

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

In the Matter of Time Limited Instream)	PRELIMINARY DETERMINATION
Transfer Application T-13451, Union)	PROPOSING APPROVAL OF CHANGES IN
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

C. Glen and Ronda G. Smith
563 NW 21st Street
Pendleton, Oregon 97801

Agent

The Freshwater Trust (TFT)
401 NE 1st Street
Enterprise, Oregon 97828

Findings of Fact

1. On May 15, 2020, C. Glen and Ronda G. Smith and TFT filed a time-limited instream transfer application to change the character of use and place of use under Certificate 6459 to instream use for a period of 13 years (2021-2033 irrigation seasons). The Department assigned the application number T-13451.
2. Notice of the application for transfer was published on June 9, 2020, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
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 the Union County Planning Department and the City of Union.
4. On December 31, 2020, the Department mailed a copy of the draft Preliminary Determination proposing to approve Time-Limited Instream Transfer Application T-13451 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of January 29, 2021, for the applicants to respond. The applicants 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.

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.

5. The portion of the right to be transferred is as follows:

Certificate: 6459 in the name of E. H. Miles (perfected under the Grande Ronde River Decree, of record at Salem, in the Order Record of the State Engineer, in Volume 8, at Page 1)

Use: Irrigation of 19.2 acres

Priority Date: 1872

Quantity: **Limit:** That the amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed three acre feet per acre in any irrigation season, diverted at a rate of not to exceed one-fortieth of a cubic foot per second per acre;

Source: Catherine Creek, tributary to the Grande Ronde River

Authorized Point of Diversion (POD): Not described on Certificate

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	40 E	WM	34	NE SW	7.0
4 S	40 E	WM	34	NW SW	12.2
Total:					19.2

6. Certificate 6459 does not provide a description of the location of the point of diversion. Based upon additional information provided by the Applicant and Agent, for purposes of this Time-Limited Instream Transfer, the point of diversion is described as follows:

Twp	Rng	Mer	Sec	Q-Q	Latitude / Longitude
4 S	40 E	WM	34	SW SE	POD NO. 1 (SAMS DITCH): LATITUDE 45.167247, LONGITUDE -117.799479

7. Certificate 6459 does not specify the irrigation season; nor is an irrigation season specified by Basin Program or Decree. For the purposes of this time-limited instream transfer, an irrigation season of March 1 through October 31, consistent with OAR 690-250, shall be used to establish when water may be protected instream. However, additional information is available from the Grande Ronde River Decree at Paragraph 18, Page 17, indicating a rate of 1/80th cfs per acre for 120 days was sufficient for irrigation.

8. The Grande Ronde Decree further states water may be used at a rate up to the equivalent of 1/40th cfs per acre but only on a rotation basis. The use of water at 1/80th cfs per acre is allowed at a continuous rate. The Department and the applicant identified that the instream rate is equivalent to 1/40th cfs per acre and cannot be maintained as a continuous flow without injury to other water rights. Water will be protected instream at rates equivalent to 1/80th cfs per acre.

9. A total of 57.6 acre-feet of water may be beneficially used annually under the existing right.

10. Transfer Application T-13451 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; and pollution abatement for a period of 13 years.
11. The applicant requests that the water use revert to its authorized use and place of use after 13 years from the date of the order beginning in 2021. Since water under a right may not be protected instream and diverted to out-of-stream use within the same irrigation season, the instream use may be allowed for a term of 13 (irrigation) seasons, ending October 31, 2033.
12. Transfer Application T-13451 proposes to change the place of use of the right to create an instream reach from the point of diversion to the mouth of Catherine Creek.
13. The applicant proposes the quantities water to be transferred instream be as protected follows:

Instream Period	Instream Rate (cfs)	Instream Volume (acre-feet)
July 1 through October 28	0.24	57.6

14. The applicant has requested the instream water right established as a result of this time-limited 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); and 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. This portion of Certificate 6459 was leased instream under IL-1531 during the period of 2016 through 2020 irrigation seasons and there 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-13451.
17. A portion of the water diverted at the POD returns to Catherine Creek within the proposed reach and is available to downstream water right holders. Approximately 20% of return flows from the existing use return to the creek system below the POD. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected instream should be modified to account for return flows immediately below the POD.

18. In addition, there are known areas of natural streamflow loss to the river bed downstream from the point of diversion. The Watermaster has identified that below river mile 12 there is a loss of 1% per mile. The quantity that may be protected instream below river mile 12 will be adjusted to prevent injury to downstream users and enlargement of the right.
19. Based on the Finding of Fact Nos. 7, 8, 17, and 18, the quantities to be transferred and protected instream have been modified and are as follows:

Catherine Creek, tributary to the Grande Ronde River

Instream Point No. 1: At Sams Ditch POD (as described in Finding of Fact No. 6)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
6459	1872	0.24	57.6	July 1 through October 28

Instream Reach: From immediately below Sams Ditch POD to the River Mile 12

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
6459	1872	0.19	46.08	July 1 through October 28

From River Mile 12 to the mouth of Catherine Creek the amount protected instream will be reduced by 1% per mile

Instream Point No. 2: At mouth of Catherine Creek

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
6459	1872	0.17	40.42	July 1 through October 28

20. Other conditions to prevent injury and enlargement are:

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 calculated based on available data and the use of water by senior appropriators will determine the amount of water to which this right is entitled downstream from the original point of diversion within the specified reach to the mouth of Catherine Creek.
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 known areas of natural loss of streamflow to the riverbed downstream from the point of diversion. The quantity of water to be protected instream has been reduced by 1% per mile below River Mile 12 to account for the loss; 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. The quantity of water to be protected instream has been reduced in the instream reach to account for return flows.
25. Within the proposed reach on Catherine Creek, there are several existing instream water rights. There is one instream water right, Certificate 59537, established under ORS 537.346 (minimum flow conversion) for the purposes of supporting aquatic life and carries a priority date of November 3, 1983. This instream right overlaps with the proposed new instream water right over a short segment at the beginning of the reach from the POD as described in Finding of Fact No. 6, to the Swackhammer diversion at Union, located about 400 feet downstream from the POD. There are also other existing instream water rights established under ORS 537.348(2) (instream transfer and lease process) for fish and wildlife habitat.
26. The existing instream water right, established under ORS 537.346 (minimum streamflow conversion), within a portion of the reach on Catherine Creek is sufficient to protect the monthly quantities of water necessary for supporting aquatic life but is 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 under an earlier priority date.
27. 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, and pollution abatement.
28. During the period of July 1 through October 28, 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 new instream water rights under these statutes.
29. 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.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-13451 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 Transfer Application T-13451 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-13451 are approved.*
- 2. The exercise of the right evidenced by Certificate 6459 for irrigation at the former place of use as described in Finding of Fact No. 5 shall be SUSPENDED, without loss of priority, for the term of this order as authorized herein.*
- 3. The instream water right established under this order shall provide for the protection of streamflows as follows:*

Catherine Creek, tributary to the Grande Ronde River

Instream Point No. 1: At Sams Ditch POD (as described in Finding of Fact No. 6)

<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (CFS)</i>	<i>Instream Volume (AF)</i>	<i>Period Protected Instream</i>
<i>6459</i>	<i>1872</i>	<i>0.24</i>	<i>57.6</i>	<i>July 1 through October 28</i>

Instream Reach: From immediately below Sams Ditch POD to the River Mile 12

<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (CFS)</i>	<i>Instream Volume (AF)</i>	<i>Period Protected Instream</i>
<i>6459</i>	<i>1872</i>	<i>0.19</i>	<i>46.08</i>	<i>July 1 through October 28</i>

From River Mile 12 to the mouth of Catherine Creek the amount protected instream will be reduced by 1% per mile

Instream Point No. 2: At mouth of Catherine Creek

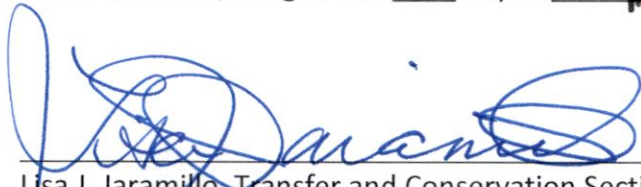
<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (CFS)</i>	<i>Instream Volume (AF)</i>	<i>Period Protected Instream</i>
<i>6459</i>	<i>1872</i>	<i>0.17</i>	<i>40.42</i>	<i>July 1 through October 28</i>

- 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 calculated based on available data and the use of water by senior appropriators will determine the amount of water to which this right is entitled*

downstream from the original point of diversion within the specified reach to the mouth of Catherine Creek.

6. During the term of this order, 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.
7. 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 6459 and any related decree.
8. The term of this Final Order shall begin on the date this order is approved and continue through October 31, 2033.
9. Upon expiration of this time-limited instream transfer, the use of water shall revert to its original use and place of use as described by Certificate 6459. The use shall revert to the authorized use and place of use on November 1, 2033.
10. This order may be terminated prior to the end date of October 31, 2033, and revert back to the original use and place of use only upon submission of a termination request from The Freshwater Trust and the Landowner.

Dated at Salem, Oregon this ____ day of ~~____~~ **MAR 18 2021**.



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

This Preliminary Determination was prepared by Sarah Henderson. If you have question about the information in this document, you may reach me at 503-986-0884 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.

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.

MAR 1 10 2007



Oregon

Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

March 18, 2021

VIA E-MAIL

Applicant

C. Glen and Ronda G. Smith
563 NW 21st Street
Pendleton, Oregon 97801
glen.smith@coreva.com

Agent

The Freshwater Trust (TFT)
401 NE 1st Street
Enterprise, Oregon 97828
rob@thefreshwatertrust.org

SUBJECT: Time-Limited Instream Transfer Application T-13451

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-13451. 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 Observer newspaper in La Grande, Oregon, 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 503-986-0884 or Sarah.A.Henderson@oregon.gov if I may be of assistance.

Sincerely,



Sarah Henderson
Flow Restoration Program Coordinator
Transfer and Conservation Section

cc: Transfer Application file T-13451
Shad Hattan, District 6 Watermaster *(via e-mail)*
Meg Belais, The Freshwater Trust, Agent for the applicant *(via e-mail)*
Jessica Humphreys, Agent for the applicant *(via e-mail)*

encs