



Oregon

Kate Brown, Governor

Water Resources Department

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August 24, 2016

Applicant

Scott Birky

39880 Crawfordsville Drive

Sweet Home, OR 97836

sbbirky@gmail.com

SUBJECT: Allocation of Conserved Water Application CW-91

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve Conserved Water Application CW-91.

The issuance of this order starts a 30-day protest period. If no protest is filed, the Department will issue a Final Order consistent with this Preliminary Determination. You should receive a copy of the Final Order shortly after the close of the protest periods for both the transfer and conserved water applications.

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 to the Water Resources Commission.

Please do not hesitate to contact me at 503-986-0911 or teri.k.hranac@wrd.state.or.us, if I may be of assistance.

Sincerely,

Teri Hranac

Allocation of Conserved Water

Transfer and Conservation Section

Enclosure

cc: CW-91

Michael Mattick, District #2 Watermaster (via e-mail)

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

In the Matter of Allocation of Conserved)
Water Application CW-91, Linn County)
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PRELIMINARY DETERMINATION
PROPOSING APPROVAL ON
COMPLETION AND FINALIZATION
ALLOCATION OF CONSERVED
WATER CW-91

Applicant:

Scott Birky
39880 Crawfordsville Drive
Sweet Home, OR 97386

Applicable Law

Any person or group of persons holding a water use subject to transfer as defined in ORS 540.505 may submit an application for an Allocation of Conserved Water to the Water Resources Commission for a conservation project that has not yet been implemented or was implemented within five years prior to the submission of the application. ORS 537.465. Under the Allocation of Conserved Water Program, a portion of the water proposed to be conserved by an applicant may be used on additional lands, put to a different use, or be leased or sold to another user. OAR 690-018-0010. A portion of the water conserved is allocated to the state to be converted to an instream water right or to revert to the public for appropriation by other water users. ORS 537.470(3).

An application for an allocation of conserved water shall include: (a) A description of the measure as implemented and the date on which the measure was implemented; (b) A description of the diversion facilities before the conservation measure was implemented and the amount of water that was diverted at the facilities before the conservation measure was implemented; (c) The amount of water needed to supply existing rights after implementation of the conservation measure; (d) The amount of water conserved by implementing the conservation measure; (e) The proposed allocation and use of the conserved water if different from the allocation specified in ORS 537.470; (f) The intended use of any water allocated to the applicant; (g) The applicant's choice of priority date for the conserved water; (h) Evidence that the measure was implemented within five years prior to the date of filing the application; and (i) Any other information the commission considers necessary to evaluate the application. ORS 537.465.

After determining any quantity of water needed to mitigate the effects on other water rights, 25-percent of the conserved water shall be allocated to the state and 75-percent to the applicant

Pursuant to OAR 690-018-0050, any person objecting to the proposed allocation may file a protest to this Preliminary Determination with the Water Resources Commission within 60 days of the mailing of this determination.

unless the applicant proposes a higher allocation to the state or more than 25-percent of the funds used to finance the conservation measures comes from federal or state sources. ORS 537.470(3).

If an application for the allocation of conserved water is approved, the Department shall issue orders describing the changes in the original water rights. Once the conservation project is finalized, the Department shall issue new certificates preserving the previously established priority date of the rights to reflect the unaffected portion of the water rights. ORS 537.470(6).

ORS 537.455 to 537.500 authorize and establish the process by which a water right holder may submit a request for an allocation of conserved water. OAR Chapter 690, Division 18, implements the statutes and provides the Department’s procedures and criteria for evaluating allocation of conserved water applications. OAR Chapter 690, Division 077 provides additional criteria for evaluating proposed instream water rights.

Findings of Fact

1. On June 9, 2016, Scott Birky, Applicant filed an allocation of conserved water application under Certificate 65680. The Department assigned the application number CW-91.
2. The conservation project involves converting from a 15-hp pump and handlines running 40-50 sprinklers at a time to a 2-hp pump, ½ poly tubing .26 gph emitters spaced 24” apart. The conversion to drip irrigation is a proven technology for conserving water.
3. Application CW-91 proposes a rate reduction of approximately 0.09 cubic foot per second (cfs) and proposes to reduce the annual volume by 19.38 acre-feet (AF).

Conserved Water Description										
Certificate	Certificate				Needed				Conserved Water	
	Rate		Duty		Rate		Duty		Rate	Duty
	Maximum CFS	CFS/AC	Maximum AF	AF/AC	Maximum CFS	CFS/AC	Maximum AF	AF/AC	Maximum CFS	Maximum AF
65680	0.14	1/80	27.68	2.5	0.05	.005	8.3	.75	0.09	19.38

4. The portion of the right to be modified by CW-91 is as follows:

Certificate: 65680 in the name of LEE and NANCY LAND (perfected under Permit S-50103)
Use: IRRIGATION of 11.07 ACRES
Priority Date: SEPTEMBER 22, 1987
Rate: 0.14 CUBIC FOOT PER SECOND
Limit/Duty: The amount of water used for irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to diversion of ONE-EIGHTIETH of one cubic foot per second per acre (or its equivalent) and 2.5 acre-feet for each acre irrigated during the irrigation season of each year.
Source: CALAPOOIA RIVER, tributary to the WILLAMETTE RIVER
Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
14 S	1 W	WM	15	SW NW	41	1420 FEET SOUTH AND 900 FEET EAST FROM THE NW CORNER OF SECTION 15

Authorized Place of Use:

Twtp	Rng	Mer	Sec	Q-Q	DLC	Acres
14 S	1 W	WM	15	NE NW	41	0.50
14 S	1 W	WM	15	SE NW	41	10.57

5. Certificate 65680 does not list a period of use. However, the Calapooya Decree (page 43) sets forth an irrigation season of May 1 through September 30.
6. Water has been used within the five-year period prior to submission of the allocation of conserved water application, and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.
7. 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 the application.
8. The Applicant requests that the conserved water be allocated as follows:

Certificate	State's Portion			Applicant's Portion			Conserved Water		
	Percentage	Maximum Rate (CFS)	Maximum Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Maximum Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Maximum Duty (Volume) AF
65680	25%	0.02	4.84	75%	0.07	14.54	100%	0.09	19.38

9. The Applicant proposes that its portion of the conserved water be allocated for an out-of-stream use within Sections 15 and 16, Township 14 South, Range 1 West, W.M
10. The Applicant requests that the priority date for any conserved water be the one minute junior to the originating right.
11. The Applicant funded 100% of the conservation project.
12. The Applicant submitted a completed Land Use Form from Linn County which indicated the proposed use was allowed outright or is not regulated by Linn County's comprehensive plan, LCC 928.310(B)(1).
13. The implementation of the conservation measures began no earlier than May 2016. The conservation measures were completed in June 2016. The Applicant provided evidence that it attempted to identify and resolve the concerns of water right holders in the area, governmental entities and other organizations.
14. The Applicant proposes that any instream water right created be for the purposes of conservation, maintenance, and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, and other ecological values.
15. The Applicant requested the Department protect the new instream water right created from the conserved water under Certificate 65680 at the authorized point of diversion on the Calapooya River.

16. The Applicant submitted a Notice of Completion on June 15, 2016, indicating the project was complete. In addition, the Applicant submitted a Request for Finalization of the allocation with the application.
17. The application meets the requirements of OAR 690-018-0040.
18. The Department has consulted with the Oregon Department of Fish and Wildlife (ODFW) and the Oregon Department of Environmental Quality (DEQ) to ascertain whether the proposed instream flows are necessary to support instream flow uses.
19. Notice of the proposed conservation project was published in the Department's weekly notice on August 2, 2016, and in the Springfield Times newspaper on July 7 and 14, 2016, as required under OAR 690-018-0050(1)(a) and (2). No comments were filed in response to the notices.

Allocation of Conserved Water Review Criteria [OAR 690-018-0050]

20. The proposed allocation of conserved water will result in a reduced diversion of the use allowed under the existing right pursuant to OAR 690-0018-0050(4)(a). (Finding of Fact #3).
21. On July 22, 2016, the District #2 Watermaster performed a review of the proposed Allocation of Conserved Water Project. The Watermaster determined that the conservation project would not harm other water rights; therefore, no quantity of conserved water is needed to mitigate for harm to other water rights. OAR 690-018-0050(4)(b) and (d).
22. The conservation project is consistent with the local comprehensive land use plan requirements established in OAR 690-005-0045. (Finding of Fact #12). OAR 690-018-0050(4)(c).
23. Pursuant to OAR 690-018-0050(4)(e), the new reduced rate and duty for the existing uses involved in Allocation of Conserved Water Application CW-91 under Certificate 61680 are as follows:

Certificate	Acres	Rate		Duty	
		Maximum CFS	CFS/AC	Maximum AF	AF/AC
65680	11.07	.05	.005	8.3	0.75

(Finding of Fact #3).

24. Pursuant to OAR 690-018-0050(4)(e), the rate and volume allocated to the State for instream use is as follows:

Maximum Rate	Maximum Duty (Volume)
0.02 cfs	4.84

Finding of Fact #8.

25. As required by OAR 690-018-0050(4)(f), the Department has determined that the instream right created will support public benefits. The proposed instream water right will help to meet the flows necessary for conservation, maintenance and enhancement of aquatic and fish life, and fish habitat, as well as maintaining minimum base flows for meeting temperature TMDL. (Finding of Fact #18).

26. Pursuant to ORS 537.470(3) and OAR 690-018-0050(4)(g), the amount of water allocated to the Applicant does not need to be adjusted because the Applicant funded 100% of the project. (Finding of Fact #11).

27. The rate and volume allocated to the Applicant is as follows:

Priority Date	Maximum Rate	Maximum Duty (Volume)
9/22/1987, <i>plus one minute</i>	0.07 cfs	14.54 AF

Finding of Fact #8.

28. The new instream water right created will be protected in the Calapooia River at the authorized point of diversion as described in Finding of Fact #4, at approximately river mile 47.1. OAR 690-018-0050(4)(h); OAR 690-077-0015(8).

29. To prevent enlargement, the period of use for water to be protected instream must be adjusted so the annual volume limitation is not exceeded. By reducing the period of allowed use, the conserved water may be protected without enlarging the right.

30. The instream right shall allow the use and protection of flows as follows:

Priority Date	Period	Rate (cfs)	Volume (acre-feet)
09/22/1987, <i>plus one minute</i>	6/1 through 9/30	0.02	4.84

31. The amount and timing of the proposed instream flows are allowable within the limits and use of the original water right. OAR 690-077-0015(10).

32. The protection of flows at the authorized point of diversion is appropriate, considering:

- a. The instream water use 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 point of the instream water right.

OAR 690-077-0015(8).

33. The combination of instream rights for the proposed reach on the Calapooia River does not exceed the amount needed to provide increased public benefits, and does not exceed the estimated average natural flow or level occurring from the drainage system. OAR 690-077-0015(4) and (11).

34. Instream water right Certificate 66857, established pursuant to ORS 537.341 (minimum flow conversion) exists on the Calapooia River. By adding to this instream water right and other instream water rights established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) located within the proposed reach, any new instream water rights established by this conserved water project 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, as well as maintaining minimum base flows for meeting temperature TMDL. OAR 690-077-0015(11).

35. The proposed areas within which the conserved water is proposed to be used for out-of-stream uses are within Sections 15 and 16, Township 14 South, Range 1 West, W.M. (Finding of Fact #9). OAR 690-018-0050(4)(h).
36. The Applicant submitted a Notice of Completion on June 15, 2016. In addition, the Applicant submitted a Request for Finalization of the allocation with the application. (Finding of Fact #16). OAR 690-018-0050(4)(i).
37. In the Request for Finalization, the Applicant requested a portion of the Applicant's portion of conserved water be used for an out-of-stream use as follows:

Priority Date: September 22, 1987, *plus one minute*

Rate/Volume: 0.05 cfs/13.5 Acre Feet

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
14 S	1 W	WM	15	SW NW	41	1420 FEET SOUTH AND 900 FEET EAST FROM THE NW CORNER OF SECTION 15

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	1 W	WM	15	NE NW	15.0
14 S	1 W	WM	15	SE NW	3.0

38. In the Request for Finalization, the Applicant request the remaining quantity of the Applicant's portion of conserved water of 0.02 cfs with a volume of 1.04 acre-feet be managed instream for future out-of-stream use.
39. To prevent enlargement of this right, the season of use for the applicant's portion of conserved water to be managed instream for future out-of-stream use must be reduced so the annual volume limitation is not exceeded. Therefore, the Applicant's portion of conserved water for future out-of-stream use is as follows:

Priority Date	Period	Rate (cfs)	Volume (acre-feet)
09/22/1987, <i>plus one minute</i>	9/5 through 9/30	0.02	1.04

This water is to be managed at a point being the authorized point of diversion as follows:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
14 S	1 W	WM	15	SW NW	41	1420 FEET SOUTH AND 900 FEET EAST FROM THE NW CORNER OF SECTION 15

40. No other conditions or limitations are needed to prevent or mitigate for harm to existing water rights. (Finding of Fact #21). OAR 690-018-0050(4)(j).

Determination and Proposed Action

The project described in Allocation of Conserved Water Application CW-91, is consistent with the criteria in ORS 537.455 to 537.500, and OAR Chapter 690, Divisions 018 and 077. If protests are not filed pursuant to OAR 690-018-0050(b), the conserved water application will be approved.

If Allocation of Conserved Water Application CW-91 is approved, the Order Approving will include the following:

1. *The proposed change will result in a reduced diversion for the uses allowed under the original water right. Findings of Fact #3 and #23.*
2. *The proposed allocation of conserved water will not harm existing water rights. Finding of Fact #21.*
3. *The application is consistent with the requirements established in OAR 690-005-0045. Findings of Fact #12 and #22.*
4. *The changes proposed in CW-91 are approved.*
5. *The quantities of water conserved and allocated are as follows:*

Certificate	State's Portion			Applicant's Portion			Conserved Water		
	Percentage	Maximum Rate (CFS)	Maximum Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Maximum Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Maximum Duty (Volume) AF
65680	25%	0.02	4.84	75%	0.07	14.54	100%	0.09	19.38

6. *The right to the use of the water is restricted to beneficial use at the places of use described, and is subject to all other conditions and limitations contained in Certificate 65680 and any related decree.*
7. *Certificate 65680 is cancelled. A new certificate will be issued for that portion of the water right not affected by this Allocation of Conserved Water application, and a superseding Certificate will be issued for the existing use at the reduced rate and duty as follows:*

Use: IRRIGATION of 11.07 ACRES
Priority Date: SEPTEMBER 22, 1987
Rate: 0.05 CUBIC FOOT PER SECOND
Limit/Duty: *The amount of water used for irrigation under this right, together with the amount secured under any other right existing for the same lands, is limited to diversion of (1/235) or 0.0043 of one cubic foot per second (or its equivalent) and 0.71 acre-feet for each acre irrigated during the irrigation season of each year, and is further limited to an annual volume limitation of 8.3 acre-feet per year.*
Source: CALAPOOIA RIVER, tributary to the WILLAMETTE RIVER

Authorized Point of Diversion:

<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>	<i>DLC</i>	<i>Measured Distances</i>
14 S	1 W	WM	15	SW NW	41	1420 FEET SOUTH AND 900 FEET EAST FROM THE NW CORNER OF SECTION 15

Authorized Place of Use:

<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>	<i>DLC</i>	<i>Acres</i>
14 S	1 W	WM	15	NE NW	41	0.50
14 S	1 W	WM	15	SE NW	41	10.57

8. *Water use measurement conditions:*

- a. *Before the use of the Applicant's portion of conserved water, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of diversion.*
- b. *The water user shall maintain the meters or measuring devices in good working order.*
- c. *The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.*

9. *The project is complete and no additional time is needed for finalization.*

10. *The proposed areas within which the Applicant's portion of conserved water is proposed to be used for out-of-stream uses are within Sections 14 and 15, Township 15 South, Range 1 West, W.M.*

11. *A portion of the Applicant's portion of conserved water may be utilized as listed below until further notice is provided as set forth in ORS 537.490(10) and OAR 690-018-0090:*

Orig. Certificate: 65680
Use: IRRIGATION of 18.0 ACRES
Priority Date: September 22, 1987
Rate: 0.05 CUBIC FEET PER SECOND
Limit: 13.5 ACRE FEET
Source: CALAPOOIA RIVER, tributary to the WILLAMETTE RIVER

Authorized Point of Diversion:

<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>	<i>DLC</i>	<i>Measured Distances</i>
14 S	1 W	WM	15	SW NW	41	1420 FEET SOUTH AND 900 FEET EAST FROM THE NW CORNER OF SECTION 15

Authorized Place of Use:

<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>	<i>Acres</i>
14 S	1 W	WM	15	NE NW	15.0
14 S	1 W	WM	15	SE NW	3.0

12. The remaining portion of the Applicant's portion of conserved water shall be used and managed instream until a Notice of Use or Disposition is received pursuant to ORS 537.490 and OAR 690-018-0090 is received.

Source: Calapooia River

Priority Date	Period	Rate (cfs)	Volume (acre-feet)
09/22/1987, plus one minute	9/5 through 9/30	0.02	1.04

The water shall be managed instream at the point of the authorized point of diversion located:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
14 S	1 W	WM	15	SW NW	41	1420 FEET SOUTH AND 900 FEET EAST FROM THE NW CORNER OF SECTION 15

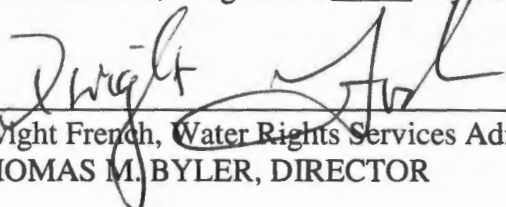
13. The Department shall issue a new instream water right certificate for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values, as well as maintaining minimum base flows for meeting temperature TMDL in the Calapooia River as follows:

Priority Date	Period	Rate (cfs)	Volume (acre-feet)
09/22/1987, plus one minute	6/1 through 9/30	0.02	4.84

At the point following point:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
14 S	1 W	WM	15	SW NW	41	1420 FEET SOUTH AND 900 FEET EAST FROM THE NW CORNER OF SECTION 15

Dated at Salem, Oregon this 24 day of August, 2016.


 Dwight French, Water Rights Services Administrator for
 THOMAS M. BYLER, DIRECTOR

Mailing Date: AUG 26 2016

NOTICE OF RIGHTS

The Legislative Assembly finds that persons affected by actions taken by state agencies have a right to be informed of their rights and remedies with respect to those actions. ORS 183.415.

The Commission shall notify the applicant and any other person requesting notice, of the action the Commission intends to take under ORS 537.470(3). Any person objecting to the proposed allocation may file a protest requesting a contested case hearing before the Commission. ORS 537.470(4).

If a protest to the proposed allocation of conserved water is received by the Department within 60 days of the mailing of the preliminary determination pursuant to ORS 537.470(4) and OAR 690-018-0050(4), the Director may work with the applicant and any protestant to determine whether the issues can be resolved through mutually agreeable conditions, or by modifying the application. OAR 690-018-0050(6).

If protests are received raising issues that cannot be resolved pursuant to OAR 690-018-0050(6), the Director shall present the application, all protests and a recommendation for action to the Commission for review and action. OAR 690-018-0050(8).

The Commission shall examine the application, the protests and the Director's recommendation. If the Commission finds the allocation of conserved water is likely to injure existing water rights or is otherwise inconsistent with these rules, the Commission may direct the Department to hold a contested case hearing on the application pursuant to ORS 183.413 and OAR 690, Divisions 1 and 2 or to resume attempts to resolve the disputed issues. If the Commission finds the allocation of conserved water is not likely to injure existing rights and is otherwise consistent with OAR 690-018-0050, the Commission may authorize the Director to issue an order approving the application. OAR 690-018-0050(9).

In the event of a land use dispute, as defined in OAR 690-005-0015, the Director shall follow resolution procedures provided in 690-005-0040 (Resolution of Land Use Disputes). OAR 690-018-0050(10).

NOTICE REGARDING SERVICEMEMBERS: Active duty servicemembers have a right to stay proceedings under the federal Servicemember's Civil Relief Act 50 U.S.C. App. §§ 501-597b. You may contact the Oregon State Bar or the Military Department for more information. The toll-free telephone number for the Oregon State Bar is (800) 452-8260. The toll-free number for the Oregon Military Department is: (800) 452-7500. The internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is <http://legalassistance.law.af.mil>.