



Oregon

Kate Brown, Governor

Water Resources Department

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January 25, 2016

Clean Water Services
16060 SW 85th Ave
Tigard OR 97224

SUBJECT: Time Limited Instream Water Right Transfer Application T-11469

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11469. 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 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 503-986-0827 or Tracy.L.Fox@wrd.state.or.us if I may be of assistance.

Sincerely,

Ms. Tracy Fox
Transfer Specialist
Transfer and Conservation Section

cc: T-11469
Jake Constans, District 18 Watermaster (*via e-mail*)
Martha Pagel, Agent for the applicant (*via e-mail*)
Tualatin Valley Irrigation District

enclosure

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

In the Matter of Time-Limited Instream)	PRELIMINARY DETERMINATION
Transfer Application T-11469,)	PROPOSING APPROVAL OF A
Washington County)	CHANGE IN PLACE OF USE AND
)	CHARACTER OF USE OF A WATER
)	RIGHT

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

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

Findings of Fact

1. On August 27, 2012, Clean Water Services filed a time-limited instream transfer application to change the character of use and place of use under Certificate 22048 to instream use until termination is requested by the applicant. The Department assigned the application number T-11469.
2. 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.
3. Certificate 22048 was cancelled by T-11468 and a remaining right certificate was issued December 31, 2012, for the water right not modified by Special Order Volume 88, Page 865. The new certificate is 87874.
4. The application included a Land Use Information form completed and signed by a representative of the Washington County planning department. 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 Clackamas County, and the cities of Forest Grove, Cornelius, Hillsboro, Tigard, Durham, Tualatin, King City, Rivergrove, and West Linn. All affected local governments located along the reach of a

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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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 October 27, 2015, the Department mailed notice to these additional local governments. No comments were filed in response to the notice.

5. On December 7, 2015, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11469 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of January 8, 2016, 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.

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

Certificate: 87874 in the name of CLEAN WATER SERVICES (perfected under Permit S-20745)
Use: IRRIGATION of 29.7 ACRES
Priority Date: SEPTEMBER 19, 1951
Rate: 0.37 CUBIC FOOT 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, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.
Source: TUALATIN RIVER, a tributary to the WILLAMETTE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC
1 S	3 W	WM	8	NE NW	47

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
1 S	3 W	WM	8	NE NE	47	14.1
1 S	3 W	WM	8	SE NE	47	0.8
1 S	3 W	WM	9	NW NW	47	14.8
Total:						29.7

7. Certificate 87874 does not describe the measured distances of the point of diversion, however information is available from the transfer application indicating that the point of diversion is further described as follows:

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)

8. The irrigation season is not specified in Certificate 87874. However, the irrigation season under the Tualatin River Decree for the area is May 1 through September 30.
9. A total of 74.25 acre-feet of water may be beneficially used annually under the existing right.
10. Transfer Application T-11469 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 on a time-limited basis.
11. The applicant requests that the water use revert to its authorized use and place of use if it is determined by the applicant that use of water under Certificate 87874 is needed. For example, if the property is sold to a new landowner or if reclaimed water (currently being used for irrigation purposes on the described place of use) is no longer available.
12. Transfer Application T-11469 proposes to change the place of use of the right to create an instream reach from the point of diversion (approximately River Mile (RM) 55) to the mouth of the Tualatin River (RM 0).
13. The applicant proposes the quantities of water to be transferred instream be protected as follows:

Instream Period	Instream Rate (cfs)	Instream Volume (acre-feet)
June 23 to September 30	0.37	74.2

14. 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)

15. 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). As part of the transfer application, the applicant identified that water has not been used under the existing water right and that reclaimed municipal water has been used instead for the irrigation.
16. ORS 540.610(2)(h) identifies that a water right is not subject to forfeiture if the nonuse 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.

17. A registration for use of reclaimed water may be recognized by the Department under ORS 537.132 provided that the use of reclaimed water is also authorized by a national pollutant discharge elimination system or water control facilities permit issued pursuant to ORS 468B.050 or 468B.053. A National Pollutant Discharge Elimination System (NPDES) permit (Permit Number 101142) was issued by the Department of Environmental Quality, authorizing the use of reclaimed water for irrigation, on August 25, 1993.
18. A registration for use of municipal reclaimed water was submitted to the Department on November 25, 2009, and identifies the reclaimed water was used for irrigation in-lieu of Certificate 22048 (superseded by Certificate 87874) and was applied under NPDES permit 101142.
19. Because the non-use of water occurred during a period of time within which the water right holder was using reclaimed water in lieu of the existing water right, the applicant has sufficiently rebutted the presumption of forfeiture in accordance with ORS 540.610(2)(h).
20. It is not clear whether 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-11469. However a delivery system to apply reclaimed water is identified as being present within the five-year period prior to submittal of Application T-11469.
21. Based upon review of the transfer application, water may be protected instream as follows:

Instream Reach: From the point of diversion (approximately RM 55) to the mouth of the Tualatin River (RM 0).

Instream Period	Instream Rate (cfs)	Instream Volume (acre-feet)
June 23 to September 30	0.37	74.2

22. The proposed change would not result in enlargement of the right. The lands described in Finding of Fact No. 6 may continue to receive reclaimed water during the term of this time-limited instream transfer.
23. The proposed changes would not result in injury to other water rights.
24. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
25. 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.
26. 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). Priority dates of these instream protections range from May 25, 1966, to August 5, 1993.
27. There are two time-limited instream water rights created as a result of the instream transfer process (ORS 537.348), being Special Order Volume 76, Page 912 (T-10332), Special Order Volume 80, Page 1127 (T-7408). There are also two permanent instream rights, Certificates 87718 and 87873, established under the instream transfer process.
28. The instream right established under Special Order Volume 76, Page 912 (T-10332) is junior in priority date (August 14, 1975) to instream uses under MF-174, MF-175, and Certificate 59692 and is additive to those rights.
29. The proposed instream use is senior in priority date to each of the existing instream water rights established as a result of ORS 537.346 (minimum flow conversion) and 537.341 (state agency application process). The proposed instream use is also senior to the instream right established under Special Order Volume 76, Page 912.
30. A Total Maximum Daily Load (TMDL) designation has been established for the Tualatin River Basin.
31. The existing instream water rights, established under ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency application process), within the proposed reach on the Tualatin River are sufficient to protect the monthly quantities of water necessary for supporting aquatic life and anadromous and resident fish habitat and pollution abatement, but are not always met. By replacing a portion of these instream water rights, and the instream right established under Special Order Volume 76, Page 912, any instream water right created as a result of this transfer will provide protection of stream flows identified as necessary for supporting aquatic life and anadromous and resident fish habitat under earlier priority dates.

32. 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 and pollution abatement.
33. During the period June 23 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, ORS 537.346, and Special Order Volume 76, Page 912, and be in addition to other 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.
34. 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.
35. The combination of existing instream water rights exceeds the estimated average natural flow. Exceedance of these flows occurred under previous instream transactions. However, the proposed instream water right, in combination with other senior instream water rights established through the instream transfer process, 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-11469 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-11469 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-11469 are approved.*
2. *The exercise of the right evidenced by Certificate 87874 for irrigation of 29.7 acres at the former place of use shall be SUSPENDED without loss of priority, for the term of the transfer authorized herein. The former place of use may continue to receive water under an NPDES permit issued by the Department of Environmental Quality and a registration for the use of reclaimed water filed with the Department on November 25, 2009.*
3. *The instream water right shall provide for the protection of streamflows from the point of diversion (described in Finding of Fact Nos. 6 and 7) to the mouth of the Tualatin River (RM 0) for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values and pollution abatement.*

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

<i>Priority Date</i>	<i>Instream Period</i>	<i>Instream Rate (cfs)</i>
<i>9/19/1951</i>	<i>June 23 to September 30</i>	<i>0.37</i>

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. *During the term of this order, 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 Special Order Volume 76, Page 912. In addition, the instream right established by this transfer shall be in addition to other 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 87874 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 order may be terminated at any time during a calendar year. However, if the termination request is received less than 30 days prior to the period of allowed instream use or after the instream period has begun, water may not be used under Certificate 87874 until the following calendar year, unless the Director determines that enlargement would not occur.*
11. *This order may be terminated upon submission of evidence by the applicant that conditions for termination of the order have been met. Conditions for termination include:*
- a) Ownership of the lands to which Certificate 87874 are appurtenant has changed and the new landowner intends to exercise Certificate 87874 on the land;*
 - b) Reclaimed water is no longer available for use on the subject lands; or*
 - c) The applicant provides other information demonstrating that termination of the order is appropriate.*

12. *The term of this Final Order shall continue until terminated. Upon termination of this time-limited instream transfer, the use of water shall revert to its original use and place of use as described by Certificate 87874.*

Dated at Salem, Oregon this 25 day of January, 2016.



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

This Preliminary Determination was prepared by Tracy Fox. If you have questions about the information in this document, you may reach me at 503 986-0827 or Tracy.L.Fox@wrdd.state.or.us.

Protests should be addressed to the Water Rights Services Division, Oregon Water Resources Department, 725 Summer Street, Suite A, Salem, OR 97301-1266.