

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

In the Matter of Instream Transfer                                 )     FINAL ORDER APPROVING A  
Application T-9883, Deschutes County,                             )     CHANGE IN PLACE OF USE AND  
Oregon   )     CHARACTER OF USE TO INSTREAM

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. OAR Chapter 690, Division 077 provides additional criteria for evaluating transfers to instream water rights.

**Applicant**

Central Oregon Irrigation District 2598 N. Highway 97 Redmond, OR 97756	Deschutes River Conservancy P.O. Box 1560 Bend, OR 97709
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**Findings of Fact**

1. Central Oregon Irrigation District and the Deschutes River Conservancy, on behalf of several property owners (listed in Finding #3, below), filed a transfer application to permanently change the place of use and the character of use under Certificate 76358 to instream use. The Department assigned the application number T-9883. The application was submitted on March 10, 2005. June 13, 2005 the applicants submitted a letter amending the definition of the proposed reaches and the flow rates in Reach #2.
2. The applicant intends to transfer only the primary water right (Certificate 76358) instream, and the supplemental right (Certificate 76714) will not be transferred instream. Instead, the applicant has indicated that the portion of Certificate 76714 associated with Transfer T-9883 will be cancelled upon issuance of the Final Order.

<p>This is a final order in other than contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60 day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-080 and OAR 690-01-005 you may either petition for judicial review or petition the Director for reconsideration of this order.</p>
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3. The water right is appurtenant to lands owned as outlined in the following table. The primary water right under Certificate 76358 has been Quit Claimed to COID on behalf of the following property owners.

Parcel #	Owner	T	R	S	¼ ¼	Current Tax Lot
1.	Peter Taylor	15S	13E	4	NE NW	500
2.	Peter Taylor	15S	13E	4	SE NW	100
3.	Floyd R. and Sandy M. Garner	15S	13E	4	SE NW	201
4.	Windridge Homes Inc.	15S	13E	4	SE NW	300
5.	Harold B. and Zell Povey	15S	13E	10	NW NW	202
6.	Gary Wayne Knox	15S	13E	19	SW NE	704

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

**Certificate:** 76358 in the name of Central Oregon Irrigation District

**Use:** Irrigation

**Acres:** 31.0 acres

**Priority Date:** October 31, 1900 (Seasons 1, 2, & 3) & December 2, 1907 (Season 3)

**Season of Use:** April 1 through October 31, further limited as follows:

April 1 to May 1 & October 1 to November 1, described as Season 1

May 1 to May 15 & September 15 to October 1, described as Season 2

May 15 to September 15, described as Season 3

**Quantity (Rate):** Season 1 (limited to 1/80 cfs per acre): 0.388 cfs (1900 priority)

Season 2 (limited to 1/60 cfs per acre): 0.517 cfs (1900 priority)

Season 3 (limited to 1/32.4 cfs per acre): 0.957 cfs, being 0.682 cfs under the 1900 priority date and 0.275 cfs under the 1907 priority date

**Duty:** Not to exceed 9.91 acre-feet (AF) per acre: 307.2 AF

**The quantities listed reflect allowance of a 45% transmission loss as determined by decree of the Circuit Court of Deschutes County, dated March 24, 1933.** Those lands not served from the district main canal systems, but by direct pumping from the Deschutes River, will not be allowed the 45% transmission loss.

**Source:** Deschutes River, tributary to the Columbia River

**Authorized Point of Diversion:**

Township		Range		Meridian	Sec	¼ ¼	Location
17	S	12	E	W.M.	29	SE NE	POD # 11 (COID North Canal): 850' N & 630' W of the E ¼ corner of Section 29

**Authorized Place of Use:**

Township		Range		Meridian	Sec	¼ ¼	Tax Lot	POD	Acres
15	S	13	E	W.M.	4	NE NW	500	11	2.7
15	S	13	E	W.M.	4	SE NW	100	11	2.5
15	S	13	E	W.M.	4	SE NW	201	11	2.7
15	S	13	E	W.M.	4	SE NW	300	11	2.8
15	S	13	E	W.M.	10	NW NW	202	11	8.3
15	S	13	E	W.M.	19	SW NE	704	11	12.0

5. Supplemental right, certificate 76714, is appurtenant to the same lands from which the primary right under certificate 76358 is proposed to be transferred to instream use. The transfer application indicates the intent of the applicant to not include transfer of the supplemental right to instream use.
6. A total of 307.2 acre-feet (AF) of water may be beneficially used annually for primary irrigation under the portion of existing Certificate 76358 proposed for transfer.
7. Application T-9883 proposes to change the character of use to instream use for fish and wildlife habitat enhancement; pollution abatement; and recreation.
8. Application T-9883 proposes to change the place of use of the portion of the primary right, described in Finding 4, to create an instream reach from POD #11 (North Canal Dam) to Lake Billy Chinook (described below as Reach #1) and from Lake Billy Chinook to the mouth of the Deschutes River (described below as Reach #2).
9. The applicant requested that water be transferred instream as follows:

Certificate	Priority Date	Rate Instream	Volume Instream
Reach #1: POD #11 (North Canal Dam) to Lake Billy Chinook			
76358	October 31, 1900	Season 1: 0.210 CFS Season 2: 0.280 CFS Season 3: 0.520 CFS	168.63 AF

Certificate	Priority Date	Rate Instream	Volume Instream
Reach #2: Lake Billy Chinook to the mouth of the Deschutes River			
76358	October 31, 1900	April 1 to November 1: 0.13 CFS	55.08 AF

10. To prevent injury and enlargement, the 45% transmission loss, which is identified in certificate 76358, may not be included in the amount of water that may be transferred and protected instream. ORS 540.530, OAR 690-380-4010 & OAR 690-077-0075. The water previously diverted to offset transmission losses will remain in the river and become available for other users.
11. Existing information suggests that return flows from irrigation of lands proposed for transfer would enter the Deschutes River between River Mile 125 (NW SE, Section 17, T13S, R12E) and River Mile 100 near the Madras gage (SE SW, Section 1, T10S, R12E). Thus, return flows below River Mile 125 are available to junior users and cannot be protected instream without injury and enlargement.
12. Based on the Department's evaluation, the reaches may be defined as follows: Reach 1 from POD #11 (North Canal Dam) to River Mile 125, and Reach 2 from River Mile 125 to the mouth of the Deschutes River.
13. Within Reach 2 from River Mile 125 to the mouth of the Deschutes River, the amount of water to be protected is based on the portion of the water diverted for the authorized use that is estimated to be consumptively used by growing crops in this part of the Deschutes Basin (1.8 AF per acre per year, or approximately 33% of the amount diverted directly from the river). The remaining portion of the diverted water, returns to the river below River Mile 125, and cannot be protected in Reach 2 without potential injury to other water rights. Stream channel losses and gains calculated based on available data and the use of water from senior appropriators will determine the amount of water to which this right is entitled downstream from River Mile 125 within the specified stream reach.
14. Irrigation water under this right is diverted from the river at various rates during seasons 1, 2, and 3 during the summer. Available information suggests that return flows from irrigation contribute to streamflow at a nearly constant rate throughout the year. Subtraction of constant rate return flows from a variable rate of diversion yields a remaining variable rate consumptive portion to be protected instream in Reach 2. Consequently, the amount of water that can be protected instream is different than that described in the application.

15. Based upon the Department's review, water may be protected instream as follows:

Certificate	Priority Date	Rate Instream	Volume Instream
Reach #1: POD 11 (North Canal Dam) to River Mile 125			
76358	October 31, 1900	Season 1: 0.21 CFS Season 2: 0.28 CFS Season 3: 0.52 CFS	168.63 AF

Certificate	Priority Date	Rate Instream	Volume Instream
Reach #2: River Mile 125 to the mouth of the Deschutes River			
76358	October 31, 1900	Season 1: 0.07 CFS Season 2: 0.09 CFS Season 3: 0.17 CFS	55.08 AF

16. On June 13, 2005 the applicants submitted a letter agreeing to the above redefinition of the two reaches and the adjustment of the rates of streamflow to be protected in Reach #2 as stated in Finding #15.

17. There are several existing instream water rights that overlap the instream reaches proposed by the applicant. The Department has identified the following existing instream water rights:

Certificate	Instream Protection Mechanism	Priority Date	Instream Rate	Period Protected Instream	Instream Reach	Instream Purpose
Above Lake Billy Chinook						
80400	ORS 537.348 (instream transfer process) and replaces a portion of rights established under ORS 537.341	10/10/1903	0.35 CFS	April 1 to November 1	POD (SW ¼ SE ¼, Section 6, T18S, R12E) to Lake Billy Chinook	Fisheries Enhancement (mitigation credit project MP-1)

Certificate	Instream Protection Mechanism	Priority Date	Instream Rate	Period Protected Instream	Instream Reach	Instream Purpose
80856	ORS 537.348 (instream transfer process) and is in addition to certificate 80400	10/31/1900 & 12/2/1907	0.13 CFS during Season 1 (1900 priority), 0.17 CFS during Season 2 (1900 priority), and 0.30 CFS during Season 3, (being 0.22 CFS with 1900 priority and 0.08 CFS with 1907 priority)	April 1 to November 1	COID North Canal to Lake Billy Chinook	Aquatic and fish species (mitigation credit project MP-11)
76687	ORS 537.348 (instream transfer process)	9/1/1899	0.144 CFS during Season 1, 0.193 CFS during Season 2, and 0.358 CFS during Season 3	April 1 to November 1	North Canal Dam to Lake Billy Chinook	Fisheries enhancement
80965	ORS 537.470 (allocation of conserved water)	2/28/1913	0.21 CFS limited to 90.5 AF	April 1 through October 31	North Unit ID POD (River Mile 164, T22S, R12E, Sec. 29) to Lake Billy Chinook	Instream use (CW24)
81313	ORS 537.348 (instream transfer process)	5/12/1944	0.233 CFS	April 1 through October 31	POD (T14S, R12E, Sec 26) to Lake Billy Chinook	Fish and wildlife habitat enhancement, pollution abatement, and recreation (Mitigation Credit Project MP-24)
81314	ORS 537.348 (instream transfer process)	5/12/1944	0.015 CFS	April 1 through October 31	POD (T14S, R12E, Sec 26) to Lake Billy Chinook	Fish and wildlife habitat enhancement, pollution abatement, and recreation (Mitigation Credit Project MP-24)
81332	ORS 537.470 (allocation of conserved water)	12/8/1961	1.9 CFS April, 4.3 CFS May, 6.3 CFS June, 7.8 CFS July, 6.3 CFS August, 4.3 CFS September, 1.7 CFS October	April 1 through October 31	Tumalo Feed Canal POD on Tumalo Creek, from mouth of Tumalo Creek on Deschutes River to Lake Billy Chinook	Conservation, maintenance and enhancement of aquatic and fish life, wildlife, and wildlife habitat and other ecological values

Certificate	Instream Protection Mechanism	Priority Date	Instream Rate	Period Protected Instream	Instream Reach	Instream Purpose
81333	ORS 537.470 (allocation of conserved water)	September, 1900	5.82 CFS	April 1 through October 31	Tumalo Feed Canal POD on Tumalo Creek, from mouth of Tumalo Creek on Deschutes River to Lake Billy Chinook	Conservation, maintenance and enhancement of aquatic and fish life, wildlife, and wildlife habitat and other ecological values
Certificate pending (Sp. Ord. Vol 61, p 630)	ORS 537.470 (allocation of conserved water)	9/1/1899	0.08 CFS 4/1-5/1 & 10/1-11/1; 0.11 CFS 5/1-5/15 & 9/15-10/1; 0.19 CFS 5/15-9/15	April 1 to November 1	POD 15 (Section 14, T15S, R12E) to Lake Billy Chinook	Aquatic life (CW-13)
IS 70695 (pending application)	ORS 537.341 (state agency ISWR application process)	9/19/1990	250 CFS	Year-Round	North Canal Dam to Round Butte Reservoir (aka Lake Billy Chinook)	Anadromous and resident fish rearing
Below Lake Billy Chinook						
73188	ORS 537.341 (state agency ISWR application process)	10/2/1989	3500 CFS 3/1-6/30 and 3000 CFS 7/1-2/28 for fish passage and spawning; 3500 CFS 3/1-6/30 and 3000 CFS 7/1-2/28 for recreational fishing/boating	Year-Round	Pelton Dam to the confluence with the Columbia River	Maintaining a significant salmon, steelhead, and trout fishery; provide for recreational fishing, drift, and power boating, and aesthetics in a state and federal scenic waterway
73237	ORS 537.341 (state agency ISWR application process)	1/16/1991	Max. rate: 4500 CFS	Year-Round	Pelton Dam to the confluence with the Columbia River	Migration, spawning, egg incubation, fry emergence, and juvenile rearing

18. The applicants propose that the transfer add 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), and replace, with an earlier priority date, a portion of any existing or future instream rights established pursuant to ORS 537.341 (state agency in stream water rights, applied for under ORS 537.336) or 537.346 (minimum stream flow conversion).

19. Notice of the application for transfer was published pursuant to ORS 540.520 and OAR 690-380-4000. No comments were filed in response to the notices.

20. 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.
21. A diversion structure and ditch sufficient to use the full amount of water proposed to be transferred under this right are present. The remaining right certificate issued as a result of this transfer, and other activities associated with certificate 76358, will be reduced by the amount of water transferred to instream use. The reduction will be from the lesser of the maximum quantity listed on the water right or the capacity of the diversion and delivery system.
22. The proposed change would not result in enlargement of the right provided that the lands currently irrigated under the existing rights do not receive water from other rights currently appurtenant to these lands.
23. The proposed change would not result in injury to other water rights.
24. The amount and timing of the proposed instream flow are allowable within the limits and use of the original water right.
25. The protection of flows at the authorized points of diversion is appropriate, considering:
  - a) The instream water right begins at the recorded points 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 points of diversion; and
  - d) The location of areas of known return flows.
26. Within the reach proposed by the applicant, the Deschutes River is a designated State Scenic Waterway. The protection of flows necessary to maintain the free flowing character of the Deschutes River for fish and wildlife habitat, and recreation is a matter of statutory policy. Also, as noted in Finding of Fact 17, there are two instream water rights established through the state agency application process below Lake Billy Chinook, with 1989 and 1991 priority dates respectively, and one pending state agency instream water right application above Lake Billy Chinook, which will have a priority date of September 24, 1990, if approved. These instream water rights establish flow levels needed for fish habitat, recreation and aesthetics. In addition to flows for the designated Scenic Waterway and the existing and pending instream water right applications, which are at times not met during the requested periods for instream protection, portions of this segment of the Deschutes River are also on the Department of Environmental Quality's 303d list of water quality limited streams for temperature, dissolved oxygen (DO), and pH.
27. By adding to existing instream water rights between POD # 11 and Lake Billy Chinook the instream right will provide protection for additional streamflows necessary for fish and wildlife habitat enhancement, pollution abatement, and recreation. By replacing a portion of Certificates 73188 and 73237 from Lake Billy Chinook to the mouth of the Deschutes River,



this instream use will provide protection for streamflows previously identified as necessary for supporting aquatic life and recreation under an earlier priority date.

**Partial Cancellation of Certificate 76714**

28. ORS 540.510(1) and OAR 690-380-2250(5) provide that the order approving the transfer of a primary right shall cancel the portion of a supplemental right appurtenant to the same lands if the supplemental right is not included in the transfer. The supplemental right under Certificate 76714 is not included in transfer application T-9883, and will be cancelled upon issuance of this order approving T-9883.
29. Consistent with OAR 690-380-2250, the Department notified the applicants May 13, 2005, by issuance of a draft of the preliminary determination, of the Department's intent to cancel the portions of the supplemental water rights described below unless within 30 days the applicants modified the application to include the supplemental right or withdrew the application. The applicants have agreed to cancellation of the supplemental right and on May 18, 2005 the applicants sent notices of intent to cancel the supplemental right to affected landowners. No responses to the notices were received.

30. The portion of the following right is proposed to be cancelled:

**Certificate:** 76714 in the name of Central Oregon Irrigation District  
**Use:** Supplemental Irrigation  
**Acres:** 31.0 acres  
**Priority Date:** February 28, 1913  
**Season of Use:** April 1 through October 31  
**Source:** Crane Prairie Reservoir, constructed under permit R-1687, tributary to the Deschutes River

**Authorized Point of Diversion:**

Township		Range		Meridian	Sec	¼ ¼	Location
21	S	8	E	W.M.	17	NE NE	Crane Prairie Reservoir
17	S	12	E	W.M.	29	SE NE	POD # 11 (COID North Canal): 850' N & 630' W of the E ¼ corner of Section 29

**Authorized Place of Use:**

Township		Range		Meridian	Sec	¼ ¼	Tax Lot	POD	Acres
15	S	13	E	W.M.	4	NE NW	500	11	2.7
15	S	13	E	W.M.	4	SE NW	100	11	2.5
15	S	13	E	W.M.	4	SE NW	201	11	2.7
15	S	13	E	W.M.	4	SE NW	300	11	2.8
15	S	13	E	W.M.	10	NW NW	202	11	8.3
15	S	13	E	W.M.	19	SW NE	704	11	12.0

**Conclusions of Law**

The changes in place of use and character of use proposed in application T-9883 are consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075.

**Now, therefore, it is ORDERED:**

1. The changes in place of use and character of use proposed in application T-9883 are approved.
2. Certificate 76358 is modified and a new instream water right certificate shall be issued. The Department shall issue a new water right certificate to supersede certificate 76358 on a determination that it is necessary to produce a certificate to confirm that portion of the right not involved in this transfer. Approval of this transfer reduces the amount of water lawfully available under the remaining portion of certificate 76358 by 0.388 CFS in Season 1, 0.517 CFS in Season 2, and 0.957 CFS, being 0.682 CFS under the 1900 priority date and 0.275 CFS under the 1907 priority date, in Season 3.
3. Certificate 76714 is modified. The Department shall issue a new water right certificate on a determination that it is necessary to produce a certificate to confirm that portion of the water right not affected by the cancellation described in Finding of Fact #30. Modification of this supplemental water right will decrease by 31.0 acres the number of acres to which stored water may be applied for supplemental irrigation under the right.
4. The instream water right shall provide for the protection of streamflows from the authorized point of diversion to the mouth of the Deschutes River. The maximum quantities of water to be protected under the instream water right are as follows:

Certificate	Priority Date	Period Protected Instream	Rate Instream	Volume Instream
<b>Reach 1: POD #11 (North Canal Dam) to River Mile 125</b>				
76358	October 31, 1900	Season 1: April 1 to May 1 and October 1 through November 1	0.21 CFS	168.63 AF
		Season 2: May 1 to May 15 and September 15 to October 1	0.28 CFS	
		Season 3: May 15 to September 15	0.52 CFS	
<b>Reach 2: River Mile 125 to the mouth of the Deschutes River</b>				
76358	October 31, 1900	Season 1	0.07 CFS	55.08 AF
		Season 2	0.09 CFS	
		Season 3	0.17 CFS	

5. Within Reach 1, from North Canal Dam to River Mile 125, 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 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.
6. 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 and 537.470 unless otherwise specified by an order approving a new instream water right under these statutes.
7. The former place of use shall no longer be irrigated as part of certificates 76358 and 76714.

Dated at Salem, Oregon this 23<sup>rd</sup> day of August, 2005.

*for Phillip C. Ward*  
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Phillip C. Ward  
Director

Mailing date: AUG 24 2005