



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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June 5, 2012

WOODY WOLFE
81544 HWY 82
WALLOWA, OR 97885

SUBJECT: Water Right Transfer Application T-11351

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11351. This document is an intermediate step in the approval process; water may not be used legally as proposed in the transfer application until a Final Order has been issued by the Department. Please read this entire letter carefully to determine your responsibility for additional action.

A public notice is being published in the Department's weekly publication and in the Wallowa Chieftain newspaper, simultaneously with issuance of the Preliminary Determination. The notice initiates a period in which any person may file either a protest opposing the decision proposed by the Department in the Preliminary Determination or a standing statement supporting the Department's decision. The protest period will end 30 days after the last date of newspaper publication.

If no protest is filed, the Department will issue a Final Order consistent with the Preliminary Determination. You should receive a copy of the Final Order about 30 days after the close of the protest period.

If a protest is filed, the application may be referred to a contested case proceeding. A contested case provides an opportunity for the proponents and opponents of the decision proposed in the Preliminary Determination to present information and arguments supporting their position in a quasi-judicial proceeding.

Please do not hesitate to contact me at 503-986-0881 or Teri.K.Hranac@wrd.state.or.us if I may be of assistance.

Sincerely,

Teri Hranac
Transfer Specialist
Transfer and Conservation Section

Enclosure

cc: T-11351
Shad L. Hattan, District 6 Watermaster (*via e-mail*)
The Freshwater Trust, (*via e-mail at david@thefreshwatertrust.org*)



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.

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

15. 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.
16. In addition, the right is currently being 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 is set to expire on October 1, 2015.
17. 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.
18. 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.
19. 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.

20. Based upon Findings of Fact #18 and #19, 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

21. The proposed changes, as modified, would not result in enlargement of the right.
22. The proposed changes, as modified, would not result in injury to other water rights.
23. The amount and timing of the proposed instream flow, as modified, are allowable within the limits and use of the original water right.
24. The protection of flows within the proposed reach are appropriate, considering:
- a) The instream water right begins at the recorded point of diversion;
 - b) The location of confluences with other streams downstream of the point of diversion;
 - c) There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
 - d) 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.
25. 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.
26. 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.
27. 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.

28. 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.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-11351 appear to be consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved.

If Transfer Application T-11351 is approved, the final order will include the following:

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:*

<i>Period</i>	<i>Rate (cfs)</i>
<i>May 1 through September 30</i>	<i>0.39</i>

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 5 day of June, 2012.


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

This Preliminary Determination was prepared by Teri Hranac. If you have questions about the information in this document, you may reach me at 503-986-0881 or Teri.K.Hranac@wrд.state.or.us.

Protests should be addressed to the attention of Transfer and Conservation Section, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.