

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

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Application T-13431, Wallowa County)	PROPOSING APPROVAL OF CHANGES IN
)	PLACE OF USE AND CHARACTER OF USE;
)	AND APPROVING A CHANGE IN PLACE OF
)	USE UNDER CERTIFICATE 94161

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.

Applicants

KEN AND BOBBIE BAKER
81705 HWY 82
WALLOWA, OREGON 97885

PERRY JOHNSTON
81703 HWY 82
WALLOWA, OREGON 97885

Agent

THE FRESHWATER TRUST (TFT)
ATTN: JESSICA HUMPHREYS
401 NE 1ST STREET
ENTERPRISE, OREGON 97828

Findings of Fact

1. On April 29, 2020, Ken and Bobbie Baker, Perry Johnston and the Freshwater Trust filed an application to change the place of use and character of use under Certificates 94782, 94348, 94780, 94778, and 94160 to instream use; and change the place of use under Certificate 94161. The Department assigned the application number T-13431.
2. Notice of the application for transfer was published on May 12, 2020, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On June 19, 2020, the Department contacted TFT by written correspondence to notify the applicant's agent of the deficiencies in the application. On July 22, 2020, TFT submitted revised application pages resolving the deficiencies.
4. On July 23, 2020, Certificate 94348 was cancelled by Special Order Volume 117, pages 98-101, and superseded by Certificate 94906.

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.
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5. 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 Wallowa County. Additionally, the Department provided notice of the proposed action to the Wallowa County upon receipt of Transfer Application T-13431.
6. The applicants also submitted a signed Supplemental Form D from Cross Country Canal Company and Minam Lake Reservoir Company.
7. On September 23, 2020, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-13431 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of October 22, 2020, for the applicants to respond. The applicants requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicants are authorized to pursue the transfer.
8. The portion of the first right to be transferred is as follows:

Certificate: 94782 in the name of S.W. Miles (confirmed by decree of the Circuit Court of the State of Oregon for Wallowa County, the decree is of record at Salem, in the Order Record of the Water Resources Director, in Volume 5 at Pages 184-185)

Use: IRRIGATION OF 6.5 ACRES

Priority Date: 1882 for Tract 1

Limit/Duty: The amount of water to which this right is entitled is limited to an amount actually used beneficially, and shall not exceed 1.5 acre-feet per acre during any period of 30 days prior to July 31 of each year, and thereafter not to exceed 1.0 acre-foot per acre during the entire remainder of the irrigation season.

Source: LOSTINE RIVER (aka SOUTH FORK WALLOWA RIVER), tributary to the WALLOWA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	43 E	WM	9	SE NE	POD 1: MILES DITCH; TRACT 1

Authorized Place of Use:

TRACT 1 – PRIMARY IRRIGATION							
Priority	Twp	Rng	Mer	Sec	Q-Q	Acres	POD ID
1882	1 N	43 E	WM	32	NW SE	1.7	1
	1 N	43 E	WM	32	SW SE	4.8	
Total						6.5	

9. Certificate 94782 does not provide a full description of the point of diversion of the Miles Ditch. However, based upon additional information provided by the Applicants, the Department's Watermaster, and a review of the Department's records, the Applicants have

been utilizing the downstream Foster Ditch for a point of diversion. Therefore, the point of diversion from the Lostine River, is described and located approximately as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances Latitude / Longitude
1 S	43 E	WM	4	NE SW	FOSTER DITCH: 320 FEET SOUTH AND 625 FEET WEST OF THE CENTER OF SECTION 4; LATITUDE: 45.50716, LONGITUDE: -117.45096

10. A total of 36.40 acre-feet of water may be beneficially used annually under the existing right.

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

Certificate: 94906 in the name of S L. Magill (confirmed by decree of the Circuit Court of the State of Oregon for Wallowa County. The decree is of record at Salem, in the Order Record of the Water Resources Director in Volume 5, at Page 181)

Use: IRRIGATION of 3.9 ACRES

Priority Date: 1889 for Tract No. 3

Limit/Duty: The amount of water to which this right is entitled is limited to an amount actually beneficially used for said purposes, and shall not exceed 1.5 acre feet per acre during any period of 30 days prior to July 31st of each year, and thereafter not to exceed 1.0 acre foot per acre during the entire remainder of the irrigation season; and said right shall be subject to all other conditions and limitation contained in said decree.

Source: SOUTH FORK OF WALLOWA RIVER (LOSTINE RIVER), tributary to the WALLOWA RIVER

Authorized Point of Diversion: None listed on Certificate

Authorized Place of Use:

TRACT NO. 3 – PRIMARY IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	43 E	WM	32	SE NW	3.9
Total					3.9

12. Certificate 94906 does not describe the location of the point of diversion. However, information is available from the Applicants and Department records indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Latitude / Longitude
1 N	43 E	WM	9	SE NE	MILES DITCH: LATITUDE: 45.494134, LONGITUDE: 117.438922

13. A total of 21.84 acre-feet of water may be beneficially used annually under the existing right.

14. The third right to be transferred is as follows:

Certificate: 94780 in the name of Kenneth M. and Bobbie Lou Baker, Perry M. Johnston (confirmed by decree of the Circuit Court of the State of Oregon for Wallowa County. The decree is of record at Salem, in the Order Record of the Water Resources Director in Volume 5 at Page 177)

Use: IRRIGATION OF 0.3 ACRES AND STOCK

Priority Date: 1883

Limit/Duty: The amount of water to which this right is entitled is limited to an amount actually used beneficially, and shall not exceed 1.5 acre feet per acre for any period of 30 days prior to July 31 of each year, and thereafter not to exceed 1.0 acre foot per acre during the entire remainder of the irrigation season; and said right shall be subject to all other conditions and limitations contained in said decree.

Source: LOSTINE RIVER, tributary to the WALLOWA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	43 E	WM	4	NE SW	FOSTER DITCH: 320 FEET SOUTH AND 625 FEET WEST FROM THE CENTER OF SECTION 4; LATITUDE: 45.50716, LONGITUDE: -117.45096

Authorized Place of Use:

IRRIGATION AND STOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	43 E	WM	32	SW NE	0.3

15. A total of 1.68 acre-feet of water may be beneficially used annually under the existing right.

16. The portion of the fourth right to be transferred is as follows:

Certificate: 94778 in the name of William Sherod (confirmed by decree of the Circuit Court of the State of Oregon for Wallowa County. The decree is of record at Salem, in the Order Record of the Water Resources Director in Volume 5, at Page 193)

Use: IRRIGATION 3.4 ACRES

Priority Date: 1883

Limit/Duty: The amount of water to which this right is entitled and hereby confirmed for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed 1.5 acre feet per acre during any period of 30 days prior to July 31 of each year, and thereafter not to exceed 1.0 acre foot per acre during the entire remainder of the irrigation season.

Source: LOSTINE RIVER (aka SOUTH FORK WALLOWA RIVER), tributary to the WALLOWA RIVER

Authorized Point of Diversion: None listed on Certificate

Authorized Place of Use:

PRIMARY IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	43 E	WM	32	NW NW	3.4
Total					3.4

17. Certificate 94778 does not provide the location of the point of diversion. Based upon additional information provided by the Applicants and the Department's records, the point of diversion on the Lostine River is described and located approximately as follows:

Twp	Rng	Mer	Sec	Q-Q	Latitude / Longitude
1 N	43 E	WM	33	SW SW	CLEARWATER DITCH: 1283 FEET NORTH AND 313 FEET EAST OF THE SW CORNER OF SECTION 33; Latitude: 45.518688; Longitude: -117.469878

18. A total of 19.04 acre-feet of water may be beneficially used annually under the existing right.

19. The portion of the fifth right to be transferred is as follows:

Certificate: 94160 in the name of Cross Country Canal Company (perfected under Permit S-11695)

Use: SUPPLEMENTAL IRRIGATION of 14.1 ACRES

Priority Date: JUNE 6, 1935

Rate: 0.355 CUBIC FEET PER SECOND

Limit/Duty: The amount of water for irrigation, together with the amount secured under any other right existing for the same lands, shall not exceed 1.5 acre feet per acre during any 30 day period from May 1 to July 31, and thereafter shall not exceed 1.0 acre foot per acre for the remainder of the irrigation season ending October 1, and the total quantity allowed under this and any other right for these lands described herein shall not at any time exceed the quantity of water allowed herein..

Period of Use: May 1 to October 1

Source: WALLOWA RIVER, tributary to the GRANDE RONDE RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
1 S	43 E	WM	11	NW SE

Authorized Place of Use:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	43 E	WM	32	SW NE	0.3
1 N	43 E	WM	32	NW NW	3.4
1 N	43 E	WM	32	SE NW	3.9

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	43 E	WM	32	NW SE	1.7
1 N	43 E	WM	32	SW SE	4.8
Total					14.1

20. Certificate 94160 does not describe the exact location of the point of diversion. However, based on current mapping and information available from the Applicants and the Watermaster, the headgate for the Cross Country Canal is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	43 E	WM	11	SW SE	CROSS COUNTRY CANAL: 912 FEET NORTH AND 2000 FEET WEST FROM THE SE CORNER OF SECTION 11

21. Certificate 94160 is supplemental to the portions of Certificates 94782, 94906, 94780, and 94788 proposed to be transferred instream.
22. A total of 78.96 acre-feet of water may be beneficially used annually under Certificate 94160.
23. Transfer Application T-13431 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 any other ecological values for Certificates 94782, 94906, 94780, 94788 and 94160.
24. Transfer Application T-13431 proposes to change the character of use and places of use of the rights to create an instream reach from the points of diversion (PODs) (as described in Findings of Fact Nos. 9, 12, 14, 17, and 20) to the mouth of the Wallowa River.
25. The portion of the sixth right to be transferred is as follows:

Certificate: 94161 in the name of Minam Lake Reservoir Company (perfected under Permit S-3271)

Use: SUPPLEMENTAL IRRIGATION of 14.1 ACRES

Priority Date: MAY 29, 1916

Rate: 0.08 CUBIC FEET PER SECOND

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to ONE-EIGHTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated during the irrigation season of each year.

Source: MINAM LAKE RESERVOIR, CONSTRUCTED UNDER PERMIT R-396, a tributary of MINAM LAKE

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
1 S	43 E	WM	27	NE NW

Authorized Place of Use:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	43 E	WM	32	SW NE	0.3
1 N	43 E	WM	32	NW NW	3.4
1 N	43 E	WM	32	SE NW	3.9
1 N	43 E	WM	32	NW SE	1.7
1 N	43 E	WM	32	SW SE	4.8
Total					14.1

26. Transfer Application T-13431 proposes to change the place of use of Certificate 94161 to:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	42 E	WM	29	NE SW	9.4
1 N	42 E	WM	29	SE NW	3.2
1 N	42 E	WM	29	NE NW	1.5
Total					14.1

27. Transfer Application T-13431 proposes to change the place of use of the right to create an instream reach from the authorized points of diversion to the mouth of the Wallowa River at the confluence with the Grande Ronde River.

28. Certificates 94782, 94906, 94780, 94788, 94160, and 94161 do not list a period of use. Pursuant to the Wallowa River Decree, the irrigation season of use is May 1 to October 1.

29. The Applicants propose the following quantities of water to be transferred instream to be protected as follows:

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
		5/3 – 7/31	5/3 – 7/31	8/1 – 9/30	8/1 – 9/30	
94778	1883	0.086	15.30	0.028	3.40	May 3 through September 30
94906	1889	0.098	17.55	0.032	3.90	
94780	1883	0.002	1.35	0.002	0.30	
94782	1882	0.330	29.25	0.054	6.50	
94160(IS)	6/6/1935	0.355	63.45	0.117	14.10	
Totals		0.871	126.90	0.233	28.20	

30. 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 instream water rights 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 a more senior priority date.

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

31. 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.
32. 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-13431.
33. A portion of the water diverted at the points of diversion returns to the Lostine and Wallowa Rivers and is available to downstream water right holders. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected instream requires modification and return flows should be accounted for immediately below each point of diversion. The reduction in the instream water rights from the original quantities identified in Finding of Fact No. 29 is as follows:

Reach	Percent
From immediately below each of the points of diversion to the Clearwater Ditch Point of Diversion located in the SWSW Section 33, T1N, R43E, W.M.	5%
From the Clearwater Ditch Point of Diversion to the Mouth of the Lostine River at the confluence with the Wallowa River	10%
In the Wallowa River from the confluence with the Lostine River (approx. RM 25.9) at Latitude: 45.552227, Longitude: -117.490133 to the Wallowa River (approx. RM 25.6) at Latitude: 45.55639, Longitude: -117.49803	40%
From the Wallowa River at Latitude: 45.55639, Longitude: -117.49803 to Latitude: 45.57406, Longitude: -117.52571 near the town of Wallowa (approx. RM 23.8)	60%
From the Wallowa River at Latitude: 45.57406, Longitude: -117.52571 near the town of Wallowa to the mouth of the Wallowa River at the confluence with the Grande Ronde River	70%

OAR 690-077-0015(8).

34. Transfer application requests to protect water instream from the Lostine River into the Wallowa River. An instream reach is generally from the point of diversion to the mouth of the source stream (Lostine), but may be protected further if measurable in the receiving stream (Wallowa) (OAR 690-077-0015(8)). The quantity of water that may be transferred instream in the Lostine River is measurable into the Wallowa River and may be protected instream in the Wallowa River.
35. Certificate 94160 is supplemental to Certificates 94782, 94906, 94780, and 94788. The portion of Certificate 94160 being transferred instream shall only be protected instream if the full rate and duty under Certificates 94782, 94906, 94780, and 94788 is not available.

36. The instream right has been modified to prevent injury and enlargement and shall allow the use and protection of flows as follows:

LOSTINE RIVER, tributary to the Wallowa River

Instream Point No. 1:

At the Miles Ditch POD (described below):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	43 E	WM	9	SE NE	MILES DITCH: Latitude: 45.494134; Longitude: -117.438922

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.098	0.032	17.94	3.90	May 1 through September 30

Instream Reach No. 1:

From: Immediately below the Miles Ditch POD to the Foster Ditch POD (described below):

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.093	0.031	17.04	3.71	May 1 through September 30

Foster POD:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	43 E	WM	4	NE SW	FOSTER DITCH: 320 FEET SOUTH AND 625 FEET WEST FROM THE CENTER OF SECTION 4 LATITUDE: 45.50716, LONGITUDE: -117.45096

Instream Point No. 2:

At the Foster POD (described above):

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.093	0.031	17.04	3.71	May 1 through September 30
94782	1882	0.164	0.054	29.90	6.50	
94780	1883	0.008	0.002	1.38	0.30	
Total		0.265	0.087	48.32	10.51	

Instream Reach No. 2:

From: Immediately below the Foster POD to the Clearwater Ditch POD (described below):

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.093	0.031	17.04	3.71	May 1 through September 30
94782	1882	0.156	0.051	28.41	6.18	
94780	1883	0.007	0.002	1.31	0.29	
Total		0.256	0.084	46.76	10.18	

Clearwater Ditch POD:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 N	43 E	WM	33	SW SW	CLEARWATER DITCH: 1283 FEET NORTH AND 313 FEET EAST OF THE SW CORNER OF SECTION 33; LATITUDE: 45.518688; LONGITUDE: -117.469878

Instream Point No. 3:

At the Clearwater Ditch POD (described above):

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.093	0.031	17.04	3.71	May 1 through September 30
94782	1882	0.156	0.051	28.41	6.18	
94780	1883	0.007	0.002	1.31	0.29	
94778	1883	0.086	0.028	15.64	3.40	
Total		0.342	0.112	62.40	13.58	

Instream Reach No. 3:

From: Immediately below the Clearwater Ditch POD to the mouth of the Lostine River at RM 0.00 at the Confluence with the Wallowa River (approx. RM 25.9), located within the NWSE of Sec. 19, T1N, R43E, W.M. (Latitude: 45.552272; Longitude: -117.490133):

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.088	0.029	16.15	3.51	May 1 through September 30
94782	1882	0.147	0.048	26.91	5.85	
94780	1883	0.007	0.002	1.24	0.27	
94778	1883	0.077	0.025	14.08	3.06	
Total		0.319	0.104	58.38	12.69	

WALLOWA RIVER, tributary to the Grande Ronde River

Instream Reach No. 4:

From the authorized POD for Certificate 94160 (as described below) to the confluence of the Lostine River:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	43 E	WM	11	SW SE	CROSS COUNTRY CANAL: 912 FEET NORTH AND 2000 FEET WEST FROM THE SE CORNER OF SECTION 11

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94160 (IS)	6/6/1935	0.355	0.117	64.86	14.10	May 1 through September 30

Instream Reach No. 5:

From the mouth of the Lostine River (approx. RM 25.9) to a location in the NWNW of Sec. 19, T1N, R43E, W.M. (approx. RM 25.6) at Latitude: 45.55639, Longitude: -117.48803:

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.059	0.019	10.76	2.34	May 1 through September 30
94782	1882	0.098	0.032	17.94	3.90	
94780	1883	0.005	0.001	0.83	0.18	
94778	1883	0.051	0.017	9.38	2.04	
94160 (IS)	6/6/1935	0.213	0.070	38.92	8.46	
	Total	0.426	0.139	77.83	16.92	

Instream Reach No. 6:

From the location in NWNW of Sec. 19, T1N, R43E, W.M. (approx. RM 25.6) to the location in the SESE of Sec. 11, T1N, R43E, WM (approx. RM 23.8) at Latitude: 45.57406, Longitude: -117.52571:

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.039	0.013	7.18	1.56	May 1 through September 30
94782	1882	0.066	0.021	11.96	2.60	
94780	1883	0.003	0.001	0.55	0.12	
94778	1883	0.034	0.011	6.26	1.36	
94160 (IS)	6/6/1935	0.142	0.047	25.94	5.64	
	Total	0.284	0.093	51.89	11.28	

Instream Reach No. 7:

From the location in the SESE of Sec. 11, T1N, R42E, WM (at approx. RM 23.8) at Latitude: 45.57406, Longitude: -117.52571 to the mouth of the Wallowa River at the confluence with the Grande Ronde River

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.029	0.010	5.38	1.17	May 1 through September 30
94782	1882	0.049	0.016	8.97	1.95	
94780	1883	0.002	0.001	0.41	0.09	
94778	1883	0.026	0.008	4.69	1.02	
94160 (IS)	6/6/1935	0.107	0.035	19.46	4.23	
	Total	0.213	0.07	38.91	8.46	

37. The proposed changes would not result in enlargement of the right.
38. The proposed changes would not result in injury to other water rights.
39. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
40. The protection of flows within the proposed reaches is 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) Return flows resulting from the exercise of the existing water rights would re-enter the river within the reaches of the instream water right below the points of diversions.
The quantity of water to be protected has been reduced to account for return flows.
41. Within the proposed reaches there are several existing instream water rights for the same reaches as that proposed for the new instream water right. One existing instream water right, Certificate 59814 on the Lostine River, established under ORS 537.346 (minimum streamflow conversion) is for the purposes of supporting aquatic life and carries a priority date of November 3, 1983. There is an instream water right, Certificate 73023 on the Wallowa River, established under ORS 537.341 (state agency application process) for the purposes of anadromous and resident fish habitat and carries a priority date of November 22, 1991. The remaining instream water rights, Certificates 87709, 59808, and 93535, were established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process).
 42. The existing instream water rights, established under ORS 537.346 (minimum stream flow conversion, and ORS 537.341 (state agency application process), within the proposed reaches are sufficient to protect the monthly quantities of water necessary for support aquatic life and anadromous and resident fish habitat. By replacing a portion of these instream water rights, any instream water right created as a result of this transfer will provide protection of stream flows identified as necessary for supporting aquatic life and anadromous and resident fish habitat under earlier priority dates.
 43. By adding to other instream water rights, established pursuant to ORS 537.348 (instream transfer process and instream lease) and ORS 537.470 (allocation of conserved water process) within the proposed reaches, any new instream water right established by the 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.
 44. During the period of May 1 through September 30, 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 may be in addition to instream water rights established pursuant to ORS 537.348 and ORS 537.470, unless otherwise specified in an order approving a new instream water right under these statutes.

45. 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.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-13431 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-13431 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-13431 are approved.*
2. *Water right certificates 94906, 94782, 94780, 94778, and 94160 are cancelled. A new certificate confirming the instream water rights shall be issued. New certificates will be issued describing the portion of the rights not affected by this transfer.*
3. *Certificate 94161 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer.*
4. *Transfer Application T-13431 proposes to change the character of use and places of use of the rights to create an instream reach from the PODs (as described in Findings of Fact Nos. 9, 12, 14, 17, and 20) to the mouth of the Wallowa River.*
5. *The quantities of water to be protected under the instream water right are:*

LOSTINE RIVER, tributary to the Wallowa River

Instream Point No. 1:

At the Miles Ditch POD (described below):

<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>	<i>Measured Distances</i>
1 S	43 E	WM	9	SE NE	MILES DITCH: Latitude: 45.494134; Longitude: -117.438922

<i>Certificate</i>	<i>Priority</i>	<i>Instream Rate (CFS)</i>		<i>Instream Volume (AF)</i>		<i>Period Protected</i>
		<i>5/1-7/31</i>	<i>8/1-9/30</i>	<i>5/1-7/31</i>	<i>8/1-9/30</i>	
94906	1889	0.098	0.032	17.94	3.90	May 1 through September 30

Instream Reach No. 1:

From: Immediately below the Miles Ditch POD to the Foster Ditch POD (described below):

<i>Certificate</i>	<i>Priority</i>	<i>Instream Rate (CFS)</i>		<i>Instream Volume (AF)</i>		<i>Period Protected</i>
		<i>5/1-7/31</i>	<i>8/1-9/30</i>	<i>5/1-7/31</i>	<i>8/1-9/30</i>	
94906	1889	0.093	0.031	17.04	3.71	May 1 through September 30

Foster POD:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	43 E	WM	4	NE SW	FOSTER DITCH: 320 FEET SOUTH AND 625 FEET WEST FROM THE CENTER OF SECTION 4 LATITUDE: 45.50716, LONGITUDE: -117.45096

Instream Point No. 2:

At Foster POD (described above):

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.093	0.031	17.04	3.71	May 1 through September 30
94782	1882	0.164	0.054	29.90	6.50	
94780	1883	0.008	0.002	1.38	0.30	
Total		0.265	0.087	48.32	10.51	

Instream Reach No. 2:

From: Immediately below the Foster POD to the Clearwater Ditch POD (described below):

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.093	0.031	17.04	3.71	May 1 through September 30
94782	1882	0.156	0.051	28.41	6.18	
94780	1883	0.007	0.002	1.31	0.29	
Total		0.256	0.084	46.76	10.18	

Clearwater Ditch POD:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 N	43 E	WM	33	SW SW	CLEARWATER DITCH: 1283 FEET NORTH AND 313 FEET EAST OF THE SW CORNER OF SECTION 33; LATITUDE: 45.518688; LONGITUDE: -117.469878

Instream Point No. 3:

At the Clearwater Ditch POD (described above):

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.093	0.031	17.04	3.71	May 1 through September 30
94782	1882	0.156	0.051	28.41	6.18	
94780	1883	0.007	0.002	1.31	0.29	
94778	1883	0.086	0.028	15.64	3.40	
Total		0.342	0.112	62.40	13.58	

Instream Reach No. 3:

From: Immediately below the Clearwater Ditch POD to the mouth of the Lostine River at RM 0.00 at the Confluence with the Wallowa River (approx. RM 25.9), located within the NWSE of Sec. 19, T1N, R43E, W.M. (Latitude: 45.5522272; Longitude: -117.490133):

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.088	0.029	16.15	3.51	May 1 through September 30
94782	1882	0.147	0.048	26.91	5.85	
94780	1883	0.007	0.002	1.24	0.27	
94778	1883	0.077	0.025	14.08	3.06	
Total		0.319	0.104	58.38	12.69	

WALLOWA RIVER, tributary to the Grande Ronde River

Instream Reach No. 4:

From the authorized POD for Certificate 94160 (as described below) to the confluence of the Lostine River:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	43 E	WM	11	SW SE	CROSS COUNTRY CANAL: 912 FEET NORTH AND 2000 FEET WEST FROM THE SE CORNER OF SECTION 11

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94160 (IS)	6/6/1935	0.355	0.117	64.86	14.10	May 1 through September 30

Instream Reach No. 5:

From the mouth of the Lostine River (approx. RM 25.9) to a location in the NWNW of Sec. 19, T1N, R43E, W.M. (approx. RM 25.6) at Latitude: 45.55639, Longitude: -117.48803:

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.059	0.019	10.76	2.34	May 1 through September 30
94782	1882	0.098	0.032	17.94	3.90	
94780	1883	0.005	0.001	0.83	0.18	
94778	1883	0.051	0.017	9.38	2.04	
94160 (IS)	6/6/1935	0.213	0.070	38.92	8.46	
Total		0.426	0.139	77.83	16.92	

Instream Reach No. 6:

From the location in NWNW of Sec. 19, T1N, R43E, W.M. (approx. RM 25.6) to the location in the SESE of Sec. 11, T1N, R43E, WM (approx. RM 23.8) at Latitude: 45.57406, Longitude: -117.52571:

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.039	0.013	7.18	1.56	May 1 through September 30
94782	1882	0.066	0.021	11.96	2.60	
94780	1883	0.003	0.001	0.55	0.12	
94778	1883	0.034	0.011	6.26	1.36	
94160 (IS)	6/6/1935	0.142	0.047	25.94	5.64	
	Total	0.284	0.093	51.89	11.28	

Instream Reach No. 7:

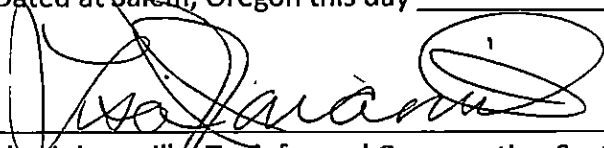
From the location in the SESE of Sec. 11, T1N, R42E, WM (at approx. RM 23.8) at Latitude: 45.57406, Longitude: -117.52571 to the mouth of the Wallowa River at the confluence with the Grande Ronde River

Certificate	Priority	Instream Rate (CFS)		Instream Volume (AF)		Period Protected
		5/1-7/31	8/1-9/30	5/1-7/31	8/1-9/30	
94906	1889	0.029	0.010	5.38	1.17	May 1 through September 30
94782	1882	0.049	0.016	8.97	1.95	
94780	1883	0.002	0.001	0.41	0.09	
94778	1883	0.026	0.008	4.69	1.02	
94160 (IS)	6/6/1935	0.107	0.035	19.46	4.23	
	Total	0.213	0.070	38.91	8.46	

6. 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.
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 point of diversion. Stream channel losses and gains calculated based on available data and the use of senior appropriators will determine the amount of water to which this right is entitled downstream from the original point of diversion within the specified stream reach.
8. 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.
9. 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 94906, 94782, 94780, 94778, 94160, and 94161 and any related decree.

10. *The former places of use of the transferred water shall no longer receive water as part of these rights.*
11. *Water use measurement conditions for water right Certificate 94161 only:*
 - a. *Before water use may begin under this order, the water user shall install a Weir, Parshall flume, or with prior approval of the Director, another suitable measuring device, at each point of diversion (new and existing).*
 - b. *The water user shall maintain the meters or measuring devices in good working order.*
 - c. *The water user shall allow the Watermaster access to the meters or measuring device(s); provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.*
12. *Full beneficial use of water shall be made, consistent with the terms of this order, on or before October 1, 2021. A Claim of Beneficial Use prepared by a Certified Water Right examiner shall be submitted by the Applicant to the Department within one year after the deadline for completion of the change in Certificate 94161 and full beneficial use of water.*
13. *After satisfactory proof of beneficial use is received for Certificate 94161, a new certificate confirming the right transferred will be issued in the name of Minam Lake Reservoir Company.*

Dated at Salem, Oregon this day FEB 11 2021



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
Tom M. Byler, Director, Oregon Water Resources Department

This Preliminary Determination was prepared by Sarah Henderson. If you have any questions about the information in this document, you may reach me at (503) 986-0884 or Sarah.A.Henderson@oregon.gov.

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

IMPORTANT: *Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. Mail. Please consider mailing early to ensure the Department receives the protest by the deadline.*

Notice Regarding Service Members: Active duty service members have a right to stay these proceedings under the federal Service members Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free number.



Oregon

Kate Brown, Governor

Water Resources Department

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Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

February 11, 2021

Applicants

KEN AND BOBBIE BAKER
81705 HWY 82
WALLOWA, OREGON 97885

PERRY JOHNSTON
81703 HWY 82
WALLOWA, OREGON 97885

SUBJECT: Water Right Transfer Application T-13431

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-13431. 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 County 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 503-986-0884 or Sarah.A.Henderson@oregon.gov if I may be of assistance.

Sincerely,

for Sarah Henderson
Flow Restoration Program Coordinator
Transfer and Conservation Section

cc: T-13431
David Bates, District #7 Watermaster (via e-mail)
Jessica Humphreys, The Freshwater Trust, (TFT) Agent for the applicant (via e-mail)
Rob Kirchner, TFT, Agent for the applicant (via e-mail)
Meg Belais, TFT, Agent for the applicant (via e-mail)

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