

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

In the Matter of Instream Transfer	)	FINAL ORDER APPROVING A
Application T-12400, Klamath County	)	CHANGE IN PLACE OF USE AND
	)	CHARACTER OF USE, AND AWARD
	)	OF MITIGATION WATER

**Authority**

Oregon Revised Statute (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. Oregon Administrative Rule (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**

LIMNES LAND COMPANY, LLC  
2033 SW JACKSON ST.  
PORTLAND, OR 97201

**Agent**

TROUT UNLIMITED  
700 MAIN ST., SUITE 201A  
KLAMATH FALLS, OR 97601

**Findings of Fact**

1. On May 31, 2016, Trout Unlimited filed an application on behalf of Limnes Land Company, LLC to change the place of use and character of use under Certificates 10902 and 10903 to instream use. The Department assigned the application number T-12400.
2. Notice of the application for transfer was published on June 7, 2016, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. Consistent with land use requirements, prior to submitting the instream transfer application, the applicant provided notification of the intent to file the instream transfer application to proposed action to Klamath County Planning Department. Additionally, the Department provided notice of the proposed action to Klamath County Planning Department upon receipt of Transfer Application T-12400.
4. On November 29, 2016, the Department contacted the applicant's agent by telephone and written correspondence to notify the agent of deficiencies in the application map and to

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.

clarify the transfer application. The Department worked with the agent to produce a satisfactory map and to clarify portions of the transfer application.

5. On January 4, 2017, in response to an e-mail from the Department, the applicant's agent requested that Point of Diversion (POD) No. 2 for Certificate 10902 be excluded from the application and concurred that Point of Diversion No. 1 (as described in Findings of Fact Nos. 6 and 10) is associated with both Certificates 10902 and 10903. Additionally, the agent confirmed that POD No. 1 is the same as the "new consolidated POD" shown on the transfer application map. Lastly, the agent clarified that the applicant is not proposing to transfer the portion of domestic and stock use that occurs outside of the irrigation season for Certificate 10902 or 10903.
6. On February 23, 2017, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-12400 to the applicant and agent. The draft Preliminary Determination cover letter set forth a deadline of March 27, 2017, 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.
7. On May 1, 2017, at the request of Crater Lake National Park, the applicant's agent agreed that instream transfer T-12400 could be used as mitigation to offset impacts of groundwater production on downstream surface waters in the Klamath scenic waterway, proposed by water right application G-18133.
8. On May 12, 2017, the Department issued a Preliminary Determination proposing to approve Transfer T-12400 and mailed a copy to the applicant. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on May 16, 2017, and in the Klamath Herald and News newspaper on May 18 and 25, 2017 pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notices.
9. On August 2, 2017, the Watermaster submitted documentation that the project to restore the lower 1.8 miles of historic stream channel of Sun Creek and reestablish its connection to Wood River is complete.
10. The portion of the first right to be transferred is as follows:
  - Certificate:** 10902 in the name of R. S. DIXON (confirmed by Wood River Decree entered of record at Salem, in the order record of the State Engineer in Volume 12, at page 269)
  - Use:** IRRIGATION OF 130.7 ACRES and the associated portion of DOMESTIC AND STOCK USE during the irrigation season
  - Priority Date:** 1895
  - Rate:** 2.61 Cubic Feet per Second (CFS) prior to July 20<sup>th</sup> and 1.63 CFS thereafter
  - Limit/Duty:** The amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed 1/50<sup>th</sup> of one cubic foot per second per acre irrigated prior to July 20<sup>th</sup> and 1/80<sup>th</sup> of one cubic foot per second per acre

irrigated thereafter, and shall not exceed 5.0 acre feet per acre during the irrigation season.

**Period of Use:** April 1 to October 1

**Source:** SUN CREEK, tributary of WOOD RIVER

**Authorized Point of Diversion:** Not described on the Certificate

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
33 S	7.5 E	WM	3	NW NE		18.4
33 S	7.5 E	WM	3	SW NE	7	15.8
33 S	7.5 E	WM	3	SW NE	12	15.9
33 S	7.5 E	WM	3	NE NW		39.3
33 S	7.5 E	WM	3	NW NW		22.2
33 S	7.5 E	WM	3	SE NW	6	15.1
33 S	7.5 E	WM	3	SE NW	13	4.0
<b>Total Acres</b>						130.7

11. Certificate 10902 does not describe the locations of the points of diversion. The Wood River Decree identifies the ditches associated with this water right as the Sun Creek Ditch and Robinson Ditch. Information from the applicant identifies that the points of diversion are located as follows:

POD	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
Robinson Ditch (POD 1)	32 S	7.5 E	W.M.	33	NW NW	302 FEET SOUTH AND 17 FEET EAST FROM THE NW CORNER OF SECTION 33
Sun Creek Ditch (POD 3)	33 S	7.5 E	W.M.	4	NW SW	3136 FEET SOUTH AND 1349 FEET EAST FROM THE NW CORNER OF SECTION 4

12. A total of 653.50 Acre-Feet (AF) of water may be beneficially used annually under the existing right.

13. The portion of the second right to be transferred is as follows:

**Certificate:** 10903 in the name of JOS V. HESSIG and J. H. HESSIG (confirmed by Wood River Decree entered of record at Salem, in the order record of the State Engineer in Volume 12, at page 269)

**Use:** IRRIGATION 119.7 ACRES and the associated portion of DOMESTIC AND STOCK USE during the irrigation season

**Priority Date:** 1895

**Rate:** 2.39 CFS prior to July 20<sup>th</sup> and 1.50 CFS thereafter

**Limit/Duty:** The amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed 1/50<sup>th</sup> of one cubic foot per second per acre irrigated prior to July 20<sup>th</sup> and 1/80<sup>th</sup> of one cubic foot per second per acre irrigated thereafter, and shall not exceed 5.0 acre feet per acre during irrigation season.

**Period of Use:** April 1 to October 1

**Source:** SUN CREEK, tributary of WOOD RIVER

**Authorized Point of Diversion:** Not described on the Certificate

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
32 S	7.5 E	WM	33	SE SE	35.3
32 S	7.5 E	WM	34	NW SW	20.4
32 S	7.5 E	WM	34	SW SW	40.0
32 S	7.5 E	WM	34	SE SW	24.0
<b>Total Acres</b>					119.7

14. Certificate 10903 does not describe the location of the point of diversion. The Wood River Decree describes the ditches associated with this water right as Hessig Ditch and Robinson Ditch. Information from the applicant identifies that the point of diversion is located as follows:

POD	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
Robinson-Hessig Ditch (POD 1)	32 S	7.5 E	W.M.	33	NW NW	302 FEET SOUTH AND 17 FEET EAST FROM THE NW CORNER OF SECTION 33

15. According to the State Engineer Report of Water Supply, Use, and Duty of Water of Wood River, Crane Creek, Seven Mile Creek, Four Mile Creek and their Tributaries dated April 22, 1929, Hessig Ditch and Robinson Ditch originate in the same channel from Sun Creek and diverge near the center of Section 33, Hessig ditch being the upper limb and Robinson ditch being the lower. For the purposes of this instream transfer the shared diversion for Robinson and Hessig ditch will be referred to as POD No. 1. This is also the same POD No. 1 as described in Finding of Fact No. 10 for Certificate 10902.
16. A total of 598.50 AF of water may be beneficially used annually under the existing right.
17. There is a discrepancy between Certificates 10902 and 10903 and the Wood River Decree, regarding limitations on the rate of water that may be beneficially used during specified periods. For the purposes of this instream transfer, the period in which the rate of water is limited shall be consistent with the Wood River Decree, being “one cubic foot per second for each 50 acres of land irrigated up to and including July 20<sup>th</sup>, and thereafter not to exceed one cubic foot per second for each 80 acres of land irrigated, with a total limitation of five acre feet per acre during the irrigation season”. Additionally, Certificates 10902 and 10903 shall be subject to all other conditions and limitation contained in the Wood River Decree.
18. Transfer Application T-12400 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.
19. Transfer Application T-12400 proposes to change the place of use of the right to create an instream reach on Sun Creek from POD No. 1, described in Finding of Fact No. 14, to the mouth of Sun Creek at the confluence with the Wood River (River Mile 0.0).

20. The applicant proposes the quantities of water to be transferred instream be protected as follows:

Priority Date	Certificate	Instream Period	Instream Rate (cfs)	Instream Volume (af)
1895	10902	April 1 through June 30	1.96	353.78
		July 1 through July 19	1.63	61.57
		July 20 through September 30	1.63	236.56
<b>Total Volume</b>				<b>651.91</b>

Priority Date	Certificate	Instream Period	Instream Rate (cfs)	Instream Volume (af)
1895	10903	April 1 through June 30	1.80	324.90
		July 1 through July 19	1.49	56.38
		July 20 through September 30	1.49	216.62
<b>Total Volume</b>				<b>597.90</b>

21. The applicant has requested that any instream water right established as a result of this instream transfer 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 has also requested that any existing instream water rights established as a result of this instream transfer replace a portion of any instream rights established pursuant to ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency instream application process), with a more senior priority date.
22. Based upon evaluation, the Department has determined that the entirety of Certificates 10902 and 10903 involved in Transfer application T-12400 (250.4 acres of irrigation) are available to be used as mitigation, as previously described in Finding of Fact No. 7.

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

23. 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.
24. 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-12400.

25. Based on the previously identified discrepancy between Certificates 10902 and 10903 and the Wood River Decree, the quantities to be transferred and protected instream have been modified as follows:

Priority Date	Certificate	Instream Period	Instream Rate (cfs)	Instream Volume (af)
1895	10902	April 1 through June 30	1.96	353.77
		July 1 through July 19	1.67	66.37
		July 20 through September 30	1.63	233.35
<b>Total Volume</b>				<b>653.49</b>

Priority Date	Certificate	Instream Period	Instream Rate (cfs)	Instream Volume (af)
1895	10903	April 1 through June 30	1.80	325.43
		July 1 through July 19	1.50	59.42
		July 20 through September 30	1.50	213.64
<b>Total Volume</b>				<b>598.49</b>

26. The proposed changes, as modified, would not result in enlargement of the rights.
27. The proposed changes, as modified, would not result in injury to other water rights.
28. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
29. The protection of flows within the proposed reach is appropriate, considering:
1. The instream water right begins at the recorded point of diversion;
  2. The location of confluences with other streams downstream of the point of diversion;
  3. There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
  4. 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.
30. There are currently no instream water rights or minimum flow conversions within the instream reach proposed by T-12400, being in the Sun Creek restored natural channel. There is an instream water right (Certificate 73385 established under ORS 537.341) on Sun Creek extending into the Sun Creek Ditch (formerly treated as part of the channel for Sun Creek) to the confluence with Annie Creek. Certificate 73385 protects water instream for various fish life stages and has a priority date of October 26, 1990. Additionally, the instream reach proposed by T-12400 is within a high priority watershed for streamflow restoration for the recovery of salmonids.

31. By adding to any future instream water rights, established pursuant to ORS 537.348 (instream transfer process and instream lease) and ORS 537.470 (allocation of conserved water process), located within the proposed reach, any new instream water right established by this transfer 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.
32. By replacing a portion of any instream water right established pursuant to ORS 537.341 (state agency application process) or ORS 537.346 (minimum flow conversion), any instream water right created as a result of this transfer will provide protection of stream flows identified as necessary for various fish life stages under an earlier priority date.
33. During the period April 1 to October 1, any instream water right established by this transfer application may replace a portion of instream water rights established pursuant to ORS 537.341 or ORS 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or ORS 537.470, unless otherwise specified in an order approving a new instream water right under these statutes.
34. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.
35. The quantity of water available for mitigation was determined from the consumptive use portion of the rights transferred to instream use and the right's history of availability. The Watermaster determined the irrigation consumptive use factor to be 0.8 AF per acre in the immediate area. The Department finds that the transfer of 250.4 acres of irrigation use to instream use will result in 200 AF of mitigation water per irrigation season.
36. Water use under Certificates 10902 and 10903 is generally unregulated in two of the five months of the irrigation season. Accounting for the right's history of availability (described in Finding of Fact #35), the amount of water available for mitigation must be reduced from 200 AF to 80 AF per irrigation season.
37. Groundwater permit application G-18133 has a mitigation obligation of 62.4 AF. If G-18133 is approved, 62.4 AF may be used to satisfy the mitigation obligation within the zone of impact above the Klamath scenic waterway. The amount of water transferred instream and not used for mitigation purposes (80 AF minus 62.4 AF = 17.6 AF) will benefit instream flow.

### **Conclusions of Law**

The changes in character of use and place of use to instream use proposed in Transfer Application T-12400 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 Transfer Application T-12400 are approved.
2. Water right certificates 10902 and 10903 are cancelled. New certificates confirming each instream water right shall be issued. A new certificate will be issued describing the portion of Certificate 10902 not affected by this transfer.
3. The instream water rights shall provide for the protection of streamflows from POD No. 1 (as described in Finding of Fact No. 14) to the confluence with the Wood River.
4. The quantities of water to be protected under the instream water right has been modified from the application and is as follows:

Priority Date	Certificate	Instream Period	Instream Rate (cfs)	Instream Volume (af)
1895	10902	April 1 through June 30	1.96	353.77
		July 1 through July 19	1.67	66.37
		July 20 through September 30	1.63	233.35
<b>Total Volume</b>				<b>653.49</b>

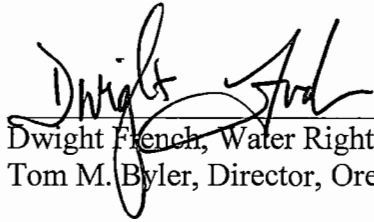
Priority Date	Certificate	Instream Period	Instream Rate (cfs)	Instream Volume (af)
1895	10903	April 1 through June 30	1.80	325.43
		July 1 through July 19	1.50	59.42
		July 20 through September 30	1.50	213.64
<b>Total Volume</b>				<b>598.49</b>

5. Water rights upstream of the original points 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. The instream right established by this instream transfer shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346 and shall be in addition to future 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.
7. 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.
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 Certificates 10902 and 10903 and any related decree.



9. The former place of use of the transferred water shall no longer receive water as part of these rights.
10. A portion of the rights transferred instream, being 62.4 AF, may be used to satisfy the mitigation obligation of groundwater permit application G-18133, for Crater Lake National Park, in Sun Creek above the Klamath scenic waterway.

Dated at Salem, Oregon this 4 day of August, 2017.



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

Mailing date: AUG 09 2017