



Oregon

Kate Brown, Governor

Water Resources Department

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DATE: MAR 14 2022

Applicant

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SUBJECT: Water Right Transfer Application T-13098

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve instream transfer application T-13098. 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.

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 503-979-9872 or Sarah.A.Henderson@water.oregon.gov if I may be of assistance.

Sincerely,



Sarah Henderson
Flow Restoration Program Coordinator
Transfer and Conservation Section

cc: Transfer Application file T-13098
Jeremy Giffin, District 11 Watermaster (*via e-mail*)
Mathias Perle, Upper Deschutes Watershed Council
(mperle@restorethedeschutes.org)

transfer application to Jefferson County. Additionally, the Department provided notice of the proposed action to Jefferson County upon receipt of Instream Transfer Application T-13098.

4. The instream transfer application was originally submitted to provide mitigation under the Deschutes Groundwater Mitigation Program as a direct Mitigation Project, no mitigation project number was assigned. The original groundwater application was submitted on December 31, 2018 and returned because it was submitted on the incorrect application form. On March 6, 2019, a new groundwater application G-18796 was submitted and withdrawn on July 26, 2019. Therefore, this Instream Transfer Application will be used for instream flow restoration purposes only.
5. On September 17, 2020, Certificate 95247 was issued and superseded Certificate 87472.
6. On April 14, 2021, the Department provided notification to the applicants' agent of discrepancies and deficiencies identified in Instream Transfer Application T-13098. On April 22, 2021, the applicants' agent responded resolving a few of the deficiencies.
7. On August 2, 2021, the Department provided notification to the applicants' agent of discrepancies in the application map and the fee submitted with the application. On August 27, 2021, the applicants' agent submitted a new application map and on December 20, 2021, additional fees were submitted resolving all deficiencies.
8. On December 29, 2021, the Department mailed a copy of the draft Preliminary Determination proposing to approve Instream Transfer Application T-13098 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of January 28, 2022, 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 applicants are authorized to pursue the transfer.
9. The portion of the right proposed to be transferred is as follows:

Certificate: 95247 in the name of MARTIN HANSEN and CECIL W. AND SALLY A. DRINKWARD (confirmed by the Deschutes River Decree). The decree is of record at Salem in the Order Record of the Water Resources Director in Volume 9, at Page 362)

Use: Irrigation, Livestock and Domestic use on 2.0 acres

Priority Date: 1888

Rate: 0.022 CUBIC FOOT PER SECOND (CFS)

Limit/Duty: The use is limited to 3.0 acre-feet per acre, measured at the point of diversion from the stream, which may be diverted at a rate not to exceed 1/60th cubic foot per second per acre during the irrigation season from May 1 to September 15, or its equivalent in case of rotation, measured at the point of diversion from the source.

Period of Use: May 1 to September 15, for irrigation

Source: LAKE CREEK, tributary to the METOLIUS RIVER

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
13 S	9 E	WM	16	SE NE	POD 2: 2320 FEET SOUTH AND 1120 FEET WEST FROM THE NE CORNER OF SECTION 16

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
13 S	9 E	WM	16	SE SE	2.0

10. A total of 6.0 Acre-Feet (AF) of water may be beneficially used annually under the existing right during the irrigation season.
11. Certificate 95247 identifies the source of water as Lake Creek. However, Lake Creek, as it flows out of Suttle Lake, branches into the North, Middle, and South Forks of Lake Creek. The Middle Fork Lake Creek rejoins the South Fork just below River Mile 2 on the South Fork. South Fork Lake Creek then flows into the Metolius River. The North Fork flows into the Metolius River upstream from the confluence of the South Fork with the Metolius River. Water for the place of use involved in Instream Transfer Application T-13098 is diverted from South Fork Lake Creek.
12. Transfer Application T-13098 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.
13. Transfer Application T-13098 proposes to change the place of use of the right to create an instream reach from the POD to the mouth of South Fork Lake Creek at the confluence with the Metolius River.
14. The applicant proposes the quantities of water to be transferred instream be protected as follows:

Instream Period	Instream Rate (CFS)	Instream Volume (AF)
May 1 to September 15	0.033	6.0

15. 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)

16. Water has been used within the last five years, prior to submittal of the application, according to the terms and conditions of the portion of the right proposed for transfer, and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
17. 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 Instream Transfer Application T-13098.
18. At the full instream rate and volume requested (as identified in Finding of Fact No. 14), water may only be protected instream for 90 days. The full instream period requested by the applicant, May 1 through September 15, is 138 days. To prevent enlargement of the right, the requested instream use requires modification. To maximize the instream use, the Department recommends reducing the instream rate to protect water over the full irrigation season (May 1 through September 15). The recommended instream use is as follows:

Instream Reach: From the POD (as described in Finding of Fact No. 9) on the South Fork of Lake Creek to the mouth at the confluence with the Metolius River

Certificate	Priority Date	Rate Instream (CFS)	Volume Instream (AF)	Instream Period
95247	1888	0.022	6.0	May 1 through September 15

19. The proposed change, as modified, would not result in enlargement of the right.
20. The proposed change, as modified, would not result in injury to other water rights.
21. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
22. 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.

23. Within the proposed reach on South Fork Lake Creek, there are several existing instream water rights.
 - a) Certificate 76416 was established under ORS 537.341 (state agency application process) for the purposes of providing required stream flow 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.
 - b) Certificate 59797 was established under ORS 537.346 (conversion of minimum perennial streamflows), for supporting aquatic life and carries a priority date of February 20, 1962.
 - c) Certificate 93368 was established under ORS 537.348 (instream transfer process) and has a priority date of 1888.
 - d) Certificate 95492 was established under ORS 537.348 (instream transfer process) and has a priority date of 1888.
24. Instream water rights established by instream transfer are generally additive to any existing instream water rights within the same reach established by other instream transfers and/or the allocation of conserved water program that also generally carry senior priority dates. In addition, instream water rights established by instream transfer also generally replace portions of any existing instream rights established by the state agency application process and/or minimum perennial streamflow conversion that usually have junior priority dates.
25. The proposed instream use, given a priority date of 1888, may be additive to Certificates 93368 and 95492, which also carry an 1888 priority date. In addition, the proposed instream use may replace a portion of Certificates 74146 and 59797, with an earlier priority date, which carry priority dates of October 11, 1990, and February 20, 1962, respectively.
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. 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.

29. By replacing a portion of other instream water rights, established pursuant to ORS 537.341 (state agency application process) and ORS 537.346 (conversion of minimum perennial streamflows), 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 species and 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. The total monthly quantities of water to be protected under the existing and proposed instream rights within the proposed 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-13098 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-13098 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-13098 are approved.*
2. *Water right certificate 95247 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will also be issued describing that portion of the right not affected by this transfer.*
3. *The instream right shall provide for the protection of streamflows as follows:*

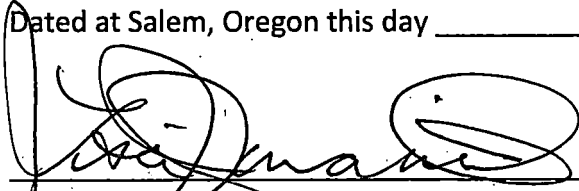
Instream Reach: From the POD (as described in Finding of Fact No. 9) on the South Fork Lake Creek to the mouth at the confluence with the Metolius River

<i>Certificate</i>	<i>Priority Date</i>	<i>Rate Instream (CFS)</i>	<i>Volume Instream (AF)</i>	<i>Instream Period</i>
95247	1888	0.022	6.0	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.*
6. *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 95247 and any related decree.*
8. *The former place of use of the transferred water shall no longer receive water as part of this right.*

MAR 14 2022

Dated at Salem, Oregon this day _____



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

Mailing date: **MAR 15 2022**

This Preliminary Determination was prepared by Sarah Henderson. If you have questions about the information in this document, you may reach me at 503-979-9872 or Sarah.A.Henderson@water.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.

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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 The Oregon Military Department does not have a toll free number.