

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

In the Matter of Instream Transfer	)	PRELIMINARY DETERMINATION
Application T-11243 and Mitigation	)	PROPOSING APPROVAL OF A
Project MP-156 for Groundwater Permit	)	CHANGE IN PLACE OF USE AND
Application G-15002, Crook County	)	CHARACTER OF USE AND
	)	APPROVAL OF A MITIGATION
	)	PROJECT

**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.

OAR 690-505-0500 to 690-505-0630 establishes the process in which anyone may submit a ground water mitigation project to the Department for the purpose of providing mitigation for a ground water permit application in the Deschutes Ground Water Study Area.

**Applicant**

TERREBONNE DOMESTIC WATER DISTRICT  
P.O. BOX 31  
TERREBONNE, OR 97760

**Agent**

David Newton  
Newton Consultant's Inc.  
PO Box 1728  
Redmond, OR 97756

**Findings of Fact**

**Background**

1. On May 5, 2011, the Terrebonne Domestic Water District filed an application to change the place of use and character of use under Certificate 22454 to instream use. The Terrebonne Domestic Water District also requested to cancel the corresponding portion of Certificate 22454 for supplemental irrigation. The Department assigned the application number T-11243.
2. On June 21, 2011 the Department mailed the Applicant's agent a letter requesting additional information necessary to complete the application and to clarify the intent to cancel a portion of Certificate 22454. The Applicant's agent responded with the information requested by the Department on July 8, 2011. Additional information provided by the applicant clarified the intent with regard to the instream use and how it will interact with other instream uses and addressed a request for information on use of the water right within the five years prior

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.

to the transfer being submitted. In addition, the Applicant's agent also withdrew the request to cancel a portion of Certificate 22454.

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

**Certificate:** 22454 in the name of CLAUDE BUTLER (perfected under Permit S-17167)  
**Use:** PRIMARY IRRIGATION of 5.6 ACRES  
**Priority Date:** JULY 23, 1946  
**Limit/Duty:** The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to ONE-FORTEITH of one cubic foot per second (CFS) per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 4.0 acre-feet (AF) per acre for each acre irrigated during the irrigation season of each year.  
**Source:** CROOKED RIVER, tributary to the DESCHUTES RIVER

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	14 E	WM	22	NE NE	NONE GIVEN

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	14 E	WM	15	SE SE	5.6

4. Certificate 22454 does not provide any measured distances for the location of the authorized point of diversion. However, based upon information provided with the transfer application materials, the point of diversion is more accurately located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	14 E	WM	22	NE NE	1300 FEET SOUTH FROM THE NE CORNER OF SECTION 22

5. Certificate 22454 is a deficient water right. If water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rates and duty allowed (described in Finding of Fact #3), the total rate and duty for the water right would be exceeded. In the event water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rates and duty allowed at the POD (described in Finding of Fact #4), the portion of the right involved in this transfer would be limited as described in the table below. This rate and duty are also the quantities by which Certificate 22454 shall be reduced, if this transfer is approved.

Rate	Duty
0.11 CFS	22.4 AF

6. Certificate 22454 does not specify the irrigation season. The irrigation season is February 1 to December 1, pursuant to the Crooked River Decree.

7. The applicant is not the owner of the lands to which the water right described in Finding of Fact #3 is appurtenant. However, the applicant submitted a signed consent to transfer with the application.
8. Application T-11243 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.
9. Application T-11243 proposes to change the place of use of the right to create an instream reach in the Crooked River from the authorized POD (described in Finding of Fact #4) to Lake Billy Chinook.
10. The applicant proposes the quantities of water to be transferred instream to be protected follows:

Instream Period	Rate (cfs)	Volume (acre-feet)
April 1 to October 15	0.14	22.4

11. On July 8, 2011, the Applicant's agent clarified that the applicant proposes that any instream water right established as a result of this instream transfer be additive to 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 rights 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.
12. The applicant provided notification of the proposed action to Jefferson and Crook Counties and to the Bureau of Reclamation. Additionally, the Department provided notice of the proposed action to these local governments upon receipt of Transfer Application T-11243.
13. Notice of the application for transfer was published on May 10, 2011, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
14. On August 17, 2011, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11243 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of September 15, 2011, for the applicant to respond. 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.
15. On September 23, 2011, the Department sent a revised draft Preliminary Determination to the agent for the applicant. The revised draft included the addition of Finding of Fact #4 to accurately describe the location of the point of diversion. On September 30, 2011, the agent concurred with the proposed change on behalf of the applicant.

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

16. 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.
17. A pump, pipeline, and sprinkler 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-11243.
18. A portion of the water diverted at the POD returns to the Crooked River below the POD and is available to downstream water right holders. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected instream requires modification to account for both surface and subsurface return flows.

The hydrogeologic evaluation of where subsurface return flows occur is generally based on the following information: 1) the local shallow and regional ground water elevations, 2) the shallow and regional head gradient (i.e. ground water flow direction), 3) elevation of nearby streams, 4) elevation of closest gaining stream reaches, 5) distance from nearby streams and gaining stream reaches, and 6) local geologic information.

When evaluating for return flows, the Department generally considers the place of use as a whole and where the majority of return flows occur based upon the presence of surface return flows (overland flow) and the factors described above for any subsurface return flows.

A portion of the water diverted to the place of use returns to the Crooked River as surface return flows, approximately ten percent of the water diverted. Remaining return flows take the form of subsurface return flows. Both surface and subsurface return to the river system locally, near the point of diversion.

The instream flows just below the point of diversion have been reduced to the consumptive portion of the right to account for return flows and prevent injury and enlargement.

19. At the full rate and duty, the Department also cannot protect water instream during the proposed period, April 1 through October 15 (a 198 day period), without injury and enlargement. In addition, as noted in Finding of Fact #5, Certificate 22454 is a deficient water right and only 0.11 CFS is available for transfer to instream use. At the full rate and volume described in Finding of Fact #5, water may be protected instream for a period of 107 days. The Watermaster has identified that the Crooked River experiences low flows during the late summer in August and September and that there is a need for higher flows during the late irrigation season. The Department's Watermaster recommended instream period be reduced by a few days to start in July to allow water to be protected instream during the periods of lowest flow on the Crooked through the end of the original instream period requested by the applicant.

20. Based on Findings of Fact #18 and #19, on August 29, 2011, the applicant agreed to modify the quantities to be transferred and protected instream as follows:

Reach #1: At the authorized POD (as described in Finding of Fact #4)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
22454	7/23/1946	0.11	22.4	July 1 through October 15

Reach #2: From immediately below the authorized POD to Lake Billy Chinook.

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
22454	7/23/1946	0.05	10.1	July 1 through October 15

21. The proposed changes, as modified, would not result in enlargement of the right.
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, as modified, is allowable within the limits and use of the original water right.
24. The protection of flows, as modified, within the proposed reach is appropriate considering:
- The instream water right begins at the recorded point of diversion;
  - The location of confluences with other streams downstream of the point of diversion;
  - There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
  - Return flows resulting from the exercise of the existing water right would re-enter the river within the proposed reach and has been accounted for immediately below the point of diversion.
25. There are existing instream water rights established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) within the same reach as that proposed for the instream water right, which include the use of water for fish and wildlife habitat, aquatic life, recreation, and pollution abatement. There presently are no instream water rights within the proposed reach created as a result of ORS 537.346 (minimum flow conversion) or ORS 537.341 (state agency instream water right application process). However, there is a pending instream water right application filed by the Oregon Department of Fish and Wildlife (ODFW) pursuant to ORS 537.341 to establish an instream water right from Bowman Dam to Lake Billy Chinook for anadromous and resident fish rearing, which if approved will have a priority date of May 11, 1990. Requested flows for this pending instream water right application are at times not available during the instream period requested by the applicant.
26. By adding to other water rights leased or transferred instream at the same location or created through the conserved water statutes, the instream right will provide protection for additional

streamflows previously identified as necessary for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values.

27. By replacing a portion of any instream rights created at the request of state agency or under the minimum streamflow conversion process, the instream right will provide protection for streamflows previously identified as necessary for anadromous and resident fish rearing under earlier priority dates.
28. During the period July 1 through October 15, any instream water right established by this transfer application may replace a portion of instream water rights established pursuant to ORS 537.341 or ORS 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or ORS 537.470 unless otherwise specified by an order approving a new instream water right under these statutes.
29. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

#### ***Mitigation Project Review Criteria***

30. Terrebonne Domestic Water District (the Applicant) has requested this instream transfer application be used to establish mitigation water for Ground Water Permit Application G-15002, filed by Cascade Timberlands (Oregon), LLC.
31. The Department assigned this mitigation project number MP-156.
32. The Department consulted with representatives from ODFW, DEQ, Oregon Parks and Recreation Department, Oregon Department of State Lands, the Oregon Department of Agriculture, and the Department's Watermaster pursuant to and OAR 505-0615 (7) and OAR 690-505-0630 (2) on June 15, 2011. No comments were received in response to this notice.
33. Ground Water Permit Application G-15002 has been determined to have a mitigation obligation of 144.8 AF in the Crooked River Zone of Impact, as described in the Final Order issued proposing to approve this application on December 7, 2006. Mitigation must be provided in the Crooked River subbasin above the mouth of the Crooked River. There is nothing in the review of the ground water permit application that suggests this project would not meet the requirements for a portion of the mitigation needed for this application.
34. The applicant is also proposing to provide mitigation for Groundwater Permit Application G-15002 under an incremental development plan. The first increment of mitigation, consistent with the plan currently on file with the Department, requires 8.0 AF of mitigation water.
35. The proposed transfer of 5.6 acres of irrigation to instream use will provide 10.1 acre-feet of mitigation water.

36. The proposed reach would protect instream flows within the Crooked River and General Zones of Impact. Mitigation water generated from this instream transfer may be used to satisfy the mitigation obligation of a ground water permit application in the Crooked River Zone of Impact.
37. Based upon Findings of Fact #33 through #36, the Department has determined that the proposed mitigation project will satisfy a portion of the mitigation obligation for Ground Water Permit Application G-15002 and the first increment of mitigation consistent with the incremental development plan currently on file with the Department. The remaining balance of the mitigation obligation (134.7 AF) must be made up from another mitigation project or by obtaining sufficient mitigation credits in the Crooked River Zone of Impact.
38. A total of 22.4 AF is proposed to be transferred to instream use and 10.1 AF of that, as identified above, may be used for mitigation purposes. The amount of water transferred instream and not used for mitigation purposes will benefit instream flow.
39. Mitigation water generated by this project may be used to satisfy a portion of the mitigation obligation for Ground Water Permit Application G-16905 upon completion of the approved project (the instream transfer) by the applicant and verification by the Department that the project is complete. The issuance of a certificate for the proposed instream water right shall result in completion of the project and verification that the project is complete.
40. Mitigation water generated by this project may be available for mitigation use the first calendar year that water is protected instream under a new instream water right certificate.

### **Determination and Proposed Action**

The changes in character of use and place of use to instream use proposed in application T-11243 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.

This mitigation project appears to result in mitigation pursuant to ORS 537.746 and OAR 690-505-0610.

*If Transfer Application T-11243 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-11243 are approved.*
2. *Water right certificate 22454 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will be issued describing that portion of the right not affected by this transfer.*

3. *The instream water right shall provide for the protection of streamflows from the authorized POD (as described in Finding of Fact #4) to Lake Billy Chinook. The quantities of water to be protected under the instream water right are:*

*Reach #1: At the authorized POD (as described in Finding of Fact #4)*

<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (CFS)</i>	<i>Instream Volume (AF)</i>	<i>Instream Period</i>
22454	7/23/1946	0.11	22.4	July 1 through October 15

*Reach #2: From immediately below the authorized POD to Lake Billy Chinook.*

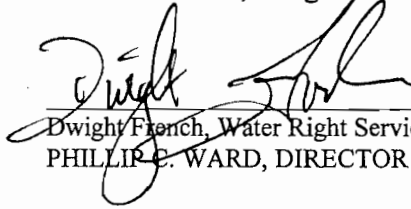
<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (CFS)</i>	<i>Instream Volume (AF)</i>	<i>Instream Period</i>
22454	7/23/1946	0.05	10.1	July 1 through October 15

4. *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.*
5. *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.*
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 Certificate 22454 and any related decree.*
8. *The former place of use of the transferred water shall no longer receive water as part of this right.*
9. **Mitigation Water:** *Mitigation Water generated by this project will be used to satisfy a portion of the mitigation obligation for Ground Water Permit Application G-15002 upon completion of the project and verification by the Department that the project has been completed as proposed. Issuance of a new instream water right certificate, as described herein, will result in completion of the project and verification by the Department that the project is complete. If completed as proposed, the project will generate 10.1 AF of Mitigation Water in the **Crooked River Zone of Impact**. Mitigation Water generated by this project will be available for use as mitigation water beginning the first calendar year that water will be protected instream under the new instream water right.*



10. *The instream certificate created from this transfer shall be identified as a mitigation project/source for a ground water permit, issued as a result of approval of Ground Water Permit Application G-16905. Within the instream certificate, the volume of mitigation water, the zone of impact in which the mitigation water was generated and may be used, and the volume of water dedicated instream solely for instream benefits shall also be specified.*

Dated at Salem, Oregon this 7 day of October, 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@wrд.state.or.us](mailto:Laura.K.Wilke@wrд.state.or.us).