

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

In the Matter of Allocation of Conserved ) PRELIMINARY DETERMINATION  
Water Application CW-129, ) PROPOSING APPROVAL OF ALLOCATION OF  
Wallowa County ) CONSERVED WATER CW-129

**Applicant**

Rocking M Cattle Company  
70208 Warnock Rd  
Wallowa, OR 97885

**Agent**

Trout Unlimited  
Jessica Humphreys  
401 NE 1<sup>st</sup> Street  
Enterprise, OR 97828

**Applicable Law**

Any person or group of persons holding a water use subject to transfer as defined in ORS 540.505 may submit an application for an Allocation of Conserved Water to the Water Resources Commission for a conservation project that has not yet been implemented or was implemented within five years prior to the submission of the application. ORS 537.465. Under the Allocation of Conserved Water Program, a portion of the water proposed to be conserved by an applicant may be used on additional lands, put to a different use, or be leased or sold to another user. OAR 690-018-0010. A portion of the water conserved is allocated to the state to be converted to an instream water right or to revert to the public for appropriation by other water users. ORS 537.470(3).

An application for an allocation of conserved water shall include: (a) A description of the measure as implemented and the date on which the measure was implemented; (b) A description of the diversion facilities before the conservation measure was implemented and the amount of water that was diverted at the facilities before the conservation measure was implemented; (c) The amount of water needed to supply existing rights after implementation of the conservation measure; (d) The amount of water conserved by implementing the conservation measure; (e) The proposed allocation and use of the conserved water if different from the allocation specified in ORS 537.470; (f) The intended use of any water allocated to the applicant and the proposed location of use; (g) The applicant's choice of priority date for the conserved water; (h) Evidence that the measure was implemented within five years prior to the date of filing the application; and (i) Any other information the commission considers necessary to evaluate the application. ORS 537.465.

Pursuant to OAR 690-018-0050, any person objecting to the proposed allocation may file a protest to this Preliminary Determination with the Water Resources Commission within 60 days of the mailing of this determination.

After determining any quantity of water needed to mitigate the effects on other water rights, 25-percent of the conserved water shall be allocated to the state and 75-percent to the applicant unless the applicant proposes a higher allocation to the state or more than 25-percent of the funds used to finance the conservation measures comes from federal or state sources not subject to repayment. ORS 537.470(3).

If an application for the allocation of conserved water is approved, the Department shall issue orders describing the changes in the original water rights. Once the conservation project is finalized, the Department shall issue new certificates preserving the previously established-priority date of the rights to reflect the unaffected portion of the water rights and new certificates reflecting the changes for the portions of the water rights involved in the conserved water application. ORS 537.470(6).

ORS 537.455 to 537.500 authorize and establish the process by which a water right holder may submit a request for an allocation of conserved water. OAR Chapter 690, Division 18, implements the statutes and provides the Department’s procedures and criteria for evaluating allocation of conserved water applications. OAR Chapter 690, Division 077 provides additional criteria for evaluating proposed instream water rights.

**Findings of Fact**

1. On April 25, 2022, Rocking M Cattle Company filed an allocation of conserved water application under Certificate 3162. The Department assigned the application number CW-129.
2. The conservation project involves converting from flood irrigation to high efficiency pivot irrigation and piping the supply ditches bypassing a portion of open earthen ditches. The conversion of flood irrigation to sprinkler irrigation and piping ditches are proven technologies for conserving water.
3. On July 5, July 14, and July 26, 2022, the Applicant amended the application and maps to correct scrivener’s errors.
4. Application CW-129 proposes to reduce the annual volume by 144.58 acre-feet (AF). The conservation project proposes to affect the rate and duty of the Certificate during the period of May 1 through July 31.

Conserved Water Description										
Certificate	Certificate				Needed				Conserved Water	
	Rate		Duty		Rate		Duty		Rate	Duty
	Maximum CFS	CFS/AC	Maximum AF	AF/AC	Maximum CFS	CFS/AC	Maximum AF	AF/AC	Maximum CFS	Maximum AF
3162	1.78	1/41	325.31	4.5	0.99	1/73	180.73	2.5	0.79	144.58

\* - Actual calculations may be slightly different due to rounding

5. The portion of the right to be modified by CW-129 is as follows:

**Certificate:** 3162 in the name of ED THOMPSON, confirmed by the Wallowa River Decree  
**Use:** IRRIGATION of 72.29 ACRES  
**Priority Date:** 1883  
**Rate:** Not listed in decree  
**Limit/Duty:** The amount of water to which this right is entitled for irrigation 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; and said right shall be subject to all other conditions and limitations contained in said decree.  
**Source:** South Fork of Wallowa River (aka Lostine River), a tributary of Wallowa River

**Authorized Point of Diversion:** Not listed on Certificate

**Authorized Place of Use:**

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres
1 N	43 E	WM	28	NE NW	6300	34.94
1 N	43 E	WM	28	NW NW	6400	0.41
1 N	43 E	WM	28	SW NW	6400	12.67
1 N	43 E	WM	28	SE NE	6300	24.27
Total						72.29

6. Certificate 3162 does not list the point of diversion. Information from the applicant, and the Watermaster indicate the authorized point of diversion (POD) for Certificate 3162 is as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
1 N	43 E	WM	28	SE NW	Latitude: 45.499396 Longitude: -117.442333

7. Certificate 3162 does not list a period of use. Pursuant to Wallowa River Decree, the irrigation season of use is May 1 to October 1.

8. The Applicants request that the conserved water for the season of May 1 through July 31 be allocated as follows:

Conserved Water Description										
		State's Portion			Applicant's Portion			Conserved Water		
Certificate	Priority	Percentage	Max. Rate (CFS)	Max. Duty (Volume) AF	Percentage	Max. Rate (CFS)	Max. Duty (Volume) AF	Percentage	Max. Rate (CFS)	Maximum Volume (AF)
3162	1883	100%	0.79	144.58	0%	0.00	0.00	100%	0.79	144.58

9. The Applicants requests 100% of the conserved water be dedicated to instream use. Therefore, there is no location proposed for out-of-stream use of the conserved water.

10. The Applicants requests that the priority date for any conserved water be the same as the originating right.
11. The Applicant received non-reimbursable State funds for the conservation project. The Applicants propose an allocation to the State of 100% of the combined total of conserved water from all certificates involved in the conservation measure.
12. The Applicants submitted a completed Land Use Form from Wallowa County which indicated the proposed use was allowed outright or is not regulated by Wallowa County's comprehensive plan.
13. The implementation of the conservation measures had not begun prior to the submission of the application.
14. The Applicants propose any instream water right created be for the purposes of conservation, maintenance, and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, and other ecological values.
15. The Applicants requested the Department protect the new instream water right created from the conserved water under the certificate in the Lostine River, from the Fitzpatrick point of diversion on the Lostine River to the mouth of the Lostine River, and into the Wallowa River to the mouth of the Wallowa River at its confluence with the Grande Ronde River.
16. The Applicants requested the deadline for submitting the Notice of Completion of November 30, 2023. The Applicant will submit a Request for Finalization on or before finalization of the allocation on or before December 1, 2023.
17. The application meets the requirements of OAR 690-018-0040.
18. The Department has consulted with the Oregon Department of Fish and Wildlife (ODFW) to ascertain whether the proposed instream flows are necessary to support instream flow uses. The ODFW asserted the Lostine River spring Chinook and bull trout populations are limited by water availability annually which is listed in the recovery plans as the primary limitation factor for these species. The proposed reach is in a high priority area for streamflow restoration.
19. Notice of the proposed conservation project was published in the Department's weekly notice on August 2, 2022, and in the Wallowa Chieftain newspaper on July 27 and August 3, 2022, as required under OAR 690-018-0050(1)(a) and (2). No comments were filed in response to the notices.

**Allocation of Conserved Water Review Criteria [OAR 690-018-0050]**

20. Water has been used within the five-year period prior to submission of the allocation of conserved water application, and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.
21. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right was present within the five-year period prior to submittal of the application.
22. The proposed allocation of conserved water will result in a reduced diversion of the use allowed under the existing right pursuant to OAR 690-0018-0050(4)(a). (Finding of Fact #4).
23. On July 1, 2022, the District #7 Watermaster performed a review of the proposed Allocation of Conserved Water Project. The Watermaster determined that the conservation project could harm other water rights through the appropriation of more water than is authorized. The applicant asks for a full 5.5 AF per acre duty, when the proposed lease season is only for the first three months of the season, which would be 4.5 AF per acre. In addition, some acres were identified as having been under sprinkler irrigation for decades, or identified as “wet ground,” due to a localized spring. The applicant submitted a revised application, changing the AF per acre duty to 4.5 AF per acre as authorized, and removing the acres identified by the Watermaster for removal from the application. The revised application addresses the Watermaster’s concerns, therefore, no additional quantity of conserved water is needed to mitigate for harm to other water rights. OAR 690-018-0050(4)(b) and (d).
24. The conservation project is consistent with the local comprehensive land use plan requirements established in OAR 690-005-0045. (Finding of Fact #12). OAR 690-018-0050(4)(c).
25. Pursuant to OAR 690-018-0050(4)(e), the new reduced rate and duty for the existing uses involved in Allocation of Conserved Water Application CW-129 under Certificates 3162 is as follows:

Certificate	Rate		Duty		Acreage
	Maximum CFS	CFS/AC	Maximum AF	AF/AC	Acres
3162	0.99	1/73	180.73	2.5	72.29

(Finding of Fact #4).

26. Pursuant to OAR 690-018-0050(4)(e), the rate and volume allocated to the State for instream use is as follows:

Certificate	Priority	Max. Rate (cfs)	Max. Duty (Volume) AF
3162	1883	0.79	144.58

(Finding of Fact #8).

27. As required by OAR 690-018-0050(4)(f), the Department has determined that the instream right created will support public benefits. The proposed instream water right will help to meet the flows necessary for spring Chinook and bull trout populations. (Finding of Fact #18).
28. Pursuant to ORS 537.470(3) and OAR 690-018-0050(4)(g), the entire quantity of conserved water is being allocated to the State of Oregon for an instream water right. Therefore, the quantity of water does not need to be adjusted. (Finding of Fact #8 and #9).
29. The new instream water right created will be protected in the Lostine River from the authorized point of diversion as described in Findings of Fact #6, to the mouth of the Lostine River and into the Wallowa River to the mouth of the Wallowa River at the confluence with the Grande Ronde River. An instream reach is generally from the point of diversion to the mouth of the source stream (Lostine River), but may be protected further if measurable into the receiving stream (Wallowa River). The quantity of water that may be protected from the Lostine River is measurable into the Wallowa River. OAR 690-018-0050(4)(h); OAR 690-077-0015(8).
30. Within the proposed reach, a portion of the water diverted at the point of diversion returns to the Lostine River (10%) and is available to downstream water right holders. A portion of the water diverted at the point of diversion returns to the Wallowa River (10%) 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 the point of diversion. OAR 690-077-0015(8).
31. The instream right shall allow the use and protection of flows as follows:

**LOSTINE RIVER, a tributary of Wallowa River**

**Instream Point No. 1:** At the POD (Finding of Fact #6)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
3162	1883	0.79	144.58	May 1 through July 31

**Instream Reach No. 1:** From immediately below the POD to the mouth of the Lostine River at the confluence with the Wallowa River

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
3162	1883	0.71	130.12	May 1 through July 31

**Instream Reach No. 2:** In the Wallowa River from immediately below the confluence with the Lostine River to the mouth at confluence with the Grande Ronde River

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
3162	1883	0.64	117.11	May 1 through July 31

32. The amount and timing of the proposed instream flows are allowable within the limits and use of the original water right. OAR 690-077-0015(10).
33. The protection of flows within the proposed reach is appropriate, considering:
  - a. The instream water use 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 are accounted for within the reaches of the instream water as identified in Findings of Fact Nos. 9 and 10. OAR 690-077-0015(8).
34. The combination of instream rights for the proposed reach on the Lostine River does not exceed the amount needed to provide increased public benefits, and does not exceed the estimated average natural flow or level occurring from the drainage system. OAR 690-077-0015(4) and (11).
35. Existing instream Certificate 73021, with a priority date of October 22, 1991, established pursuant to ORS 537.341 (state agency application process), 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. By replacing a portion of this instream water right and any other water rights established under ORS 537.336 (minimum streamflow conversion process), any instream water right created as a result of this allocation will provide protection of stream flows identified as necessary for supporting aquatic life under earlier priority dates.
36. By adding to other instream water rights established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) located within the proposed reach, any new instream water rights established by this conserved water project 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. OAR 690-077-0015(11).
37. There are no proposed areas within which the conserved water is proposed to be used for out-of-stream uses. (Finding of Fact #9). OAR 690-018-0050(4)(h).
38. The deadline for submitting a Notice of Completion is November 30, 2023. The deadline for submitting a Request for Finalization is December 1, 2023. (Finding of Fact #16). OAR 690-018-0050(4)(i).

39. No other conditions or limitations are needed to prevent or mitigate for harm to existing water rights. (Finding of Fact #23). OAR 690-018-0050(4)(j).

**Determination and Proposed Action**

The project described in Allocation of Conserved Water Application CW-129, is consistent with the criteria in ORS 537.455 to 537.500, and OAR Chapter 690, Divisions 018 and 077. *If protests are not filed pursuant to OAR 690-018-0050(6), the conserved water application will be approved.*

*If Allocation of Conserved Water Application CW-129 is approved, the Order Approving will include the following:*

1. *The proposed change will result in a reduced diversion for the uses allowed under the original water right. Findings of Fact #4 and #25.*
2. *The proposed allocation of conserved water will not harm existing water rights. Finding of Fact #23.*
3. *The application is consistent with the requirements established in OAR 690-005-0045. Findings of Fact #12 and #24.*
4. *The changes proposed in CW-129 are approved.*
5. *The quantities of water conserved and allocated are as follows:*

		<b>Conserved Water Description</b>								
		<b>State's Portion</b>			<b>Applicant's Portion</b>			<b>Conserved Water</b>		
<i>Certificate</i>	<i>Priority</i>	<i>Percentage</i>	<i>Max. Rate (CFS)</i>	<i>Max. Duty (Volume) AF</i>	<i>Percentage</i>	<i>Max. Rate (CFS)</i>	<i>Max. Duty (Volume) AF</i>	<i>Percentage</i>	<i>Max. Rate (CFS)</i>	<i>Maximum Volume (AF)</i>
3162	1883	100%	0.79	144.58	0%	0.00	0.00	100%	0.79	144.58

6. *The right to the use of the water is restricted to beneficial use at the places of use described, and is subject to all other conditions and limitations contained in Certificate 3162, and any related decree.*

Upon filing the Notice of Completion:

7. *Water Right Certificate 3162 is cancelled. A new certificate will be issued for that portion of the water right not affected by this Allocation of Conserved Water application, and a superseding Certificate will be issued for the existing use and place of use as described in Finding of Fact #5 and not modified by Finding of Fact #8, at the reduced rate and duty as follows:*

**Use:** IRRIGATION of 72.29 ACRES  
**Priority Date:** 1883  
**Rate:** 0.99 CUBIC FOOT PER SECOND  
**Limit/Duty:** The amount of water to which this right is entitled shall not exceed 1.0 acre-foot 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; and said right shall be subject to all other conditions and limitations contained in said decree.

**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	Tax Lot	Acres
1 N	43 E	WM	28	NE NW	6300	34.94
1 N	43 E	WM	28	NW NW	6400	0.41
1 N	43 E	WM	28	SW NW	6400	12.67
1 N	43 E	WM	28	SE NE	6300	24.27
Total						72.29

8. **Water use measurement conditions:**

a. The water user shall maintain and operate the existing measurement device and shall make such improvements as may be required by the Department.

9. All conserved water shall be managed instream until a Request for Finalization is submitted as follows:

**LOSTINE RIVER, a tributary of Wallowa River**

**Instream Point No. 1:** At the POD (Finding of Fact #6)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
3162	1883	0.79	144.58	May 1 through July 31

**Instream Reach No. 1:** From immediately below the POD to the mouth of the Lostine River at the confluence with the Wallowa River

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
3162	1883	0.71	130.12	May 1 through July 31

**Instream Reach No. 2:** In the Wallowa River from immediately below the confluence with the Lostine River to the mouth at confluence with the Grande Ronde River

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
3162	1883	0.64	117.11	May 1 through July 31

**Upon Filing the Request for Finalization:**

10. The project is complete and no additional time is needed for finalization.

11. *The Department shall issue a new instream water right certificate for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values as follows:*

**LOSTINE RIVER, a tributary of Wallowa River**

**Instream Point No. 1:** At the POD (Finding of Fact #6)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
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Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
3162	1883	0.64	117.11	May 1 through July 31

*Within the specified stream reaches, the amount of water to which this right is entitled shall not exceed the quantity of water legally available at the original points of diversion. Stream channel losses and gains calculated based on available data and the use of water by 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.*

*The instream right established by this allocation 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 in an order approving a new instream water right under these statutes.*

Dated at Salem, Oregon this DEC 21 2022.



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for  
Douglas E. Woodcock, Acting Director  
Oregon Water Resources Department

### NOTICE OF RIGHTS

The Legislative Assembly finds that persons affected by actions taken by state agencies have a right to be informed of their rights and remedies with respect to those actions. ORS 183.415. The Commission shall notify the applicant and any other person requesting notice, of the action the Commission intends to take under ORS 537.470(3). Any person objecting to the proposed allocation may file a protest requesting a contested case hearing before the Commission. ORS 537.470(4).

If a protest to the proposed allocation of conserved water is received by the Department within 60 days of the mailing of the preliminary determination pursuant to ORS 537.470(4) and OAR 690-018-0050(4), the Director may work with the applicant and any protestant to determine whether the issues can be resolved through mutually agreeable conditions, or by modifying the application. OAR 690-018-0050(6).

If protests are received raising issues that cannot be resolved pursuant to OAR 690-018-0050(6), the Director shall present the application, all protests and a recommendation for action to the Commission for review and action. OAR 690-018-0050(8).

The Commission shall examine the application, the protests and the Director's recommendation. If the Commission finds the allocation of conserved water is likely to injure existing water rights or is otherwise inconsistent with these rules, the Commission may direct the Department to hold a contested case hearing on the application pursuant to ORS 183.413 and OAR 690, Divisions 1 and 2 or to resume attempts to resolve the disputed issues. If the Commission finds the allocation of conserved water is not likely to injure existing rights and is otherwise consistent with OAR 690-018-0050, the Commission may authorize the Director to issue an order approving the application. OAR 690-018-0050(9).

In the event of a land use dispute, as defined in OAR 690-005-0015, the Director shall follow resolution procedures provided in 690-005-0040 (Resolution of Land Use Disputes). OAR 690-018-0050(10).

**NOTICE REGARDING SERVICEMEMBERS:** Active duty service members have a right to stay proceedings under the federal Servicemembers Civil Relief Act 50 U.S.C. App. §§ 501-597b. You may contact the Oregon State Bar at 800-452-8260, the 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 telephone number.