

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

In the Matter of Instream Transfer	)	PRELIMINARY DETERMINATION
Application T-10021, Grant County	)	PROPOSING APPROVAL OF A TIME-
	)	LIMITED INSTREAM TRANSFER

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

JANA SETZLER, THE NATURE CONSERVANCY
821 SE 14TH AVE
PORTLAND OR 97214

Findings of Fact

1. On 10-26-2005, Jana Setzler, agent for The Nature Conservancy, filed a time-limited instream transfer application to temporarily change the use, and place of use under Certificate 25662 to instream use for a period of 25 years. The Department assigned the application number T-10021.
2. The right to be transferred is as follows:

Certificate: 25662 in the name of OREGON LUMBER COMPANY, A UTAH CORPORATION, BY W. J. ECCLES, VICE PRESIDENT (confirmed by John Day River decree)

Use: IRRIGATION of 32 ACRES

Priority Date: 1907

Limit/Duty: One-fortieth cfs per acre irrigated to June 1 and one-eightieth cfs per acre thereafter, further limited to one acre-foot per acre per calendar month to June 1 and 4 acre-feet per acre during the season April 1 to September 30, measured at the point of diversion

Source: BIG BOULDER CREEK, tributary to MIDDLE FORK JOHN DAY RIVER

Authorized Point of Diversion: NOT SPECIFIED

Authorized Place of Use:

Twtp	Rng	Mer	Sec	Q-Q	Acres
10 S	33 E	WM	27	SW NE	15.00
10 S	33 E	WM	27	NE SE	15.00

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.
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Twp	Rng	Mer	Sec	Q-Q	Acres
10 S	33 E	WM	27	NW SE	2.00

3. A total of 127.5 acre-feet of water may be diverted annually under the existing right.
4. The diversion for the right is from Big Boulder Creek through the Boulder-Riley Ditch, as specified by the John Day River Decree, page 575. The decree map shows the Boulder-Riley Ditch diversion point to be in the NW¼ of the SW¼ of Section 26, T10S, R33E, W.M., approximately 814 feet south and 187 feet east from the E¼ corner of Section 27.
5. Application T-10021 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 any other ecological values for a period of 25 years.
6. The applicant requests that the water use revert to its authorized use and place of use after 25 years from the date of the order. 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 25 irrigation seasons, ending September 30, 2030.
7. Application T-10021 proposes to change the place of use of the right to create an instream reach from the original point of diversion at the Boulder-Riley Ditch on Big Boulder Creek, being in the NW¼ of the SW¼ of Section 26, T10S, R33E, W.M., approximately 814 feet south and 187 feet east from the E¼ corner of Section 27, to the mouth of Big Boulder Creek.
8. The applicant proposes that water to be transferred instream be protected as follows:

Period	Rate (cfs)	Volume (acre-feet)
APRIL 2 through MAY 31	0.26	30.9
JUNE 1 through SEPTEMBER 30	0.40	96.6
Total		127.5

9. There is a pending instream water right application, IS-70652, filed by the Oregon Department of Fish and Wildlife on Big Boulder Creek for anadromous and resident fish rearing. The pending instream water right application has a priority date of September 11, 1990. The applicant has requested this time-limited instream transfer replace a portion of that pending instream water right application upon its approval.
10. Notice of the application for transfer was published on November 8, 2005, pursuant to ORS 540.520 and OAR 690-380-4000. No comments were filed in response to the notice, and the Oregon Department of Fish and Wildlife indicated that there does not appear to be a potential for injury to instream rights as a result of the proposed change.

11. Water has been used within the last five years according to the terms and conditions of the right, and no evidence is available 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 are present.
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 of the proposed instream flow and the timing of the proposed instream flow are 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 no known areas of natural loss of streamflow to the river bed downstream from the point of diversion;
 - d) Any return flows resulting from the exercise of the existing water right result in return flows to the Middle Fork of the John Day River, not Big Boulder Creek; thus 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.
17. 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.
18. There are presently no instream water rights on Big Boulder Creek. There is a pending instream water application, IS-70652, to establish instream flows for anadromous and resident fish rearing. By replacing a portion of that instream water right application, upon its approval, the instream water right established with this transfer application will provide protection for streamflows identified as necessary for fish habitat under an earlier priority date during the term of this transfer.

Determination and Proposed Action

The proposed changes in place of use and character of use in application T-10021 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 and will be approved provided that protests are not filed pursuant to OAR 690-380-4030.

If application T-10021 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-10021 are approved.*
2. *The exercise of the right evidenced by Certificate 25662 for irrigation of 32.0 acres at the former place of use shall be SUSPENDED, without loss of priority, for the term of the transfer authorized herein.*
3. *The instream water right established under this order shall provide for the protection of streamflows from the original point of diversion at the Boulder-Riley Ditch on Big Boulder Creek, being in the NW¼ of the SW¼ of Section 26, T10S, R33E, W.M., approximately 814 feet south and 187 feet east from the E¼ corner of Section 27, to the mouth of Big Boulder Creek.*
4. *The quantities of water to be protected instream during the term of this order are:*

<i>Period</i>	<i>Rate (cfs)</i>
<i>APRIL 2 through MAY 31</i>	<i>0.26</i>
<i>JUNE 1 through SEPTEMBER 30</i>	<i>0.40</i>

5. *During the term of this order, the instream water right shall replace a portion of instream water rights established pursuant to ORS 537.341 during the period April 2 through September 30.*
6. *The use of water shall revert to the use and place of use as described by Certificate 25662 on October 1, 2030.*

Dated at Salem, Oregon this 4th day of June 2007.


Phillip C. Ward, Director *PCW*

This draft Preliminary Determination was prepared by a Reimbursement Authority contractor. If you have questions about the information in this document, you may reach Dorothy Pedersen at 503-986-0890 or Dorothy.I.Pedersen@wrdd.state.or.us.

Protests should be addressed to the attention of Field Services Division, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.