



# Oregon

Kate Brown, Governor

**Water Resources Department**

725 Summer St NE, Suite A

Salem, OR 97301

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March 5, 2017

VIA E-MAIL

Tony Malmberg  
1782 S Main Street  
Union, OR 97883  
[tony@thefreshwatertrust.org](mailto:tony@thefreshwatertrust.org)

**SUBJECT: Water Right Transfer Application T-12196**

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-12196. 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 503-986-0892 or [Joan.M.Smith@ wrd.state.or.us](mailto:Joan.M.Smith@ wrd.state.or.us) if I may be of assistance.

Sincerely,

Joan Smith  
Transfer Specialist  
Transfer and Conservation Section

cc: T-12196 file  
Shad L. Hattan, District 6 Watermaster (*via e-mail*)  
Rob Kirschner, Agent for the applicant (*via e-mail*)  
encs

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

In the Matter of Instream Transfer	)	PRELIMINARY DETERMINATION
Application T-12196, Union County	)	PROPOSING APPROVAL OF A
	)	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**

TONY MALMBERG  
1782 S MAIN STREET  
UNION, OR 97883

**Findings of Fact**

1. On November 4, 2015, Tony Malmberg filed an application to change the character of use under Certificate 57428 to instream use. The Department assigned the application number T-12196.
2. Notice of the application for transfer was published on November 10, 2015, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On January 6, 2017, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-12196 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of February 6, 2017, 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.
4. Consistent with the land use requirements, prior to submitting the instream transfer application, the applicant provided notification of the intent to file the instream transfer application to Union County. Additionally, the Department provided notice of the proposed action to Union County upon receipt of Transfer Application T-12196.

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 portion of the right to be transferred is as follows:

**Certificate:** 57428 in the name of GUILD UNITED DITCHES (confirmed by the Grande Ronde River Decree Volume 8 at Page 1)

**Use:** IRRIGATION of 0.84 ACRE

**Priority Date:** 1874

**Rate:** 0.02 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, is limited to a diversion of ONE-FORTIETH 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 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.

**Source:** CATHERINE CREEK, tributary to the GRANDE RONDE RIVER

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	40 E	WM	19	NE NE	150 FEET SOUTH AND 1730 FEET EAST FROM THE N1/4 CORNER OF SECTION 19

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acre
4 S	40 E	WM	19	SW SW	0.84

6. A total of 2.52 acre-feet of water may be beneficially used annually under the existing right.
7. Certificate 57428 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 instream transfer, an irrigation season of March 1 through October 31 shall be used to help establish when water may be protected instream.
8. Transfer Application T-12196 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.
9. Transfer Application T-12196 proposes to change the place of use of the right to create an instream reach from the point of diversion to the mouth of Catherine Creek.
10. The applicant proposes the quantities water to be transferred instream and be as protected follows:

Instream Period	Instream Rate (cfs)	Instream Volume (af)
June 27 through October 31	0.01	2.52

11. 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)

***Instream Transfer Review Criteria (OAR 690-77-0075 and 690-380-4010)***

12. Portions of the right to be transferred were leased instream within the last five years under SL-15 as evidenced by Special Order Volume 88, Page 539, beginning in the 2012 irrigation season and terminated on October 1, 2014. There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
13. 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-12196.
14. The Watermaster has identified a 20% return flow loss for Instream Reach 2, as described in Finding of Fact 15 below the rate is reduced to account for this loss.
15. Based on Finding of Fact No.14 the Department proposes to protect the instream use as follows:

**Instream Reach 1:** From the POD, as described in Finding of Fact No. 4, to the confluence with Pyles Creek.

Priority Date	Instream Period	Instream Rate (cfs)	Instream Volume (AF)
1874	June 27 through October 31	0.01	2.52

**Instream Reach 2:** From the confluence with Pyles Creek to the mouth of Catherine Creek.

Priority Date	Instream Period	Instream Rate (cfs)	Instream Volume (AF)
1874	June 27 through October 31	0.008	2.02

16. The proposed change as conditioned would not result in enlargement of the right.
17. The proposed change as conditioned would not result in injury to other water rights.
18. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
19. 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) Return flows resulting from the exercise of the existing water right would re-enter the river within the reach of the instream water right, at the confluence of Catherine Creek with Pyles Creek. The quantity of water to be projected instream has been reduced to account for return flows within Reach No. 2.

20. Within the proposed reach on Catherine Creek, there are several existing instream water rights. There is one instream water right, Certificate 59537, established under ORS 537.346 (minimum flow conversation) for the purposes of supporting aquatic life and carries a priority date of November 3, 1983. This instream right overlaps with the proposed new instream water right over a short segment at the beginning of the reach from the POD, as described in Finding of Fact No. 5, to the Swackhammer diversion at Union, located about 400 feet downstream from the POD. There are also other existing instream water rights, several of which will begin in 2018 and 2019, established under ORS 537.348(2) (instream transfer and lease process) for fish and wildlife habitat. These other existing instream rights have priority dates ranging from 1864 to 1874.
21. 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.
22. 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.
23. During the period of June 27 through 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 new instream water rights under these statutes.
24. 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.

### **Determination and Proposed Action**

The changes in character of use and place of use to instream use proposed in application T-12196 appears 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-12196 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-12196 are approved.*

2. *Water right certificate 57428 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will be issued describing that portion of the right not affected by this transfer shall be issued.*
3. *The instream water right shall provide for the protection of stream flows from the authorized point of diversion, as described in Finding of Fact No. 5, to the mouth of Catherine Creek.*
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>1874</i>	<i>June 27 through October 31</i>	<i>0.01</i>
<i>1874</i>	<i>June 27 through October 31</i>	<i>0.008</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. Stream channel losses and gains calculated based on available data and 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.*
7. *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.*
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 57428 and any related decree.*
9. *The former place of use of the transferred water shall no longer receive water as part of this right.*

Dated at Salem, Oregon this 3 day of March 2017.

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

This Preliminary Determination was prepared by Joan Smith. If you have questions about the information in this document, you may reach me at 503-986-0892 or Joan.M.Smith@wrdd.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>