

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

In the Matter of Instream Transfer	)	FINAL ORDER APPROVING
Application T-11351, Wallowa County	)	CHANGES 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**

WOODY WOLFE  
81544 HIGHWAY 82  
WALLOWA, OR 97885

**Findings of Fact**

**Background**

1. On February 9, 2012, Woody Wolfe filed an application to change the place of use and character of use under Certificate 3922 to instream use. The Department assigned the application number T-11351.
2. On March 6, 2012, the Department received complete application materials, including signature page of the application with the applicant's original signature.
3. This instream transfer is intended to provide mitigation for transfer T-9715.
4. The portion of the right to be transferred is as follows:

**Certificate:** 3922 in the name of L. J. WILLETT (perfected under Permit S-5571)  
**Use:** IRRIGATION of 31.4 ACRES  
**Priority Date:** AUGUST 11, 1922  
**Rate:** 0.39 CUBIC FOOT PER SECOND (CFS)

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.

**Limit/Duty:** None Specified in Certificate.  
**Period of Use:** None Specified in Certificate.  
**Source:** SOUTH FORK OF WALLOWA RIVER (aka LOSTINE 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	11.5
1 N	43 E	WM	19	SE SW	6.5
1 N	43 E	WM	19	SW SE	13.4

5. Certificate 3922 does not describe the location of the point of diversion, however information is available from the Applicant indicating that the point of diversion is located as follows:

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

6. Certificate 3922 does not describe the duty of the right.
7. Certificate 3922 does not describe the irrigation season. The irrigation season for the area, consistent with the Wallowa River Decree, is May 1 to October 1.
8. Application T-11351 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. Application T-11351 proposes to change the place of use of the right to create an instream reach from the authorized point of diversion, as described in Finding of Fact #5, to the mouth of the Lostine River.
10. The applicant proposes the quantities water to be transferred instream to be protected as follows:

Period	Rate (cfs)	Volume (acre-feet)
May 1 through July 30	0.39	141.3
July 31 through September 30	0.39	31.4
Total		172.4

11. The applicant proposes that any instream water right established as a result of this instream transfer to 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 also proposes that any instream water right 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 an earlier priority date.

12. The applicant provided notice of the intent to transfer Certificate 3922 to instream use to the City of Wallowa prior to submitting the transfer application. Notice was not provided to Wallowa County prior to the transfer application being submitted. However, the Department provided notification of the proposed action to the City of Wallowa and Wallowa County upon receipt of Transfer Application T-11351.
13. Notice of the application for transfer was published on February 21, 2012, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
14. On April 19, 2012, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11351 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of May 18, 2012, 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.
15. On June 5, 2012, the Department issued a Preliminary Determination proposing to approve Transfer Application T-11351 and sent a copy to the applicant. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on June 26, 2012, and in the Wallowa Chieftain newspaper on June 13 and 20, 2012, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.

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

16. Water has been used within the last five years according to the terms and conditions of the right, and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
17. In addition, the right has been leased instream under IL-1184, as evidenced by Special Order Vol. 85, Page 88, approved on August 15, 2011. The term of this instream lease was set to expire on October 1, 2015. On July 16, 2012, a Final Order terminating IL1184 was issued by the Department, as evidenced by Special Order Volume 88, Pages 38-40.
18. 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 Application T-11351.
19. Use of water under the existing right is subject to beneficial use without waste in accordance with ORS 536.310. Information available from Department records indicates that the duty of 3.75 Acre-Feet (AF) per acre would be an appropriate duty of water based on the quantity of water that could be beneficially used without waste under this right. Therefore, a total of 117.8 AF of water may be beneficially used annually under the existing right.

20. The instream use requested by the applicant requires modification. The applicant has requested to protect up to 172.7 AF instream, the equivalent of 5.5 AF per acre. This exceeds the maximum volume that the Department has identified may be used beneficially and without waste. The instream volume has been reduced to 117.8 AF. This does not affect the proposed instream period or instream rate.
21. Based upon Findings of Fact #19 and #20, on May 14, 2012, the applicant agreed to modify the quantities to be transferred and protected instream as follows:

Period	Rate (cfs)	Volume (acre-feet)
May 1 through September 30	0.39	117.8

22. The proposed changes, as modified, would not result in enlargement of the right.
23. The proposed changes, as modified, would not result in injury to other water rights.
24. The amount and timing of the proposed instream flow, as modified, are allowable within the limits and use of the original water right.
25. The protection of flows within the proposed reach are appropriate, considering:
- The instream water right begins at the recorded point of diversion;
  - The location of confluences with other streams downstream of the point of diversion;
  - There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
  - Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the reach of the instream water right.
26. There is an existing instream water right, Certificate 59814, for the same reach as that proposed for the new instream water right. This right was established through the minimum flow conversion process for the purpose of supporting aquatic life, with a priority date of November 3, 1983.
27. The existing instream water right, established under ORS 537.346 (minimum streamflow conversion), within the proposed reach on the Lostine River is sufficient to protect the monthly quantities of water necessary for supporting aquatic life but is not always met and has a priority date junior in comparison to other water rights on the Lostine River. The proposed instream use will have a priority date of April 11, 1922. By replacing a portion of instream rights created under the minimum streamflow conversion process, the proposed instream right will provide protection for streamflows previously identified as supporting aquatic life under an earlier priority date.

28. In addition, by adding any instream water rights established in the future under the instream transfer or allocation of conserved water process for the same location, the instream right established by this instream transfer will provide protection for additional streamflows necessary for aquatic life, unless otherwise identified in a subsequent order establishing a new instream water right under those statutes.
29. The total monthly quantities of water to be protected under the proposed instream right in the reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

**Conclusions of Law**

The changes in character of use and place of use to instream use proposed in application T-11351 are consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075.

**Now, therefore, it is ORDERED:**


1. The changes in character of use and place of use to instream use proposed in application T-11351 are approved.
2. Water right certificate 3922 is cancelled. A new certificate confirming the instream water right shall be issued.
3. The instream water right shall provide for the protection of streamflows from authorized point of diversion, as described in Finding of Fact # 5, to the mouth of the Lostine River, River Mile 0.0.
4. The quantities of water to be protected under the instream water right are:

Period	Rate (cfs)
May 1 through September 30	0.39

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.
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 3922 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 30<sup>th</sup> day of July, 2012.



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

Mailing date:           **AUG 03 2012**