

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

In the Matter of Transfer Application )  
T-13920, Jackson County )

**D R A F T**      PRELIMINARY  
DETERMINATION PROPOSING APPROVAL  
OF A CHANGE IN PLACE OF USE AND  
CHARACTER OF USE

**Authority**

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. 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**

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**Findings of Fact**

1. On February 14, 2022, Robert Russell and TU filed an application to change a portion of the place of use and character of use under Certificate 86767 to instream use. The Department assigned the application number T-13920.
2. Notice of the application for transfer was published on February 22, 2022, pursuant to OAR 690-380-4000. No comments were received by the comment deadline, March 24, 2022.
3. Consistent with land use requirements, notice of the intent to file the instream transfer application was provided by the applicant to Jackson County Planning Department and City of Eagle Point Public Works. Additionally, the Department provided notification of the proposed action to these local governments upon receipt of Transfer Application T-13920.
4. The portion of the right to be transferred is as follows:  
**Certificate:**            86767 in the name of Robert E. Russell and Deborah S. Russell (confirmed by Little Butte Creek Decree of record at Salem, in the Order Record of the Water Resources Director in Volume 3, at Page 1)

**Use:** Power Development  
**Season of Use:** April 1 through March 31  
**Priority Date:** 1872  
**Quantity:** **Limit:** The amount of water to which this right is entitled is limited to an amount actually used beneficially, and shall not exceed 6.63 Cubic Feet per Second (CFS) from April 1 through October 31 and 8.4 CFS from November 1 through March 31 of each year, or its equivalent in case of rotation, measured at the point of diversion.  
**Source:** Little Butte Creek, a tributary to Rogue River

**Authorized Point of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
35 S	1 W	WM	35	SW SW	90 FEET NORTH AND 1150 FEET EAST FROM THE SW CORNER OF SECTION 35

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q
36 S	1 W	WM	3	NE NE

- A total of 2814.19 acre-feet of water from April 1 through October 31 and 2515.83 acre-feet of water from November 1 through March 31 may be beneficially used annually under the existing right.
- Application T-13920 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.
- Application T-13920 proposes to change the place of use of the right to a point at T35S, R1W, WM, Section 35 in the SW SW.
- The applicant proposes the quantities of water to be transferred instream be protected as follows:

Period	Rate (cfs)	Volume (acre-feet)
November 1 through March 31	8.40	2515.83
April 1 through October 31	6.63	2814.19
Total	15.03	5330.02

- 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)**

- 10. The portion of the right proposed for transfer was leased instream under IL-1608. 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.
- 11. 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 Application T-13920.
- 12. The quantities to be protected instream are as follows:  
Little Butte Creek, tributary to Rogue River

**Instream Point:** At the POD (as described below)

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
35 S	1 W	WM	35	SW SW	90 FEET NORTH AND 1150 FEET EAST FROM THE SW CORNER OF SECTION 35

Certificate	Priority Date	Instream Rate (CFS)	Period Protected Instream
86767	1872	6.63	April 1 through October 31
		8.40	November 1 through March 31

- 13. The proposed change would not result in enlargement of the right.
- 14. The proposed change would not result in injury to other water rights.
- 15. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
- 16. The protection of flows at the authorized point of diversion 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 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 point of the instream water right.

17. Within the proposed instream protection on Little Butte Creek, there is an existing instream water rights established under ORS 537.348 (instream transfer process) for the purpose of maintaining instream flow for fisheries enhancement. There is also a pending instream water right application IS-88945, filed by the Oregon Department of Fish and Wildlife pursuant to ORS 537.341 (state agency application process), with the Department to establish an instream water right on Little Butte Creek for the purposes of conservation, maintenance and enhancement of aquatic and fish life, wildlife, and fish and wildlife habitat.
18. Any instream water right established as a result of this instream transfer will 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). Any instream water right established as a result of this instream transfer will 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.
19. The total monthly quantities of water to be protected under the existing and proposed instream right at the point 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-13920 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-13920 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-13920 are approved.*
2. *Water right certificate 86767 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will be issued describing that portion of the right not affected by this transfer.*
3. *The water user shall assist in maintaining the existing measurement device at the original point of diversion and at the gage 14347800 and shall make such improvements as may be required by the Department.*
4. *The instream water right shall provide for the protection of streamflows for a point located at T35S, R1W, WM, Section 35 in the SW SW.*

5. *The quantities of water to be protected under the instream water right are:*

***Instream Point:*** *At the POD (as described below)*

<b><i>Twp</i></b>	<b><i>Rng</i></b>	<b><i>Mer</i></b>	<b><i>Sec</i></b>	<b><i>Q-Q</i></b>	<b><i>Measured Distances</i></b>
35 S	1 W	WM	35	SW SW	90 FEET NORTH AND 1150 FEET EAST FROM THE SW CORNER OF SECTION 35

<b><i>Certificate</i></b>	<b><i>Priority Date</i></b>	<b><i>Instream Rate (CFS)</i></b>	<b><i>Period Protected Instream</i></b>
86767	1872	6.63	April 1 through October 31
		8.40	November 1 through March 31

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 86767 and any related decree.*
9. *The former place of use of the transferred water shall no longer receive water as part of this right.*

Dated at Salem, Oregon this day \_\_\_\_\_.

**D R A F T**

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

This draft 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