

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

In the Matter of Time-Limited Instream	)	PRELIMINARY DETERMINATION
Transfer Application T-10022, Grant	)	PROPOSING APPROVAL OF A
County	)	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 October 26, 2005, Jana Setzler, for The Nature Conservancy, filed a time-limited instream transfer application to change the character of use and the place of use under Certificate 25126 to instream use for a period of 25 years. The Department assigned the application number T-10022.
2. Certificate 25126 has been cancelled. On September 27, 2005, the Department issued Certificate 81550 for the remaining portion of certificate 25126 that was not cancelled by the provisions of an order of the Department.
3. On April 5, 2006, the applicant modified the application to clarify the shaping of the instream use proposed to be created from this time-limited instream transfer.
4. On May 30, 2007, the applicant further modified the application to reduce the number of acres of irrigation to be transferred instream by 2.0 acres in order to provide some irrigation around site buildings and to maintain some domestic and stock use on the property. The applicant also clarified that the spring identified on Certificate 81550 is not included in the transfer application.
5. The portion of the right to be transferred is as follows:
Certificate: 81550 in the name of The Nature Conservancy (John Day River (F) decree)
Use: Irrigation of 150.90 Acres
Priority Date: February 5, 1907

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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Rate: Maximum of 3.77 Cubic Feet per Second (CFS)
Limit/Duty: Middle Fork John Day River: 1/40th CFS per acre irrigated from April 1 to September 30 of each year; further limited to 1.0 acre-foot (AF) per acre per calendar month for a maximum of 5.0 AF per acre for the irrigation season as measured at the point of diversion
Source: Middle Fork John Day River, tributary to the North Fork John Day River

Authorized Points of Diversion: None specified on certificate.

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
10 S	33 E	WM	20	NE SE	12.00
10 S	33 E	WM	20	NW SE	14.00
10 S	33 E	WM	20	SE SE	28.00
10 S	33 E	WM	21	SW SW	28.60
10 S	33 E	WM	21	SE SW	6.40
10 S	33 E	WM	21	SE SE	7.80
10 S	33 E	WM	22	SW SW	2.80
10 S	33 E	WM	27	NW NW	7.60
10 S	33 E	WM	28	NE NE	7.40
10 S	33 E	WM	28	NW NE	11.70
10 S	33 E	WM	28	NE NW	22.20
10 S	33 E	WM	28	NW NW	2.40
				Total:	150.9

- A total of 754.5 acre-feet of water may be beneficially used annually under the existing right.
- The points of diversion for the portion of the right to be transferred to instream use are on the Middle Fork John Day River. The instream transfer application describes points of diversion on the Middle Fork John Day River as being located as follows:

Township		Range		Meridian	Sec	¼ ¼	Location
10	S	33	E	W.M.	27	NW NW	POD #1: 480 feet South and 1010 feet East from the NW corner of Section 27
10	S	33	E	W.M.	28	NW NE	POD #2: 375 feet South & 1900 feet West from the NW corner of Section 27
10	S	33	E	W.M.	28	NW NW	POD #3: 440 feet South & 1105 feet East from the NW corner of Section 28

- Application T-10022 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.
- 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 flows allocated under

this Time-Limited Transfer will not be protected until 2008. The term of this transfer will end September 30, 2033.

10. Application T-10022 proposes to change the place of use of the right to create an instream reach from the lowermost POD (POD #3 as described in Finding of Fact #7) on the Middle Fork John Day River to the mouth of the Middle Fork John Day River.
11. Application T-10022 initially proposed that the listed quantities of water be transferred instream while recognizing that adjustments may be necessary below the POD to avoid injury to other water rights:

Period	Rate (cfs)	Volume (acre-feet)
April 23 through April 30	1.00	15.84
May 1 through May 31	2.45	150.38
June 1 through June 30	2.45	145.53
July 1 through July 31	2.45	150.38
August 1 through August 31	2.45	150.38
September 1 through September 20	3.80	150.48
Total Volume:		761.01

12. 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.
13. Water has been used within the last five years according to the terms and conditions of the rights, and there is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
14. The portion of the water right to be transferred has been leased instream since 1995 under instream lease L-12. The term of this instream lease has been extended through September 30, 2007. The instream lease will terminate prior to the time at which this instream transfer will become effective.
15. The Oregon Water Trust and Nature Conservancy have been involved in other water right transactions affecting flows in the Middle Fork John Day River. A portion of Certificate 25126 was voluntarily cancelled resulting in a reduction in calls on the river of 0.48 cfs. An instream water right on Big Boulder Creek for 0.40 cfs also is proposed under a water right transfer. The instream right would be protected to the mouth of Big Boulder Creek and would increase the availability of water to downstream water rights calling on the Middle Fork John Day River.
16. The US Geological Survey (USGS) has operated a streamflow gaging station at Ritter since 1929. The station provides an accurate record of streamflows in the Middle Fork John Day River at Ritter, approximately 15 miles upstream of the mouth. However, there is no long-term record of streamflows at the locations of the points of diversion authorized under Certificate 81550.

17. In August 2002, the Department of Environmental Quality (DEQ) performed several streamflow measurements on the Middle Fork John Day River. The measurements suggest that streamflows in the upper portions of the proposed instream reach are 30 to 40 percent lower than at the Ritter gage.
18. Based upon available data, including streamflow data from the Ritter gage and data from DEQ, flows are sufficient in the Middle Fork John Day River prior to June 1 to ensure that other water rights are not injured by the transfer. However, after June 1, streamflows begin to decrease significantly.
19. Although flows in the Middle Fork John Day River increase between POD #3 and the mouth, a portion of the water allocated under the transfer would evaporate or be lost to seepage in Reaches #1 and #2. These channel losses reduce the quantity of water that can be protected through the reach. Data are not available to accurately quantify the channel losses. However, absent additional information, a loss factor of one percent per mile provides a reasonable estimate.
20. Any return flows resulting from the exercise of the existing water right likely occur between POD #3 and Camp Creek.
21. To prevent injury and enlargement and to account for the amendment to the application identified in Findings of Fact #3 and #4 and to account for channel losses and return flows as described in Findings of Fact #18 and #19, the applicant has agreed to modify the quantities to be transferred and protected instream as follows:

Instream Period	POD #3	Immediately below POD #3	USGS Gage at Ritter*	Mouth*
April 28 through April 30	1.00	1.00	0.72	0.62
May 1 through May 31	2.45	2.45	1.76	1.51
June 1 through June 30	2.45	1.12	0.80	0.69
July 1 through July 31	2.45	1.43	1.03	0.88
August 1 through August 31	2.45	1.14	0.82	0.70
September 1 through September 20	3.77	0.83	0.60	0.51
Total Annual Instream Volume:	753.23	414.19		

* Estimated based on a channel loss factor of one percent per mile.

At POD #3: Location as described in Finding of Fact #7.

Reach #1: Below POD #3 to the USGS Gage at Ritter

Reach #2: From the USGS Gage at Ritter to the mouth of the Middle Fork John Day River.

Mouth: Mouth of the Middle Fork John Day River.

22. The quantities of water that can be protected instream throughout Reaches #1 and #2 are the respective quantities listed under Finding of Fact #20 less channel losses. As identified in Finding of Fact #19, data are not currently available to accurately quantify the channel losses. Pending the availability of more accurate data, a channel loss factor of one percent loss per mile will be applied to the quantity of water protected beginning immediately below POD #3 and extending throughout Reaches #1 and #2 to the mouth of the Middle Fork John Day River.
23. To prevent injury to upstream junior water users, the proposed instream use should be conditioned such that these upstream users are not regulated for flows in excess of the quantities to which this instream water right is entitled at the original point of diversion.
24. Within the proposed instream reach, there are two existing instream water rights. Instream water right Certificate 66610, established under ORS 537.346 (minimum streamflow conversion), for the purpose of supporting aquatic life, is located within the Middle Fork John Day River as measured at the USGS Ritter gage located in Section 8, Township 8 South, Range 30 East, W.M, and has a priority date of May 24, 1962. The other existing instream water right, Certificate 59789, also established under ORS 537.346, for the purpose of supporting aquatic life and minimizing pollution, is located in the Middle Fork John Day River between the Ritter gage and the mouth of the Middle Fork John Day River, and has a priority date of November 3, 1983.
25. This portion of the Middle Fork John Day River is a designated State Scenic Waterway. The State Scenic Waterway designation provides for protection of flows necessary to maintain the free flowing character of the Middle Fork John Day River for fish and wildlife habitat, and recreation, which is a matter of statutory policy.
26. Flows for the designated Scenic Waterway and the existing instream water rights are not always met during requested period for instream protection.
27. The applicant requested that the proposed instream water right be additive to Certificate 66610 and replace a portion of the existing instream water right Certificate 59789. By replacing a portion of Certificate 59789, the instream water right created as a result of this transfer will provide for protection of streamflows identified as necessary for aquatic life under an earlier priority date. The combined quantities of water to be protected under Certificate 66610 and the proposed instream water right do not exceed the quantities established as beneficial through issuance of Certificate 59789.
28. The proposed change, as described in Finding of Fact #21, would not result in enlargement of the right.
29. The proposed change, as described in Finding of Fact #21, would not result in injury to existing water rights.

30. The protection of flows within the proposed reach, as described in Finding of Fact #21, is appropriate, considering:
- a) The instream water right begins at the recorded point of diversion (POD #3);
 - 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. An estimated loss factor of one percent per mile has been applied to the quantity of water that may be protected instream throughout reach #2; and
 - d) The quantity of water to be protected instream below POD #3 has been reduced to account for return flows. Any return flows resulting from the exercise of the existing water right would re-enter the river between POD #3 and Camp Creek.
31. Based upon Findings of Fact #21 through #24, any instream water right established by this transfer application may 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, during the period April 28 through September 20, unless otherwise specified by an order approving a new instream water right under these statutes.
32. 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.

Determination and Proposed Action

The proposed changes in place of use and character of use in time-limited transfer application T-10022 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 approved, the change and subsequent use of water shall be subject to the following conditions:

- 1. The proposed changes shall be effective upon issuance of a Final Order.*
- 2. The exercise of the right evidenced by Certificate 81550 for irrigation of 150.9 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 point of diversion #3 (as described in Finding of Fact #7) to the mouth of the Middle Fork John Day River.*

4. *Except as may be otherwise established under Condition #6 of this order, the quantities of water to be protected instream during the term of this order are:*

<i>Instream Period</i>	<i>POD #3</i>	<i>Immediately below POD #3</i>	<i>USGS Gage at Ritter*</i>	<i>Mouth*</i>
<i>April 28 through April 30</i>	<i>1.00</i>	<i>1.00</i>	<i>0.72</i>	<i>0.62</i>
<i>May 1 through May 31</i>	<i>2.45</i>	<i>2.45</i>	<i>1.76</i>	<i>1.51</i>
<i>June 1 through June 30</i>	<i>2.45</i>	<i>1.12</i>	<i>0.80</i>	<i>0.69</i>
<i>July 1 through July 31</i>	<i>2.45</i>	<i>1.43</i>	<i>1.03</i>	<i>0.88</i>
<i>August 1 through August 31</i>	<i>2.45</i>	<i>1.14</i>	<i>0.82</i>	<i>0.70</i>
<i>September 1 through September 20</i>	<i>3.77</i>	<i>0.83</i>	<i>0.60</i>	<i>0.51</i>
<i>Total Annual Instream Volume:</i>	<i>753.23</i>	<i>414.19</i>		

** Estimated based on a channel loss factor of one percent per mile.*

At POD #3: *Location as described in Finding of Fact #7.*

Reach #1: *Below POD #3 to the USGS Gage at Ritter*

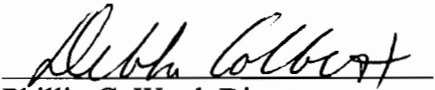
Reach #2: *From the USGS Gage at Ritter to the mouth of the Middle Fork John Day River.*

Mouth: *Mouth of the Middle Fork John Day River.*

5. *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.*
6. *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 within Reaches #1 and #2. Pending more accurate quantification of channel losses, a loss factor of one percent loss per mile will be applied to the quantity of water protected beginning immediately below POD #3 and extending throughout Reaches #1 and #2 to the mouth of the Middle Fork John Day River. The Department may apply a different loss factor in calculating the quantity of water to be protected within the reaches on finding that available data allow a more accurate estimate of channel losses within the reach.*
7. *During the term of this order, the instream water right shall be additive to Certificate 66610 and replace a portion of Certificate 59789 during the period April 28 through September 20.*
8. *During the term of this order, the right to the instream 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 81550 and any related decree.*

9. *The use of water shall revert to the use and place of use as described by Certificate 81550 on October 1, 2033.*

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


Phillip C. Ward, Director

This Preliminary Determination was prepared by Doug Parrow. If you have questions about the information in this document, you may reach me at 503-986-0881 or Douglas.M.Parrow@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.