty servicemembers have a right to stay these proceedings under the federal Servicemembers Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free number.



Oregon

Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

March 17, 2021

VIA E-MAIL

Applicant

OREGON DEPT. OF FISH & WILDLIFE

ATTN: DANETTE FAUCERA

4034 FAIRVIEW INDUSTRIAL DR SE

SALEM, OR 97302

SUBJECT: Water Right Transfer Application T-12866

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-12866. 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 World* 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.

IMPORTANT: Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. Mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified above.

Please do not hesitate to contact me at 503-986-0886 or Patrick.K.Starnes@wrdd.state.or.us or usteri.k.hranac@oregon.gov or 503-986-0881, if I may be of assistance.

Sincerely,

Transfer and Conservation Section

Enclosure

cc: Transfer Application file T-
Susan Douthit, District #15 Watermaster (*via e-mail*)