

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

In the Matter of the Proposed Allocation of)	FINAL ORDER
Conserved Water by North Unit Irrigation District,)	APPROVING
the Deschutes Resources Conservancy, and the)	ALLOCATION OF
Oregon Water Trust for Certificates 72279 and)	CONSERVED WATER
72283, Jefferson County, Oregon)	

Application History

On November 15, 2002, North Unit Irrigation District (NUID), the Deschutes Resources Conservancy, and the Oregon Water Trust filed an application for the allocation of conserved water under water right certificates 72279 and 72283. The Department assigned this conserved water application number C-24.

In 2002, NUID completed the piping of two irrigation canals eliminating seepage loss. The application proposes to allocate 50 percent of the conserved water created by piping the canals to the state for instream use and 50 percent to NUID.

On August 22, 2003, the applicants requested that the application be modified to reflect that the maximum annual duty diverted under certificate 72283 is 34,123.2 ac-ft. The rate and quantity conserved under this application for certificate 72283 was also amended to 1.74 cfs and 298.4 ac-ft.

On February 11, 2003, the Department published notice of the application, inviting public comments. On February 13, 20 and 27, 2003, the Bend Bulletin published notice, inviting public comments on the application. Timely public comments were received from Brad J. Harper, Executive Director of Water for Life, Inc. and Robert B. Towne, Field Manager, Deschutes Resource Area, Bureau of Land Management.

Applicable Law

Under chapter 726, Oregon Laws 1997, Sec. 2, any person holding a water right certificate issued under ORS 537.250, 537.630 or 539.140 or a decree may submit a conservation proposal to the Water Resources Commission for approval of a proposed conservation measure or a conservation measure implemented not more than five years prior to submitting the request. 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, may be 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.

This is a final order in other than a 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 137-004-0080 and OAR 690-001-0005 you may either petition for judicial review or petition the Director for reconsideration of this order.

Under chapter 726, Oregon Laws 1997, Sec. 3, 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.

If an application for the allocation of conserved water is approved, the Department shall issue orders covering the changes in the original water rights and once the conservation project is completed new certificates preserving the previously established priority of right(s) shall be issued to cover the unaffected portion of the water right(s) and separate new certificates describing the right created by the allocation of conserved water. ORS 537.470(6).

Under ORS 537.455 to 537.500; chapter 726, Oregon Laws 1997, as amended by chapter 394, Oregon Laws 1999; and OAR 690-018-0010 to 690-018-0090, the Department has considered the application and the public comments received and makes the following:

Findings of Fact

1. Water right certificates 72279 and 72283 were issued in the name of NUID with priority dates of February 28, 1913, and September 18, 1968, respectively.
2. NUID undertook a conservation project that consisted of piping two open ditches, irrigation laterals L-51-4 and L-52, which was completed in 2002. The applicant has indicated that they have not used any of the conserved water on new lands since the completion of the project. There is no evidence in the record to contradict this.
3. The proposed allocation of conserved water will result in reduced diversions for the uses allowed under the original rights. The reduced amounts and the quantity conserved is:

Certificate	Before Project	After Project	Conserved
72279	1101 cfs 262,059 ac-ft	1099.3 cfs 261,335 ac-ft	1.7 cfs 724 ac-ft
72283	200.00 cfs 34,123.2 ac-ft	198.26 cfs 33,824.8 ac-ft	1.74 cfs 298.4 ac-ft

4. The proposed allocation will not harm existing out-of-stream or in-stream water rights in the Upper Deschutes (above Bend), Middle Deschutes (above Lake Billy Chinook) or Crooked River because the diversions will be reduced and the downstream return flows are not available until Lake Billy Chinook.

Out-of-stream rights in the Lower Deschutes (below Lake Billy Chinook) are not harmed since there is always sufficient flow for these rights. In-stream flows in the Lower Deschutes are not harmed because the increased consumptive use of water on new acres is more than offset by the new instream water right and the attenuating effects of the return flow via ground water which is averaged equally throughout the year.

The monthly increased consumptive use from Deschutes River water averages 0.09 cfs, while the monthly increase in Deschutes River water flowing into Lake Billy Chinook averages

0.50 cfs. There will be no net decrease in Lower Deschutes River flows during any months. The monthly increased consumptive use from Crooked River water averages 0.08 cfs, while the monthly increase in Crooked River water flowing into Lake Billy Chinook averages 0.51 cfs. There will be a net decrease in Lower Deschutes River flows from November to March of 0.08 cfs, however this is more than offset by the 0.79 cfs increase from April to October.

5. The applicants have obtained the required land use approvals.
6. The proposed allocation of conserved water will not harm other water rights and, therefore, no reduction in the quantity of conserved water will be needed to mitigate for harm to existing water rights.
7. The new rate and duty for the existing water rights and for any out-of-stream use of conserved water shall be:

Certificate	Rate Per Acre (cfs)	Duty Per Acre(ac-ft)
Associated with 72279	1/40	5.25
Associated with 72283	1/40	5.25

8. In consultation with the Departments of Fish and Wildlife, Environmental Quality and Parks and Recreation, the Department has determined that conserved water is needed to support instream uses. Additional streamflows are needed in the Crooked and Deschutes Rivers to provide for improved habitat for incubation, rearing and migration of redband trout, bull trout, brown trout and mountain whitefish.
9. There are existing instream water rights in the Deschutes River that are within the reach for which the State's portion of the conserved water is proposed to be dedicated instream. These rights are shown below.

Application	Certificate	Priority Date
T8519	76687	September 1, 1899
MF197	59778	November 3, 1983
MF198	59777	November 3, 1983
MF199	59776	November 3, 1983

Deschutes River instream certificate 59776 is rarely met in the winter. Certificates 59778 and 59777 are met more frequently, but not always. The instream water right shall replace a portion of any existing instream water rights established pursuant to ORS 537.341 or 537.346 and be in addition to any instream water rights established pursuant to ORS 537.348 or 537.470. Minimum flow releases shall be treated in the same way.

The primary storage right for Wickiup Reservoir, certificate 51229, is for agricultural and domestic uses. This classification prevents a portion of the secondary water right, certificate 72279, from being converted to an instream water right. Therefore, in lieu of an instream water right the minimum flow release from Wickiup Reservoir which certificate 72279 is

subject to and which is described in the State Engineer's Orders dated January 20, 1955 and February 4, 1955, shall be increased by 0.76 cfs from 20 cfs to 20.76 cfs from October 16 to April 14. In the event that water stored in Wickiup Reservoir is authorized for maintenance of instream flow, NUID has indicated that they will consent to and support an allocation of 271.5 ac-ft of Wickiup Storage to instream flow maintenance below Wickiup Reservoir in lieu of the minimum flow release condition.

The minimum flow past the North Unit Crooked River pumps which certificate 72283 is subject to and which is described in the State Engineer's Orders dated May 6, 1969, shall be increased through the creation of an instream water right by 0.54 cfs from 10 cfs to 10.54 cfs from May 1 to September 16.

10. Under chapter 726, Oregon Laws 1997, Sec. 3, after determining the quantity of water needed, if any, 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. The applicant funded more than 50 percent of the project, however they request that 50 percent of the allocation of conserved water go to NUID and 50 percent to the state.

11. The combination of new rates and duties leads to the following allocation:

Certificate	Conserved Water	Applicant's Share	State's Share
72279	1.7 cfs 724 ac-ft	0.85 cfs 362 ac-ft	0.85 cfs 362 ac-ft
72283	1.74 cfs 298.4 ac-ft	0.87 cfs 149.2 ac-ft	0.87 cfs 149.2 ac-ft

12. The applicant's portion of the conserved water shall be allocated to NUID in the following manner.

Certificate	Applicant's Share of Conserved Water	Allocated	Location
72279	0.85 cfs 362 ac-ft	0.59 cfs 140.7 ac -ft	NW ¼ NW ¼ 10.2 ac SW ¼ NW ¼ 16.6 ac Section 21, Township 9 South, Range 14 East, WM
		0.26 cfs 221.3 ac-ft	To be temporarily protected as a minimum flow release from Wickiup Reservoir from April 1 to October 31; POD (SE ¼ NE ¼ Section 29, Township 22 South, Range 12 East, WM; 1,700 Feet South and 730 Feet West From the NE Corner of Section 29.) near RM 164 to Lake Billy Chinook. Permanent location still to be determined by NUID.
72283	0.87 cfs 149.2 ac-ft	0.87 cfs 149.2 ac-ft	SE ¼ NE ¼ 37.3 ac Section 20, Township 9 South, Range 14 East, WM

13. Certificate 72279 is for the use of live flow water from the Deschutes River and stored water from Wickiup Reservoir and Haystack Reservoir. Twenty-five percent of the water diverted under certificate 72279 is from natural flow, and 75 percent is from storage in Wickiup Reservoir. Therefore, 271.5 ac-ft of the instream allocation is attributable to a reduction of demand from Wickiup Reservoir. The stored water component that is allocated to the state may be released at any time, regardless of whether it is during or outside the irrigation season.

14. The state's portion of the conserved water shall be allocated in the following manner:

Certificate	State's Share of Conserved Water	Allocated	Time period and Location
72279	0.85 cfs 362 ac-ft	0.76 cfs 271.5 ac-ft from Wickiup Reservoir	October 16 through April 14; Wickiup Reservoir (SW ¼ NE ¼, Section 7, Township 22 South, Range 9 East, W.M.) to Lake Billy Chinook
		0.21 cfs; 90.5 ac-ft from natural flow	April 1 to October 31; POD (SE ¼ NE ¼ Section 29, Township 22 South, Range 12 East, WM; 1,700 Feet South and 730 Feet West From the NE Corner of Section 29.) near RM 164 to Lake Billy Chinook
72283	0.87 cfs 149.2 ac-ft	0.54 cfs 149.2 ac-ft	May 1 to September 16; POD (SW¼ NE ¼ Section 13, Township 14 South, Range 13 East, WM; 590 Feet North and 2,790 Feet East From the W ¼ Corner, Section 13) to Lake Billy Chinook

15. Transfer Application number T-8643 has been filed associated with this conserved water project and is being processed concurrently.
16. Under chapter 726, Oregon Laws 1997, Sec. 4, the priority of any right to the use of conserved water, including an in-stream water right, shall be either the same as or one minute after the priority of the water right held by the person implementing the conservation measures. The applicant has requested that the new acreage be assigned the same priority date as the existing rights. The applicant also requested that the rate and duty associated with the new lands be the same as what is allowed under the applicant's existing rights after the allocation of conserved water.
17. The applicant has completed the conservation project and has not requested additional time to finalize the allocation under OAR 690-018-0050(3)(i).
18. No other conditions or limitations are needed to prevent or mitigate for harm to existing water rights.

Ultimate Findings of Fact

The ultimate findings of fact that the Department must make are described in OAR 690-018-0050.

- A. The allocation of conserved water will result in a reduced diversion for the uses allowed under the original water rights.

- B. The proposed allocation of conserved water will not harm existing water rights.
- C. The application is consistent with local land use plans.
- D. No water is needed to mitigate for harm to existing water rights.
- E. The new rate and duty for the existing water rights held by the NUID and for any out-of-stream uses of the conserved water rights is shown below.

Certificate	Rate Per Acre (cfs)	Total Rate (cfs)	Duty Per Acre (ac-ft)	Total Duty (ac-ft)
Existing 72279	1/40	1099.3	5.25	261,335
Conserved and allocated from 72279	1/40	0.59	5.25	140.7
Conserved and temporarily reserved instream from 72279	1/40	0.26	5.25	221.3
Existing 72283	1/40	198.26	4.0	33,802
Conserved from 72283	1/40	0.87	4.0	149.2

- F. The conserved water allocated to the state is needed to support instream uses.
- G. Fifty percent of the conserved water will be allocated to the applicant, and 50 percent will be allocated to the state as shown below.

Certificate	Conserved Water	Applicant's Share	State's Share
72279	1.7 cfs 724 ac-ft	0.85 cfs 362 ac-ft	0.85 cfs 362 ac-ft
72283	1.74 cfs 298.4 ac-ft	0.87 cfs 149.2 ac-ft	0.87 cfs 149.2 ac-ft

- H. NUID may use the conserved water for out of stream purposes within its District boundaries as shown below.

Certificate	Applicant's Share of Conserved Water	Allocated	Location
72279	0.85 cfs 362 ac-ft	0.59 cfs 140.7 ac -ft	NW ¼ NW ¼ 10.2 ac SW ¼ NW ¼ 16.6 ac Section 21, Township 9 South, Range 14 East, WM
		0.26 cfs 221.3 ac-ft	To be temporarily leased instream from April 1 to October 31; POD (SE ¼ NE ¼ Section 29, Township 22 South, Range 12 East, WM; 1,700 Feet South and 730 Feet West From the NE Corner of Section 29.) near RM 164 to Lake Billy Chinook. Permanent location still to be determined by NUID.
72283	0.87 cfs 149.2 ac-ft	0.87 cfs 149.2 ac-ft	SE ¼ NE ¼ 37.3 ac Section 20, Township 9 South, Range 14 East, WM

The reach of the instream water right held by the state or minimum flow release as a result of the allocation of conserved water shall be as shown below.

Certificate	State's Share of Conserved Water	Allocated	Time period and Location
72279	0.85 cfs 362 ac-ft	0.76 cfs 271.5 ac-ft from Wickiup Reservoir	October 16 through April 14; Wickiup Reservoir (SW ¼ NE ¼, Section 7, Township 22 South, Range 9 East, W.M.) to Lake Billy Chinook
		0.21 cfs; 90.5 ac-ft from natural flow	April 1 to October 31; POD (SE ¼ NE ¼ Section 29, Township 22 South, Range 12 East, WM; 1,700 Feet South and 730 Feet West From the NE Corner of Section 29.) near RM 164 to Lake Billy Chinook
72283	0.87 cfs 149.2 ac-ft	0.54 cfs 149.2 ac-ft	May 1 to September 16; POD (SW¼ NE ¼ Section 13, Township 14 South, Range 13 East, WM; 590 Feet North and 2,790 Feet East From the W ¼ Corner, Section 13) to Lake Billy Chinook

- I. The applicant has completed the conservation project and has requested finalization of the allocation of the conserved water.
- J. No other conditions or limitations are needed to prevent or mitigate for harm to existing water rights.

Conclusion of Law

The project described in the application C-24 for allocation of conserved water is consistent with the criteria in ORS 537.455 to 537.500, chapter 726, Oregon Laws 1997, as amended by chapter 394, Oregon Laws 1999; and OAR Chapter 690, Division 018.

Now, therefore, it is ORDERED:

1. Certificate 72279 is cancelled. A new superseding certificate shall be issued for 1,099.3 cfs for irrigation of 49,916.0 acres. The place of use shall be those lands described under certificate 72279, as modified by any transfers completed pursuant to ORS 540.580, and T-8643. All other conditions and limitations of the existing water right shall be included in the superseding certificate.
2. NUID may divert conserved water at the points of diversion described in certificate 72279 for the irrigation of up to a total of 26.8 acres, being 10.2 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 16.6 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, all in Section 21, Township 9 South, Range 14 East, W.M. The right shall allow the use of 0.59 cfs with a duty of 140.7 ac-ft. The priority date shall be February 28, 1913. All other conditions and limitations of the right superseding 72279 shall be included. If the applicant notifies the Department that the respective right has become appurtenant to the specified lands and provides satisfactory proof, the Department shall issue a certificate for the use of water at the identified location.
3. Certificate 72283 is cancelled. A new superseding certificate shall be issued for 198.26 cfs for irrigation of 8,525.80 acres and 5.0 acres equivalent for industrial use. The place of use shall be those lands described under certificate 72283, as modified by any transfers completed pursuant to ORS 540.580, and T-8643. All other conditions and limitations of the existing water right shall be included in the superseding certificate.
4. NUID may divert conserved water at the points of diversion described in certificate 72283 for the irrigation of up to a total of 37.3 acres all in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 20, Township 9 South, Range 14 East, W.M. The right shall allow the use of 0.87 cfs with a duty of 149.2 ac-ft. The priority date shall be September 18, 1968. All other conditions and limitations of the right superseding 72283 shall be included. If the applicant notifies the Department that the respective right has become appurtenant to the specified lands and provides satisfactory proof, the Department shall issue a certificate for the use of water at the identified location.
5. The unused conserved water held by NUID shall be reserved instream as a minimum flow release until a permanent place of use is determined. The rate and duty remaining under certificate 72279 is 0.26 cfs and 221.3 ac-ft. This water will be released from April 1 to October 31. The reach where it will be protected is from the POD (SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 29, Township 22 South, Range 12 East, WM; 1,700 Feet South and 730 Feet West From the NE

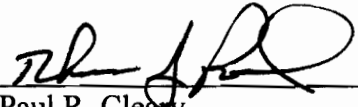
Corner of Section 29.) near RM 164 to Lake Billy Chinook. Once a permanent place of use is determined, NUID shall submit a statement consistent with OAR 690-018-0062 (3)(a) that identifies:

- a. The name and address of the person using the water;
 - b. A description of the type of beneficial use of the water;
 - c. A legal description of the place of use; and
 - d. A map that meets the standards in OAR 690-310-0050.
6. Prior to water being used at the new location, approval must be obtained from the Department. Once water has been used at the new location, if the applicant notifies the Department that the respective right has become appurtenant to the specified lands and provides satisfactory proof, the Department shall issue a certificate for the use of water at the identified location.
7. New certificates for instream water rights shall be issued which replace a portion of any existing instream water rights established pursuant to ORS 537.341 or 537.346 and be in addition to any instream water rights established pursuant to ORS 537.348 or 537.470. The new rights that shall be issued are for:
- a. The reach from NUID's point of diversion on the Deschutes River (SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 29, Township 22 South, Range 12 East, WM; 1,700 feet south and 730 feet west from the NE Corner of Section 29) near RM 164 to Lake Billy Chinook at a rate of 0.21 cfs and with a duty of 90.5 ac-ft. The period of use shall be April 1 through October 31. The priority date shall be February 28, 1913.
 - b. The reach from NUID's point of diversion on the Crooked River (SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 13, Township 14 South, Range 13 East, WM; 590 Feet North and 2,790 Feet East From the W $\frac{1}{4}$ Corner, Section 13) to Lake Billy Chinook at a rate of 0.54 cfs and with a duty of 149.2 ac-ft from May 1 through September 16. The priority date shall be September 18, 1968. This amount shall be additive to the 10 cfs minimum flow described in the stipulation signed on May 6, 1969, between NUID and the Oregon State Game Commission which is recorded in the Miscellaneous Records of the Water Resources Department.
8. In the event that Wickiup Reservoir, certificate 51229, ever becomes authorized for storage maintenance of an instream flow, a new instream water right certificate shall be issued for:

The stored water from Wickiup Reservoir (SW $\frac{1}{4}$ NE $\frac{1}{4}$, Sect. 7, T 22 S, R 9 E, W.M.) to Lake Billy Chinook (near RM 164) at a rate of 0.76 cfs and with a duty of 271.5 ac-ft. The period of use shall be October 16 through April 14. The priority date shall be February 28, 1913. This amount shall be additive to the 20 cfs minimum release described in the State Engineer's Orders of January 20, 1955 and February 4, 1955. Until this new instream certificate is issued, this same amount of water will be protected as a minimum flow release.

9. If the order approving Transfer Application number T-8643 is protested or appealed and, as result, does not become final, this order shall not become final.

Dated at Salem, Oregon this 4th day of February 2004.


Paul R. Cleary
Director