



Oregon

Kate Brown, Governor

Water Resources Department

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October 17, 2016

Applicant

DAVID RICKER

60534 OR HWY 203

UNION, OR 97883

SUBJECT: Instream Water Right Transfer Application T-12088

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-12088. 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@ wrd.state.or.us if I may be of assistance.

Sincerely,

Laura Wilke

Flow Restoration Program Coordinator

Transfer and Conservation Section

cc: T-12088

Shad Hatten, 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 Time-Limited Instream)
Transfer Application T-12088, 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

DAVID RICKER
60534 OR HWY 203
UNION, OR 97883

Agent

THE FRESHWATER TRUST
1782 S. MAIN ST.
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Findings of Fact

1. On June 17, 2015, David Ricker filed a time-limited instream transfer application to temporarily change the place of use and character of use under Certificate 6181 to instream use for a period of 15 years. The Department assigned the application number T-12088.
2. Notice of the application for transfer was published on June 23, 2015, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
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 Union County and the City of Union. Additionally, the Department provided notice of the proposed action to Union County and the City of Union upon receipt of Transfer Application T-12088.
4. On March 1, 2016, the Department sent to the applicants a copy of a draft Preliminary Determination proposing to deny Transfer Application T-12088. The draft Preliminary Determination cover letter set forth a deadline of March 30, 2016, 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. The draft Preliminary Determination issued by the Department on March 1, 2016, identified that a portion of the lands on which Certificate 6181 is appurtenant are sub-irrigated due to a shallow water table. The Watermaster has estimated that 4.2 acres within Tract 1, adjacent to State Ditch, are located within a low lying area and are sub-irrigated and cannot be completely dried. The Watermaster identified that there appears to be sufficient local influence from Catherine Creek, the same source, on the local water table in the root zone to keep this area green. The water table around State Ditch is elevated when the ditch is running, which likely contributes to a higher water table on the upstream side of the ditch. Use of water under the existing right is subject to beneficial use without waste in accordance with ORS 536.310. This portion of the right proposed for transfer cannot be beneficially used in full during those periods in which the sub-irrigation is sufficient to satisfy the crop needs. In addition, the lands would likely remain green as a result of water from the same source, resulting in enlargement if the full face value of the right were transferred to instream use.
6. The Department also identified a number of deficiencies in the transfer application and map describing the portion of the water right proposed for transfer. Specifically, the sum of the areas proposed for instream transfer and the remaining areas within each quarter-quarter section did not equal the total acres authorized in the right. Consequently, the Department was unable to clearly identify the number of acres available for transfer.
7. To address the enlargement issue described in Finding of Fact No. 5, on March 29, 2016, the Freshwater Trust provided additional information for consideration by the Department. The Department reviewed the information provided and identified in a subsequent conversation with the Freshwater Trust that the findings of the draft Preliminary Determination were not overcome.
8. On April 18, 2016, the Freshwater Trust provided documentation demonstrating that the applicant is authorized to pursue the transfer.
9. In August, 2016, the Department's Watermaster met with the applicant on site. Based on discussion with the applicant and observation of the area of sub-irrigation, the Watermaster recommended that that the equivalent of 2.0 AF per acre could be transferred to instream use off of the 4.2 acres of sub irrigation considering beneficial use without waste and without enlargement of Certificate 6181.
10. In a letter dated July 1, 2016, to address the sub-irrigation issue described in Finding of Fact No. 5, the Freshwater Trust agreed to the Watermaster's recommendation to reduce the annual duty of the 4.2 sub-irrigated acres from 3.0 acre-feet per acre to 2.0 acre-feet per acre.
11. Also, in their July 1, 2016, letter, the Freshwater Trust acknowledged that 1.64 acres in the SE ¼ SE ¼ of Section 20, Township 4 South, Range 40 East, W.M., are not transferrable based upon the Department's determination that those acres may be located on land which is now occupied by a highway. On August 24, 2016, the Freshwater Trust provided a revised transfer application map.

12. Based on continued evaluation by the Department, the concerns addressed in the draft Preliminary Determination sent to the applicant on March 1, 2016, have been resolved.
13. The portion of the right to be transferred has been clarified from the transfer application and is as follows:

Certificate: 6181 in the name of A. N. BUSICK (confirmed by the Grande Ronde River Decree, of record at Salem, in the Order Record of the State Engineer, in volume 8, at page 1)

Use: IRRIGATION of 32.58 ACRES, being 31.45 acres from Tract No. 1 and 1.13 acres from Tract No. 2

Priority Date: 1864 for Tract No. 1; May 1897 for Tract No. 2

Rate: 0.82 CUBIC FEET PER SECOND (CFS), being 0.79 CFS under the 1864 priority date and 0.03 CFS under the 1897 priority date

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 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, TRACT No. 1					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	40 E	WM	20	SE SE	12.90
4 S	40 E	WM	29	NE NE	18.55
Total Acres					31.45

IRRIGATION, TRACT No. 2					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	40 E	WM	28	NW NW	1.13

14. Certificate 6181 does not provide a description of the location of the point of diversion. Based upon information provided on the transfer application map, 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 45.19088, Longitude -117.82800

15. Transfer Application T-12088 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 for a period of 15 years, beginning in 2019.
16. The applicant requests that the water use revert to its authorized use and place of use after 15 years. 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 2033.

17. Transfer Application T-12088 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.
18. 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 (AF)
1864, May 1897	July 2 to October 31	0.42	102.7

19. 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)

20. Water has been used within the last five years according to the terms and conditions of the right. The portion of the right to be transferred has been leased instream within the last five years under Instream Lease IL-1404, as evidenced by Special Order Volume 92, Page 851, beginning in the 2014 irrigation season and is scheduled to terminate on October 31, 2018. There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
21. 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-12088.
22. Approximately 4.2 acres of the lands on which this water right is appurtenant in Tract 1 are sub-irrigated due to a shallow water table as described in Finding of Fact No. 5. 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.
23. As identified in Finding of Fact No. 10, the agent for the applicant agreed to the reduction in the amount of water available for transfer from 3.0 acre-feet per acre to 2.0 acre-feet per acre for 4.2 acres in Tract 1. 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 2.0 acre-feet per acre is reasonable considering beneficial use without waste and the level of sub-irrigation. These 4.2 acres are located as follows:

IRRIGATION, TRACT No. 1					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	40 E	WM	20	SE SE	2.50
4 S	40 E	WM	29	NE NE	1.70
Total Acres					4.20

24. The total number of acres proposed for transfer has also been reduced and the portion of the right proposed for transfer is described in Finding of Fact No. 13.
25. Based upon the number of acres available for transfer and in consideration of the reduced volume for the sub-irrigated acreage, up to 93.54 AF, being 90.15 AF for Tract 1 and 3.39 AF for Tract 2, may be beneficially used annually under the existing right.
26. The proposed instream use requested by the applicant, as described in Finding of Fact No. 18, requires modification to account for the reduced acreage and volumes available for transfer.
27. In addition, the applicant has requested to protect water instream from the POD described in Finding of Fact No. 14 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. The Watermaster has determined that return flows in the amount of 20% from the existing use return to Catherine Creek below the POD. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected in stream requires modification and return flows should be accounted for immediately below the POD.
28. Based on the Findings of Fact Nos. 22 through 27, the Department has determined that water may be transferred and protected instream as follows:

Instream Reach No. 1: At the POD, as described in Finding of Fact No. 14

Certificate	Tract/Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
6181	Tract 1: 1864	0.37	90.15	July 2 through October 31
	Tract 2: May 1897	0.014	3.39	
	Total:	0.384	93.54	

Instream Reach No. 2: From immediately below the POD to the mouth of Catherine Creek

Certificate	Tract/Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
6181	Tract 1: 1864	0.298	72.12	July 2 through October 31
	Tract 2: May 1897	0.011	2.71	
	Total:	0.309	74.83	

29. The proposed change, as modified above, would not result in enlargement of the right.
30. The proposed change, as modified above, would not result in injury to other water rights.
31. The amount and timing of the proposed instream flow, as modified, is allowable within the limits and use of the original water right.

32. 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;
 - d) Return flows resulting from the exercise of the existing water right would re-enter the river within the reach of the instream water right, immediately below the POD. The quantity of water to be projected instream within the Instream Reach No. 2 has been reduced to account for return flows.
33. Within the proposed reach on Catherine Creek, and in 2019 when the instream use is proposed to begin, there are several instream water rights. There is an existing instream water right, Certificate 59537, established under ORS 537.346 (minimum flow conversion) for the purposes of supporting aquatic life that carries a priority date of November 3, 1983. This instream right overlaps with the proposed new instream right over a short segment at the beginning of the reach from the POD, as described in Finding of Fact No. 14, to the Swackhammer Diversion at Union, located 2 to 3 miles downstream from the POD.
34. There are also three existing time-limited instream transfers (established under ORS 537.348); T-11614 and T-11636, which will begin in 2018, and T-11613, which will go into effect in 2019. These instream rights have priority dates of 1870, 1864, and 1874 respectively and are to protect water instream for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.
35. A TMDL (Total Maximum Daily Load) has been approved for the Upper Grande Ronde River Basin, including Catherine Creek, for water quality standards. In addition, Catherine Creek is on the Department of Environmental Qualities 303d list of water quality limited streams.
36. 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.
37. By adding to any 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 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.

38. During the period July 2 to October 31, 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 and do not exceed the estimated average natural flow.
40. As identified in Finding of Fact No. 20, the portion of this right proposed for transfer to instream use on a time-limited basis is also presently being leased instream under IL-1404 through the irrigation season ending in 2018. This time-limited instream transfer is proposed to go into effect the following calendar year, being 2019.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-12088 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-12088 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-12088 are approved.*
2. *The exercise of the right evidenced by Certificate 6181 for irrigation at the former place of use (as described in Finding of Fact No. 13) 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 streamflow as follows:*

Instream Reach No. 1: At the POD, as described in Finding of Fact No. 14

<i>Certificate</i>	<i>Tract/Priority Date</i>	<i>Instream Rate (cfs)</i>	<i>Instream Volume (AF)</i>	<i>Period Protected Instream</i>
<i>6181</i>	<i>Tract 1: 1864</i>	<i>0.37</i>	<i>90.15</i>	<i>July 2 through October 31</i>
	<i>Tract 2: May 1897</i>	<i>0.014</i>	<i>3.39</i>	
	<i>Total:</i>	<i>0.384</i>	<i>93.54</i>	

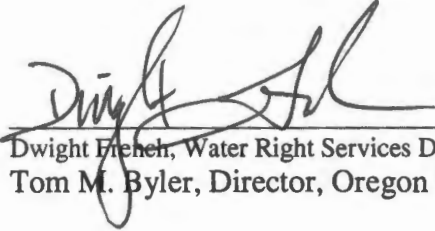
Instream Reach No. 2: From immediately below the POD to the mouth of Catherine Creek

<i>Certificate</i>	<i>Tract/Priority Date</i>	<i>Instream Rate (cfs)</i>	<i>Instream Volume (AF)</i>	<i>Period Protected Instream</i>
6181	<i>Tract 1: 1864</i>	0.298	72.12	July 2 through October 31
	<i>Tract 2: May 1897</i>	0.011	2.71	
	<i>Total:</i>	0.309	74.83	

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.*
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, 2019 and run through October 31, 2033.*

9. *Upon expiration of this time-limited instream 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, 2033.*

Dated at Salem, Oregon this 17 day of October 2016.



Dwight French, Water Right Services Division Administrator, for
Tom 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@wrđ.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.

Notice Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act, 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>