

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

In the Matter of Instream Transfer	)	PRELIMINARY DETERMINATION
Application T-7054, Tillamook County	)	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

NESKOWIN REGIONAL WATER DISTRICT
PO BOX 823
NESKOWIN, OR 97149

Findings of Fact

Background

1. On November 1, 1993, Neskowin Regional Water District filed an application to change the place of use (to expand the service district boundary for Neskowin) and point of diversion under Certificate 21365. The Department assigned the application number T-7054.
2. On March 7, 2008, the applicant requested to amend the application and submitted revised application materials. The amended application proposes to change the place of use and character of use under Certificates 21365 and 21373 to instream use.
3. This transfer application is intended to provide mitigation for surface water permit application S-85745.
4. The first right to be transferred is as follows:

Certificate:	21365 in the name of JAMES J. WALTON (perfected under Permit S-6132)
Use:	MUNICIPAL USE
Priority Date:	AUGUST 26, 1920
Rate:	1.0 CUBIC FOOT PER SECOND (CFS)

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.

Source: TWO UNNAMED STREAMS, tributary to HAWK CREEK

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 S	11 W	WM	25	SW SE	Unspecified in Certificate
5 S	11 W	WM	36	NE NE	Unspecified in Certificate

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q
5 S	11 W	WM	25	NW NE
5 S	11 W	WM	25	SW NE
5 S	11 W	WM	25	NE NW
5 S	11 W	WM	25	SE NW
5 S	11 W	WM	25	NE SW
5 S	11 W	WM	25	NW SE

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

Certificate: 21373 in the name of JAMES J. WALTON (perfected under Permit S-16092)

Use: MUNICIPAL USE

Priority Date: DECEMBER 7, 1944

Rate: 1.3 CFS

Source: UNNAMED STREAM, tributary to BUTTE CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 S	11 W	WM	25	SE NE	Unspecified in Certificate

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q
5 S	11 W	WM	25	NW NE
5 S	11 W	WM	25	SW NE
5 S	11 W	WM	25	NE NW
5 S	11 W	WM	25	SE NW
5 S	11 W	WM	25	NE SW
5 S	11 W	WM	25	NW SE

6. The measured distances for the point of diversion are not specified in the certificate. However, there is additional information in the application file that identifies the location of the points of diversion as follows:

Points of Diversion for Certificate 21365:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 S	11 W	WM	36	NE NE	UNNAMED STREAM #1: 1880 FEET EAST AND 670 FEET SOUTH FROM N $\frac{1}{4}$ CORNER OF SECTION 36
5 S	11 W	WM	25	SW SE	UNNAMED STREAM #2: 1308 FEET EAST AND 137 FEET NORTH FROM THE S $\frac{1}{4}$ CORNER OF SECTION 25

Point of Diversion for Certificate 21373:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 S	11 W	WM	25	SE NE	450 FEET WEST AND 1650 FEET SOUTH FROM THE NE CORNER OF SECTION 25

7. Application T-7054 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.
8. The applicant proposes to change the place of use to create an instream use as follows:

Certificate 21365

Instream Reach: From the authorized POD's to confluence with Hawk Creek and into Hawk Creek to confluence with Butte Creek and to the mouth of Butte Creek

Instream Period	Rate (cfs)	Volume (acre-feet)
January 1 – December 31	1.0 CFS	723.79

Certificate 21373

Instream Reach: From the authorized POD to confluence with Butte Creek and into Butte Creek to the mouth of Butte Creek

Instream Period	Rate (cfs)	Volume (acre-feet)
January 1 – December 31	1.3 CFS	941.16

9. The applicant proposes that any instream water right established as a result of this instream transfer be additive to any existing instream water rights for the same reach established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process). The applicant also proposes that any instream water right established as a result of this instream transfer replace a portion of any existing instream rights established pursuant to ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency instream application process), with an earlier priority date.
10. Notice of the application for transfer was originally published on November 10, 1993. No comments were filed in response to the notice.
11. Notice of the application for transfer as an instream transfer was published on November 3, 2009, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
12. Consistent with land use requirements, the Department provided notice of the instream transfer application to Tillamook County on October 30, 2009.
13. On March 18, 2010, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-7054 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of April 16, 2010, for the applicant to respond. This deadline was extended at the applicant's request. The applicants concurred with the findings of the draft Preliminary Determination on June 30, 2010, and requested that the Department proceed with issuance of a Preliminary Determination.

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

14. The applicant has submitted an affidavit asserting that the water rights are not subject to forfeiture under ORS 540.610.
15. It appears that a diversion structure and pipeline sufficient to use the full amount of water allowed under the existing rights may not have been present within the five-year period prior to submittal of Application T-7054. However, the information in the record is not sufficient to initiate cancellation proceedings under ORS 540.631.
16. The applicant has proposed to protect water instream beyond the source streams and into downstream tributaries. Generally, an instream use may be protected from the POD to the mouth of the source stream. However, the instream use may be protected further downstream and into a tributary (receiving stream) if the amount (rate) of the instream use is measurable into the receiving stream.
17. The instream reach proposed by the applicant for Certificate 21365 requires modification. The amount (1.0 CFS) of the proposed instream use beginning in the two Unnamed Streams is measurable into Hawk Creek but is not measurable into Butte Creek. The reach for the instream use may extend to the mouth of Hawk Creek but not into Butte Creek.
18. The instream reach proposed by the application for Certificate 21373 may be protected to the mouth of Butte Creek. The amount (1.3 CFS) of the proposed instream use beginning in the Unnamed Stream is measurable into Butte Creek.
19. Certificate 21365 allows the use of 1.0 CFS from two unnamed streams but does not specify how much comes from each stream. The Department has identified that for the purpose of creating an instream use in each unnamed stream, the 1.0 CFS may be divided evenly between each stream.
20. Based on Findings of Fact #17 and #19, on June 30, 2010, the applicants agreed to modify the proposed instream use as follows:

Certificate 21365

Instream Reach #1: From the POD on Unnamed Stream #1 (described in Finding of Fact #6) to confluence with Hawk Creek and into Hawk Creek to the confluence with Unnamed Stream #2

Instream Period	Rate (cfs)	Volume (acre-feet)
January 1 – December 31	0.5 CFS	361.98

Instream Reach #2: From the POD on Unnamed Stream #2 (described in Finding of Fact #6) to confluence with Hawk Creek

Instream Period	Rate (cfs)	Volume (acre-feet)
January 1 – December 31	0.5 CFS	361.98

Instream Reach #3: From the confluence of Hawk Creek and Unnamed Stream #2 to the mouth of Hawk Creek

Instream Period	Rate (cfs)	Volume (acre-feet)
January 1 – December 31	1.0 CFS	723.79

Certificate 21373

Instream Reach: From the POD (described in Finding of Fact #6) to confluence with Butte Creek and into Butte Creek to the mouth of Butte Creek

Instream Period	Rate (cfs)	Volume (acre-feet)
January 1 – December 31	1.3 CFS	941.16

21. The proposed changes, as modified, would not result in enlargement of the rights.
22. The proposed changes, as modified, would not result in injury to other water rights.
23. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
24. The protection of flows within the proposed reach, as modified in Finding of Fact #20, is appropriate, considering:
 - a) The instream water right begins 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) 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 rights.
25. Both Butte Creek and Hawk Creek are tidally influenced. Measurement of the instream use would not likely be possible at the mouth of each stream. However, for purposes of managing the instream use, measurement at a location above the area of tidal influence would be appropriate.
26. There are no existing instream water rights within the reach of the proposed instream water rights.
27. There are existing instream water rights on Neskowin Creek, which are not always met, for the purpose of supporting aquatic life and various fish life stages. Hawk and Butte Creeks are part of the Neskowin Creek watershed. In addition, Neskowin Creek is a high priority watershed for flow restoration for fish habitat.
28. Therefore, by adding to other water instream rights that may be created in the future through an instream transfer or through the conserved water statutes, the proposed instream rights

will provide protection for additional streamflows necessary for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values.

29. In addition, by replacing a portion of any instream rights created in the future at the request of state agencies, which would have a priority date consistent with the date an application is filed, the proposed instream rights will provide protection for streamflows necessary for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values under earlier priority dates.
30. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach/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-7054 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-7054 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-7054 are approved.*
2. *Water right certificates 21365 and 21373 are cancelled. New certificates confirming the instream water right shall be issued.*
3. *The instream water rights shall provide for the protection of streamflows as follows:*

Certificate 21365

Instream Reach #1: From the POD on Unnamed Stream #1 (described in Finding of Fact #6) to confluence with Hawk Creek and into Hawk Creek to the confluence with Unnamed Stream #2

<i>Instream Period</i>	<i>Rate (cfs)</i>	<i>Volume (acre-feet)</i>
<i>January 1 – December 31</i>	<i>0.5 CFS</i>	<i>361.98</i>

Instream Reach #2: From the POD on Unnamed Stream #2 (described in Finding of Fact #6) to confluence with Hawk Creek

<i>Instream Period</i>	<i>Rate (cfs)</i>	<i>Volume (acre-feet)</i>
<i>January 1 – December 31</i>	<i>0.5 CFS</i>	<i>361.98</i>

Instream Reach #3: From the confluence of Hawk Creek and Unnamed Stream #2 to the mouth of Hawk Creek

<i>Instream Period</i>	<i>Rate (cfs)</i>	<i>Volume (acre-feet)</i>
<i>January 1 – December 31</i>	<i>1.0 CFS</i>	<i>723.79</i>

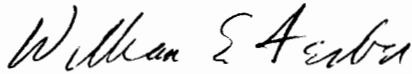
Certificate 21373

Instream Reach: From the POD (described in Finding of Fact #6) to confluence with Butte Creek and into Butte Creek to the mouth of Butte Creek

<i>Instream Period</i>	<i>Rate (cfs)</i>	<i>Volume (acre-feet)</i>
<i>January 1 – December 31</i>	<i>1.3 CFS</i>	<i>941.16</i>

4. *Protection of the instream use on Butte Creek and Hawk Creek shall be based on measurements above the area of tidal influence on each creek.*
5. *Water rights upstream of the original points 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 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 identified in a subsequent order establishing a new instream water right under these statutes.*
7. *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 21365 and 21373 and any related decree.*
8. *The former place of use of the transferred water shall no longer receive water as part of this right.*

Dated at Salem, Oregon this 30th day of June, 2010.



for Phillip C. Ward, Director

This Preliminary Determination was prepared by Laura Wilke. If you have questions about the information in this document, you may reach me at 503-986-0884 or Laura.K.Wilke@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.

