

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

In the Matter of Instream Transfer) PRELIMINARY DETERMINATION
Application T-10090, Jackson County) PROPOSING APPROVAL OF
) CHANGES 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

DANIEL E. AND MARILYN F. MILTON
560 HAMILTON RD.
JACKSONVILLE, OR 97530

Findings of Fact

Background

1. On January 30, 2006, Daniel E. and Marilyn F. Milton filed a time-limited instream transfer application to change the character of use and place of use under Transfer T-8945, approved by Special Order Volume 56, Page 2293, to instream use until such time that conditions for termination of a stored water use contract agreement between the applicant and the Bureau of Reclamation are met. The Department assigned the application number T-10090.
2. A new certificate was issued on January 30, 2009, for the water right evidenced by Special Order Volume 56, Page 2293. The new certificate number is 81950.
3. The applicant has requested that approval of this time-limited instream transfer be contingent upon the applicant entering into a stored water use contract with the Bureau of Reclamation and approval by the Oregon Water Resources Department of a permit to use stored water.
4. The right to be transferred is as follows:

Certificate: 81950 in the name of DANIEL E. AND MARILYN F. MILTON
Use: IRRIGATION of 6.0 ACRES
Priority Date: SEPTEMBER 1, 1857
Rate: 0.1196 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.
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Limit: If available at the original point of diversion: Farmer's Ditch located in the NE¼ NE¼, Section 14, T 39 S, R 3 W, W.M.

Source: LITTLE APPLGATE RIVER, tributary to the APPLGATE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
39 S	3 W	WM	4	NE NE	20 FEET SOUTH AND 1250 FEET WEST FROM NE CORNER OF SECTION 4
39 S	3 W	WM	14	NE NE	FARMER'S DITCH: 350 FEET SOUTH AND 900 FEET WEST FROM NE CORNER OF SECTION 14; ALSO LOCATED AS GPS COORDINATES: LATITUDE 42.18400, LONGITUDE -123.0174

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
38 S	3 W	WM	33	SE SE	6.0

5. The irrigation season, as established by the Rogue River Decree, is April 1 through October 31.
6. Application T-10090 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 any other ecological values on a time limited basis.
7. The applicant has entered into a 25-year agreement with the Bureau of Reclamation to provide stored water for irrigation of the place of use described in Finding of Fact #4. This agreement automatically renews for additional 25-year periods unless otherwise terminated by the parties. The applicant requests that the water right described in Finding of Fact #4 revert to its authorized use and place of use upon termination of a stored water contract with the Bureau of Reclamation or if the agreement between the applicant and the Bureau of Reclamation is not renewed. The termination request may either be received from both the Bureau of Reclamation and the applicant or from the applicant along with evidence that the stored water contract has been terminated or that the agreement with the Bureau of Reclamation has not been renewed.
8. Application T-10090 proposes to change the place of use of the right to create an instream reach from the Farmers Ditch POD described in Finding of Fact #4 to the mouth of the Little Applegate River.
9. The applicant proposes the quantities of water to be transferred instream to be protected as follows:

Period	Rate (CFS)
April 1 through October 31	0.1196

10. Historically the applicant has diverted the full quantity allowed by the water right during the entire irrigation season. The right has been used as part of a rotation agreement.

11. There is an existing instream water right, Certificate 75996 (Application IS-70982), with a priority date of December 7, 1990, within the same reach as that proposed for the new instream water right.
12. During the instream period, April 1 through October 31, the applicant proposes that this time-limited instream transfer be additive to other instream water rights, including other time-limited instream transfers, for the same reach/point, up to the amounts requested in the original instream water right application filed by the Oregon Department of Fish and Wildlife under IS-70982, as shown below:

	APR	MAY	JUN	JUL	AUG	SEP	OCT
1 st ½*	85.0	85.0	50.0	33.0	33.0	33.0	50.0
2 nd ½*	85.0	50.0	50.0	33.0	33.0	50.0	85.0

* The rates in cfs by ½ month requested in instream water right application IS-70982.

Otherwise the applicant proposes that the time-limited instream transfer should replace a portion of the existing instream water right (Certificate 75996) with an earlier priority date.

13. An application to use stored water, application number S-87646, has been filed associated with this time-limited instream transfer application and is being processed concurrently.
14. Consistent with land use requirements, notice of the intent to file the instream transfer application was provided by the applicant to Jackson County. Additionally, the Department provided notification of the proposed action to this local government upon receipt of Transfer Application T-10090.
15. Notice of the application for transfer was published on February 28, 2006, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
16. On July 13, 2009, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10090 to the applicants. The cover letter to the draft Preliminary Determination set forth a deadline of August 11, 2009, for the applicants to respond. The applicants requested additional time to respond to the draft Preliminary Determination. The additional information requested by the Department was received on August 11, 2010 and January 24, 2011. The applicants also concurred with the findings of 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)

17. 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.
18. 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-10090.

19. Due to the quantity of water diverted, there have been return flows. These return flows have primarily entered the Applegate River downstream of its confluence with the Little Applegate River. However, a portion of the return flows may enter the Little Applegate River downstream of the point of diversion, described in Finding of Fact #4. There are no water users on the Little Applegate River downstream of this point of diversion.
20. The proposed change would not result in enlargement of the right.
21. The proposed change would not result in injury to other water rights.
22. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
23. The protection of flows within the proposed reach described in Finding of Fact #8 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) As described in Finding of Fact #19, any return flows resulting from the exercise of the existing water right would re-enter the Applegate River downstream of the reach of the proposed time-limited instream water right. If a portion of return flows would enter the Little Applegate River downstream of the point of diversion no injury would occur to downstream users, as there are none, and any potential enlargement or injury to upstream users can be prevented by further conditioning of the time-limited instream transfer so that 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 time-limited instream water right is entitled at the original point of diversion.
24. By adding to existing instream water rights, including other time-limited instream transfers, for the same location, the total monthly quantities of water to be protected instream will exceed the estimated average natural flow. However, the Department has determined that the estimated average natural flows may be exceeded due to the following:
 - a) The quantities to be protected instream will not exceed the amounts requested in the original instream water right application (IS-70982) filed by the Oregon Department of Fish and Wildlife (ODFW) (see Finding of Fact #12) and;
 - b) The water right proposed to be transferred to a time-limited instream water right is either in an Oregon Department of Fish and Wildlife (ODFW) flow restoration priority watershed or ODFW has indicated that exceeding the estimated average natural flow in the reach, up to the amount requested by the ODFW, will provide for a beneficial purpose and are significant for Coho and fall Chinook salmon, summer and winter

steelhead and cutthroat trout for migration spawning, egg incubation, fry emergence and juvenile rearing.

25. By adding to other instream water rights established pursuant to ORS 537.341 (state agency application process) and ORS 537.348 (instream transfer 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.
26. By replacing a portion of the instream water rights established under 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. The quantity and timing of the proposed instream use will provide for a beneficial purpose.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-10090 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-10090 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-10090 are approved, and become effective when this order is signed, or when the permit under Application S-87646 is issued, whichever happens later.*
2. *The exercise of the right evidenced by Certificate 81950 for Irrigation at the former place of use shall be SUSPENDED, without loss of priority, for the term of the transfer authorized herein.*
3. *The instream water right shall provide for the protection of streamflows from the diversion authorized under Certificate 81950, located at:*

<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>	<i>Measured Distances</i>
39 S	3 W	WM	14	NE NE	FARMER'S DITCH: 350 FEET SOUTH AND 900 FEET WEST FROM NE CORNER OF SECTION 14; ALSO LOCATED AS GPS COORDINATES: LATITUDE 42.18400, LONGITUDE -123.0174

to the mouth of the Little Applegate River (River Mile 0.0).

4. *The quantities of water to be protected under the instream water right are:*

<i>Period</i>	<i>Rate (CFS)</i>
<i>April 1 through October 31</i>	<i>0.1196</i>

5. *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.*
6. *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.*
7. *During the term of this order and for the 2nd half of May and the month of June 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.*
8. *During the term of this order and for April, the 1st half of May, and the months of July, August, September, and October the instream right established by this transfer shall be in addition to instream water rights established pursuant to ORS 537.341, 537.346, 537.348 or 537.470, but the quantity protected instream shall not exceed the rate in cfs shown below:*

	APR	MAY	JUN	JUL	AUG	SEP	OCT
1 st ½	85.0	85.0	50.0 [†]	33.0	33.0	33.0	50.0
2 nd ½	85.0	50.0 [†]	50.0 [†]	33.0	33.0	50.0	85.0

† These months or partial months are shown to describe the maximum instream rate associated with the time-limited instream water right, in connection with other instream water rights for the same reach.

Once the amounts protected instream as a result of this time limited instream transfer, in combination with other time-limited instream transfers, exceeds the amounts listed above, any additional quantities protected instream as a result of a time-limited instream transfer shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346.

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 81950 and any related decree.*
10. *The term of this Final Order shall continue until terminated. Upon termination of this transfer, the use of water shall revert to its original use and place of use as described by Certificate 81950. The use shall revert to the authorized use and place of use upon submission of a termination request from:*
 - a) *The Bureau of Reclamation and the applicant, or*
 - b) *The applicant along with evidence that the stored water contract from Applegate Reservoir has been terminated or that the agreement between the applicant and the Bureau of Reclamation has not been renewed.*

11. This order also may be terminated if a permit is not issued or is rescinded under Application S-87646.

Dated at Salem, Oregon this 26 day of May, 2011.


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

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

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@wrds.state.or.us.

**Notice of Preliminary Determination for
Water Right Transfers T-10078, T-10079, T-10087, T-10088,
T-10089, T-10090, T-10091, T-10092, T-10104, T-10105, T-10159,
T-10167, T-10168, and T-10957**

T-10078 filed by Timothy and Jodi Jimerson (PO Box 341, Oro Grande, CA 92368), proposes a change in place of use and a change in character of use under Certificate 85632. The right allows the use of 0.26 Cubic Foot per Second (CFS) (priority date 1908) for Irrigation and Livestock in Sec. 11, T39S, R3W, W.M. T-10079 filed by Timothy and Jodi Jimerson, proposes a change in place of use and a change in character of use under Certificate 85728. The right allows the use of 0.97 CFS (priority date 1854) for Irrigation in Sec. 11, T39S, R3W, W.M. T-10087 filed by William James and Lori McTaggart (495 Little Applegate Rd., Jacksonville, OR 97530), proposes a change in place of use and a change in character of use under Certificate 85461. The right allows the use of 1.23 CFS (priority date 1908) for Irrigation and Livestock in Sec. 2, 3, and 10, T39S, R3W, W.M. T-10088 filed by William James and Lori McTaggart, proposes a change in place of use and a change in character of use under Certificate 85460. The right allows the use of 0.06 CFS (priority date 1854) for Irrigation in Sec. 10, T39S, R3W, W.M. T-10089 filed by Herschel and Roberta Wright (1388 Upper Applegate Rd., Jacksonville, OR 97530), proposes a change in place of use and a change in character of use under Certificate 81949. The right allows the use of 0.22 CFS (priority date September 1, 1857) for Irrigation in Sec. 33, T38S, R3W, W.M. T-10090 filed by Daniel and Marilyn Milton (560 Hamilton Rd., Jacksonville, OR 97530), proposes a change in place of use and a change in character of use under Certificate 81950. The right allows the use of 0.1196 CFS (priority date September 1, 1857) for Irrigation in Sec. 33, T38S, R3W, W.M. T-10091 filed by John and Lynda Babbitt (2345 Upper Applegate Rd., Jacksonville, OR 97530), proposes a change in place of use and a change in character of use under Certificate 85320. The right allows the use of 0.025 CFS (priority date September 1, 1857) for Irrigation and Livestock in Sec. 3, T39S, R3W, W.M. T-10092 filed by William Wright (2433 Upper Applegate Rd., Jacksonville, OR 97530), proposes a change in place of use and a change in character of use under Certificate 85321. The right allows the use of 0.025 CFS (priority date September 1, 1857) for Irrigation and Livestock in Sec. 3, T39S, R3W, W.M. T-10104 filed by Hobart and Nanette Marvin (2557 Upper Applegate Rd., Jacksonville, OR 97530) and William Wright, proposes a change in place of use and a change in character of use under Certificate 85735. The right allows the use of 0.24 CFS (priority date May 29, 1916) for Irrigation in Sec. 3, T39S, R3W, W.M. T-10105 filed by Hobart and Nanette Marvin, proposes a change in place of use and a change in character of use under Certificate 81954. The right allows the use of 0.0625 CFS (priority date September 1, 1857) for Irrigation and Livestock in Sec. 3, T39S, R3W, W.M. T-10159 filed by Wayne and Sue Stone, Trustees (900 Hamilton Rd., Jacksonville, OR 97530), proposes a change in place of use and a change in character of use under Certificate 85463. The right allows the use of 0.5 CFS (priority date September 1, 1857) for Irrigation in Sec. 33, T38S, R3W, W.M. The application was amended to include cancellation of a portion of Certificates 60701 and 60702 for supplemental irrigation. T-10167 filed by William Christofferson (2444 Upper Applegate Rd., Jacksonville, OR 97530) or c/o Ruch Dental, 181 Upper Applegate Rd., Jacksonville, OR 97530), proposes a change in place of use and a change in character of use under Certificate 85290. The right

allows the use of 0.025 CFS (priority date September 1, 1857) for Irrigation and Livestock in Sec. 3, T39S, R3W, W.M. T-10168 filed by Carver and Patricia Moosman (PO Box 668, Jacksonville, OR 97530), proposes a change in place of use and a change in character of use under Certificate 81692. The right allows the use of 0.025 CFS (priority date September 1, 1857) for Livestock and Irrigation in Sec. 3, T39S, R3W, W.M. T-10957 filed by Stage Left Farm (10670 Rochester Ave., Los Angeles, CA 90024), proposes a change in place of use and a change in character of use under Certificate 85462. The right allows the use of 1.64 CFS (priority date September 1, 1857) for Irrigation in Sec. 33, T38S, R3W, W.M.

Each right (except Certificate 85735) allows the use of water from Farmer's Ditch (Sec 14, T39S, R3W, W.M.) on the Little Applegate River. Certificate 85735 allows the use of water from Buck and Jones Ditch (Sec 13, T39S, R3W, W.M.). The applicants propose to create an instream use in the Little Applegate River from Farmer's Ditch and Buck and Jones Ditch, at a maximum of 5.4021 CFS, to the mouth of the Little Applegate River.

The Water Resources Department has concluded that the proposed transfers appear to be consistent with the requirements of ORS Chapter 540, 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) 986-0883. The last date of newspaper publication is [INSERT DATE OF LAST PUBLICATION]. If no protests are filed, the Department will issue a final order consistent with the preliminary determination.