

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

In the Matter of Transfer Application	)	PRELIMINARY DETERMINATION
T-14531, Union County	)	PROPOSING APPROVAL OF A CHANGE IN
	)	PLACE OF USE AND CHARACTER OF USE

**Authority**

Oregon Revised Statutes (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 Rules (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**

Gary Smith  
69519 Elgin Cemetery Road  
Elgin, Oregon 97827

**Agent**

Trout Unlimited (TU)  
Attn: Jessica Humphreys  
401 NE 1<sup>st</sup> Street  
Enterprise, OR 97828

**Findings of Fact**

1. On September 12, 2024, Gary Smith filed an application to change the place of use and character of use under Certificates 36696 and 36706 to instream use. The Department assigned the application number T-14531.
2. Notice of the application for transfer was published on September 24, 2024, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. Consistent with land use requirements, notice of the intent to file the instream transfer application was provided by the applicant to the Union County Planning Department, the City of Elgin Public Work Department and the Confederated Tribes of the Umatilla Indian Reservation. Additionally, the Department provided notification of the proposed action to these local governments upon receipt of Instream Transfer Application T-14531.
4. On December 24, 2024, the Department mailed a copy of the draft Preliminary Determination proposing to approve Instream Transfer Application T-14531 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of January 24, 2025, for the applicant to respond.

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. On January 23, 2025, the applicant's agent responded to the draft preliminary determination and requested changes to the instream rate and period protected instream. Additionally, the applicant provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
6. A revised draft preliminary determination was issued to amend the instream rate and period of protection.
7. On January 29, 2025, the Department mailed a copy of the revised draft Preliminary Determination proposing to approve Instream Transfer Application T-14531 to the applicant. The revised draft Preliminary Determination cover letter set forth a deadline of February 28, 2025, for the applicant to respond. On January 30, 2025, the applicant requested that the Department proceed with issuance of a Preliminary Determination.
8. The first right to be transferred is as follows:

**Certificate:** 36696 in the name of Peter Westenskow (perfected under Permit S-31186)

**Use:** Irrigation of 40.0 acres

**Priority Date:** January 13, 1966

**Quantity:** **Rate:** 0.50 Cubic Foot per Second (CFS)  
**Volume:** 100.0 Acre-Feet (AF)  
**Limit:** The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to one-fortieth of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 2.5 acre feet per acre for each acre irrigated during the irrigation season of each year.

**Source:** Clark's Creek, a tributary of Grande Ronde River

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 N	39 E	WM	24	SE SW	2110 FEET NORTH AND 1780 FEET WEST FROM THE SOUTHEAST CORNER OF NW NE OF SECTION 25

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	39 E	WM	24	SE SW	12.6
1 N	39 E	WM	25	NW NE	18.0
1 N	39 E	WM	25	NE NW	9.4
Total Acres					40.0

9. The second right to be transferred is as follows:

**Certificate:** 36706 in the name of Peter C. Westenskow (perfected under Permit S-132)  
**Use:** Irrigation of 97.2 acres  
**Priority Date:** August 4, 1909  
**Quantity:** **Rate:** 1.22 Cubic Feet per Second (CFS)  
**Limit:** The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to one-eightieth of one cubic foot per second per acre.  
**Source:** Clark's Creek, a tributary of Grande Ronde River

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 N	39 E	WM	24	SE SW	2110 FEET NORTH AND 1780 FEET WEST FROM THE SOUTHEAST CORNER NW NE OF SECTION 25

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	39 E	WM	23	NE SE	15.6
1 N	39 E	WM	23	SE SE	30.0
1 N	39 E	WM	24	NW SW	3.6
1 N	39 E	WM	24	SW SW	40.0
1 N	39 E	WM	24	SE SW	5.0
1 N	39 E	WM	25	NW NW	3.0
Total Acres					97.2

10. Certificate 36706 does not specify a duty limit per acre. However, the Grande Ronde River Decree specifies the duty limit as 3.0 af/acre.
11. Certificates 36696 and 36706 do not specify the irrigation season; nor is an irrigation season specified by Basin Program or Decree. For the purposes of this instream transfer, an irrigation season of March 1 through October 31, consistent with OAR 690-250-0070, shall be used to establish when water may be protected instream.
12. For Certificate 36696, a total of 100.0 acre-feet of water may be beneficially used annually under the existing right.
13. For Certificate 36706, a total of 291.6 acre-feet of water may be beneficially used annually under the existing right.
14. Instream Transfer Application T-14531 proposes to change the place of use of the right to create an instream reach from the point of diversion to the mouth of Clark Creek.



15. The original application proposed the quantities of water to be transferred instream be protected as follows:

Certificate	Period	Rate (cfs)	Volume (acre-feet)
36696	May 15 through September 1	0.50	100.0
36706	May 1 through September 30	1.22	291.6

16. The requested amendment to the proposed period to be protected is as follows:

Certificate	Period	Rate (cfs)	Volume (acre-feet)
36696	May 15 through August 22	0.50	100.0
36706	May 1 through August 29	1.22	291.6

17. There is an existing instream water right, Certificate 73018, within the same reach as that proposed for the new instream water rights.
18. 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)***

19. The rights were leased instream under IL-1585 during the irrigation season of 2017 through 2021 and 2023 and there is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
20. A pump, pipeline, and sprinkler system sufficient to use the full amount of water allowed under the existing rights were present within the five-year period prior to submittal of Instream Transfer Application T-14531.
21. The water rights are subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14).

22. The quantities to be transferred and protected instream are as follows:  
Clark's Creek, a tributary of Grande Ronde River

Instream Reach: From the POD (as described in Finding of Fact Nos. 8 & 9) to the mouth of Clark's Creek

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
36696	January 13, 1966	0.50	100.0	May 15 through August 22
36706	August 4, 1909	1.22	291.6	May 1 through August 29

23. 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 points of diversion. Stream channel losses and gains 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 points of diversion within the specified stream reach.

24. The proposed change, as conditioned, would not result in enlargement of the rights.
25. The proposed change, as conditioned, would not result in injury to other water rights.
26. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water rights.
27. The protection of flows within the proposed reach is appropriate, considering:
- a) The instream water rights begin 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 rights would re-enter the river downstream of the reach of the instream water rights.
28. The instream rights established by this instream transfer shall replace a portion of instream water rights established pursuant to ORS 537.336 or 537.346 and shall be in addition to instream water rights established pursuant to ORS 537.348 or 537.470. By adding to the existing instream water right within the same reach during the month of September, the total monthly quantities of water to be protected instream will exceed the estimated average natural flow. The estimated average natural flow may not be exceeded unless criteria for exceeding are met.



29. The Department has determined that the estimated average natural flows may be exceeded due to the following:
- a) There is an existing state agency established instream water right certificate (Certificate 73018) that covers the same reach or portion of the reach to be established by the proposed instream transfer. Filed by the Oregon Department of Fish and Wildlife (ODFW) and;
  - b) The water rights proposed to be transferred are within an Oregon Department of Fish and Wildlife (ODFW) flow restoration priority watershed.
30. All other application requirements are met.

**Determination and Proposed Action**

The changes in character of use and place of use to instream use proposed in application T-14531 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-14531 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-14531 are approved.*
- 2. *Water right certificates 36696 and 36706 are cancelled. New certificates confirming the instream water rights shall be issued.*
- 3. *The quantities to be transferred and protected instream are as follows:*  
*Clark’s Creek, a tributary of Grande Ronde River*

*Instream Reach: From the POD (as described in Finding of Fact Nos. 8 & 9) to the mouth of Clark’s Creek*

<b>Certificate</b>	<b>Priority Date</b>	<b>Instream Rate (CFS)</b>	<b>Instream Volume (AF)</b>	<b>Period Protected Instream</b>
36696	January 13, 1966	0.50	100.0	May 15 through August 22
36706	August 4, 1909	1.22	291.6	May 1 through August 29

- 4. *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 and gains calculated based on available data and the use of senior appropriators will determine the amount of water to which this right is entitled downstream from the original point of diversion within the specified stream reach.*

5. *The instream rights 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.*
6. *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 Certificates 36696 and 36706 and any related decree.*
7. *The former place of use of the transferred water rights shall no longer receive water as part of these rights.*

Dated at Salem, Oregon this day FEB 25 2025.



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for  
Ivan Gall, 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.*

### **Protests**

Under the provisions of ORS 540.520(6) & (7) and OAR 690-380-4030, within 30 days after the last date of publication of the newspaper notice or the Department's weekly notice as prescribed by OAR 690-380-4020, whichever is later, any person may file, jointly or severally, a protest expressing opposition of approval of the transfer application and disagreement with this Preliminary Determination or a standing statement in support of this Preliminary Determination. If this Preliminary Determination determines that a change in point of diversion or appropriation would result in injury, the applicant may file a notification of intent to pursue approval of the transfer under OAR 690-380-5030 to 690-380-5050. Protests and standing statements must be received by the Water Resources Department within 30 days after the last date of publication of the newspaper notice or the Department's weekly notice as prescribed by OAR 690-380-4020, whichever is later.



Protests must be in writing and received in hard copy form with the appropriate statutory protest filing fee; protests cannot be filed by electronic mail. [OAR 690-002-0025(3) and 690-380-0100(9)]. The protest must include the following:

- The person's name, address, and telephone number;
- All reasonably ascertainable issues and all reasonably available arguments supporting the person's position by the close of the protest period. Failure to raise a reasonably ascertainable issue in a protest or failure to provide sufficient specificity to afford the Department an opportunity to respond to the issue may preclude consideration of the issue during the hearing;
- If you are the applicant, a protest fee of \$480 required by ORS 536.050; and
- If you are not the applicant, a protest fee of \$950 required by ORS 536.050 and proof of service of the protest upon the applicant.

### **Requests for Standing**

Under the provisions of OAR 690-380-4030(5), the Department shall provide to persons who have filed standing statements as defined under OAR 690-380-0100(11) notice of any differences between the Department's Preliminary Determination and the Final Order, notice of a hearing on the application under OAR 137-003-0535, and an opportunity to request limited party status or party status in the hearing.

Requests for standing must be received in the Water Resources Department no later than 30 days after the last date of publication of the newspaper notice or the Department's weekly notice as prescribed by OAR 690-380-4020, whichever is later. Requests for standing must be in writing, and must include the following:

- The requester's name, mailing address and telephone number;
- If the requester is representing a group, association or other organization, the name, address and telephone number of the represented group;
- A statement that the requester supports the preliminary determination as issued.

After the protest period has ended, the Director will either issue a Final Order or schedule a contested case hearing. The contested case hearing will be scheduled only if a protest has been filed under OAR 690-380-4030. In accordance with OAR 690-380-4200, notice and conduct of the hearing shall:



- Be under the applicable provisions of ORS 183.310 to 183.550, pertaining to contested cases, and the hearing shall be held in the area where the rights are located unless all parties stipulate otherwise; and
- If a protest has asserted that a water right to be transferred has been forfeited through non-use, include the notice and procedures described in OAR 690-017-0500 to 690-017-0900.

If after hearing the Department issues a proposed Final Order finding that a change in point of diversion or appropriation will result in injury, the applicant may file a notification of intent to pursue approval of the transfer under OAR 690-380-5030 to 690-380-5050 within 15 days of receipt of the proposed order. Notwithstanding 690-002-0175, if the applicant files a notification of intent to pursue approval of the transfer under 690-380-5030 to 690-380-5050, the deadline for filing exceptions to the proposed order shall be 30 days after the Department provides notice to the parties that the transfer does not meet the requirements of 690-380-5030 to 690-380-5050.

If you do not request a hearing within 30 days after the close of the protest period, or if you withdraw a request for a hearing, notify the Department or the administrative law judge that you will not appear, or fail to appear at a scheduled hearing, the Director may issue a final order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials that you have submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

You may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions, or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 690-137-0555, an agency representative may represent partnerships, corporations, associations, governmental subdivisions or public, or private organizations if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

**Notice Regarding Servicemembers:** Active-duty servicemembers have a right to stay proceedings under the federal Servicemembers Civil Relief Act. 50 U.S.C. App. §§501-597b. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 971-355-4127, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>.

If you have questions about how to file a protest or if you have previously filed a protest and you want to know the status, please contact Will Davidson at 503-507-2749.

If you have questions about the Department or any of its programs, please contact our Water Resources Customer Service Group at 503-986-0900.

Address any correspondence to: Oregon Water Resources Department, Transfer and Conservation Section, 725 Summer Street NE, Suite A, Salem OR 97301-1266.





# Oregon

Tina Kotek, Governor

## Water Resources Department

North Mall Office Building  
725 Summer St NE, Suite A  
Salem, OR 97301  
Phone 503 986-0900  
Fax 503 986-0904  
[www.oregon.gov/owrd](http://www.oregon.gov/owrd)

DATE FEB 25 2025

VIA CERTIFIED MAIL AND E-MAIL

**Applicant**

Gary Smith  
69519 Elgin Cemetery Road  
Elgin, Oregon 97827

**Agent**

Trout Unlimited  
Attn: Jessica Humphreys  
401 NE 1<sup>st</sup> Street  
Enterprise, OR 97828

SUBJECT: Instream Transfer Application T-14531

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve instream application T-14531. 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 Eastern Oregonian 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) if I may be of assistance.

Sincerely,



Sarah Henderson  
Flow Restoration Program Coordinator  
Transfer and Conservation Section

cc: Transfer Application file T-14531  
Shad Hattan, District 6 Watermaster (*via e-mail*)

encs