

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

In the Matter of Transfer Application) FINAL ORDER APPROVING A
T-9715, Wallowa County) CHANGE IN POINT OF DIVERSION

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.

Applicant

WOODY WOLFE
81544 HWY 82
WALLOWA, OR 97885

Findings of Fact

Background

1. On May 6, 2004, WOODY WOLFE filed an application for an additional point of diversion under Certificate 3922. The Department assigned the application number T-9715.
2. Notice of the application for transfer was published on May 24, 2004, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On February 15, 2005, the Department issued a draft Preliminary Determination proposing to deny Transfer Application T-9715 and mailed a copy to the applicant. The draft Preliminary Determination proposed denial because of the potential to injure an instream water right.
4. The applicant requested that the Department seek a recommendation from Oregon Department of Fish and Wildlife (ODFW) as to whether the Department should consent to injury of the instream water right pursuant to OAR 690-380-4030.

This final order is subject to judicial review by the Court of Appeals under ORS 183.482. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.482(1). Pursuant to ORS 536.075 and OAR 137-003-0675, you may petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

5. On March 1, 2005, the Department issued a Preliminary Determination proposing to deny Transfer Application T-9715 unless ODFW recommended consent to injury of the instream water right, and mailed a copy to the applicant. Additionally, notice of the Preliminary Determination was published in the Department's weekly notice on March 8, 2005.
6. On March 1, 2005, the Department requested ODFW submit a recommendation on whether the Department should consent to the injury to instream water right 59814 that would result from approval of Transfer Application T-9715.
7. On September 14, 2011, the applicant submitted an amended application and map indicating the transfer application request was for a change in point of diversion rather than an additional point of diversion, and reducing the number of acres associated with the point of diversion change.

8. The portion of the right, as amended, to be transferred is as follows:

Certificate: 3922 in the name of L.J. WILLETT (perfected under Permit S-5571)
Use: IRRIGATION of 38.6 ACRES
Priority Date: AUGUST 11, 1922
Rate: 0.49 CUBIC FOOT PER SECOND
Source: SOUTH FORK OF WALLOWA RIVER, tributary to the WALLOWA RIVER

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	43 E	WM	19	NE SW	3.5
1 N	43 E	WM	19	NW SW	1.0
1 N	43 E	WM	19	SW SW	1.0
1 N	43 E	WM	19	SE SW	31.5
1 N	43 E	WM	19	SW SE	1.6

9. Certificate 3922 describes the source of water as the South Fork of the Wallowa River. This stream is also known as the Lostine River.
10. Certificate 3922 does not provide the location of the authorized point of diversion. However, based on the information available including the Department's records and the Certified Water Right Examiner's inspection, the point of diversion is located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 N	43 E	WM	30	SE NE	2297 FEET SOUTH AND 279 FEET WEST FROM THE NE CORNER OF SECTION 30

11. Transfer Application T-9715 proposes to move the authorized point of diversion approximately 2.17 miles upstream in the Lostine River to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 N	43 E	WM	33	NW SW	1916 FEET NORTH AND 223 FEET EAST FROM THE SW CORNER OF SECTION 33

12. On September 21, 2011, the Department issued an Amended Preliminary Determination proposing to deny Transfer Application T-9715 unless ODFW recommended consent to injury of the instream water right, and mailed a copy to the applicant. Additionally, notice of the Preliminary Determination was published in the Department's weekly notice on September 27, 2011, and in the Wallowa County Chieftain newspaper on October 20 and 27, and November 3, 2011, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.
13. On September 22, 2011, the Department sent a letter to ODFW, accompanied by a copy of the Preliminary Determination and other supporting documentation, requesting the agency's recommendation on whether the Department should consent to injury on the instream water right due to the proposed change resulting in a net benefit to the resource; and any conditions necessary to ensure that the proposed change would be consistent with that recommendation.
14. On November 14, 2011, ODFW recommended that the Department consent to the injury of instream water right 59814 because the transfer would result in net benefits to the resource if conditioned to require the applicant to permanently transfer to an instream water right the 0.39 cfs that was currently leased instream. The recommendation concluded that the following benefits will more than offset the potential for injury:
- a) Elimination of a diversion structure, including elimination of an annually constructed push-up dam from the lower Lostine River, will decrease sediment loads and eliminate annual stream disturbance improving fish habitat downstream of the current point of diversion.
 - b) Conversion of the allocated water right to permanent instream use will increase flows and improve habitat conditions for aquatic species in the lower 1.4 miles.
 - c) Permanent protection of 36 acres of wetland and riparian habitat including 0.5 mile of the lower Lostine River through a conservation easement.
 - d) The project should help facilitate development of an additional conservation easement to protect 110 acres of riparian and wetland habitats including another mile of the lower Lostine River.
15. Notice of opportunity to comment on ODFW's recommendation to consent to injury of the instream water right was published on the Department's weekly notice on November 22, 2011. No comments to the recommendation were received.

16. On February 9, 2012, the applicant submitted an application for an instream transfer (T-11351) to permanently transfer to instream use the water currently leased instream under IL-1184.
17. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screen is necessary at the new point of diversion to prevent fish from entering the diversion and/or safely transport fish back to the body of water from which the fish were diverted and that the diversion is currently equipped with an appropriate fish screen.

Transfer Review Criteria [OAR 690-380-4010(2)]

18. Water has been used within the five-year period prior to submittal of the transfer application according to the terms and conditions of the right. There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
19. 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-9715.
20. The proposed change would not result in enlargement of the right.
21. An instream water right, Certificate 59814, exists for the reach of the river in which the authorized point of diversion would be moved upstream, and stream flows within the reach are frequently below the levels allocated under the instream water right. Thus, the instream water right would be injured as a result of the proposed change in point of diversion; however, ODFW recommended that OWRD consent to the injury, provided the conditions in Finding of Fact #14 are met.
22. Based on the conditions of the recommendation of ODFW that the Department consent to injury, an Order approving instream Transfer Application T-11351 is being issued concurrently, as evidenced by Special Order Volume 88, Pages 204-209.

Conclusions of Law

Based on the recommendation of ODFW, the Water Resources Department consents to injury of the instream water right under Certificate 59814 pursuant to OAR 690-380-5050. The change in point of diversion proposed in Transfer Application T-9715 is consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000.

Now, therefore, it is ORDERED:

1. The change in point of diversion proposed in application T-9715 is approved.
2. 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 3922 and any related decree.

3. Water right certificate 3922 is cancelled.
4. The quantity of water diverted at the new point of diversion shall not exceed the quantity of water lawfully available at the original point of diversion.
5. The Director may require the water user to install a totalizing flow meter or other suitable measuring device at the point of diversion. If the Director notifies the water user to install a totalizing flow meter or other measuring device, the water user shall install such device specified by the Director within the period allowed in the notice. Once installed, the water user shall maintain the meter or measuring device in good working order and shall allow the Watermaster access to the meters or measuring devices.
6. The water user shall maintain and operate a fish screen at the point of diversion consistent with the Oregon Department of Fish and Wildlife's operational and maintenance standards.
7. An Order approving instream Transfer Application T-11351 is being issued concurrently with this Order, as evidenced by Special Order Volume 88, Pages 204-209.
8. The approved change shall be completed and full beneficial use of the water shall be made on or before **October 1, 2013**. A Claim of Beneficial Use prepared by a Certified Water Right Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the change and full beneficial use of the water.
9. When satisfactory proof of the completed change is received, a new certificate confirming the right transferred will be issued.

Dated at Salem, Oregon this 30th day of July, 2012.


Dwight French, Water Right Services Administrator, for
PHILLIP C. WARD, DIRECTOR

AUG 13 2012

Mailing date: _____