



Oregon

Kate Brown, Governor

Water Resources Department

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December 20, 2017

Applicant

Toft-Kaser Farm, LLC

828 Sun Valley Avenue

Silverton, OR 97381

SUBJECT: Allocation of Conserved Water Application CW-100

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve Conserved Water Application CW-100.

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 period for the conserved water application.

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 503-986-0881 or teri.k.hranac@oregon.gov, if I may be of assistance.

Sincerely,

Teri Hranac

Allocation of Conserved Water

Transfer and Conservation Section

Enclosure

cc: CW-100
District #16 Watermaster *(via e-mail)*



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

In the Matter of Allocation of Conserved) PRELIMINARY DETERMINATION
Water Application CW-100,) PROPOSING APPROVAL OF
Clackamas County) ALLOCATION OF CONSERVED
) WATER CW-100

Applicant

Toft-Kaser Farm, LLC
828 Sun Valley Avenue
Silverton, OR 97381

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 and the proposed location of use; (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 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 not subject to repayment. ORS 537.470(3).

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.

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 October 6, 2017, Toft-Kaser Farm, LLC filed an allocation of conserved water application under Certificate 26123. The Department assigned the application number CW-100.
2. The conservation project involves converting from handlines and sprinklers to drip irrigation. The conversion to drip irrigation is a proven technology for conserving water.
3. Application CW-100 proposes a rate reduction of approximately 0.22 cubic foot per second (cfs) and proposes to reduce the annual volume by 34.65 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
26123	0.25	1/80	49.50	2.5	.03	.0015	14.85	.75	0.22	34.65

4. The right to be modified by CW-100 is as follows:

Certificate: 26123 in the name of SYLVESTER TERRY (perfected under Permit S-21641)
Use: IRRIGATION of 19.8 ACRES
Priority Date: JULY 25, 1952
Rate: 0.25 CUBIC FOOT PER SECOND
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 a diversion of not to exceed 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.
Source: BUTTE CREEK, tributary to the PUDDING RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC
6 S	1 E	WM	15	SW NW	39

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
6 S	1 E	WM	15	SW NW	44	10.00
6 S	1 E	WM	15	SE NW	44	2.20
6 S	1 E	WM	15	NE SW	44	2.20
6 S	1 E	WM	15	NW SW	44	5.40

5. Certificate 26123 does not list a specific location for the point of diversion. Based on the Department’s records and the final proof survey map, the point of diversion is located approximately:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
6 S	1 E	WM	15	SW NW	39	50 FEET NORTH AND 240 FEET EAST FROM THE WEST ¼ CORNER OF SECTION 15

6. Certificate 26123 does not list a period of use; therefore, pursuant to OAR 690-250-0070, the irrigation season of use is March 1 through October 31.
7. 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.
8. 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.
9. 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
26123	25%	0.05	8.66	75%	0.17	25.99	100%	0.22	34.65

10. The Applicant proposes that its portion of the conserved water be allocated for an out-of-stream use within Sections 9, 10, 15, and 16, Township 6 South, Range 1 East, W.M
11. The Applicant requests that the priority date for any conserved water be the one minute junior to the originating right.
12. The Applicant funded 100% of the conservation project.
13. The Applicant submitted a completed Land Use Form from Clackamas County which indicated the proposed use was allowed outright or is not regulated by Clackamas County’s comprehensive plan.
14. The implementation of the conservation measures began no earlier than October 1, 2017, and will be completed by March 1, 2018. At the time of filing, the Applicant had just started construction of the project and had not expended 25% of the project costs.

15. 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, and pollution abatement.
16. The Applicant requested the Department protect the new instream water right created from the conserved water under Certificate 26123 from the authorized point of diversion to the mouth at the confluence with the Pudding River.
17. The Applicant requested March 1, 2018 as the deadline for submitting the Notice of and Request for Finalization.
18. The application meets the requirements of OAR 690-018-0040.
19. The Department has consulted with the Oregon Department of Fish and Wildlife (ODFW) and Oregon Department of Environmental Quality (DEQ) to ascertain whether the proposed instream flows are necessary to support instream flow uses. The ODFW concluded the proposed instream water right will be a net benefit to the aquatic species of Butte Creek. The DEQ concluded the proposed instream water right would assist the temperature reduction requirements of the Molalla-Pudding Subbasin total maximum daily load.
20. Notice of the proposed conservation project was published in the Department's weekly notice on October 31, 2017, and in the Molalla Pioneer newspaper on November 8 and 15, 2017, 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]

21. 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).
22. On November 30, 2017, the District #16 Watermaster performed a review of the proposed Allocation of Conserved Water Project. The Watermaster has indicated the quantity of water to be protected instream is not a measurable quantity in Butte Creek; therefore, the instream water right should be protected at the authorized point of diversion and not the reach as requested by the Applicant. The Watermaster has also determined that at this time, the Department lacks sufficient data to quantify the return flows that likely return to Butte Creek below the authorized point of diversion; therefore, the Department is unable to determine if any quantity of conserved water is needed to mitigate for harm to other water rights. OAR 690-018-0050(4)(b) and (d).
23. The conservation project is consistent with the local comprehensive land use plan requirements established in OAR 690-005-0045. (Finding of Fact #13). OAR 690-018-0050(4)(c).

24. 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-100 under Certificate 26123 are as follows:

Certificate	Rate		Duty
	Maximum CFS	CFS/AC	Maximum AF
26123	0.03	0.0015	14.85

(Finding of Fact #3).

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

Priority Date	Maximum Rate (cfs)	Maximum Duty / Volume (AF)
July 25, 1952, <i>plus one minute</i>	0.05	8.66

(Findings of Fact #9 and #11).

26. 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 be a net benefit to the aquatic species of Butte Creek and will assist the temperature reduction requirements of the Molalla-Pudding Subbasin total maximum daily load. (Finding of Fact #19).

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

Priority Date	Maximum Rate (cfs)	Maximum Duty / Volume (AF)
July 25, 1952, <i>plus one minute</i>	0.17	25.99

(Findings of Fact #9 and #11).

28. The new instream water right created will be protected in Butte Creek at the authorized point of diversion as described in Finding of Fact #5. OAR 690-018-0050(4)(h); OAR 690-077-0015(8). (Finding of Fact #22).

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 season, the conserved water may be protected at the full rate 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)
7/25/1952, <i>plus one minute</i>	June 1 through August 26	0.05	8.66

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:
- The instream water use begins at the recorded point of diversion;
 - 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 point on Butte Creek does not exceed the amount needed to provide increased public benefits, and do not exceed the estimated average natural flow or level occurring from the drainage system. OAR 690-077-0015(4) and (11).
- 34. There are no existing instream water rights on Butte Creek encompassing the proposed point, established pursuant to ORS 537.341 (minimum flow conversion) or ORS 537.336 (state agency process). By adding to 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. 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 9, 10, 15, and 16, Township 6 South, Range 1 East, W.M. (Finding of Fact #10). OAR 690-018-0050(4)(h).
- 36. The deadline for submitting a Notice of Completion is March 1, 2018. The requested deadline for submitting a Request for Finalization is March 1, 2018. (Finding of Fact #17). OAR 690-018-0050(4)(i).
- 37. No other conditions or limitations are needed to prevent or mitigate for harm to existing water rights. (Finding of Fact #22). OAR 690-018-0050(4)(j).

Determination and Proposed Action

The project described in Allocation of Conserved Water Application CW-100, 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(6), the conserved water application will be approved.

If Allocation of Conserved Water Application CW-100 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 24.*
- 2. *The proposed allocation of conserved water will not harm existing water rights. Findings of Fact #22 and #37.*
- 3. *The application is consistent with the requirements established in OAR 690-005-0045. Finding of Fact #23.*
- 4. *The changes proposed in CW-100 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
26123	25%	0.05	8.66	75%	0.17	25.99	100%	0.22	34.65

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 26123 and any related decree.

7. Water Right Certificate 26123 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 and place of use (described in Finding of Fact #5) at the reduced rate and duty as follows:

Use: IRRIGATION of 19.8 ACRES

Priority Date: JULY 25, 1952

Rate: 0.03 CUBIC FEET PER SECOND

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 0.0015 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 0.75 acre-feet per acre for each acre irrigated during the irrigation season of each year, and is further limited to an annual volume limitation of 14.85 acre-feet per year.

Source: BUTTE CREEK, tributary to the PUDDING RIVER

8. Water use measurement conditions:

- a. A totalizing flow meter shall be maintained at the point of diversion on Butte Creek.
- b. 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.

Upon Filing a Notice of Completion and Request for Finalization

9. The project is complete and no additional time is needed for finalization. The Applicant's portion of conserved water (0.17 cfs, 25.99 AF) shall be used and managed instream until a Notice of Use or Disposition is received pursuant to ORS 537.490 and OAR 690-019-0090 is received. The water shall be managed instream from the authorized point of diversion located:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
6 S	1 E	WM	15	SW NW	39	50 FEET NORTH AND 240 FEET EAST FROM THE WEST ¼ CORNER OF SECTION 15

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 9, 10, 15, and 16, Township 6 South, Range 1 East, W.M*
11. *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, and pollution abatement in Butte Creek as follows:*

<i>Priority Date</i>	<i>Period</i>	<i>Rate (cfs)</i>	<i>Volume (acre-feet)</i>
<i>7/25/1952, plus one minute</i>	<i>June 1 through August 26</i>	<i>0.05</i>	<i>8.66</i>

Source: Butte Creek. Protected at the authorized point of diversion under Certificate 26123 located approximately:

<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>	<i>DLC</i>	<i>Measured Distances</i>
<i>6 S</i>	<i>1 E</i>	<i>WM</i>	<i>15</i>	<i>SW NW</i>	<i>39</i>	<i>50 FEET NORTH AND 240 FEET EAST FROM THE WEST ¼ CORNER OF SECTION 15</i>

Dated at Salem, Oregon this 21 day of December, 2017.



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

Mailing Date: Dec. 22, 2017

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 service members have a right to stay proceedings under the federal Servicemembers 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>.