



# Oregon

John A. Kitzhaber, MD, Governor

## Water Resources Department

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January 29, 2014

DAVID RICKER  
60534 OR HWY 203  
UNION, OR 97883

SUBJECT: Water Right Transfer Application T-11636

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11636. 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](mailto: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-11636  
Shad L. Hattan, District 6 Watermaster (*via e-mail*)  
Tony Malmberg (The Freshwater Trust), 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 Instream Transfer	)	PRELIMINARY DETERMINATION
Application T-11636, Union County	)	PROPOSING APPROVAL OF A
	)	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**  
**DAVID RICKER**  
**60534 OR HWY 203**  
**UNION, OR 97883**

**Agent**  
**The Freshwater Trust**  
**65 SW Yamhill St., Suite 200**  
**Portland, OR 97204**

**Findings of Fact**

***Background***

1. On July 9, 2013, David Ricker filed a time-limited instream transfer application to temporarily change the character of use and place of use under Certificate 6181 to instream use for a period of 15 years. The Department assigned the application number T-11636.
2. Notice of the application for transfer was published on July 16, 2013, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On December 18, 2013, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11636 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of January 16, 2014, 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.
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4. The portion of the right to be transferred is as follows:

**Certificate:** 6181 in the name of A N. BUSICK  
**Use:** IRRIGATION of 31.4 ACRES  
**Priority Date:** 1864  
**Rate:** 0.79 CUBIC FEET PER SECOND (CFS)  
**Limit/Duty:** The amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed three (3) acre feet per acre in any irrigation season, diverted at a rate of not to exceed one-fortieth (1/40) of a cubic foot per second per acre.  
**Source:** CATHERINE CREEK, tributary to the GRANDE RONDE RIVER  
**Authorized Point of Diversion:** Not described in the certificate.  
**Authorized Place of Use:**

Irrigation					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	40 E	WM	20	SW SE	31.4

5. Certificate 6181 does not provide a description of the location of the point of diversion. Based upon information provided on the transfer application map, prepared by the Department, the point of diversion may be more accurately located as follows:

Twp	Rng	Mer	Sec	Q-Q	Coordinates
4 S	40 E	WM	28	SW NW	Latitude - 117.82800 Longitude - 45.19088

6. A total of 94.2 acre-feet of water may be beneficially used annually under the existing right.
7. Transfer Application T-11636 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 for a period of 15 years, beginning in 2018.
8. The applicant requests that the water use revert to its authorized use and place of use after 15 years, beginning in 2018. 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 2032.
9. Transfer Application T-11636 proposes to change the place of use of the right to create an instream reach from the authorized point of diversion to the mouth of Catherine Creek.
10. The applicant proposes the following modified quantity of water to be transferred instream and be protected as follows:

Priority Date	Instream Period	Instream Rate (CFS)	Instream Volume (AF)
1864	June 18 to October 16	0.39	94.2

11. 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.

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

12. Water has been used within the last five years according to the terms and conditions of the right. In addition, the portion of the right to be transferred was leased instream within the last five years under IL-1285, as evidenced by Special Order Volume 89, Page 942, beginning in the 2013 irrigation season and scheduled to terminate on October 31, 2017. There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
13. 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-11636.
14. The Applicant has requested to protect water instream from the POD described in Finding of Fact No. 5 to the mouth of Catherine Creek. A portion of the water diverted at the POD returns to Catherine Creek within the proposed reach and is available to downstream water right holders. Approximately 20% return flows from the existing use generally return to the creek system below the POD. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected instream requires modification and return flows should be accounted for immediately below the POD.
15. In addition, the Watermaster has determined that the segment of Catherine Creek below river mile 12 is a losing reach and loses as much as 50% of its flows at low flows late in the summer. Therefore, the instream use must be further reduced below river mile 12 to account for streamflow losses.
16. Based on Findings of Fact Nos. 14 and 15, the Department proposes to modify the quantities to be transferred and protected instream as follows:

**Instream Reach #1: At the POD (as described in Finding of Fact No. 5)**

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
6181	1864	0.39	94.2	June 18 through October 16

**Instream Reach #2: From immediately below the POD to River Mile 12**

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
6181	1864	0.31	74.4	June 18 through October 16

**Instream Reach #3: From River Mile 12 to the mouth of Catherine Creek**

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
6181	1864	0.16	38.4	June 18 through October 16

17. The proposed change, as modified, would not result in enlargement of the right.
18. The proposed change, as modified, would not result in injury to other water rights.
19. The amount and timing of the proposed instream flow as described in Finding of Fact No. 16 is allowable within the limits and use of the original water right.
20. The protection of flows within the proposed reaches as described in Finding of Fact No. 16 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 below the POD.
21. Within the proposed reach on Catherine Creek, and in 2018 when the instream use is proposed to begin, there is one existing instream water right. The existing instream water right, Certificate 59537, was 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 2 to 3 miles downstream from the POD.
22. 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.
23. By adding to any 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.
24. 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.

25. 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.
26. As identified in Finding of Fact No. 12, the portion of this right proposed for transfer to instream use on a time-limited basis is also presently being leased instream under IL-1285 through the irrigation season ending in 2017. This time-limited instream transfer is proposed to go into effect the following calendar year, being 2018.

**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-11636 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-11636 are approved.*
2. *The exercise of the right evidenced by Certificate 6181 for irrigation at the former place of use described in Finding of Fact #4 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: At the POD (as described in Finding of Fact #5)***

<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (cfs)</i>	<i>Instream Volume (AF)</i>	<i>Period Protected Instream</i>
6181	1864	0.39	94.2	June 18 through October 16

***Instream Reach #2: From immediately below the POD to River Mile 12***

<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (cfs)</i>	<i>Instream Volume (AF)</i>	<i>Period Protected Instream</i>
6181	1864	0.31	74.4	June 18 through October 16

***Instream Reach #3: From River Mile 12 to the mouth of Catherine Creek***

<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (cfs)</i>	<i>Instream Volume (AF)</i>	<i>Period Protected Instream</i>
6181	1864	0.16	38.4	June 18 through October 16

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 12 to the mouth of Catherine Creek and whether the described instream flows below River Mile 12 may be adjusted. If adjusted, instream flows from River Mile 12 to the mouth of Catherine Creek may not exceed the quantities specified within Reach No. 2.*
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 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 6181 and any related decree.*
8. *The term of this Final Order shall begin on March 1, 2018 and run through October 31, 2032.*
9. *Upon expiration of this transfer, the use of water shall revert to its original use and place of use as described by Certificate 6181. The use shall revert to the authorized use and place of use on November 1, 2032.*

Dated at Salem, Oregon this 29 day of January, 2014.

  
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](mailto:Laura.K.Wilke@wrds.state.or.us).