



# Oregon

Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

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DATE: JUN 22 2022

VIA CERTIFIED MAIL AND E-MAIL

**Applicant**

Robert Russell

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**Agent**

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SUBJECT: Instream Transfer Application T-13920

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve instream transfer application T-13920. 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 Medford Mail Tribune 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 503-979-9872 or [sarah.a.henderson@water.oregon.gov](mailto:sarah.a.henderson@water.oregon.gov) 503-986-0886 or [Patrick.K.Starnes@wrdd.state.or.us](mailto:Patrick.K.Starnes@wrdd.state.or.us) if I may be of assistance.

Sincerely,

Sarah Henderson

Transfer and Conservation Section

cc: Transfer Application file T-13920  
Shavon Haynes, District 13 Watermaster (via e-mail)

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2022, for the applicant to respond. 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.

5. 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

6. 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.

7. 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.

8. 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.

9. 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

10. 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)**

11. 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.
12. 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.
13. 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

14. The proposed change would not result in enlargement of the right.
15. The proposed change would not result in injury to other water rights.
16. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
17. 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.
18. 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.
19. 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.
20. 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:

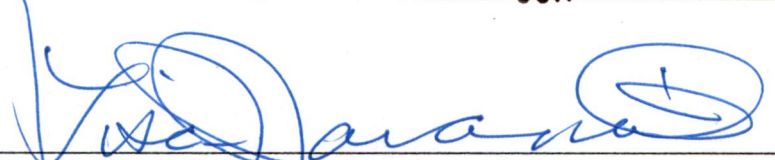
**Instream Point:** At the POD (as described below)

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

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 JUN 22 2022.



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 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.*

**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.

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