



# Oregon

John A. Kitzhaber, MD, Governor

December 6, 2012

## Water Resources Department

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### **Applicant**

LLOYD L. SCHRIER

PO BOX 81

DAYVILLE, OR 97825

**SUBJECT: Water Right Transfer Application T-10938**

Please find enclosed our Preliminary Determination indicating that, based on the information available, the Department has concluded that approval of the changes in points of diversion proposed in T-10938 would result in injury to instream water right 59794. Consistent with your request that we seek a recommendation from the Department of Fish and Wildlife on whether we should consent to the injury to the instream water right, we are proceeding with that process concurrently with issuance of the preliminary determination

The Water Resources Department holds instream water rights in trust for the benefit of the people of Oregon. Under ORS 540.530(c), we may approve the transfer only if the agency that requested the instream water right concludes that the changes proposed will result in net benefits to the resources protected by the instream water right, and recommends that we consent to the injury of the right. Please contact the agency staff person to whom the agency review letter has been sent, to discuss whether you may be able to assist in providing information needed for the analysis.

After we have received a recommendation from the Oregon Department of Fish and Wildlife on whether to consent to the injury, provided no protests have been filed, we will issue an order either:

- Approving the transfer with conditions, if any, identified in the agency recommendations as necessary to ensure that the change will result in net benefits, or
- Reaffirming our decision that the instream water right would be injured and denying the transfer.

The timing for issuance of the order will depend on the availability of information needed by ODFW to perform the net benefits analysis upon which their recommendation must be based, and the time necessary to allow public review and comment on the recommendation. You are not authorized to use water from the proposed points of diversion pending a final decision by the Department on your transfer application.

A public notice is being published in the Department's weekly publication and in the Blue Mountain Eagle 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.

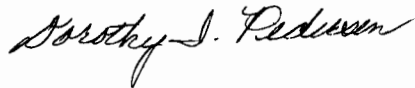
If no protest is filed, the Department will issue a Final Order consistent with the Preliminary Determination. You should receive a copy of the Final Order about 30 days after the close of the protest period.



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) 986-0890 or [Dorothy.I.Pedersen@wrdd.state.or.us](mailto:Dorothy.I.Pedersen@wrdd.state.or.us) if I may be of assistance.

Sincerely,



Dorothy I. Pedersen  
Transfer Program Advisor

cc: T-10938  
Eric Julsrud, District 4 Watermaster *(via e-mail)*  
Kyle Sullivan, Agent for the applicant *(via e-mail)*  
Gary Wilson, CWRE → *address: 721 South Canyon Blvd., John Day, OR 97845*

encs

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

In the Matter of Transfer Application            )  
T-10938, Grant County                            )     PRELIMINARY DETERMINATION  
                                                          )     PROPOSING DENIAL OF A CHANGE  
                                                          )     IN POINT OF DIVERSION

**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.

**Applicant**

LEE SCHRIER  
PO BOX 81  
DAYVILLE, OR 97825

**Agent**

KYLE SULLIVAN  
GRANT SOIL & WATER CONSERVATION DIST.  
721 SOUTH CANYON BLVD.  
JOHN DAY, OR 97825

**Findings of Fact**

***Background***

1. On July 31, 2009, Lloyd L. (Lee) Schrier filed an application for an additional point of diversion under Certificate 12096. The Department assigned the application number T-10938.
2. On February 24, 2012, the Department received an amended map and application pages from the applicant requesting an additional change in point of diversion to clarify the actual Miller Ditch diversion point as a result of the 1964 flood event.
3. The portion of the first right to be transferred is as follows:  
The right to be transferred is as follows:  
**Certificate:** 12096 in the name of LINDA MCARTHUR (perfected under Permit S-11192)  
**Use:** IRRIGATION of 1.5 ACRES  
**Priority Date:** FEBRUARY 23, 1934  
**Rate:** 0.035 CUBIC FOOT PER SECOND  
**Limit/Duty:** The water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to a diversion of ONE-FORTIETH of one cubic foot per second or its equivalent for each

Pursuant to OAR 690-380-4030, any person may file a protest or standing statement within 30 days after the last date of publication of notice of this preliminary determination.

acre irrigated prior to June 1<sup>st</sup>, and thereafter ONE-EIGHTIETH of one cubic foot per second for each acre irrigated, or its equivalent, and shall not exceed ONE-ACRE FOOT per acre during any month prior to June 1, nor exceed a total during the irrigation season from April 1 to September 30, of each year of FOUR-ACRE FEET per acre.

**Source:** SOUTH FORK JOHN DAY RIVER, tributary to the JOHN DAY RIVER

**Authorized Point of Diversion:**

| Twp  | Rng  | Mer | Sec | Q - Q | Measured Distances |
|------|------|-----|-----|-------|--------------------|
| 13 S | 26 E | WM  | 13  | NW SE | - not specified    |

**Authorized Place of Use:**

| IRRIGATION |      |     |     |       |      |       |
|------------|------|-----|-----|-------|------|-------|
| Twp        | Rng  | Mer | Sec | Q - Q | GLot | Acres |
| 13 S       | 26 E | WM  | 13  | NE SE | --   | 1.5   |

- Transfer Application T-10938 proposes to change the point of diversion upstream approximately 2100 feet to the current (historical) Miller Ditch diversion and approximately 3700 feet upstream to the Cummings Ditch diversion located:

**Proposed Points of Diversion:**

| Twp  | Rng  | Mer | Sec | Q - Q | Measured Distances                                                                       |
|------|------|-----|-----|-------|------------------------------------------------------------------------------------------|
| 13 S | 26 E | WM  | 13  | SW SE | MILLER DITCH (ACTUAL) - 50 FEET NORTH AND 470 FEET EAST FROM THE S¼ CORNER OF SECTION 13 |
| 13 S | 26 E | WM  | 24  | NW NE | CUMMINGS DITCH - 1090 FEET SOUTH AND 160 FEET EAST FROM THE N¼ CORNER OF SECTION 24      |

- Notice of the application for transfer was published on August 18, 2009, pursuant to OAR 690-380-4000. The Oregon Department of Fish and Wildlife filed a response to the notice, stating that moving a proposed point(s) of diversion upstream on the South Fork of the John Day River would injure instream water right Certificate 59794. The Oregon Department of Fish and Wildlife also determined that a fish screening and /or by-pass device is necessary at the new point(s) of diversion to prevent fish from entering the diversion and/or safely transport fish back to the body of water from which the fish were diverted and that the diversion is not currently equipped with an appropriate fish screening and/or by-pass device. The diversion may be eligible for screening cost share funds.
- No other comments were filed in response to the notice.
- Accompanying the transfer application was a letter from Gary Wilson, Engineer for the Grant Soil and Water Conservation District (GSWCD), stating that this transfer is one of three transfers being proposed and a part of a complete project on the South Fork of the John Day River to improve irrigation efficiency, fish passage and habitat for listed steelhead and spring Chinook salmon. These projects would result in the elimination of three gravel push-up dams and would convert a fourth to a lay-flat stanchion structure, all allowing for the conversion of approximately 115 acres from flood irrigation to sprinkler along a 5.5 mile reach of the river.

8. In addition to the support letter from the GSWCD, two letters were received from the Oregon Department of Fish and Wildlife (ODFW) effectively stating that the proposed upstream movement of the original point of diversion would cause injury to the instream water right Certificate 59794, but that because the transfer was submitted along with two other transfers as described in the table below, the merits and impacts of the project may create an overall net benefit to the resource (fish) and wildlife habitat. The ODFW also stated that they would look forward to a more thorough review once the transfer proceeds. Transfer applications T-10939 (Stan & Karen Harlan) and T-10940 (Jim Gillespie) are being processed simultaneously with this transfer and propose moving their points of diversion downstream. The following table was submitted by the Grant Soil and Water Conservation District and may be used to evaluate the "package" as a whole in terms of the three associated transfer files being proposed on the South Fork John Day River. The table represents the movement of a specific amount of cubic foot per second per each segment of the river described.

|                                                          |                                                                                                                                                          | Distances (moving downstream from Cummings River Ditch) |                    |                       |                    |                       |                    |                        |                    |                        |                    |                     |                    |
|----------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------|--------------------|-----------------------|--------------------|-----------------------|--------------------|------------------------|--------------------|------------------------|--------------------|---------------------|--------------------|
|                                                          |                                                                                                                                                          | Cummings Ditch                                          |                    | Miller Ditch          |                    | Campbell Martin Ditch |                    | Riley Ditch            |                    | Gillespie Pump Station |                    | Dayville Ditch      |                    |
| From:                                                    |                                                                                                                                                          | Miller Ditch                                            |                    | Campbell Martin Ditch |                    | Riley Ditch           |                    | Gillespie Pump Station |                    | Dayville Ditch         |                    | Harlan Pump Station |                    |
| To:                                                      |                                                                                                                                                          | Miller Ditch                                            |                    | Campbell Martin Ditch |                    | Riley Ditch           |                    | Gillespie Pump Station |                    | Dayville Ditch         |                    | Harlan Pump Station |                    |
| Distance:                                                |                                                                                                                                                          | 0.7 mile                                                |                    | 2.3 mile              |                    | 0.4 mile              |                    | 0.1 mile               |                    | 0.8 mile               |                    | 0.4 mile            |                    |
| *Split Season Rate / Before & After June 1 <sup>st</sup> |                                                                                                                                                          | 1/40 <sup>th</sup>                                      | 1/80 <sup>th</sup> | 1/40 <sup>th</sup>    | 1/80 <sup>th</sup> | 1/40 <sup>th</sup>    | 1/80 <sup>th</sup> | 1/40 <sup>th</sup>     | 1/80 <sup>th</sup> | 1/40 <sup>th</sup>     | 1/80 <sup>th</sup> | 1/40 <sup>th</sup>  | 1/80 <sup>th</sup> |
| Schrier Transfer (T-10938)                               | Move Water Right Cert <sup>#</sup> 12096 upstream to fish friendly permanent lay-flat diversion structure to eliminate need for gravel push-up diversion | -0.035                                                  | -0.017             |                       |                    |                       |                    |                        |                    |                        |                    |                     |                    |
| Gillespie Transfer (T-10940)                             | Move part of Water Right 25488 & 25495 Downstream to Pump Station                                                                                        |                                                         |                    |                       |                    |                       |                    | 1.27                   | 0.64               |                        |                    |                     |                    |
|                                                          | Move part of Water Right 9154 & 9155 Downstream to Pump Station                                                                                          | 0.68                                                    | 0.34               | 0.68                  | 0.34               | 0.68                  | 0.34               | 0.68                   | 0.34               |                        |                    |                     |                    |
|                                                          | Move Water Right 25490 & 25497 Downstream to Pump Station                                                                                                |                                                         |                    |                       |                    | 0.49                  | 0.24               | 0.49                   | 0.24               |                        |                    |                     |                    |
| Harlan Transfer (T-10939)                                | Move part of Water Right 25488 & 25495 Downstream to Pump Station                                                                                        |                                                         |                    |                       |                    |                       |                    | 0.32                   | 0.16               | 0.32                   | 0.16               | 0.32                | 0.16               |
|                                                          | Move Water Right 25496 Downstream to Pump Station                                                                                                        |                                                         |                    |                       |                    |                       |                    |                        |                    |                        |                    | 0.44                | 0.22               |
| <b>Net Instream Benefit (cfs)*</b>                       |                                                                                                                                                          | <b>0.645</b>                                            | <b>0.323</b>       | <b>0.68</b>           | <b>0.34</b>        | <b>1.17</b>           | <b>0.58</b>        | <b>2.76</b>            | <b>1.38</b>        | <b>0.32</b>            | <b>0.16</b>        | <b>0.76</b>         | <b>0.38</b>        |

\*Note: the above water rights each specify a rate allowed per each season, that being before and after June 1<sup>st</sup>.  
 APRIL - MAY (1/40 CFS PER ACRE)                      JUNE - SEPTEMBER (1/80 CFS PER ACRE)

9. The applicant and Watermaster have reported that in the summer of 2005, a fish-friendly, lay-flat stanchion design was installed at the Cummings Ditch diversion.

10. On November 28, 2011, the Department mailed a copy of the Preliminary Determination proposing to deny Transfer Application T-10939 to the applicant. The Preliminary Determination set forth a deadline of December 28, 2011 for the applicant to respond.
11. On December 23, 2011, the applicant submitted a written request to formally withdraw the transfer.
12. On January 6, 2012, the Department issued an order (Vol. 85, Page 882) withdrawing transfer application T-10938.
13. On February 9, 2012, the Department received a request for reconsideration regarding the withdrawal order. The applicant stated that in the interest of the ranch and the long term benefits to the aquatic resources of the South Fork John Day River, he would like to again pursue the transfer and have his transfer reinstated.
14. On February 21, 2012, the Department reconsidered the order of withdrawal recorded at Special Order Volume 85, Page 882 and issued an order recorded at Special Order Volume 87, Page 74, re-instating the processing of T-10938.
15. On October 16, 2012, the applicant submitted a request to withdraw a portion of the place of use involved in the transfer and submitted a revised application and map to reflect the modification. The adjustment made to the place of use also necessitated modification to the amount of water associated with the new acreage amount. The table in Findings of Fact #8 above has been adjusted accordingly to reflect these changes to transfer application T-10938.
16. On October 23, 2012, the Department mailed a REVISED draft of the Preliminary Determination proposing to deny Transfer Application T-10938 to the applicant. The draft Preliminary Determination identified the process by which the Department could proceed with the application. The revised draft of the Preliminary Determination set forth a deadline of November 26, 2012 to respond. On November 13, 2012, the agent for the applicant requested that the Department proceed with the application and seek a recommendation from the Oregon Department of Fish and Wildlife as to whether the Department should consent to injury of the instream water right pursuant to OAR 690-380-4030, and provided the necessary information to demonstrate the applicant is authorized to pursue the transfer.

***Transfer Review Criteria [OAR 690-380-4010(2)]***

17. The applicant submitted evidence that water has been used within the last five years according to the terms and conditions of the right, and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.
18. A diversion structure, ditch, and sprinkler system 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-10938.

19. The Watermaster has made a statement that regulation on the South Fork of the John Day River rarely takes place but that the instream water right is deficient at times during the summer months.
20. The proposed change would not result in enlargement of the right.
21. An instream water right (Certificate 59794, priority date November 3, 1983) exists for the reach of the river in which the authorized point of diversion would be moved upstream, and stream flows within the reach are frequently below the levels allocated under the instream water right. The proposed upstream point of diversion would further reduce flows in a portion of this reach.
22. Streamflows in the reach of the South Fork John Day River covered by the instream water right are measured at the gage 14039500 near Dayville, Oregon. Summary data for the period of record is October 1, 1986 to current year and is published in USGS Open-File Reports and now available at the Department's website. The following table provides a comparison of monthly South Fork John Day River streamflows at the gage near Dayville and the instream water right:

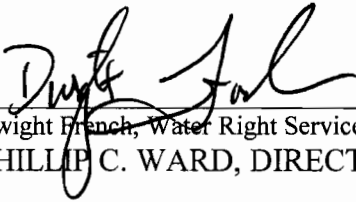
| Month     | 80 Percent Exceedance Flow (cfs) | Instream Water Right Certificate 59794 (cfs) |                      |
|-----------|----------------------------------|----------------------------------------------|----------------------|
|           |                                  | Monthly period 1 <sup>st</sup> Half          | 2 <sup>nd</sup> Half |
| January   | 53.0                             | 100                                          | 100                  |
| February  | 84.0                             | 100                                          | 133                  |
| March     | 132.0                            | 133                                          | 133                  |
| April     | 197.0                            | 133                                          | 133                  |
| May       | 146.0                            | 133                                          | 133                  |
| June      | 72.8                             | 100                                          | 100                  |
| July      | 24.1                             | 50                                           | 25                   |
| August    | 18.8                             | 25                                           | 25                   |
| September | 18.1                             | 25                                           | 25                   |
| October   | 31.6                             | 25                                           | 25                   |
| November  | 37.0                             | 50                                           | 50                   |
| December  | 44.2                             | 100                                          | 100                  |

23. An instream water right exists for the reach of the river in which the authorized point of diversion would be moved upstream, and stream flows within the reach are frequently below the levels allocated under the instream water right. Thus, the instream water right would be injured as a result of the proposed change in point of diversion.

**Determination and Proposed Action**

The request to change the point of diversion of water as proposed in application T-10938 cannot be effected without injury to an existing instream water right. Thus, the application appears NOT to be consistent with the requirements of ORS 537.705 and 540.505 to 540.580 and OAR 690-380-5000. Pursuant to ORS 540.530, the transfer application will be denied unless the Oregon Department of Fish and Wildlife recommends that the Department consent to injury of instream water right, pursuant to OAR 690-380-5050, or protests are filed pursuant to OAR 690-380-4030.

Dated at Salem, Oregon this 4 day of December, 2012.



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

This Preliminary Determination was prepared by Ken Dowden. If you have questions about the information in this document, you may reach me at 541-278-5456 or [Ken.D.Dowden@wrд.state.or.us](mailto:Ken.D.Dowden@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.