



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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November 16, 2012

VIA E-MAIL

Applicant

CLEAN WATER SERVICES
16060 SW 85TH AVE
TIGARD, OR 97224

SUBJECT: Water Right Transfer Application T-11468

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11468. This document is an intermediate step in the approval process; water may not be used legally as proposed in the transfer application until a Final Order has been issued by the Department. Please read this entire letter carefully to determine your responsibility for additional action.

A public notice is being published in the Department's weekly publication and in the Daily Journal of Commerce newspaper, simultaneously with issuance of the Preliminary Determination. The notice initiates a period in which any person may file either a protest opposing the decision proposed by the Department in the Preliminary Determination or a standing statement supporting the Department's decision. The protest period will end 30 days after the Department's notice or 30 days after the last date of newspaper publication, whichever is later.

If no protest is filed, the Department will issue a Final Order consistent with the Preliminary Determination. You should receive a copy of the Final Order about 30 days after the close of the protest period.

If a protest is filed, the application may be referred to a contested case proceeding. A contested case provides an opportunity for the proponents and opponents of the decision proposed in the Preliminary Determination to present information and arguments supporting their position in a quasi-judicial proceeding.

Please do not hesitate to contact me at (503) 986-0890 or Dorothy.L.Pedersen@ wrd.state.or.us if I may be of assistance.

Sincerely,

Dorothy Pedersen
Transfer Program Advisor

cc: T-11468
Cole Beaman, District 18 Watermaster (*via e-mail*)
Martha O. Pagel, Agent for the applicant (*via e-mail*)

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exceed 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: TUALATIN RIVER, tributary to the WILLAMETTE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
1 S	3 W	WM	8	NE NW	47	NOT DESCRIBED ON CERTIFICATE

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
1 S	3 W	WM	9	NW NW	47	1.5
1 S	3 W	WM	9	SW NW	47	0.9

- Certificate 22048 does not describe the coordinates of the point of diversion, however information is available from the transfer application indicating that the point of diversion is located at approximate River Mile 55 and is further measured as follows:

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
1 S	3 W	WM	8	NE NW	47	1275 FEET SOUTH AND 40 FEET WEST FROM THE N¼ CORNER OF SECTION 8 (LOCATED APPROXIMATELY AT RIVER MILE 55)

- The irrigation season is not specified in Certificate 22048. However, the irrigation season under the Tualatin River Decree for the area is May 1 through September 30.
- A total of 6.0 acre-feet of water may be beneficially used annually under the existing right.
- Application T-11468 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 and pollution abatement.
- Application T-11468 proposes to change the place of use of the right to create an instream reach from point of diversion as described in Finding of Fact #3 to the mouth of the Tualatin River.
- The applicant proposes the quantities water to be transferred instream be protected as follows:

Instream Period	Rate (cfs)	Volume (acre-feet)
June 23 to September 30	0.03	6.0

- The applicant has requested 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 has also requested 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 a more senior priority date.

10. The Department also provided notice to Washington County upon receipt of the transfer application. However, the applicant did not provide notice of the proposed application to Washington County, Clackamas County, and the cities of Tigard, Tualatin, West Linn, Durham, Rivergrove, King City, Cornelius and Hillsboro. All affected local governments located along the reach of a proposed instream use must be provided notice of both the intent to file the instream transfer by the applicant and upon receipt of an instream transfer application by the Department. On September 19, 2012, the Department provided notice to these additional local governments.
11. Notice of the application for transfer was published on September 4, 2012, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
12. On October 8, 2012, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11468 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of November 9, 2012, for the applicant to respond. On October 25, 2012, 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.

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

13. Under OAR 690-380-3000 (12) each transfer application is required to include evidence that the water right has been used in the past five years or, if the water right has not been used in the last five years, documentation that the presumption of forfeiture would be rebutted under ORS 540.610 (2).
14. ORS 540.610 (2) (h) identifies that a water right is not subject to forfeiture if the non use occurred during a period of time within which the water right holder was using reclaimed water in lieu of using water under an existing right.
15. A registration for use of reclaimed water may be recognized by the Department under ORS 537.132.
16. The registration for use of municipal reclaimed water submitted on November 25, 2009, for transfer application T-7408 identifies the reclaimed water was used for irrigation in-lieu of Certificate 22048 and was applied under NPDES permit 101142.
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-11468.

18. The proposed change, as described in Findings of Fact #7 and #8, would not result in enlargement of the right. The lands described in Finding of Fact #2 may continue to receive reclaimed water.
19. The proposed change, as described in Findings of Fact #7 and #8, would not result in injury to other water rights
20. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
21. The protection of flows within the proposed reach 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) 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 right.
22. Within the proposed reach are several existing instream flow protections and instream water rights, which include the use of water for pollution abatement, supporting aquatic life, and fish and wildlife habitat. Two of the instream flow protections (MF-174 and MF-175) are minimum stream flows that have not yet been converted to instream water rights. Other instream rights include Certificate 59692, which was converted from a minimum stream flow (MF-173) under ORS 537.346, and Certificates 72960, 72961 and 80000, which were established as a result of the state agency instream application process (ORS 537.341). There are also three instream rights created as a result of the instream transfer process (ORS 537.348), Special Order Volume 76, Page 912 (T-10332), and Special Order Volume 80, Page 1127 (T-7408), which protect water instream on a time-limited basis, and T-10785 recorded at Special Order Volume 88, Page 370, which created instream water right Certificate 87718.
23. The proposed instream use is senior in priority date to each of the existing instream water rights except for Certificate 87718 for 0.21 cfs with priority date March 5, 1946.
24. The existing instream flow protections and instream water rights established under ORS 537.346 and ORS 537.341 within the proposed reach are sufficient to protect the monthly quantities of water necessary for supporting aquatic life and pollution abatement, but are at times not met during the requested period for instream protection.
25. Any new instream water right established by this transfer:
 - a) By replacing a portion of MF-174, MF-175, and the instream water rights established under ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency

application process), will provide for protection of streamflows previously identified as necessary for supporting aquatic life and pollution abatement under an earlier priority date.

- b) 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, will provide protection for additional streamflows necessary for fish and wildlife habitat.
26. Any instream water right established by this transfer 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.
27. The total monthly quantities of water to be protected under the proposed instream right, in addition to the existing instream water rights, within the proposed reach 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-11468 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 Transfer Application T-11468 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-11468 are approved.*
- 2. *Water Right Certificate 22048 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 point of diversion to the mouth of the Tualatin River. The point of diversion is located as follows:*

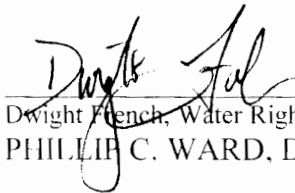
TWP	RNG	MER	SEC	Q-Q	MEASURED DISTANCES
1 S	3 W	WM	8	NE NW	1275 FEET SOUTH AND 40 FEET WEST FROM THE N ⁴ CORNER OF SECTION 8 (LOCATED APPROXIMATELY AT RIVER MILE 55)

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

Instream Period	Rate (cfs)
June 23 through September 30	0.03

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. *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.*
8. *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 20013 and any related decree.*
9. *The former place of use of the transferred water shall no longer receive water as part of this right.*
10. *The approval of Transfer Application T-11468 provides mitigation of 0.03 CFS to be applied towards Transfer Application T-7012.*

Dated at Salem, Oregon this 15th day of November, 2012.



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

This Preliminary Determination was prepared by Dorothy Pedersen. If you have questions about the information in this document, you may reach me at 503-986-0890 or Dorothy.I.Pedersen@wr.d.state.or.us.

Protests should be addressed to the attention of Transfer and Conservation Section, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.