

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

In the Matter of Allocation of Conserved ) PRELIMINARY DETERMINATION  
Water Application CW-123, ) PROPOSING APPROVAL OF ALLOCATION OF  
Yamhill County ) CONSERVED WATER CW-123

**Applicant**

John G. Bernards Trust  
dated January 9, 2018  
14295 SW Masonville Road  
McMinnville, OR 97128  
[jmbfarmslc@gmail.com](mailto:jmbfarmslc@gmail.com)

**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.

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.
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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).

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 and new certificates reflecting the changes for the portions of the water rights involved in the conserved water application. 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 March 26, 2021, John G. Bernards Trust dated January 9, 2018, (Applicant) filed an allocation of conserved water application under Certificate 39576. The Department assigned the application number CW-123.
2. The conservation project involves conversion from a big gun sprinkler system to drip irrigation. The conversion from sprinklers to drip irrigation is a proven technology for conserving water.
3. Application CW-123 proposes a rate reduction of approximately 0.37 cubic foot per second (cfs) and proposes to reduce the annual volume by 81.8 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
39576	0.92	0.0112	204.5	2.5	0.55	0.007	122.7	1.5	0.37	81.8

4. The portion of the right to be modified by CW-123 is as follows:
  - Certificate:** 39576 in the name of MARVIN BERNARDS (perfected under Permit S-34335)
  - Use:** IRRIGATION of 81.8 ACRES
  - Priority Date:** APRIL 22, 1969
  - Rate:** 0.92 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 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:** SOUTH YAMHILL RIVER, tributary to the YAMHILL RIVER

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
5 S	5 W	WM	12	NW NE	63	2840 FEET SOUTH AND 1570 FEET EAST FROM NE CORNER OF MILLER DLC 64

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	5 W	WM	2	NE NE	59	4.6
5 S	5 W	WM	2	NW NE	59	13.0
5 S	5 W	WM	2	SW NE	59	19.6
5 S	5 W	WM	2	SE NE	59	12.6
5 S	5 W	WM	2	NE NW	59	17.7
5 S	5 W	WM	2	NW NW	59	0.4
5 S	5 W	WM	2	SE NW	59	13.9
Total						81.8

5. Certificate 39576 does not list a period of use; therefore, pursuant to the Yamhill River Decree, the irrigation season of use is April 1 to 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)	Max. Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Max. Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Max. Duty (Volume) AF
39576	25	0.09	20.45	75	0.28	61.35	100	0.37	81.80

9. The Applicant proposes that its portion of the conserved water be allocated for an out-of-stream use within Sections 35 and 36, Township 4 South, Range 5 West, W.M. and Sections 1 and 2, Township 5 South, Range 5 West, W.M.
10. The Applicant requested 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 Yamhill County that indicated the proposed use was allowed outright or is not regulated by Yamhill County's comprehensive plan.
13. The Applicant anticipates implementation of the conservation measures to occur on or before August 31, 2022.
14. The Applicant proposed 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 39576 at the authorized point of diversion.
16. The Applicant requested the deadline for submitting the Notice of Completion of August 31, 2022. The Applicant will submit a Request for Finalization of the allocation on or before August 31, 2027.
17. The application meets the requirements of OAR 690-018-0040.
18. The Department has determined the proposed instream flows are necessary to support instream flow uses. Instream Water Right Certificate 72977 exists in the stream reach where the proposed instream water right is to be protected and is for the same instream flow purposes. The priority date of Certificate 72977 is August 5, 1993. Replacing a portion of Certificate 72977 with an earlier priority date supports the public benefits.
19. Notice of the proposed conservation project was published in the Department's weekly notice on April 20, 2021, and in the *News Register* newspaper on April 20 and 27, 2021, 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 May 3, 2021, the District #22 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-123 under Certificate 39576 are as follows:

Certificate	Rate		Duty	
	Maximum CFS	CFS/AC	Maximum AF	AF/AC
39576	0.55	0.007	122.7	1.5

(Finding of Fact #3).

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

Priority Date	Maximum Rate (cfs)	Maximum Duty (Volume) (AF)
April 22, 1969, <i>plus one minute</i>	0.09	20.45

(Findings of Fact #8 and #10).

25. As required by OAR 690-018-0050(4)(f), the Department has determined that the instream right created will support public benefits. (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). The priority date, rate and volume allocated to the Applicant is as follows:

Priority Date	Maximum Rate (cfs)	Maximum Duty (Volume) (AF)
April 22, 1969, <i>plus one minute</i>	0.28 cfs	61.35

(Findings of Fact #8 and #10).

27. The new instream water right created will be protected in the South Yamhill River at the authorized point of diversion as described in Finding of Fact #4, at approximately River Mile 20.6. OAR 690-018-0050(4)(h); OAR 690-077-0015(8).
28. 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 use, the conserved water may be protected at the full rate without enlarging the right.
29. The instream right shall allow the use and protection of flows as follows:

Source: South Yamhill River, tributary to the Yamhill River

Priority Date	Period	Rate (cfs)	Volume (AF)
April 22, 1969, <i>plus one minute</i>	June 11 through September 30	0.09	20.45

At the authorized point of diversion at approximately River Mile (RM) 20.6:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
5 S	5 W	WM	12	NW NE	63	2840 FEET SOUTH AND 1570 FEET EAST FROM NE CORNER OF MILLER DLC 64

30. 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).
31. 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).
32. The combination of instream rights for the proposed point on the South Yamhill 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).
33. The existing instream water rights on the South Yamhill River established pursuant to ORS 537.341 (minimum flow conversion) or ORS 537.336 (state agency process), at the proposed point on the South Yamhill River are sufficient to protect the monthly quantities of water necessary for supporting aquatic life and anadromous and resident fish habitat, but are not always met. By replacing a portion of these instream water rights, any instream water right created as a result of this allocation will provide protection of stream flows identified as necessary for supporting aquatic life and anadromous and resident fish habitat under an earlier priority date.
34. 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 areas within which the conserved water is proposed to be used for out-of-stream uses are within Sections 35 and 36, Township 4 South, Range 5 West, W.M. and Sections 1 and 2, Township 5 South, Range 5 West, W.M. (Finding of Fact #9). OAR 690-018-0050(4)(h).
36. The deadline for submitting a Notice of Completion is August 31, 2022. The deadline for submitting a Request for Finalization is August 31, 2027. (Finding of Fact #16). 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 #21). OAR 690-018-0050(4)(j).

**Determination and Proposed Action**

The project described in Allocation of Conserved Water Application CW-123, 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-123 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 #20.*
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. Finding of Fact #12 and #22.*
4. *The changes proposed in CW-123 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)	Max. Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Max. Duty (Volume) AF	Percentage	Maximum Rate (CFS)	Max. Duty (Volume) AF
39576	25	0.09	20.45	75	0.28	61.35	100	0.37	81.80

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 39576 and any related decree.*

**Upon filing the Notice of Completion:**

7. *Water Right Certificate 39576 is cancelled. A new certificate will be issued for that portion of the water right not modified by this Allocation of Conserved Water application. A superseding Certificate will be issued for the existing use and place of use at the reduced rate and duty as follows:*

**Use:** IRRIGATION of 81.8 ACRES

**Priority Date:** APRIL 22, 1969

**Rate:** 0.55 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 ONE-HUNDRED FORTY-NINTH (1/149) 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 1.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.*

**Source:** SOUTH YAMHILL RIVER, tributary to the YAMHILL RIVER

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
5 S	5 W	WM	12	NW NE	63	2840 FEET SOUTH AND 1570 FEET EAST FROM NE CORNER OF MILLER DLC 64

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
5 S	5 W	WM	2	NE NE	59	4.6
5 S	5 W	WM	2	NW NE	59	13.0
5 S	5 W	WM	2	SW NE	59	19.6
5 S	5 W	WM	2	SE NE	59	12.6
5 S	5 W	WM	2	NE NW	59	17.7
5 S	5 W	WM	2	NW NW	59	0.4
5 S	5 W	WM	2	SE NW	59	13.9
Total						81.8

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. All conserved water, both the Applicant's portion and the State's portion shall be managed instream until a Request for Finalization is submitted as follows:

Source: South Yamhill River, tributary to the Yamhill River

Priority Date	Period	Rate (cfs)	Volume (AF)
April 22, 1969, plus one minute	June 11 through September 30	0.37	81.8

At the authorized point of diversion at approximately River Mile (RM) 20.6:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
5 S	5 W	WM	12	NW NE	63	2840 FEET SOUTH AND 1570 FEET EAST FROM NE CORNER OF MILLER DLC 64

**Upon Filing the Request for Finalization:**

10. The project is complete, and no additional time is needed for finalization.
11. The Applicant's portion of conserved water (0.28 cfs, 61.35 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. The water shall be managed instream as follows:



Source: South Yamhill River, tributary to the Yamhill River

Priority Date	Period	Rate (cfs)	Volume (AF)
April 22, 1969, plus one minute	June 11 through September 30	0.28	61.35

At the authorized point of diversion at approximately River Mile (RM) 20.6:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
5 S	5 W	WM	12	NW NE	63	2840 FEET SOUTH AND 1570 FEET EAST FROM NE CORNER OF MILLER DLC 64

12. The areas within which the conserved water is proposed to be used for out-of-stream uses are within Sections 35 and 36, Township 4 South, Range 5 West, W.M. and Sections 1 and 2, Township 5 South, Range 5 West, W.M.
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 follows:

Source: South Yamhill River, tributary to the Yamhill River

Priority Date	Period	Rate (cfs)	Volume (AF)
April 22, 1969, plus one minute	June 11 through September 30	0.09	20.45

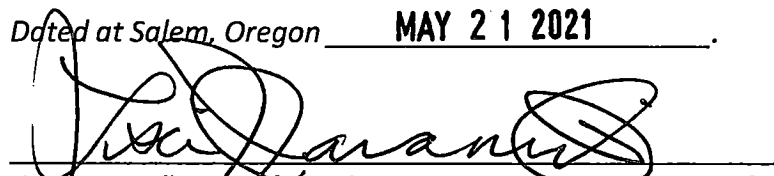
At the authorized point of diversion at approximately River Mile (RM) 20.6:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
5 S	5 W	WM	12	NW NE	63	2840 FEET SOUTH AND 1570 FEET EAST FROM NE CORNER OF MILLER DLC 64

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 points of diversion. Stream channel losses and gains calculated based on available data and the use of water by 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.

The instream right established by this allocation 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 in an order approving a new instream water right under these statutes.

Dated at Salem, Oregon     MAY 21 2021    .



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for  
THOMAS M. BYLER, DIRECTOR  
Oregon Water Resources Department

Mailing Date:     MAY 24 2021

## 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).

If a protest is withdrawn, or any party to a hearing notifies the Department or the administrative law judge that the party will not appear, or if the party fails to appear at a scheduled hearing, the Director may issue a final order by default. If the Director issues a Final Order by default, the Department designates the relevant portions of its files on this matter, including all materials that parties have submitted relating to this matter, as the record for purpose of proving a *prima facie* case upon default.

Any party may be represented by an attorney at the hearing. Legal aid organizations may be able to assist a party with limited financial resources. Generally, partnerships, corporations, associations, governmental subdivisions, or public or private organizations are represented by an attorney. However, consistent with OAR 690-002-0020 and OAR 690-137-0555, an agency representative may represent partnerships, corporations, associations, governmental subdivisions

or public or private organization if the Department determines that appearance of a person by an authorized representative will not hinder the orderly and timely development of the record in this case.

Notice Regarding Servicemembers: Active duty service members have a right to stay proceedings under the federal Servicemembers Civil Relief Act. For more information, contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free telephone number.

*Protests should be addressed to the attention of Allocation of Conserved Water Program, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.*

**IMPORTANT: Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. Mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified.**