



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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June 4, 2014

VIA E-MAIL

Applicant

LYNDEN L. CHARLSON
P.O. BOX 624
UNION, OR 97883

SUBJECT: Water Right Transfer Application T-11614

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11614. 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@wrdd.state.or.us if I may be of assistance.

Sincerely,

Laura Wilke
Flow Restoration Program Coordinator
Transfer and Conservation Section

cc: T-11614
Shad L. Hattan, District 6 Watermaster (*via e-mail*)
Tony Malmberg, The Freshwater Trust, Agent for the applicant (*via e-mail*)
Aaron Maxwell, 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 Time-Limited Instream)
Transfer Application T-11614, Union)
County)
)
) **PRELIMINARY DETERMINATION
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

LYNDEN L. CHARLSON
P.O. BOX 624
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Agent

The Freshwater Trust
65 SW Yamhill Street, Suite 200
Portland, OR 97204

Findings of Fact

1. On June 13, 2013, Lynden L. Charlson filed a time-limited instream transfer application change the character of use and place of use under Certificate 81811 to instream use for a period of 10 years, beginning in 2018 and terminating in 2027. The Department assigned the application number T-11614.
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. The map for the transfer application was prepared with assistance from the Oregon Water Resource Department's Eastern Region office as authorized under OAR 690-380-3410 and identified 39.4 acres proposed to be transferred to instream use, consistent with the transfer application. David Pilz (The Freshwater Trust), as agent for the applicant, concurred with the revised map on December 2, 2013.
4. On December 6, 2013, the Department sent a copy of a draft Preliminary Determination proposing to deny Transfer Application T-11614 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of January 6, 2014, for the applicants to respond.

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.

5. In the draft Preliminary Determination, the Department identified that the place of use proposed for instream transfer in Transfer Application T-11614 is surrounded on two sides by delivery ditches from the subject source and bounded on a third side by an adjacent field that is flood irrigated from Catherine Creek. Therefore, without making provisions (such as plugging feeder ditches) to prevent the original place of use from receiving water from the same source by overland flow during the term of the time-limited instream transfer, the proposed transfer cannot be made without enlargement of the original right.
6. The draft Preliminary Determination also identified that the place of use involved in the transfer is also sub irrigated due to a high water table. If approved, the proposed transfer would result in enlargement of the right and in the transfer of more water than could be beneficially used without waste. Use of water under the existing right is subject to beneficial use without waste in accordance with ORS 536.310. The right proposed for transfer cannot be beneficially used during those periods in which the sub-irrigation is sufficient to satisfy crop needs.
7. The Department also identified that no information was provided in the application concerning the capacity of the existing water delivery system. This information is required in order for the application to be considered complete, and to determine that the system has the capacity to deliver the quantity of water proposed for transfer.
8. To address the enlargement issue described in Finding of Fact No. 5, the applicant blocked/plugged the feeder ditches to prevent the original place of use from receiving water from overland flow during the term of the time-limited instream transfer. On December 6, 2013, the Watermaster verified that this work had been completed and identified that these measures were sufficient.
9. On January 9, 2014, The Freshwater Trust requested an additional 30 days to address the remaining issues identified in the draft Preliminary Determination proposing to deny the application.
10. On January 10, 2014, to address the sub-irrigation issue described in Finding of Fact No. 6, the Freshwater Trust proposed to reduce the annual duty of the right for transfer from 3.0 acre-feet per acre to 2.5 acre-feet per acre. On January 27, 2014, the Watermaster identified that this seemed to be a reasonable reduction in the amount of water for transfer considering the sub-irrigation.
11. On January 29, 2014, the applicant provided information describing the existing irrigation system. Based on the information provided, the Watermaster has indicated he is satisfied that water delivery system is adequate for the full capacity of water under the right proposed for transfer.
12. Based on continued evaluation by the Department, the concerns addressed in the draft Preliminary Determination sent to the applicant on December 6, 2013, have been resolved.

13. On March 21, 2014, the Department mailed a copy of a revised draft Preliminary Determination proposing to approve Transfer Application T-11614 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of April 19, 2014, for the applicant to respond.
14. On April 22, 2014, the Freshwater Trust (agent) requested additional time to provide the required ownership report and review the revised Draft Preliminary Determination. The Department extended the deadline for responding to the draft Preliminary Determination to May 21, 2014.
15. On May 14, 2014, the applicant provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
16. On May 16, 2014, the Freshwater Trust, on behalf of the applicant, identified that the applicant concurred with the findings of the draft Preliminary Determination and requested that the Department proceed with issuance of a Preliminary Determination.
17. The portion of the right to be transferred is as follows:

Certificate: 81811 in the name of FLORENCE DOBBIN (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, at Page 1)

Use: IRRIGATION of 39.3 ACRES FROM TRACT NO. 1

Priority Date: 1870 FOR TRACT NO. 1

Quantity: **Rate:** 0.98 Cubic Foot per Second (CFS)

Limit: One-fortieth of one cubic foot per second per acre, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: CATHERINE CREEK (for Tract No. 1), tributary to the GRANDE RONDE RIVER

Authorized Place of Use:

| IRRIGATION | | | | | | |
|------------|------|-----|-----|-------|---------|-------|
| Twp | Rng | Mer | Sec | Q-Q | Tract # | Acres |
| 4 S | 39 E | WM | 13 | NW NE | 1 | 1.40 |
| 4 S | 39 E | WM | 13 | SW NE | 1 | 37.90 |
| Total: | | | | | | 39.30 |

18. Certificate 81811 does not specify the location of the authorized point of diversion. For purposes of this transfer, based on information provided by the Department field staff, the POD may be described as indicated in the following table:

Authorized Point of Diversion:

| Twp | Rng | Mer | Sec | Q-Q | GPS Coordinates |
|-----|------|-----|-----|-------|----------------------|
| 4 S | 40 E | WM | 18 | SW SW | 45.21086, -117.86838 |

19. Certificate 81811 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.
20. Transfer Application T-11614 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 10 years, beginning in 2018.
21. The applicant requests that the water use revert to its authorized use and place of use after 10 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 10 irrigation seasons, ending after the irrigation season in 2027.
22. Transfer Application T-11614 proposes to change the place of use of the right to create an instream reach from the original POD, as described in Finding No. 18, to the mouth of Catherine Creek.
23. The original application proposed the quantities of water to be transferred instream be protected as follows:

| Priority Date | Instream Period | Instream Rate (cfs) | Instream Volume (acre-feet) |
|---------------|---------------------|---------------------|-----------------------------|
| 1870 | June 1 to October 8 | 0.5 | 120.0 |

24. 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)

25. The right to be transferred was leased instream within the last five years under Instream Lease IL-1284, as evidenced by Special Order Volume 89, Page 797, 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.
26. Instream lease IL-1284 identified the number of acres of irrigation to be leased to instream use as 37.67 acres. This was based upon an assumption that the property lines extended into the roadway on the west and south sides of the property. The Department has clarified that the property does not extend into the roadway. While the lease included fewer acres than

identified in this time-limited instream transfer application, the full footprint of the right on the subject property was leased instream.

27. 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-11614.
28. The lands on which this water right is appurtenant are sub-irrigated due to a shallow water table. Use of water under the existing right is subject to beneficial use without waste in accordance with ORS 536.310. The right proposed for transfer cannot be beneficially used during those periods in which the sub-irrigation is sufficient to satisfy the crop needs. Additional information was requested from the applicant to demonstrate the extent to which the existing right may be beneficially used without waste.
29. As identified in Finding of Fact No. 10, the agent for the applicant requested the Department consider a reduction in the amount of water available for transfer from 3.0 acre-feet per acre to 2.5 acre-feet per acre. Based upon review of the information provided by the agent and consultation with the local Watermaster, the Department has identified that the transfer of the equivalent of 2.5 acre-feet per acre is reasonable considering the level of sub-irrigation. Therefore, 98.25 acre-feet (AF) may be beneficially used annually under the existing right.
30. The amount and timing of the proposed instream flow is not allowable within the limits of the original water right. The original application requested to protect water instream as identified in Finding of Fact No. 19. However, the portion of the right to be transferred instream has been reduced from the original application (Finding of Fact No. 3) and the quantity of water available for transfer has also been subsequently reduced (Finding of Fact No. 29). The Department has determined that during the requested instream period (June 8 through October 8) up to 0.38 CFS may be protected instream with a maximum volume of 98.25 AF.
31. The Department has identified that the full quantity requested may not be protected instream from the point of diversion to the mouth of Catherine Creek without injury to other water rights. The Watermaster has determined that return flows in the amount of 20% from the existing use return to Catherine Creek at the confluence with Little Creek. Protection of the full quantities requested within the proposed reach will result in loss of flows previously available to downstream water right holders and to which they are legally entitled.
32. In addition, the full quantity requested to be protected instream from the point of diversion to the mouth of Catherine Creek may not be made without enlargement. There are known areas of natural loss of streamflow to the river bed downstream from the point of diversion and are not accounted for within the proposed reach. The Watermaster has determined that the segment of Catherine Creek from about 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.

33. Based on the Findings of Fact Nos. 28 through 32, 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. 18, to the confluence with Little Creek.

| Priority Date | Instream Period | Instream Rate (cfs) | Instream Volume (af) |
|---------------|--------------------------|---------------------|----------------------|
| 1870 | June 1 through October 8 | 0.38 | 98.25 |

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

| Priority Date | Instream Period | Instream Rate (cfs) | Instream Volume (af) |
|---------------|--------------------------|---------------------|----------------------|
| 1870 | June 1 through October 8 | 0.30 | 77.36 |

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

| Priority Date | Instream Period | Instream Rate (cfs) | Instream Volume (af) |
|---------------|--------------------------|---------------------|----------------------|
| 1870 | June 1 through October 8 | 0.15 | 38.68 |

34. The proposed change, as modified above, would not result in enlargement of the right.
35. The proposed change, as modified above, would not result in injury to other water rights.
36. The amount and timing of the proposed instream flow as described in Finding of Fact No. 33 is allowable within the limits and use of the original water right.
37. The protection of flows within the proposed reaches as described in Finding of Fact No. 33 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 Reaches No. 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 confluence of Little Creek.
38. Within the proposed reach on Catherine Creek, there are no existing instream water rights established pursuant to ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency instream application process). There are two existing time-limited instream transfers (ORS 537.348(1)), T-11613, which will begin in 2019, and T-11636, which will go into effect in 2018. There are also several instream water rights established under ORS 537.348(2) (instream lease process) for fish and wildlife habitat.
39. If any instream water rights were established pursuant to ORS 537.341 (state agency instream application process), they would be junior in priority date and not likely always

met. By replacing a portion of any instream water right established in the future, any instream water right created as a result of this transfer will provide protection of stream flows identified as necessary for supporting fish and wildlife habitat under an earlier priority date.

40. 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.
41. During the period June 1 through October 8, 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.
42. 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.
43. As identified in Finding of Fact No. 25, the portion of this right proposed for transfer to instream use on a time-limited basis is also presently being leased instream under IL-1284 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-11614 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-11614 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-11614 are approved.*
2. *The exercise of the right evidenced by Certificate 81811 for irrigation at the former place of use (as described in Finding of Fact No. 17) shall be SUSPENDED, without loss of priority, for the term of the transfer 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. 18, to the confluence with Little Creek.

| <i>Priority Date</i> | <i>Instream Period</i> | <i>Instream Rate (cfs)</i> | <i>Instream Volume (af)</i> |
|----------------------|---------------------------------|----------------------------|-----------------------------|
| <i>1870</i> | <i>June 1 through October 8</i> | <i>0.38</i> | <i>98.25</i> |

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

| <i>Priority Date</i> | <i>Instream Period</i> | <i>Instream Rate (cfs)</i> | <i>Instream Volume (af)</i> |
|----------------------|---------------------------------|----------------------------|-----------------------------|
| <i>1870</i> | <i>June 1 through October 8</i> | <i>0.30</i> | <i>77.36</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>Instream Volume (af)</i> |
|----------------------|---------------------------------|----------------------------|-----------------------------|
| <i>1870</i> | <i>June 1 through October 8</i> | <i>0.15</i> | <i>38.68</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. *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 81811 and any related decree.*
8. *The term of this Final Order shall begin on March 1, 2018 and run through October 31, 2027.*

9. *Upon expiration of this transfer, the use of water shall revert to its original use and place of use as described by Certificate 81811. The use shall revert to the authorized use and place of use on November 1, 2027.*

Dated at Salem, Oregon this 4 day of June, 2014.



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

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@wrд.state.or.us.

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