

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

In the Matter of Time-Limited Instream)
Transfer Application T-10343, 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

GEORGE H. NEARY, TRUSTEE
10350 DRYDEN DRIVE
RENO, NV 89511

Findings of Fact

Background

1. On March 16, 2007, George H. Neary, Trustee, filed a time-limited instream transfer application to temporarily change the character of use and place of use under Certificate 81513 to instream use for a period of three years. Hendrika Neary, Trustee, also signed the application. The Department assigned the application number T-10343.

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

Certificate: 81513 in the name of JOHN DAY (perfected under Permit S-23796)

Use: IRRIGATION of 92.1 ACRES

Priority Date: JULY 28, 1955

Rate: 1.15 CUBIC FEET 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
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	17	NE NW	2.9
36 S	2 W	WM	17	NW NW	0.3
36 S	2 W	WM	17	SW NW	8.2
36 S	2 W	WM	17	SE NW	8.4
36 S	2 W	WM	18	NE NE	7.7
36 S	2 W	WM	18	NW NE	2.5
36 S	2 W	WM	18	SW NE	28.9
36 S	2 W	WM	18	SE NE	13.7
36 S	2 W	WM	18	NE NW	2.3
36 S	2 W	WM	18	SE NW	17.1
36 S	2 W	WM	18	NW SE	0.1

3. A scrivener’s error has been identified on Certificate 81513. The authorized point of diversion for Certificate 81513 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 certificate 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. A total of 414.45 acre-feet of water may be beneficially used annually under the existing right.
5. Application T-10343 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, from 2007 through 2009.
6. The applicant requests that the water use revert to its authorized use and place of use at the end of the 2009 irrigation season, being October 31, 2009. The applicant has requested the ability to terminate the order with six months written notice.
7. Application T-10343 proposes to change the place of use of the right to create an instream reach from the point of diversion described in Finding of Fact #3 to the mouth of the Rogue River.
8. The applicant proposes the quantities water to be transferred instream to be protected follows:

Period	Rate (cfs)	Volume (acre-feet)
April 2 to October 1	1.15	414.45

9. There are 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 (priority date of 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.
10. 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 rights established 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).
11. 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.
12. 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.
13. On July 26, 2007, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10343 to the applicant. The draft Preliminary Determination set forth a deadline of September 1, 2007, for the applicant(s) to respond. On August 16, 2007, 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.

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

14. 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.
15. 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-10343.

16. 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.
17. Based upon Finding of Fact #15, on August 16, 2007, the applicant agreed to modify the quantities to be transferred and protected instream as follows:

Period	Rate (cfs)	Volume (acre-feet)
April 2 to September 29	1.15	414.45

18. The proposed change as modified would not result in enlargement of the right.
19. The proposed change as modified would not result in injury to other water rights.
20. 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 right.
21. The protection of flows within the proposed reach 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; and
 - d) There are no known return flows resulting from the exercise of the existing water right.
22. 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.
23. 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.
24. 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.
25. 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-10343 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-10343 is approved, the final order will include the following:

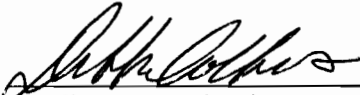
1. *The temporary changes in character of use and place of use to instream use proposed in application T-10343 are approved from the date of this order through October 31, 2009, unless terminated earlier.*
2. *The instream water right shall provide for the protection of streamflows from the authorized point of diversion, described in Finding of Fact #3, to the mouth of the Rogue River.*
3. *The quantities of water to be protected under the instream water right are:*

<i>Priority</i>	<i>Period</i>	<i>Rate (cfs)</i>
<i>July 28, 1955</i>	<i>April 2 through September 29</i>	<i>1.15</i>

4. *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.*
5. *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 81513.*
6. *The exercise of the right evidenced by Certificate 81513 for irrigation at the former place of use (as described in Finding of Fact #2) shall be SUSPENDED, without loss of priority, for the term of the transfer authorized herein.*
7. *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.*

8. *Upon expiration of this transfer, on either October 31, 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 Certificate 81513.*

Dated at Salem, Oregon this 19th day of September 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.