



Oregon

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November 2, 2011

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WATER RESOURCES DEPT
SALEM, OREGON

Dwight French
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

REFERENCE: Transfer T-9715

The Department has received notification of your finding that transfer application T-9715 cannot be made without injury to an existing in-stream water right. You also indicated that the applicant intends to seek approval under ORS 540.530(1)(b) – (e). Based on this you have requested ODFW make a recommendation on whether OWRD should consent to injury of an in-stream water right. For the ODFW to consent to injury of an in-stream water right, ODFW must find that the transfer will provide a net benefit to the resource consistent with the purposes of the in-stream water right, in this case fish and fish habitat.

The ODFW has evaluated the proposed transfer and finds that the overall benefits of the transfer provides a net benefit, which offsets the injury to the in-stream water right caused by the transfer. The attached analysis provides ODFW's reasoning for recommending the consent to injury of the in-stream water right.

Please note: that there should be a condition placed in the transfer that would require the water right holder to permanently transfer .39 cfs of the water right to in-stream after the transfer is complete.

If you have any questions please contact Bill Knox in our Enterprise office (541-426-3279) or Rick Kepler in our Salem office (503-947-6084).

Sincerely,

Bruce McIntosh
Assistant Fish Division Administrator
Fish Division

Cc: Bill Knox, ODFW Enterprise Office
Rick Kepler, ODFW Salem

ODFW's Discussion and Analysis of Transfer T-9715

November 2, 2011

Action

Part of this project involves moving the point of diversion (POD) for certificate No. 3922 (perfected under Permit S-5571) upstream approximately 2.17 miles to the existing Clearwater Ditch Diversion on the Lostine River. The amount of the water right to be transferred to the new point of diversion has a rate of 0.49 cfs. This transfer would result in the removal of a gravel push-up dam and allow the landowner to use a more efficient irrigation water delivery system (gated pipe).

The Water Resources Department (WRD) has determined that transferring this POD upstream will injure in-stream water right Certificate 59814. ODFW applied for this in-stream water right to support aquatic life in the Lostine River downstream of USGS Gage 13330000. ORS 540.530 (1)(c) allows WRD to consent to injury of an in-stream water right if the agency that applied for the in-stream water right recommends that WRD consent to the injury. For the recommendation and consent to injury to occur, the applicant agency must find that the transfer will result in a net benefit to the resource. Below is ODFW's analysis of the transfer and determination if a net benefit to aquatic resources in the Lostine River will occur.

Background

The Lostine River reach within the project area supports spring Chinook salmon (*Oncorhynchus tshawytscha*), summer steelhead trout (*Oncorhynchus mykiss*), bull trout (*Salvelinus confluentus*), resident rainbow/redband trout (*Oncorhynchus mykiss gibbsi*), Mountain whitefish (*Prosopium williamsoni*), and a variety of non-game species. Spring Chinook and summer steelhead inhabit the reach in question year-round and suitable spawning habitat exists for both species. Use of the affected reach for spawning by spring Chinook salmon is limited based on annual spawning surveys conducted by ODFW and the Nez Perce Tribe (NPT). From 2001 through 2010, the affected reach contained 0 to 5.4% (average 2.5%) of total Chinook redds observed in the Lostine River. Spawning survey data for summer steelhead in the affected reach are not available. Both summer steelhead and spring Chinook currently utilize the affected reach for juvenile rearing. Fluvial bull trout inhabit the reach during winter and spring, using it as a migration route and as a foraging area.

Over the last 20 years, ODFW, Federal agencies, Watershed Councils, and Wallowa Soil and Water Conservation District have worked with private landowners to implement hundreds of fish habitat improvement projects throughout the Wallowa and Grande Ronde River basins, including many in the Lostine River. These projects were funded to address watershed concerns such as fish passage, fish habitat, water quality, flows, and screening.

In the mid to late 1990's, the U.S. Bureau of Reclamation (BOR) worked with Wallowa Soil and Water Conservation District (SWCD) and irrigators along the Lostine River to implement projects that would improve delivery and efficiency of use of irrigation water. Among the projects were the removal of four gravel push-up dams (Clearwater, Miles, Poley Allen, and Tulley Hill diversions) and replacing them with permanent diversion structures that provided fish passage. BOR also funded installation of gated pipe along the Clearwater Ditch in 1997 to improve efficiency of use of diverted water. The Willett Ditch, the current POD for water right 3922, and its associated gravel push-up dam were to be eliminated as part of the Clearwater Ditch project with the water right being transferred upstream to the Clearwater Ditch POD. However, the landowner at the time did not apply for change in POD, the gated pipe remains installed but unused, and the gravel push-up dam continues to be constructed annually (see exhibit 1).

. After Mr. Wolfe acquired the property he was interested in improving agricultural and natural resource values on his land and sought ways to more efficiently use his lands and water rights. His first step was to apply for the change in POD to give him access to the already installed gated pipe, eliminate a push-up dam structure, and use less water for irrigation. His second step was to work with the Wallowa Land Trust to protect, in perpetuity, agricultural lands, riparian areas, and wetlands on his property from potential development through a conservation easement. Transfer application T-9715 was initially filed in 2004 and was amended and resubmitted in 2011. The amended application describes Mr. Wolfe's intention to transfer 0.49 cfs of his 0.88 cfs water right to the new POD (Clearwater Ditch) and he has leased the remaining 0.39 cfs for in-stream use under IL1184. Mr. Wolfe intends to make the 0.39 cfs lease a permanent transfer to in-stream use pending the approval of the transfer of POD (see exhibit 2).

The Wolfe Ranch and Wallowa Land Trust have completed the first step of a conservation easement that includes permanent protection for the Wallowa and Lostine Rivers confluence area, including significant wetlands and the riparian area along the lower 0.5 miles of the Lostine River (see exhibit 3). A second conservation easement is currently being planned that would include protection of additional wetlands and an additional mile of riparian habitat along the Lostine River, including the location of the POD for water right 3922. Completion of the transfer of POD would facilitate completion of the second conservation easement.

In-stream Water Right

The Lostine River has an in-stream water right (59814) from USGS Gage 13330000 (river mile 10.0) to the mouth and the reach that would be affected by T-9715 is within this section of river. There are flow records for Gage 13330000 dating from 1912 to the present. Another gage, number 13330300, is located at Baker Road adjacent to the original POD for water right 3922. Period of record for the Baker Road gage is 1995 to present. According to records from these gages, flows in the Lostine River are often less than those allocated in the in-stream water right. Therefore, transfer of the POD upstream has the potential to injure the in-stream water right. WRD has asked for a recommendation from ODFW on whether a net benefit to the resource would occur and they should consent to injury to the in-stream water right.

Injury

In-stream water right 59814 has a priority date of November 3, 1983, with flow rates ranging from 40 to 70 cfs. Comparison of the allocated flows in 59814 to WRD's Expected Natural Flows suggest there is likely to be injury to 59814 if the POD is moved upstream as proposed in T-9715. Potential injury from the transfer would be most likely during the months of August and September, during the irrigation season. WRD's Water Availability Tables show deficiencies of 67.5 and 49.4 cfs, respectively, during these months.

Adult and juvenile spring Chinook salmon, juvenile steelhead, and resident redband trout use the habitat within the affected reach during the period of potential injury. Potential impacts to these species include:

- Reduced spring Chinook spawning habitat
- Reduced availability of foraging habitat
- Reduced availability of edge habitat (hiding cover provided by vegetation, log and rock structures along the stream banks)
- Reduced water depth
- Reduced water quality (increased temperature or reduced dilution of sediment or pollutants)

We do not expect any of these potential impacts to be severe because of the relatively low volume of water (0.49 cfs) proposed for transfer.

Because of these impacts on the habitat in this stream reach; ODFW has determined that under ODFW's Mitigation Policy (OAR 635-415) the habitat would fall into Category 3. Category 3 habitat is essential or important habitat that is limited on a physiographic province or on a site-specific basis. If impacts are unavoidable, ODFW requires in-kind, in-proximity replacement of impacted habitat and no net loss of habitat quantity or quality. In this case reduced flows have the potential to affect water quality and to limit fish spawning (spring Chinook), migration, escape cover and forage opportunities.

Mitigating Measures

The primary benefit of this transfer is that stream bed material will no longer be disturbed each year to construct the push-up dam at the current POD (see exhibit 1). This will result in more stable stream bed and banks at the retired push-up dam site and likely will result in a more stable stream channel downstream. Removal of the push-up dam will also eliminate the annual creation of sediment during construction that can reduce water quality downstream, affect aquatic insect production and, depending on timing, reduce survival of fish eggs and fry. The push up dam has been constructed in a manner that provided fish passage, however, there was potential for restricting fish passage during periods of low flow. Passage should not be an issue at the proposed new POD (Clearwater Ditch) because it was constructed with a NOAA Fisheries approved fish ladder.

A second benefit of the transfer is that less water will be diverted from the Lostine River. The application states that 0.49 cfs (38.6 acres) of a 0.88 cfs water right is proposed for transfer to the

new POD and the remaining 0.39 cfs (31.4 acres) has been leased for in-stream use. The landowner took no compensation for the lease and intends to make the 0.39 cfs lease a permanent conversion to in-stream pending approval of the transfer (see exhibit 2). Transfer to the proposed new POD will also allow the landowner to use a more efficient system (gated pipe) for applying irrigation water to the 38.6 acres that will remain in production after the transfer.

The location of the current POD is approximately 1.4 miles upstream of the mouth of the Lostine River and the proposed new POD is approximately 3.5 miles upstream of the river mouth. Therefore, injury would occur in 2.1 miles of the reach covered by the in-stream water right but flows would increase in the lower 1.4 miles.

Other significant mitigating measures, not directly related to water rights, but facilitated by the transfer, are the protection of riparian and wetland habitats on Mr. Wolfe's property at the confluence of the Lostine and Wallowa rivers (see exhibit 3). The Wallowa Land Trust and the Woody Wolfe Ranch recently completed a conservation easement that provides permanent protection of 36 acres of riparian and wetland habitats, including the riparian areas along the lower 0.5 miles of the Lostine River. The parties are working on a second step of the easement that would add 110 acres of wetland and riparian areas including an additional mile of riparian protection along the lower Lostine River. The location of the current POD for water right 3922 would become protected riparian habitat.

Conclusion

Transfer of the POD for 0.49 cfs of water right 3922 upstream to the Clearwater Ditch has the potential to injure in-stream water right 59814 for 2.1 miles in the lower Lostine River. This injury, will have modest potential impacts to aquatic life in the lower Lostine River. However, ODFW estimates that a series of benefits will more than offset the potential for injury.

Benefits of the transfer include:

- Elimination of a diversion structure, including 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 POD.
- Conversion of 0.39 cfs of allocated water right to permanent in-stream use will increase flows and improve habitat conditions for aquatic species in the lower 1.4 miles.
- .
- Permanent protection of 36 acres of wetland and riparian habitat including 0.5 miles of the lower Lostine River through a conservation easement .
- 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.

Therefore, ODFW finds that the overall benefits of the proposed transfer will more than offset any negative effects and hereby recommends that WRD consent to injury of in-stream water right 59814 under T-9715.

Exhibit 1. Push-up dam at current POD for water right 3922.



Exhibit 2. Letter from landowner stating intent to convert in-stream lease to permanent in-stream use.

To whom it may concern:

This letter is in regard to Oregon Water Resources Department transfer application T-9715. As the landowner, should the point of diversion change application be accepted, I intend to make the current in stream lease on water right certificate 3922 a permanent transfer. Should the application be denied, I will seek-out the highest and best monetary use for the water.

Sincerely



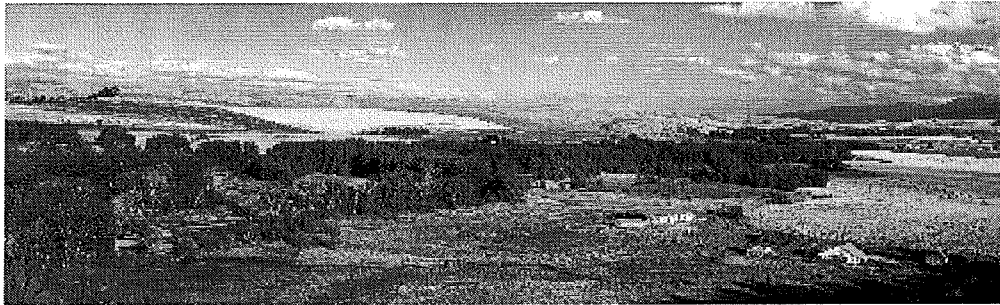
Woody Wolfe

Exhibit 3. Summary of conservation easement for Lostine-Wallowa Rivers confluence.



Wallowa Land Trust

Lostine-Wallowa Rivers Confluence Conservation Easement on the Woody Wolfe Ranch



In February 2011, Wallowa Land Trust and the Woody Wolfe Ranch completed the Lostine-Wallowa Rivers Confluence Conservation Easement. The Conservation Easement encompasses 197 acres: 161 acres of prime farmground and 36 acres of wetlands, including 2.5 miles of river, the confluence of the Lostine and Wallowa Rivers, and associated riparian areas and wetlands.

A Conservation Easement is a voluntary legal agreement between a landowner and land trust created to protect certain natural and traditional values of a property in perpetuity. The landowner retains ownership of the property and the land trust works with the landowner to protect the property's conservation values.

Benefits of the Lostine-Wallowa Rivers Conservation Easement

- Permanent protection from residential development or subdivision of 197 acres of private property, including:
 - 161 acres of prime farmground
 - 36 acres of wetlands along 2 miles of the Wallowa River and .5 miles of the Lostine River, including the rivers' confluence
- Elimination of grazing in the riparian/wetlands zone to ensure the river corridor will be protected in perpetuity
- Potential for future conservation and restoration projects to enhance the wetlands for habitat and watershed health
- Enhanced protection and habitat for spring Chinook salmon, summer steelhead, resident bull trout, and other fish & wildlife populations

Wallowa Land Trust and the landowner, in conjunction with additional partners, are currently completing a management plan for the 36-acre wetland zone. The plan will identify management goals and objectives prescribe future management actions for the wetlands. Initial goals include: establishment of wildlife friendly fencing around the entire perimeter of the wetland/riparian zone,

This project is the first in a two-step process. Wallowa Land Trust is currently negotiating Step Two which will place an additional adjacent 257 acres under easement (147 acres of prime farmground and 110 acres of riparian/wetlands along approximately 1 mile of the Lostine River) bringing the total to 454 acres.

Working cooperatively with local landowners to protect the rural nature of the Wallowa County

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Proposed Lostine-Wallowa Rivers Confluence Conservation Easement



Wallowa Land Trust

