

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

In the Matter of Time-Limited Instream)
Transfer Application T-10342, Jackson)
County)
)

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

GORDON C. AND JUDITH D. ROSE
8908 JOHN DAY DRIVE
GOLD HILL, OR 97525

Findings of Fact

Background

1. On March 16, 2007, Gordon C. And Judith D. Rose filed a time-limited instream transfer application to temporarily change the character of use and place of use under Certificates 81513 and 41771 to instream use for a period of three years. The Department assigned the application number T-10342.

2. The portion of the first right to be transferred is as follows:

Certificate: 81513 in the name of JOHN DAY (perfected under Permit S-23796)
Use: IRRIGATION of 60.9 ACRES
Priority Date: JULY 28, 1955
Rate: 0.76 CUBIC FOOT PER SECOND (CFS)
Limit/Duty: ONE-EIGHTIETH cfs per acre, not to exceed 4.5 acre-feet per acre per year
Source: ROGUE RIVER, tributary to PACIFIC OCEAN
Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
36 S	2 W	WM	18	NW NE

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.

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	2 W	WM	7	SW SW	0.7
36 S	2 W	WM	18	NE NW	1.4
36 S	2 W	WM	18	NW NW	34.5
36 S	2 W	WM	18	SW NW	7.3
36 S	2 W	WM	18	SE NW	1.1
36 S	3 W	WM	12	SE SE	0.6
36 S	3 W	WM	13	NE NE	15.3

3. A scrivener's error has been identified on Certificate 81513. The authorized point of diversion is incorrectly listed as being in the NW¼ NE¼ of Section 18. The scrivener's error occurred when Certificate 52205 was issued as a remaining right to confirm the portion of the original Certificate 27276 that was not cancelled by the provisions of an order dated May 7, 1984, Volume 38, Page 236. The scrivener's error has been carried from one remaining right to the next, being from Certificate 52205 to Certificate 57547 and again to Certificate 81513. The correct location of the authorized point of diversion for Certificate 81513 as described in Certificate 27276 is provided below.

Point of Diversion for Certificate 81513 is more accurately described as:

Twp	Rng	Mer	Sec	Q-Q
36 S	2 W	WM	18	SW NE

4. The portion of the second right to be transferred is as follows:

Certificate: 41771 in the name of JOHN S. AND MARY P. DAY (perfected under Permit S-18531)

Use: IRRIGATION of 30.7 ACRES

Priority Date: OCTOBER 28, 1948

Rate: 0.20 CUBIC FOOT PER SECOND

Limit/Duty: ONE-EIGHTIETH cfs per acre, not to exceed 4.5 acre-feet per acre per year

Source: ROGUE RIVER, tributary to PACIFIC OCEAN

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
36 S	3W	WM	18	SW NE	2350 FEET SOUTH AND 1840 FEET WEST FROM THE NE CORNER OF SECTION 18

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
36 S	3 W	WM	12	SW SE	4	2.2
36 S	3 W	WM	12	SE SE		8.4
36 S	3 W	WM	13	NE NE		14.1
36 S	3 W	WM	13	NW NE		6.0

5. As a result of a scrivener's error in Certificate 41771, the authorized point of diversion is incorrectly listed as being in Range 3 West. Certificate 41771 confirms the changes in the point of diversion and place of use for a portion of Certificate 27274 under Transfers D-140

and D-141. The correct location as described in the order approving Transfers D-140 and D-141 is provided below.

Point of Diversion for Certificate 41771 is more accurately described as:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
36 S	2W	WM	18	SW NE	2350 FEET SOUTH AND 1840 FEET WEST FROM THE NE CORNER OF SECTION 18

6. The following quantities of water may be beneficially used annually under the existing rights:

Certificate	Quantity of Water that May Be Beneficially Used Annually in Acre-Feet (AF)
81513	274.05
41771	84.50

7. Application T-10342 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 for a period of three years.
8. The applicant requests that the water use revert to its authorized use and place of use after three 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 three irrigation seasons, ending October 31, 2009. The applicant has requested the ability to terminate the order with six months written notice.
9. Application T-10342 proposes to change the place of use of the right to create an instream reach from the authorized points of diversion to the mouth of the Rogue River.
10. The applicant proposes the quantities water to be transferred instream to be protected as follows:

Certificate	Priority	Rate (cfs)	Volume(AF)	Period	Reach
81513	JULY 28, 1955	0.76	274.35	April 2 to October 1	POD (as described in Finding of Fact #3) to Mouth of Rogue River
41771	OCTOBER 28, 1948	0.196	70.74	April 2 to October 1	POD (as described in Finding of Fact #5) to Mouth of Rogue River

11. There are several existing instream water rights, Certificates 59806 (priority date of May 22, 1959), 59807 (priority date of February 24, 1966), 59816 (priority date of May 22, 1959), 59817 (February 24, 1966), 59847 (priority date of May 22, 1959), and 59848 (priority date of February 24, 1966) within the same reach as that proposed for the new instream water right. These rights were established under ORS 537.346, process to convert minimum perennial streamflows to instream water rights, for the purpose of supporting aquatic life and minimizing pollution.
12. The applicant proposes to replace a portion of the existing instream water rights established under ORS 537.346, evidenced by Certificates 59806, 59807, 59816, 59817, 59847, and 59848, and any instream water right established under ORS 537.341 (state agency

application process). The applicant also proposes that an instream water right established as a result of this instream transfer be additive to any instream water rights established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process).

13. The application includes Land Use Information forms completed and signed by a representative of the Jackson County planning department. Additionally, the Department has provided notification of the proposed action to Josephine County, Curry County, and the cities of Gold Hill, Rogue River, Grants Pass, and Gold Beach.
14. Notice of the application for transfer was published on March 27, 2007, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
15. On July 17, 2007, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10342 to the applicants. The draft Preliminary Determination set forth a deadline of August 20, 2007, for the applicants to respond. On July 20, 2007, the applicants 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.

Instream Transfer Review Criteria (OAR 690-77-0075 and 690-380-4010)

16. 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.
17. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing rights were present within the five-year period prior to submittal of Application T-10342.
18. At the rate and volume requested to be protected instream from Certificate 81513, water may not be transferred instream for the full period (182 days) requested by the applicant. Water may be protected for a shorter period (181 days), being April 2 through September 29.
19. The volume requested to be protected instream (274.35 AF) from Certificate 81513 is slightly higher than the full duty allowed by the right (274.05 AF).
20. At the requested instream rate and considering the full duty of the right, water may be protected instream over a longer period than requested (182 days) from Certificate 41771, being April 2 through October 31 (213 days), the full irrigation season.
21. Based upon Findings of Fact #17 through #19, on July 20, 2007, the applicants (by way of their agent, agreed to modify the quantities to be transferred and protected instream as follows:

Certificate	Priority	Rate (cfs)	Volume(AF)	Period	Reach
81513	JULY 28, 1955	0.76	274.05	April 2 through September 29	POD (as described in Finding of Fact #3) to Mouth of Rogue River
41771	OCTOBER 28, 1948	0.20	84.5	April 2 through October 31	POD (as described in Finding of Fact #5) to Mouth of Rogue River

22. The proposed change, as modified, would not result in enlargement of the rights.
23. The proposed change, as modified, would not result in injury to other water rights.
24. The amount of the proposed instream flow and the timing of the proposed instream flow is allowable within the limits and use of the original water rights.
25. The protection of flows within the proposed reach is appropriate, considering:
 - a) The instream water rights begin at the recorded points 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; and
 - d) There are no known return flows resulting from the exercise of the existing water rights.
26. The existing instream water rights in the reach are sufficient to protect the monthly quantities of water necessary for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values, but some of the existing instream water rights are at times not met, and the rights proposed for transfer will allow replacement of portions of the existing instream water rights with earlier priority dates.
27. The total monthly quantities of water to be protected under the existing and proposed instream rights within the proposed reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.
28. By replacing portions of Certificates 59806, 59807, 59816, 59817, 59847, and 59848, the instream rights will provide protection for streamflows identified as necessary for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values under an earlier priority date during the term of this transfer.
29. The applicant has requested the ability to terminate the order approving this time-limited instream transfer with six months written notice to the Department. Instream and irrigation water use may not occur within the same irrigation season of a calendar year. Once water has been protected instream during a calendar year, a request to terminate the order may not go into affect until the following calendar year. Water may also not be used for irrigation purposes until the following calendar year. To prevent any injury or enlargement, the order

may be terminated with written notification to the Department by February 1 of each year for the same calendar year.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-10342 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.

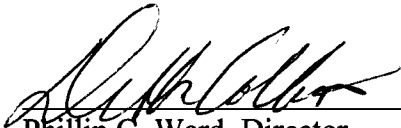
If application T-10342 is approved, the final order will include the following:

- 1. The temporary changes in character of use and place of use to instream use proposed in application T-10342 are approved from the date of this order through October 31, 2009, unless terminated earlier.*
- 2. The instream water right established under this order shall provide for protection of streamflows as follows:*

Certificate	Priority	Rate (cfs)	Period	Reach
81513	JULY 28, 1955	0.76	April 2 through September 29	POD (as described in Finding of Fact #3) to Mouth of Rogue River
41771	OCTOBER 28, 1948	0.20	April 2 through October 31	POD (as described in Finding of Fact #5) to Mouth of Rogue River

- 3. During the term of this order, the instream water right 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.*
- 4. 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 81513 and 41771 and any related decree.*
- 5. The exercise of the rights evidenced by Certificates 81513 and 41771 for irrigation at the former places of use (as described in Findings of Fact #2 and #4) shall be SUSPENDED, without loss of priority, for the term of the transfer authorized herein.*
- 6. The water right holder has the option of terminating the time-limited instream transfer with notification to the Department by February 1 of each year. If a termination request is received during the irrigation season, an order terminating this time-limited instream transfer right will not go into affect until the following calendar year.*
- 7. Upon expiration of this transfer, on either November 1, 2009 or by an order authorizing early termination of the time-limited instream transfer, the use of water shall revert to its original use and place of use as described by Certificates 81513 and 41771.*

Dated at Salem, Oregon this 17th day of August 2007.


Phillip C. Ward, Director

This Preliminary Determination was prepared by a Reimbursement Authority contractor. If you have questions about the information in this document, you may reach Bob Rice at 503-986-0885 or Robert.D.Rice@wrд.state.or.us.

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