

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

In the Matter of Transfer Application     )     FINAL ORDER  
T-11798, Malheur County                 )     APPROVING AN ADDITIONAL POINT OF  
   )     DIVERSION TO REFLECT HISTORIC USE

**Authority**

ORS 540.532 establishes the process in which a water right holder may submit a request for a change in point of diversion to reflect historical use under an existing water right. OAR Chapter 690-380-2120 implements the statute and provides the Department's procedures and criteria for evaluating historic point of diversion/appropriation transfer applications.

**Applicant**

MARK DEE HARTLEY  
SAMUEL E. HARTLEY  
PO BOX 2551  
NYSSA, OR 97913

**Findings of Fact**

1. On April 22, 2014, MARK DEE HARTLEY AND SAMUEL E. HARTLEY, filed a transfer application for authorization of an historic point of diversion under Certificate 75676. The Department assigned the application number T-11798.
2. Notice of the application for transfer was published on April 29, 2014, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On November 6, 2014, the Department mailed a copy of a draft final order proposing to approve Transfer Application T-11798 to the applicants.
4. On March 23, 2015, the certified water right examiner responded to the draft final order. They discovered that the lands were described on Certificates 75676 and 75691 incorrectly, and provided evidence that the quarter-quarter lines showing the tax lot division were not accurate.
5. On October 5, 2015, the agent submitted a revised transfer application and map showing the re-described places of use on Certificates 75676 and 75691.

This is a final order in other than a contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080, 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.

6. The right to be transferred is as follows:

**Certificate:** 75676 in the name of MARK E HARTLEY (confirmed by Owyhee River Decree)

**Use:** SUPPLEMENTAL IRRIGATION OF 162.7 ACRES

**Priority Date:** 1894

**Limit/Duty:** The use shall not exceed 1.0 acre foot per acre during any calendar month prior to June 1<sup>st</sup> and ¾ acre foot per acre during any calendar month after June 1<sup>st</sup> of each year; and a total not to exceed 3.0 acre feet per acre during the irrigation season from April 1 to October 15<sup>th</sup>.

**Source:** OWYHEE RIVER, tributary of the SNAKE RIVER

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
21 S	46 E	WM	7	SW SE	160 FEET NORTH AND 2250 FEET WEST FROM THE SE CORNER OF SECTION 7

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	GLot	Tax Lot**	Acres
21 S	46 E	WM	7	SE NW		3300	0.7
21 S	46 E	WM	7	NE SW		3300	1.2
21 S	46 E	WM	7	NW SW	3	3300	2.9
21 S	46 E	WM	7	SW SW		3300	28.3
21 S	46 E	WM	7	SE SW		3300	33.0
21 S	46 E	WM	7	NW SE		3300	0.4
21 S	46 E	WM	7	SW SE		3300	11.8
21 S	46 E	WM	18	NE NW		3300	36.1
21 S	46 E	WM	18	NW NW	1	3300	34.8
21 S	46 E	WM	18	SW NW	2	3300	13.2
21 S	46 E	WM	18	SE NW		3300	0.3
Total							162.7

\*\*Tax Lot 3300 has been re-numbered to Tax Lot 1800

7. On August 19, 2015, the certified water right examiner for T-11798 brought to the Department's attention that a portion of the place of use for Certificates 75676 and 75691 was incorrectly described and is depicted in a supplemental re-description map made part of the revised transfer application.

- a) The Public Land Survey subdivisions from the original survey prepared in 1932, a recent tax lot map, and an older tax lot used in Owyhee Irrigation District's HB3111 project were compared using GIS technology. The CWRE found that not only are the quarter-quarter lines offset in multiple places, but the quarter-quarters are not of equal size.
- b) The Department concluded that a portion of the authorized place of use described in Finding No. 6 above was incorrectly described. The property boundaries for Tax Lot 3300 (Mark E. Hartley, owner) on subsequent tax lot maps demonstrate that Tax Lot 3300 was never within the NE¼ SW¼, or NW¼ SW¼ of Section 7 as is described in Certificate 75676, which was an entirely different ownership. There was a scrivener's error found as well that identified 0.7 acre in the SE¼ NW¼.

Tax Lot 3300 has since been re-numbered to Tax Lot 1800. The land to which Certificate 75676 has always been appurtenant should be re-described. The following table lists the lands proposed for re-description under Certificate 75676 based on the above findings:

Proposed Re-Description of Place of Use in Certificate 75676									
Twp	Rng	Mer	Sec	Q-Q	GLot	Tax Lot	Acres	Type of Change	
21 S	46 E	WM	7	SW SW		1800	29.6	Historic POD	
21 S	46 E	WM	7	SE SW		1800	34.7	Historic POD	
21 S	46 E	WM	7	SW SE		1800	12.2	Historic POD	
21 S	46 E	WM	18	NE NW		1800	36.3	Historic POD	
21 S	46 E	WM	18	NW NW	1	1800	36.3	Historic POD	
21 S	46 E	WM	18	SW NW	2	1800	13.3	Historic POD	
21 S	46 E	WM	18	SE NW	2	1800	0.3	Historic POD	
Total							162.7		

- c) The Public Land Survey subdivisions from the original survey prepared in 1932, a recent tax lot map, and an older tax lot used in Owyhee Irrigation District's HB3111 project were compared using GIS technology. The CWRE found that not only are the quarter-quarter lines offset in multiple places, but the quarter-quarters are not of equal size.
- d) The Department concluded that a portion of the authorized place of use described in Finding No. 6 above was incorrectly described. The property boundaries for Tax Lot 3300 (Mark E. Hartley, owner) on subsequent tax lot maps demonstrate that Tax Lot 3300 was never within the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , NW $\frac{1}{4}$  SW $\frac{1}{4}$  or the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 7 as is described in Certificate 75691, which was an entirely different ownership. Tax Lot 3300 has since been re-numbered to Tax Lot 1800. The land to which Certificate 75691 has always been appurtenant should be re-described. The following tables list the lands identified on Certificate 75691 and the proposed re-description based on the above findings:

Certificate 75691 place of use									
Irrigation									
Twp	Rng	Mer	Sec	Q-Q	GLot	Tax Lot	Acres	Type of Change	
21 S	46 E	WM	7	NE SW		3300	1.9		
21 S	46 E	WM	7	NW SW	3	3300	2.9		
21 S	46 E	WM	7	SW SW		3300	28.3		
21 S	46 E	WM	7	SE SW		3300	33.0		
21 S	46 E	WM	7	NW SE		3300	5.1		
21 S	46 E	WM	7	SW SE		3300	11.8		
21 S	46 E	WM	18	NE NW		3300	36.1		
21 S	46 E	WM	18	NW NW	1	3300	34.8		
21 S	46 E	WM	18	SW NW	2	3300	13.2		
Total							167.1		

\*\*Tax Lot 3300 has been re-numbered to Tax Lot 1800

Proposed Re-Description of Place of Use in Certificate 75691									
Twp	Rng	Mer	Sec	Q-Q	GLot	Tax Lot	Acres	Type of Change	
21 S	46 E	WM	7	SW SW		1800	29.6	REDESCRIPTION ONLY	
21 S	46 E	WM	7	SE SW		1800	34.7	REDESCRIPTION ONLY	
21 S	46 E	WM	7	NW SE		1800	4.7	REDESCRIPTION ONLY	
21 S	46 E	WM	7	SW SE		1800	12.2	REDESCRIPTION ONLY	
21 S	46 E	WM	18	NE NW		1800	36.3	REDESCRIPTION ONLY	
21 S	46 E	WM	18	NW NW	1	1800	36.3	REDESCRIPTION ONLY	
21 S	46 E	WM	18	SW NW	2	1800	13.3	REDESCRIPTION ONLY	
Total							162.7		

8. Transfer Application T-11798 proposes an additional point of diversion to reflect historical use, for the re-described lands under Certificate 75676 described in Finding No. 7(b), approximately 0.5 mile upstream located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
21 S	46 E	WM	18	SW NW	1950 FEET SOUTH AND 640 FEET EAST FROM THE NW CORNER OF SECTION 18

9. 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 that the diversion is not currently equipped with an appropriate fish screen. This diversion may be eligible for screening cost-share funds.

***Transfer Review Criteria (ORS 540.532 and OAR 690-380-2120)***

10. Pursuant to OAR 690-380-2120(2)(a), evidence has been submitted that the actual, current point of diversion for the water right in question has been in use for more than 10 years.
11. Pursuant to OAR 690-380-2120(2)(c), the Watermaster provided a statement that to their knowledge there has been no complaint of injury due to the use of water at the actual, current point of diversion, prior to the transfer request.
12. Pursuant to OAR 690-380-2120(3), the Department provided the applicant a list of the affected water rights and a copy of the notice to be provided to each affected water right holder. The applicant has provided written proof of service of notice of the proposed transfer on all affected water right holders.
13. Water has been used within the last five years according to the terms and conditions of the right. There is no evidence available that would demonstrate that the right is subject to forfeiture under ORS 540.610.
14. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right is present.
15. The proposed change would not result in enlargement of the right.
16. The proposed change would not result in injury to other water rights.

## **Conclusions of Law**

The additional point of diversion to reflect historical use in Transfer Application T-11798 is consistent with the requirements of ORS 540.532 and OAR 690-380-2120.

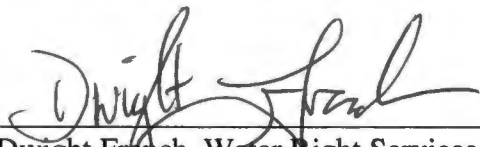
### **Now, therefore, it is ORDERED:**

1. The change proposed in T-11798 is approved and effective immediately.
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 75676 and any related decree.
3. Water Right Certificate 75676 is cancelled. Certificate 92975 will be issued to confirm the additional point of diversion for the portion of the right included in Transfer Application T-11798.
4. Water Right Certificate 75691 is corrected. The Department shall issue a new water right certificate on a determination that it is necessary to produce a certificate to confirm that portion of the water right corrected by Finding of Fact No. 7.
5. The quantity of water diverted at the additional point of diversion, together with that diverted at the old point of diversion, shall not exceed the quantity of water lawfully available at the original point of diversion.
6. Prior to diverting water, the water user shall install and maintain a headgate, an in-line flow meter, weir, or other suitable device for measuring and recording the quantity of water diverted. The type and plans of the headgate and measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.

7. Prior to diverting water, the water user shall install an approved fish screen at the new point of diversion and shall provide to the OWRD a written statement from the Oregon Department of Fish and Wildlife (ODFW) that the installed screen meets the state's criteria, or that ODFW has determined a screen is not necessary.

The water user shall operate and maintain the fish screen at the new point of diversion consistent with ODFW's operational and maintenance standards. If ODFW determines the screen is not functioning properly, and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that OWRD regulate the use of water until OWRD receives notification from ODFW that the fish screen is functioning properly.

Dated at Salem, Oregon this 6 day of April, 2017.

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

Mailing date: APR 11 2017