

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

In the Matter of Instream Transfer)
 Application T-10659, JACKSON County)
) PRELIMINARY DETERMINATION
) PROPOSING APPROVAL OF A TIME-
) LIMITED INSTREAM TRANSFER

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

J-DIAMOND L-5 TRUST
 LAWRENCE & SHARON MARTIN
 PO BOX 870
 ROGUE RIVER, OR 97572

Agent

OREGON WATER TRUST
 STEVE PARRETT
 65 SW YAMHILL ST., SUITE 300
 PORTLAND, OR 97204

Findings of Fact

Background

1. On June 16, 2008, J-Diamond L-5 Trust, Lawrence and Sharon Martin, trustees, filed a time-limited instream transfer application to change the character of use and place of use under Certificates 56489, 57576, 57577, and 57709 to instream use for a period of 29 years. The Department assigned the application number T-10659.

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

Certificate: 56489 in the name of JAMES H. AND LOTTIE L. MARTIN (confirmed by ROGUE RIVER decree)

Use: LIVESTOCK AND IRRIGATION of 1.8 ACRES

Priority Date: 1902

Quantity: 0.03 CUBIC FOOT PER SECOND (CFS), if available at the original point of diversion (Vroman Ditch)

Source: EVANS CREEK, tributary to ROGUE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
35 S	4 W	WM	15	SE NW	1650 FEET SOUTH AND 500 FEET WEST FROM THE N1/4 CORNER OF SECTION 15

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 AND LIVESTOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
35 S	4 W	WM	15	SE NE	1.8

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

Certificate: 57576 in the name of JAMES H. AND LOTTIE L. MARTIN (confirmed by ROGUE RIVER decree)

Use: LIVESTOCK AND IRRIGATION of 14.3 ACRES

Priority Date: 1902

Quantity: 0.24 CFS, if available at the original point of diversion (Vroman Ditch)

Source: EVANS CREEK, tributary to ROGUE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
35 S	4 W	WM	15	SE NW	1650 FEET SOUTH AND 500 FEET WEST FROM THE N1/4 CORNER OF SECTION 15

Authorized Place of Use:

IRRIGATION AND LIVESTOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
35 S	4 W	WM	15	SE NE	14.3

4. The third right to be transferred is as follows:

Certificate: 57577 in the name of JAMES H. AND LOTTIE L. MARTIN (confirmed by ROGUE RIVER decree)

Use: LIVESTOCK AND IRRIGATION of 1.9 ACRES

Priority Date: 1902

Quantity: 0.032 CFS, if available at the original point of diversion (Vroman Ditch)

Source: EVANS CREEK, tributary to ROGUE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
35 S	4 W	WM	15	SE NW	1650 FEET SOUTH AND 500 FEET WEST FROM THE N1/4 CORNER OF SECTION 15

Authorized Place of Use:

IRRIGATION AND LIVESTOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
35 S	4 W	WM	15	SE NE	1.9

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

Certificate: 57709 in the name of JAMES H. AND LOTTIE L. MARTIN (confirmed by ROGUE RIVER decree)

Use: LIVESTOCK AND IRRIGATION of 0.6 ACRE

Priority Date: 1902

Quantity: 0.01 CFS, if available at the original point of diversion (Vroman Ditch)

Source: EVANS CREEK, tributary to ROGUE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
35 S	4 W	WM	15	SE NW	1650 FEET SOUTH AND 500 FEET WEST FROM THE N1/4 CORNER OF SECTION 15

Authorized Place of Use:

IRRIGATION AND LIVESTOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
35 S	4 W	WM	15	SE NE	0.60

6. An annual duty limit per acre for each of the above described certificates is not specified by certificate or decree.
7. Each of the above water rights shares a common point of diversion. The amount of water that may be diverted at the authorized point of diversion may only be diverted if that quantity is available at the original point of diversion, being Vroman Ditch. Vroman Ditch is located as follows:

Twp	Rng	Mer	Sec	Q-Q
35 S	4 W	WM	11	SE NE

8. Application T-10659 proposes to change the character of use under the portions of Certificates 56489, 57576, 57577, and 57709 as described in Findings of Fact #2 through #5 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 29 years, beginning in 2011.
9. The applicant requests that the water use revert to its authorized use and place of use after 29 years from the requested begin year, being 2011. 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 29 irrigation seasons, ending October 31, 2040.
10. Application T-10659 proposes to change the place of use of the right to create an instream point at the authorized POD, as described in Findings of Fact #2 through #5.
11. The applicant proposes the quantities of water to be transferred instream to be protected as follows:

Originating Certificate	Instream Period	Rate (cfs)	Volume (acre-feet)
56489	April 1 to October 31	0.03	12.73
57576	April 1 to October 31	0.24	101.87
57577	April 1 to October 31	0.032	13.58
57709	April 1 to October 31	0.01	4.24
	Total	0.312	132.42

12. The proposed instream point is located within the reach of several existing instream water rights.
13. At the proposed instream point, the applicant requests that any instream use created as a result of this time-limited instream transfer replace a portion of the existing instream water rights established under and ORS 537.346 (state agency instream water right application process) and ORS 537.341 (minimum streamflow conversion process) with an earlier priority date for the duration of the instream use.
14. At the proposed instream point, the applicant also requests that any instream use created as a result of this time-limited instream transfer be additive to other instream water rights established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) for the duration of the instream use.
15. Notice of the intent to file the transfer application was provided by the applicant to Jackson County. Additionally, the Department provided notification of the proposed transfer to Jackson County upon receipt of Transfer Application T-10659.
16. Notice of the application for transfer was published on July 1, 2008, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
17. On October 22, 2008, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10659 to the applicants. The cover letter for the draft Preliminary Determination set forth a deadline of November 21, 2008, for the applicants to respond and provide additional information necessary to complete and clarify the application. The additional information requested by the Department was received on January 7, 2009. On January 7, 2009, the applicant concurred with the draft Preliminary Determination and requested that the Department proceed with issuance of a Preliminary Determination.

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

18. The portions of Certificates 56489, 57576, 57577, and 57709 proposed to be transferred were leased instream under L-364 during the period July 1, 2003 to October 31, 2005. There is no information in the record that would demonstrate that the water rights are subject to forfeiture under ORS 540.610.
19. A pump, pipeline, and sprinkler system sufficient to use the full amount of water allowed under each of the existing rights were present within the five-year period prior to submittal of Application T-10659.
20. The proposed change, as described in Findings of Fact #10 and #11, would not result in enlargement of the rights.
21. The proposed change, as described in Findings of Fact #10 and #11, would not result in injury to other water rights.

22. The amount and timing of the proposed instream flow, as described in Findings of Fact #11, is allowable within the limits and use of the original water rights.
23. The protection of flows at the authorized point of diversion, as described in Findings of Fact #2 through #5, is appropriate, considering:
 - a) The instream water right will be located 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) Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the point of the instream water right.
24. Encompassing the proposed instream point are at least three existing instream water rights, which include the use of water for supporting aquatic life, minimizing pollution, and fish spawning and rearing habitat. Two of the instream rights were established under the state agency application process and the minimum streamflow conversion process and carry priority dates junior to the instream use proposed by this transfer. Certificate 59705, with a priority date of November 3, 1983, was established under ORS 537.346 (minimum streamflow conversion) and Certificate 73027, with a priority date of December 7, 1990, was established under ORS 537.341 (state agency application process). Flows for these existing instream water rights are at times not met.
25. There is also one instream water right created as a result of the allocation of conserved water process (ORS 537.470). This instream right, Certificate 76035, has a priority date of 1896 (plus one minute).
26. By replacing a portion of the instream water rights established under ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency application process), any instream water right created as a result of this transfer will provide for protection of streamflows previously identified as necessary for fish and wildlife habitat under an earlier priority date.
27. By adding to other instream water rights established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) for the same location, a new instream right established by this transfer will provide protection for additional streamflows necessary for fish and wildlife habitat.
28. During the period April 1 through October 31 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 unless otherwise specified by an order approving a new instream water right under these statutes.

- The total monthly quantities of water to be protected under the existing and proposed instream rights at the point will provide for a beneficial purpose and do not exceed the estimated average natural flow.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-10659 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-10659 is approved, the final order will include the following:

- The changes in character of use and place of use to instream use proposed in application T-10659 are approved.*
- The exercise of the rights evidenced by Certificates 57576 and 57577, and the portions of Certificates 56489 and 57709 affected by this transfer, for livestock and irrigation at the former place of use, as described in Findings of Fact #2 through #5, shall be SUSPENDED, without loss of priority, for the term of the transfer authorized herein.*
- The term of the instream use shall commence on April 1, 2011, and shall remain in effect for 29 years, ending on October 31, 2040.*
- The instream water right established under this order shall provide for the protection of streamflows for a point located in the SE1/4 NW1/4, Section 15, T35S, R4W, W.M.; 1650 feet south and 500 feet west from the N1/4 corner, Section 15.*
- The quantity of water to be protected instream during the term of this order are:*

<i>Priority Date</i>	<i>Instream Period</i>	<i>Instream Rate (cfs)</i>
<i>1902</i>	<i>April 1 to October 31</i>	<i>0.312</i>

- The amount of water that may be protected instream at the instream point is limited to the quantity available at the original point of diversion, being Vroman Ditch.*
- 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. The original point of diversion, Vroman Ditch, is located as follows:*

<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>
<i>35 S</i>	<i>4 W</i>	<i>WM</i>	<i>11</i>	<i>SE NE</i>

- 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 at the specified point.*
- During the term of this order, the instream right 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.

10. During the term of this order, 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 56489, 57576, 57577, and 57709 and any related decree.

11. The use shall revert to the authorized use and place of use on October 31, 2040.

Dated at Salem, Oregon this 27th day of February, 2009.

William C. F. Ward
for 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 Laura Wilke at 503-986-0884 or Laura.K.Wilke@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.

**Notice of Preliminary Determination for
Water Right Transfer T-10659**

T-10659 filed by the J-Diamond L-5 Trust, Lawrence and Sharon Martin, Trustees, PO Box 870, Rogue River, OR 97572, proposes a time-limited change in character of use and place of use for the rights under Certificates 57576 and 57577 and portions of the rights under Certificates 56489 and 57709. The rights allow the use of a total of 0.312 cubic foot per second (cfs) (priority date 1902 for each of the four certificates) from a diversion point in the SE1/4 NW1/4, Sec. 15, T35S, R4W, W.M., for irrigation in Sec. 15, T35S, R4W, W.M. (Rogue River Basin). The applicant proposes to temporarily change the place of use and character of use of the rights to instream use in Evans Creek (at the POD located in the SE1/4 NW1/4, Sec. 15, T35S, R4W, W.M.), at a maximum rate of 0.312 cfs for the period April 1, 2011 through October 31, 2040. The Water Resources Department has concluded that the proposed transfer appears to be consistent with the requirements of ORS Chapter 540 and OAR 690-380-5000 and OAR 690-077-0075.

Any person may file, jointly or severally, with the Department a protest or standing statement within 30 days after the date of final publication of notice in the Department's weekly notice or of this newspaper notice, whichever is later. A protest form and additional information on filing protests may be obtained by calling (503) 986-0881. The last date of newspaper publication is [DATE OF LAST PUBLICATION]. If no protests are filed, the Department will issue a final order consistent with the preliminary determination.