



# Oregon

Kate Brown, Governor

**Water Resources Department**  
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June 9, 2015

VIA E-MAIL

FRED BROWN  
1469 HOLY CROSS DR.  
FAIRBANKS, AK 99709

SUBJECT: Time-Limited Instream Transfer Application T-11646

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve time-limited instream transfer application T-11646. 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 Klamath Herald and News 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@ wrd.state.or.us](mailto:laura.k.wilke@ wrd.state.or.us) if I may be of assistance.

Sincerely,

Laura Wilke  
Flow Restoration Program Coordinator  
Transfer and Conservation Section

cc: T-11646  
Scott White, District 17 Watermaster (*via e-mail*)  
Chrysten Lambert (KBRT), 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	)	PRELIMINARY DETERMINATION
Transfer Application T-11646,	)	PROPOSING APPROVAL OF A
Klamath County	)	CHANGE IN PLACE OF USE AND
	)	CHARACTER OF USE

**Authority**

Oregon Revised Statute (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. Oregon Administrative Rule (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**

FRED BROWN  
1469 HOLY CROSS DR.  
FAIRBANKS, AK 99709

**Findings of Fact**

***Background***

1. On July 29, 2013, Fred Brown filed a time-limited instream transfer application to change the character of use and place of use under Certificates 24599 and 31064 to instream use for a period of 30 years. The Department assigned the application number T-11646.
2. Additional application fees were received on August 7, 2013.
3. Consistent with land use requirements, prior to submitting the time-limited instream transfer application, the applicant provided notification of the intent to file the instream transfer application to Klamath County. Additionally, the Department provided notice of the proposed action to Klamath County upon receipt of Transfer Application T-11646.
4. Notice of the application for transfer was published on August 20, 2013, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
5. On February 28, 2014, the agent for the applicant requested to amend the application to clarify the location of the point of diversion on Cert 31064 to be used as the start point for the instream use.

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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6. On May 14, 2014, the agent requested to amend the application to change the place of use to protect water instream at the points of diversion.
7. On June 4, 2014, the agent clarified the location of the proposed instream point to be used on Cherry Creek for Certificate 24599. Water is also requested to be protected instream at the point of diversion on Tiger Lily Spring.
8. On June 27, 2014, the Department sent a copy of the draft Preliminary Determination proposing to deny Transfer Application T-11646 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of July 28, 2014, for the applicant to respond.
9. In the draft Preliminary Determination, the Department determined that portions of the land on which Certificate 31064 is appurtenant are sub-irrigated as a result of a high water table. The Department's Watermaster estimated that 47.5 acres are sub-irrigated and cannot be dried up. Consequently, the original place of use would likely continue to receive water from the authorized sources after transferring the rights instream. By definition, enlargement includes failing to keep the original place of use from receiving water from the same source (OAR 690-380-0100(2)). Therefore, the proposed transfer could not be made without enlargement of the original right.
10. The Department also identified that the application maps did not provide the coordinates of the points of diversion to be used as the instream points, as required.
11. On September 15, 2014, to address the sub-irrigation issued described in Finding of Fact No. 9, the agent requested that Certificate 31064 be removed from the transfer application.
12. On December 15, 2014, the agent submitted a revised application map identifying the coordinates of the points of diversion to be used as the instream points for Certificate 24599.
13. The reasons for denial described in the June 27, 2014, draft Preliminary Determination have been resolved.
14. On December 16, 2014, the Department mailed a revised draft Preliminary Determination proposing to approve Transfer Application T-11646 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of January 14, 2015, for the applicant to respond. The deadline was extended upon request. The applicant requested that the Department proceed with issuance of a Preliminary Determination and provided the information necessary to demonstrate that the applicant is authorized to pursue the transfer.
15. The portion of the right to be transferred is as follows:
  - Certificate:** 24599 in the name of FRED G. BROWN and CECIL M. BROWN  
(perfected under Permit S-11280)
  - Use:** IRRIGATION of 73.1 ACRES
  - Priority Date:** JULY 28, 1932
  - Rate:** 0.92 CUBIC FEET PER SECOND (CFS)
  - 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-

EIGHTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to not to exceed 3.0 acre-feet per acre throughout the irrigation season from May 1 to October 1, of each year.

**Period of Use:** May 1 to October 1

**Source:** CHERRY CREEK and TIGER LILY SPRINGS, tributary to KLAMATH LAKE

**Authorized Points of Diversion:**

Twp	Rng	Mer	Sec	Q-Q
34 S	6 E	WM	14	SW NW
34 S	6 E	WM	14	NW SW
34 S	6 E	WM	15	SE NE
34 S	6 E	WM	22	SE NE

**Authorized Place of Use:**

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
34 S	6 E	WM	11	SW SW	6.50
34 S	6 E	WM	14	NW NW	3.00
34 S	6 E	WM	14	SW NW	25.40
34 S	6 E	WM	14	SE NW	19.00
34 S	6 E	WM	14	NE SW	14.90
34 S	6 E	WM	14	NW SW	4.30
Total Acres					73.10

16. Certificate 24599 does not provide measured distances of the location of the points of diversion. The agent has provided information further describing the location of the points of diversion as follows:

Source	Twp	Rng	Mer	Sec	Q-Q	Longitude / Latitude
Tiger Lily Springs	34 S	6 E	WM	15	SE NE	Longitude 42.615807, Latitude -122.093090
Cherry Creek	34 S	6 E	WM	22	SE NE	Longitude 42.599872, Latitude -122.093959

17. Based on information provided by the Department's Watermaster, the 6.5 acres covered under Certificate 24599 in the SW1/4 SW1/4 of section 11 are irrigated from Tiger Lily Springs. All of the remaining acres proposed for instream transfer under this certificate (66.6 acres) are irrigated from Cherry Creek. Therefore, the full 0.08 CFS authorized from Tiger Lily Springs is for irrigation of 6.5 acres and 0.84 CFS is available from Cherry Creek for the remaining 66.6 acres of irrigation proposed for transfer.
18. A total of 219.3 Acre-Feet (AF) may be beneficially used annually under Certificate 24599, being 19.5 AF from Tiger Lily Spring and 199.8 AF from Cherry Creek.
19. Certificate 24599 identifies Cherry Creek and Tiger Lily Springs as tributaries to Klamath Lake. Tiger Lily Spring is tributary to Cherry Creek and Cherry Creek is tributary to Fourmile Creek, which is then tributary to Klamath Lake.

20. Transfer Application T-11646 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 30 years, beginning in 2014.
21. The applicant requests that the water use revert to its authorized use and place of use after 30 years, beginning in 2014. 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 30 irrigation seasons, ending after the irrigation season in 2044.
22. The applicant also requests that the period of instream protection be extended beyond 2044, as necessary, to meet the requested 30-year period if the Final Order for the transfer is not issued before or during the irrigation season beginning in 2014. The Final Order will not likely be issued in 2014. Therefore, the term of this transfer may extend through 2045.
23. Based on Findings of Fact No. 6 and 15, Transfer Application T-11646 proposes to change the place of use of Certificate 24599 to create instream points as follows:

Source	Twp	Rng	Mer	Sec	Q-Q	Latitude / Longitude
Tiger Lily Spring, tributary to Cherry Creek	34 S	6 E	WM	15	SE NE	Longitude 42.615807, Latitude -122.093090
Cherry Creek, tributary to Fourmile Creek	34 S	6 E	WM	22	SE NE	Longitude 42.599872, Latitude -122.093959

24. The transfer application proposes that the quantities of water to be transferred instream under Certificate 24599 be protected as follows:

Priority Date	Source	Instream Period	Instream Rate (CFS)	Instream Volume (AF)
July 28, 1932	Tiger Lily Spring	May 1 to October 1	0.063	19.0
July 28, 1932	Cherry Creek	May 1 to October 1	0.658	199.8
Total Quantities			0.721	218.8

25. 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)***

26. Portions of the right to be transferred were leased instream within the last five years under IL-681, as evidenced by Special Order Volume 74, Page 240, beginning in the 2008 irrigation season and terminating on September 30, 2012. In addition, for the portion of the right to be transferred that was not leased instream under IL-681, 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.

27. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right was present within the five-year period prior to submittal of Transfer Application T-11646.
28. The amount and timing of the proposed instream flow is allowable within the limits of Certificate 24599. However, the quantity that may be protected instream from Tiger Lily Spring requires clarification. The full volume of water that may be protected instream is 19.5 AF, which allows up to 0.064 CFS to be protected instream during the period May 1 through September 30. The Transfer Application identified the volume as 19.0 AF. Based upon amendments and clarification of the instream use, water may be protected instream as follows:

Instream Points: At the POD's described in Finding of Fact No. 23	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
Tiger Lily Spring Point	July 28, 1932	0.064	19.5	May 1 – September 30
Cherry Creek Point		0.658	199.8	

29. The proposed change, as modified, would not result in enlargement of the right.
30. The proposed change, as modified, would not result in injury to other water rights.
31. The protection of flows at the proposed points is appropriate, considering:
- a) The instream water right would be located at the recorded points of diversion;
  - b) The location of confluences with other streams downstream of the points of diversion.
  - c) There are known areas of natural loss of streamflow to the river bed on Cherry Creek. However, water is to be protected instream at the specified points only.
  - d) Any return flows resulting from the exercise of the existing water right would re-enter the stream systems downstream of the requested points for the instream water right.
32. There are no known existing instream rights on Tiger Lily Spring, tributary to Cherry Creek.
33. There are no existing instream water rights on Cherry Creek, tributary to Fourmile Creek.
34. On Cherry Creek, there is a pending instream water right application (IS-70798) filed by the Oregon Department of Fish and Wildlife under ORS 537.341 (state agency instream application process). This application is proposed to establish instream flows for anadromous and resident fish habitat and, if approved, will have a priority date of October 29, 1990.
35. The proposed instream uses on Cherry Creek and Tiger Lily Spring are all located within an area designated as a priority watershed for restoration of flows for anadromous fish habitat during the months of July through September.

36. 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 may not always be 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.
37. By adding to other instream water rights, which may be established pursuant to ORS 537.348 (instream transfer process and instream lease) and ORS 537.470 (allocation of conserved water process), located on the proposed stream sources, 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.
38. During the period May 1 through September 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.
39. 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.
40. The total monthly quantities of water proposed to be protected instream at the POD's on Cherry Creek and Tiger Lily Spring will not exceed the estimated average natural flows.

#### **Determination and Proposed Action**

The changes in character of use and place of use to instream use proposed in application T-11646 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-11646 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 as proposed in Transfer Application T-11646 are approved.*
2. *The exercise of the portion of the right evidenced by Certificate 24599 for irrigation at the former place of use shall be SUSPENDED, without loss of priority, for the term of this order as authorized herein.*

3. *Water shall be protected instream for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values.*
4. *The instream water right shall provide for the protection of streamflows at the following points:*

<i>Source</i>	<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>	<i>Latitude / Longitude</i>
<i>Tiger Lily Spring, tributary to Cherry Creek</i>	<i>34 S</i>	<i>6 E</i>	<i>WM</i>	<i>15</i>	<i>SE NE</i>	<i>Longitude 42.615807, Latitude -122.093090</i>
<i>Cherry Creek, tributary to Fourmile Creek</i>	<i>34 S</i>	<i>6 E</i>	<i>WM</i>	<i>22</i>	<i>SE NE</i>	<i>Longitude 42.599872, Latitude -122.093959</i>

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


<i>Instream Points</i>	<i>Priority Date</i>	<i>Instream Rate (CFS)</i>	<i>Instream Volume (AF)</i>	<i>Instream Period</i>
<i>Tiger Lily Spring Point</i>	<i>July 28, 1932</i>	<i>0.064</i>	<i>19.5</i>	<i>May 1 – September 30</i>
<i>Cherry Creek Point</i>		<i>0.658</i>	<i>199.8</i>	

6. *Water rights upstream of the original points 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 points of diversion.*
7. *At the specified stream points, the amount of water to which this right is entitled shall not exceed the quantity of water legally available at the original points of diversion.*
8. *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.*
9. *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 24599 and any related decree.*
10. *The term of this Final Order shall begin on the date this final order is issued and run through September 30, 2045.*



11. Upon expiration of this order, the use of water shall revert to its original use and place of use as described by Certificate 24599. The use shall revert to the authorized use and place of use after the end of the irrigation season on October 1, 2045.

Dated at Salem, Oregon this 9 day of June, 2015.

  
Dwight French, Water Right Services Administrator, for  
Thomas M. Byler, Director, Oregon Water Resources Department

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

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