

4. On April 2, 2012, Natasha Bellis, of The Freshwater Trust, agent for the applicant, submitted a revised page 7 for the application, modifying the total volume and proposed instream period.
5. On June 25, 2012, the Department sent a copy of the draft Preliminary Determination to the applicant, proposing to approve Transfer Application T-11287 to create a year-round instream right for 0.09 cubic foot per second (cfs) with an annual volume of 65 Acre-Feet (AF). The draft Preliminary Determination cover letter set forth a deadline of July 26, 2012, for the applicant to respond. The applicant requested the deadline for response be extended to November 20, 2012.
6. In September 2012, Muir & McDonald elected a new company representative, Laurie Bevens Gee, and on November 26, 2012, and February 1, 2013, The Freshwater Trust (agent for the applicant), submitted documentation to the Department regarding the change in representation to update the record for T-11287, and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
7. On February 8, 2013, the applicant requested that the Department re-evaluate the amount of water available for transfer before proceeding with issuance of a Preliminary Determination.
8. On February 15, 2013, the applicant's agent and the Department agreed to a maximum annual volume of 72.3 AF to be transferred instream year-round at a rate of 0.10 cfs.
9. On March 8, 2013, the Department issued a Preliminary Determination proposing to approve Transfer Application T-11287 and sent a copy to the applicant and agent. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on March 12, 2013, and in the Polk County Itemizer-Observer newspaper on March 13, 20 and 27, 2013, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.

10. The right to be transferred is as follows:

Certificate: 38639 in the name of MUIR AND MCDONALD COMPANY (confirmed by Rickreall Creek decree)
Use: INDUSTRIAL (TANNERY) USE
Priority Date: 1863
Rate: 0.18 CUBIC FOOT PER SECOND (CFS)
Source: RICKREALL CREEK, tributary to the WILLAMETTE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
7 S	5 W	WM	32	NE NE	68	1000 FEET NORTH AND 2800 FEET EAST FROM THE SW CORNER OF DLC 68

Authorized Place of Use:

INDUSTRIAL (TANNERY) USES					
Twp	Rng	Mer	Sec	DLC	Q-Q
7 S	5 W	WM	32	68	NE NE

11. Certificate 38639 does not list an annual duty of water, however, the decree states that water was used in the tannery operation for “washing, boilers and other normal tannery uses.” The decree describes forty-five vats and/or tanks of various dimensions with a total capacity of 13,250 cubic feet, which were refilled at different intervals. The water right was granted for “not to exceed 0.18 cubic foot per second during their normal operation period of the day”, which the Department estimates allows use of up to 72.3 acre-feet (AF) per year.
12. Application T-11287 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.
13. Application T-11287 proposes to change the place of use of the right to create an instream reach from the authorized point of diversion to the confluence of Rickreall Creek with the Willamette River, and to the extent measurable, into the Willamette River.
14. The applicant originally proposed the quantities of water to be transferred instream to be protected as follows:

Instream Period	Rate (CFS)	Volume (AF)
May 1 through October 31	0.18	65.0

15. The applicant proposes that the proposed instream water right be additive to any instream water right established under ORS 537.348 and ORS 537.470, and replace a portion of any instream water right established under ORS 537.341 and ORS 537.346 with an earlier priority date.

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

16. The tannery closed down operations in 2007, but the right has been leased instream under IL-1170. The term of the lease was during the period June 9, 2011, through December 31, 2012, and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
17. A diversion structure, holding pit and piping system 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-11287.
18. Use of water under the existing right is subject to beneficial use without waste in accordance with ORS 536.310. Based upon evaluation of information in the decree, a total of up to 72.3 AF of water may be beneficially used annually under the existing right.

19. The instream use requested by the applicant, as described in Finding of Fact #14, requires modification. Based upon continued evaluation, the Department has identified that up to 72.3 AF of water may be beneficially used and is available for transfer. The applicant previously requested to limit the instream use to 0.18 cfs from May 1 through October 31, a 184 day period, with a volume of 65 AF.
20. Since the tannery use was year-round, protecting the entire volume within an approximately six month period of time during the irrigation season would result in a larger water volume protected during those months than could have been beneficially used by the tannery operation during those months. This could increase competition between this right and other junior irrigation water rights during the irrigation season. To avoid impacts to other users, the Department finds that water may be protected instream at a reduced rate on a year-round basis.
21. The 72.3 AF volume may be protected instream year-round at a reduced rate of 0.10 cfs.
22. The applicant has proposed to protect water instream beyond the source stream (Rickreall Creek) and into a downstream receiving stream (Willamette River), if it is measureable. However, the amount (0.10 CFS) of the proposed instream use beginning at the POD in Rickreall Creek is not measurable into the Willamette River.
23. Therefore, based upon Findings of Fact #18 through #22, the Department finds that the proposed instream use may be protected as follows:

Instream Reach: From the POD on Rickreall Creek (described in Finding of Fact #10) to the mouth of Rickreall Creek, being the confluence with the Willamette River.

Priority Date	Instream Rate	Instream Volume	Instream Period
1863	0.10 cfs	72.3 AF	Year-round

24. The proposed changes, as described in Finding of Fact #23, would not result in enlargement of the right.
25. The proposed changes, as described in Finding of Fact #23, would not result in injury to other water rights.
26. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
27. The protection of flows within the proposed reach, as modified, 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) It is unlikely that any return flows resulting from the exercise of the existing water right would have re-entered the creek within the proposed reach of the instream water right.
28. The instream reach proposed by the applicant for Certificate 38639 may be protected from the POD in Rickreall Creek to the mouth (confluence with the Willamette River). Measurement of the instream use would not likely be possible at the mouth of Rickreall Creek, which is influenced by flows in the Willamette River. However, for purposes of managing the instream use, measurement should include or be at a point upstream from influence by the Willamette River.
29. There are no existing instream water right certificates for the same reach as that proposed for the new instream water right. There is an existing instream water right, Certificate 59482, upstream of the proposed reach, to be maintained in Rickreall Creek and its tributaries above USGS gage No. 14-1907, for supporting aquatic life.
30. Water right Certificate 38639 proposed for transfer was leased instream from June 9, 2011 through December 31, 2012 under instream lease IL-1170. This lease has expired and has not been renewed, so the right is subject to transfer.
31. Rickreall Creek is an Oregon Department of Fish and Wildlife high priority watershed for flow restoration for fish habitat during the summer months (July through September).
32. Therefore, by replacing a portion of any instream right established in the future under the state agency application process, the instream right will provide protection for streamflows previously identified as necessary for aquatic life and fish habitat under an earlier priority date unless otherwise identified in a subsequent order establishing a new instream water right under the state agency instream application process.
33. In addition, by adding to any instream water rights established in the future under the instream transfer or allocation of conserved water process for the same location, the instream right will provide protection for additional streamflows necessary for aquatic life and fish habitat, unless otherwise identified in a subsequent order establishing a new instream water right under those statutes.
34. The quantity of water to be protected under the proposed instream right in the reach will provide for a beneficial purpose and does not exceed the estimated average natural flow.

Conclusions of Law

The changes in character of use and place of use to instream use proposed in application T-11287, as modified, and stated in Finding of Fact #22, are consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075.

Now, therefore, it is ORDERED:

1. The changes in character of use and place of use to instream use proposed in application T-11287 are approved.

2. Water right certificate 38639 is cancelled. A new certificate confirming the instream water right shall be issued.
3. The instream water right shall provide for the protection of streamflows from the POD, originally authorized under Certificate 38639, on Rickreall Creek (described in Finding of Fact #10) to the mouth of Rickreall Creek.
4. The quantities of water to be protected under the instream water right are:

Instream Period	Rate	Volume
January 1 – December 31	0.10 CFS	72.3 AF

5. Protection of the instream use in Rickreall Creek, below the original point of diversion, shall be based on measurements above the area of influence from the Willamette River.
6. 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.
7. Within the specified stream reach, 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.
8. 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.
9. 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 38639 and any related decree.
10. The former place of use of the transferred water shall no longer receive water as part of this right.

Dated at Salem, Oregon this 30 day of April, 2013.


 Dwight French, Water Right Services Administrator, for
 PHILLIP C. WARD, DIRECTOR

Mailing Date MAY 06 2013