



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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November 11, 2013

VIA E-MAIL

Applicant

TONY AND ANDREA MALMBERG
1782 S MAIN STREET
UNION, OR 97883

SUBJECT: Water Right Transfer Application T-11613

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11613. 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 LaGrande Observer 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 last date of newspaper publication.

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 503-986-0884 or Laura.K.Wilke@wr.d.state.or.us if I may be of assistance.

Sincerely,

Laura Wilke

Flow Restoration Program Coordinator
Transfer and Conservation Section

cc: T-11613
Shad L. Hattan, District 6 Watermaster (*via e-mail*)
The Freshwater Trustc/o David Pilz, Agent for the applicant (*via e-mail*)

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

In the Matter of Time-Limited)	PRELIMINARY DETERMINATION
Instream Transfer Application T-11613,)	PROPOSING APPROVAL OF A
Union County)	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

TONY AND ANDREA MALMBERG
1782 SOUTH MAIN STREET
UNION, OR 97883

Agent

DAVID PILZ
THE FRESHWATER TRUST
65 SW YAMHILL ST, SUITE 200
PORTLAND, OR 97204

Findings of Fact

Background

1. On June 13, 2013, Tony and Andrea Malmberg filed a time-limited instream transfer application to temporarily change the character of use and place of use under Certificate 45105 to instream use for a period of fifteen (15) years. The Department assigned the application number T-11613.
2. Notice of the application for transfer was published on June 25, 2013, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On October 10, 2013, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11613 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of November 8, 2013, 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.

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.

4. The agent, on behalf of the applicant, also commented on the condition identified in Proposed Action No. 5. They requested that the condition be modified to clarify that instream flows may be adjusted if additional data becomes available to show that the stream channel loss factor is different than 50%. The Department concurred and modified Proposed Action No. 5.

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

Certificate: 45105 in the name of UNION ORCHARD CO. (confirmed by Grande Ronde River Decree and the said decree entered of record at Salem, in the Order Record of the Water Resources Director, in Volume 8, Page 1)

Use: IRRIGATION of 29.2 ACRES

Priority Date: 1874

Quantity: **Rate:** 0.73 Cubic Feet per Second (CFS)

Duty: 87.6 Acre-Feet (AF)

Limit: 3.0 AF per acre in any irrigation season, diverted at a rate of not to exceed one-FORTIETH of one CFS per acre

Source: CATHERINE CREEK, tributary to the GRANDE RONDE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	40 E	WM	19	NE NE	850 FEET SOUTH AND 2870 FEET WEST FROM THE N¼ CORNER OF SECTION 20

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	40 E	WM	19	SW SW	10.00
4 S	40 E	WM	30	NW NW	19.20
Total:					29.20

6. A total of 87.6 acre-feet of water may be beneficially used annually under the existing right.

7. Certificate 45105 does not specify the irrigation season. In addition, the Grande Ronde River Decree and the Basin Program do not specify a season of use for irrigation. Therefore, use is allowed anytime water can be used beneficially and does not exceed the annual duty. For purposes of this time-limited instream transfer, an irrigation season of March 1 through October 31 shall be used to help establish when water may be transferred instream and when the time-limited instream transfer will terminate.

8. Transfer Application T-11613 proposes to temporarily 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 for a period of 15 years, beginning in 2019.

9. The applicant requests that the water use revert to its authorized use and place of use after 15 years, beginning in 2019. Since water under a right may not be protected instream and

diverted to out-of-stream use within the same irrigation season, the instream use may be allowed for a term of 15 irrigation seasons, ending after the irrigation season in 2033.

10. Transfer Application T-11163 proposes to change the place of use of the right to create an instream reach from the POD at approximately river mile (RM) 18 to the mouth of Catherine Creek.
11. The applicant proposes the quantities of water to be transferred instream be protected as follows:

Priority Date	Instream Period	Instream Rate (CFS)	Instream Volume (AF)
1874	June 19 through October 30	0.33	87.6

12. The applicant has requested that any instream water right established as a result of this time-limited 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 time-limited 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.

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

13. The right to be transferred was leased instream within the last five years under IL-1153, as evidenced by Special Order Volume 84, Page 574, beginning in the 2011 irrigation season and scheduled to terminate on October 30, 2013. This right will also be leased instream under IL-1311, as evidenced by Special Order Volume 89, Page 807, beginning on March 1, 2014, and this lease will terminate on October 31, 2018. There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
14. 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 Transfer Application T-11613.
15. The applicant has acknowledged in Transfer Application T-11613 that return flows from the existing use return to Catherine Creek at the confluence with Pyles Creek, and the instream use may need to be reduced downstream from the POD to account for channel losses.
16. The proposed instream use requires modification to prevent injury and enlargement. The Watermaster has determined that return flows from the existing use return to Catherine Creek at the confluence of Pyles Creek, approximately at river mile 14.5. The Watermaster has recommended a reduction of 20% to the instream flow below the Pyles Creek confluence to account for return flows.
17. In addition, the Watermaster has determined that the segment of Catherine Creek from approximately river mile 9.5 to river mile 11 is a losing reach and loses as much as 50% at

low flows late in the summer. Therefore, the instream use must be further reduced below river mile 11 to account for streamflow losses.

18. Based on the Findings of Fact Nos. 16 and 17, the Department proposes to modify the quantities to be transferred and protected instream as follows:

Instream Reach 1: From the POD, as described in Finding of Fact No. 5, to the confluence with Pyles Creek.

Priority Date	Instream Period	Instream Rate (cfs)	Instream Volume (AF)
1874	June 19 through October 30	0.33	87.6

Instream Reach 2: From the confluence with Pyles Creek to river mile 11.

Priority Date	Instream Period	Instream Rate (cfs)	Instream Volume (AF)
1874	June 19 through October 30	0.26	69.1

Instream Reach 3: From river mile 11 to the mouth of Catherine Creek.

Priority Date	Instream Period	Instream Rate (cfs)	Instream Volume (AF)
1874	June 19 through October 30	0.13	34.55

19. The proposed change, as modified, would not result in enlargement of the right.
20. The proposed change, as modified, would not result in injury to other water rights.
21. The amount and timing of the proposed instream flow as described in Finding of Fact No. 18 is allowable within the limits and use of the original water right.
22. The protection of flows within the proposed reaches as described in Finding of Fact No. 18 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 known areas of natural loss of streamflow to the river bed downstream from the point of diversion that have been accounted for in Reach No. 3; and
 - d) The quantity of water to be protected instream in Reach Nos. 2 and 3 has been reduced to account for return flows. Any return flows resulting from the exercise of the existing water right would re-enter the river near the confluence of Pyles Creek.
23. Within the proposed reach on Catherine Creek, there are several existing instream water rights. There is one instream water right, Certificate 59537, established under ORS 537.346 (minimum flow conversation) for the purposes of supporting aquatic life and carries a priority date of November 3, 1983. This instream right overlaps with the proposed new instream water right over a short segment at the beginning of the reach from the POD, as described in Finding of Fact No. 5, to the Swackhammer diversion at Union, located about

400 feet downstream from the POD. There are also several instream water rights established under ORS 537.348(2) (instream lease process) for fish and wildlife habitat.

24. The existing instream water right, established under ORS 537.346 (minimum streamflow conversion), within a portion of the reach on Catherine Creek is sufficient to protect the monthly quantities of water necessary for supporting aquatic life but is not always met. By replacing a portion of this instream water right, any instream water right created as a result of this transfer will provide protection of stream flows identified as necessary for supporting aquatic life under an earlier priority date.
25. By adding to other instream water rights, established pursuant to ORS 537.348 (instream transfer process and instream lease) and ORS 537.470 (allocation of conserved water process), located within the proposed reach, any new instream water right established by this transfer would provide protection for additional flows identified as necessary for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.
26. During the period June 19 through October 30, 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 in an order approving a new instream water right under these statutes.
27. 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.
28. As identified in Finding of Fact No. 13, the portion of this right proposed for transfer to instream use on a time-limited basis is also presently being leased instream under IL-1311 through the irrigation season ending in 2018. This time-limited instream transfer is proposed to go into effect the following calendar year, being 2019.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in Transfer Application T-11613 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-11613 is approved, the final order will include the following:

1. *The changes in character of use and place of use to instream use on a time-limited basis proposed in Transfer Application T-11613 are approved.*
2. *The exercise of the right evidenced by Certificate 45105 for irrigation at the former place of use as described in Finding of Fact No. 5 shall be SUSPENDED, without loss of priority, for the term of this order as authorized herein.*

3. *The instream water right established under this order shall provide for the protection of streamflows as follows:*

Instream Reach 1: From the POD, as described in Finding of Fact No. 5, to the confluence with Pyles Creek.

<i>Priority Date</i>	<i>Instream Period</i>	<i>Instream Rate (cfs)</i>
<i>1874</i>	<i>June 19 through October 30</i>	<i>0.33</i>

Instream Reach 2: From the confluence with Pyles Creek to river mile 11.

<i>Priority Date</i>	<i>Instream Period</i>	<i>Instream Rate (cfs)</i>
<i>1874</i>	<i>June 19 through October 30</i>	<i>0.26</i>

Instream Reach 3: From river mile 11 to the mouth of Catherine Creek.

<i>Priority Date</i>	<i>Instream Period</i>	<i>Instream Rate (cfs)</i>
<i>1874</i>	<i>June 19 through October 30</i>	<i>0.13</i>

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. Stream channel losses and gains calculated based on available data and the use of senior appropriators will determine the amount of water to which this right is entitled downstream from the original point of diversion within the specified stream reach from River Mile 11 to the mouth of Catherine Creek and whether the described instream flows below River Mile 11 may be adjusted. If adjusted, instream flows from River Mile 11 to the mouth of Catherine Creek may not exceed the quantities specified within Reach No. 2.*
6. *During the term of this order, the instream right 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.*
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 45105 and any related decree.*
8. *The term of this Final Order shall begin on March 1, 2019, and run through October 31, 2033.*

9. Upon expiration of this order, the use of water shall revert to its original use and place of use as described by Certificate 45105. The use shall revert to the authorized use and place of use on November 1, 2033.

Dated at Salem, Oregon this 12 day of November, 2013.


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 a Reimbursement Authority contractor. If you have questions about the information in this document, you may reach Laura Wilke at 503-986-0884 or Laura.K.Wilke@wrds.state.or.us.