

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

In the Matter of Instream Transfer)	FINAL ORDER APPROVING A
Application T-11458 and Mitigation)	CHANGE IN PLACE OF USE AND
Project MP-175 for Groundwater Permit)	CHARACTER OF USE, APPROVAL OF
Application G-14908, Deschutes County)	A MITIGATION PROJECT, AND
)	PARTIAL CANCELLATION OF A
)	WATER RIGHT

Authority

ORS 540.505 to 540.580 establishes the process in which a water right holder may submit a request to transfer the point of diversion, place of use, or character of use authorized under an existing water right. OAR Chapter 690, Division 380 implements the statutes and provides the Department's procedures and criteria for evaluating transfer applications. OAR Chapter 690, Division 077 provides additional criteria for evaluating transfers to instream water rights.

OAR 690-505-0500 to 690-505-0630 establishes the process in which anyone may submit a ground water mitigation project to the Department for the purpose of providing mitigation for a ground water permit application in the Deschutes Ground Water Study Area.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicant

CITY OF REDMOND
243 EAST ANTLER AVE
REDMOND, OR 97756

CENTRAL OREGON IRRIGATION DISTRICT
1055 SW LAKE COURT
REDMOND, OR 97756

Findings of Fact

Background

1. On August 2, 2012, the City of Redmond and Central Oregon Irrigation District (COID) filed an application to change the place of use and character of use under Certificate 83571 to instream use. The Department assigned the application number T-11458.

This final order is subject to judicial review by the Court of Appeals under ORS 183.482. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.482(1). Pursuant to ORS 536.075 and OAR 137-003-0675, you may petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

2. On November 25, 2012, the Department received a request from Adam Sussman (GSI Water Solutions, Inc), agent for the applicant, to amend the application to reduce the number of acres of equivalent municipal use from 766.957 acres to 679.5 acres. The amendment also included a request to modify the application from a mitigation credit project to a mitigation project specifically for permit application G-14908, in the name of City of Redmond.
3. The portion of the right to be transferred is as follows:

Certificate: 83571 in the name of CENTRAL OREGON IRRIGATION DISTRICT

Use: 679.5 equivalent acres of Municipal Use

Priority Date: OCTOBER 31, 1900 and DECEMBER 2, 1907

Season of Use: April 1 to October 1, further limited as follows:

Maximum Quantity (Rate) that can be applied to an acre:

limited to 1/80th cubic foot per second (CFS) per acre during the period
April 1 through April 30 & October 1 through October 31

limited to 1/60th CFS per acre during the period May 1 through May 14 &
September 15 through September 30

limited to 1/32.4th CFS per acre during the period May 15 through
September 14

Maximum Duty that can be applied to an acre:

Not to exceed 9.91 acre-feet (AF) per acre per year

The above listed rates and duty 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, are not allowed the 45% transmission loss.

Source: DESCHUTES RIVER, tributary to the COLUMBIA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	¼ ¼	Measured Distances
17 S	12 E	WM	29	SE NE	POD #11 (COID NORTH CANAL): 850 FEET NORTH AND 630 FEET WEST FROM THE E1/4 CORNER OF SECTION 29

Authorized Place of Use:

Township	Range	Meridian	Sec	Acres Equivalent		
15	S	13	E	WM	16	679.5

4. The season of use described in Certificate 83571 contains scrivener errors. Consistent with the Decree for the Deschutes River (Volume 12, Page 282), the irrigation season should be:

Season of Use: April 1 to October 31, further limited as follows:
April 1 through April 30 and October 1 through October 31, described herein as Season 1.
May 1 through May 14 and September 15 through September 30, described herein as Season 2.
May 15 through September 14, described herein as Season 3.

5. Certificate 83571 is a deficient water right. If water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rates and duty allowed (described in Finding of Fact #3), the total rate and duty of the water right would be exceeded. In the event water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rates and duty allowed at the POD (described in Finding of Fact #3), the portion of the right involved in this instream transfer would be limited as described in the table below. These rates and duty are also the quantities by which the diversion at POD #11 under Certificate 83571 shall be reduced, if this instream transfer is approved.

Priority Date	Season 1	Season 2	Season 3	Seasonal Duty/Volume Limit
October 31, 1900	7.755 CFS	10.579 CFS	14.425 CFS	6412.03 AF
December 2, 1907			5.778 CFS	

Prior to review of this transfer, an error was identified in the tracking of the amount of water that may be diverted at the POD. The above quantities reflect correction of this tracking error.

6. A total of 3703.61 AF, excluding transmission losses, may be beneficially used annually for municipal use under the portion of Certificate 83571 proposed for transfer.
7. There is a supplemental right, Certificate 76714, appurtenant to the same lands on which the primary right Certificate 83571 is appurtenant and proposed to be transferred to instream use. The applicant has requested that the affected portion of Certificate 76714 be cancelled upon issuance of the Final Order approving T-11458.
8. Application T-11458 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 other ecological values; recreation; and pollution abatement. The application also proposes to establish mitigation in the Deschutes Ground Water Study Area for groundwater permit application G-14908.
9. Application T-11458 proposes to change the place of use of the right to create an instream reach from COID North Canal (POD #11) to Lake Billy Chinook (~RM120).
10. The applicants propose that water be protected instream during the period April 1 through October 26. Season 1 would end on October 26.
11. The applicant originally proposed the following quantities water to be transferred instream:

Certificate	Priority Date	Rate Instream	Volume Instream
83571	October 31, 1900	Season 1: 5.273 CFS Season 2: 7.030 CFS Season 3: 13.019 CFS	4180.3 AF

12. There are several existing instream water rights located within the same instream reach proposed by the applicant.

13. The applicant proposes that any instream water right established as a result of this instream transfer to 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 also proposes that any instream water right 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 application process), with an earlier priority date.
14. The applicant has requested to protect water instream under the October 31, 1900 priority date. Water is diverted at the point of diversion during Season 3 under both the 1900 and 1907 priority dates. The quantity of water diverted under the 1907 priority date during Season 3 makes up a balance of water allowed by the Decree for transmission losses. Transmission losses account for 45 percent of the water diverted at the point of diversion and are not transferable to instream use. The quantities of water proposed by the applicant to be transferred instream, as described in Finding of Fact #11, do not include the 45 percent transmission loss. The Department finds that water may be protected instream solely under the 1900 priority date.
15. Consistent with land use requirements, notice of the intent to file the instream transfer application was provided by the applicant to Deschutes and Jefferson Counties. However, notice of the intent to file the transfer was not provided to the City of Bend. Upon receipt of the transfer application, the Department provided notice of the proposed action to Deschutes and Jefferson Counties. Additionally, the Department provided notice of the proposed action to the City of Bend on October 4, 2012.
16. Notice of the application for transfer was published on August 14, 2012, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
17. On October 25, 2012, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11458 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of November 23, 2012, for the applicants to respond. On November 6, 2012, Adam Sussman (GSI Water Solutions, Inc.), agent for the applicants, submitted comments on the draft Preliminary Determination with regard to conditions on the use of the mitigation project. On November 26, 2012, Adam Sussman, on behalf of the applicants, also submitted a request to amend the application, as described in Finding of Fact #2. Changes to the application are reflected in Findings of Fact #3, 5, #22, and in the Mitigation Project Review Section of this document.
18. On December 11, 2012, the Department mailed a copy of the revised draft Preliminary Determination proposing to approve Transfer Application T-11458 to the applicants. The revised draft Preliminary Determination cover letter set forth a deadline of January 9, 2013, for the applicants to respond. On December 13, 2012, Adam Susman (agent for the applicants), submitted comments on the revised draft Preliminary Determination. The comments were primarily editorial in nature. The applicant requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to cancel a portion of the underlying right, Certificate 76714.

19. On January 25, 2013, the Department issued a Preliminary Determination proposing to approve Transfer T-11458 and mailed a copy to the applicants. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on February 12, 2013, and in the Redmond Spokesman newspaper on February 13 and 20, 2013, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.

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

- 20. The portion of the right proposed for transfer under T-11458 was leased instream under IL-1230 during the term July 10, 2012 through October 31, 2012. Consequently, 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.
- 21. A diversion structure and pipe/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 Application T-11458.
- 22. The quantities to be protected instream require modification to prevent injury and enlargement. As identified in Finding of Fact #2, the application has been amended to reduce the number of acres equivalent of municipal use to be transferred to instream use. Based on the amended number of acres, the following may be protected :

Certificate	Priority Date	Rate Instream	Volume Instream
83571	October 31, 1900	Season 1 (modified to end October 26): 4.672 CFS Season 2: 6.229 CFS Season 3: 11.535 CFS	3703.61 AF

- 23. The proposed change, as modified, would not result in enlargement of the right.
- 24. The proposed change, as modified, would not result in injury to other water rights.
- 25. The amount and timing of the proposed instream flow, as modified, is allowable within the limits and use of the original water right.
- 26. The protection of flows within the proposed reach 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) Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the reach of the instream water right.

27. Within the proposed reach, there are existing instream water rights established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) located between the North Canal Dam and the mouth of the Deschutes River, which includes the use of water for fish habitat, aquatic life, recreation, aesthetics, and pollution abatement. There are presently no instream water rights within the proposed reach created as a result of ORS 537.346 or ORS 537.341. However, there is a pending instream water right application filed by the Oregon Department of Fish and Wildlife (ODFW) pursuant to ORS 537.341 to establish an instream water right for this reach for anadromous and resident fish rearing, which if approved will have a priority date of September 19, 1990.
28. In addition, 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. Within the proposed reach, flows for the designated Scenic Water way are at times not met during the requested periods for instream protection.
29. Portions of the proposed reach on the Deschutes River are also on the Department of Environmental Quality's 303d list of water quality limited streams and a TMDL (Total Maximum Daily Load) study is underway.
30. The proposed instream water right, to be established under ORS 537.341 (state agency application process), within the proposed reach on the Deschutes River is sufficient to protect the monthly quantities of water necessary for various fishlife stages, supporting aquatic life, and minimizing pollution, but may not always met and will have a priority date junior in comparison to other water rights on the Deschutes River. The proposed instream use will have a priority date of October 31, 1900. By replacing a portion of instream rights created at the request of state agencies or under the minimum streamflow conversion process, the proposed instream right will provide protection for streamflows previously identified as necessary for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values; recreation; and pollution abatement under an earlier priority date.
31. By adding to other 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, a new instream water right established by this transfer would provide protection for additional streamflows necessary for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values; recreation; and pollution abatement.
32. During the period April 1 to October 26, 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 be in addition to instream water rights established pursuant to ORS 537.348 or ORS 537.470 unless otherwise specified by an order approving a new instream water right under these statutes.

33. The total monthly quantities of water to be protected under the proposed instream right, in addition to the existing instream water rights, within the proposed reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

Partial Cancellation of a Water Right

34. There is an existing supplemental right, Certificate 76714, appurtenant to the portion of the land on which Certificate 83571 is proposed for transfer to instream use. On December 20, 2012, the applicants submitted an affidavit certifying that the affected portion under Certificate 76714 has been abandoned.

35. The portion of the right to be cancelled is:

Certificate: 76714 in the name of CENTRAL OREGON IRRIGATION DISTRICT
Use: MUNICIPAL USE for 679.5 equivalent acres
Priority Date: FEBRUARY 28, 1913
Source: CRANE PRAIRIE RESERVOIR, constructed under permit R-1687, tributary to the DESCHUTES RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
21 S	08 E	WM	17	NE NE	CRANE PRAIRIE RESERVOIR
17 S	12 E	WM	29	SE NE	POD #11 (COID NORTH CANAL) 850 FEET NORTH AND 630 FEET EAST FROM THE N1/4 CORNER OF SECTION 29

Authorized Place of Use:

Township	Range	Meridian	Sec	Acres Equivalent
15 S	13 E	WM	16	679.5

36. The Department has information that POD #11 (COID North Canal) described in the Certificates 83571 and 76714 is the same diversion point. The location coordinates described in Certificate 76714 contain errors. The location coordinates should be:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	12 E	WM	29	SE NE	POD #11 (COID NORTH CANAL) 850 FEET NORTH AND 630 FEET <u>WEST</u> FROM THE <u>EAST</u> 1/4 CORNER OF SECTION 29

Mitigation Project Review Criteria

37. On August 2, 2012, the City of Redmond and COID (the Applicants) submitted the instream transfer application and requested that the transfer be used to establish mitigation credits in the Deschutes Ground Water Study Area.
38. The Department assigned this mitigation credit project number MP-175.
39. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on September 25, 2012. No comments were received in response to this notice.

40. The Department consulted with representatives from ODFW, DEQ, Oregon Parks and Recreation Department, Oregon Department of State Lands, the Oregon Department of Agriculture, and the Department's Watermaster pursuant to OAR 690-521-0300 (7) and OAR 690-505-0630 (2) on September 25, 2012. No comments were received in response to this notice.
41. No changes were made to the instream transfer as a result of comments received or consultation with the above named agencies.
42. On November 26, 2012, Adam Sussman (GSI Water Solutions, Inc.), as agent for the applicant, submitted a request to amend the application to a mitigation project for permit application G-14908, in the name of City of Redmond.
43. Ground Water Permit Application G-14908 has been determined to have a mitigation obligation of 1746.0 AF in the General Zone of Impact, as described in the Final Order Incorporating a Settlement Agreement issued proposing to approve this application on November 20, 2009. Mitigation must be provided in General Zone of Impact, which is anywhere in the Deschutes River subbasin above the Madras Gage.
44. The portion of Certificate 83571 proposed for transfer to instream use is for municipal use for the City of Redmond. The Department has identified that this right may be used as mitigation for City of Redmond's Groundwater Permit Application G-14908.
45. The proposed transfer of 679.5 acres equivalent of municipal use to instream use will provide 1746.0 AF of mitigation water for City of Redmond's Groundwater Permit Application G-14908.
46. The proposed reach would protect instream flows within the Middle Deschutes and General Zones of Impact. Mitigation water generated by this instream transfer may be used to satisfy the mitigation obligation of the City of Redmond's Groundwater Permit Application G-14908 in the General Zone of Impact.
47. Based upon findings of Fact #43 through #46, the Department has determined that the proposed mitigation project will satisfy the mitigation obligation for Groundwater Permit Application G-14908.
48. A total of 3703.61 AF is proposed to be transferred to instream use and 1746.0 AF of that, as identified above, may be used for mitigation purposes. The amount of water transferred instream and not used for mitigation purposes will benefit instream flow.
49. Mitigation water generated by this project may be used to satisfy the mitigation obligation for Ground Water Permit Application G-14908 upon completion of the approved project (the instream transfer) by the applicants and verification by the Department that the project is complete. The issuance of a certificate for the proposed instream water right shall result in completion of the project and verification that the project is complete.

- Mitigation water generated by this project may be available for mitigation use the first calendar year that water is protected instream under a new instream water right certificate.

Conclusions of Law

The changes in character of use and place of use to instream use proposed in application T-11458 are consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075 and the abandoned portion of the right should be cancelled.

This mitigation project results in mitigation pursuant to ORS 537.746 and OAR 690-505-0610.

Now, therefore, it is ORDERED:

- The changes in character of use and place of use to instream use proposed in application T-11458 are approved. The portion of the right that has been abandoned is cancelled.
- Water right certificate 83571 is modified and a new instream water right certificate shall be issued. The Department shall issue a new water right certificate to supersede certificate 83571 upon a determination that it is necessary to produce a certificate to describe that portion of the right not affected by this transfer. A new certificate confirming the instream water right will be issued. Approval of this transfer shall reduce the amount of water lawfully available under the remaining portion of Certificate 83571 by the following:

Priority Date	Season 1	Season 2	Season 3	Duty
October 31, 1900	7.755 CFS	10.579 CFS	14.425 CFS	6412.03 AF
December 2, 1907			5.778 CFS	

- Certificate 76714 is modified. The Department shall issue a new water 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 #35. Modification of this supplemental water right will be decreased by 679.5 acres equivalent of municipal use to which stored water may be applied for supplemental use under the right.
- The instream water right shall provide for the protection of streamflows for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values; pollution abatement; and recreation in the Deschutes River from COID North Canal POD #11 (as described in finding of Fact #3) to Lake Billy Chinook (RM120).
- The quantities of water to be protected under the instream water right are:

Certificate	Priority Date	Rate Instream
83571	October 31, 1900	Season 1 (modified to end October 26): 4.672 CFS Season 2: 6.229 CFS Season 3: 11.535 CFS

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.
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 Certificate 83571 and any related decree as may be germane to instream rights.
10. The former place of use of the transferred water shall no longer receive water as part of the portion of this right transferred to instream use.
11. **Mitigation Water:** Mitigation Water generated by this project will be used to satisfy the mitigation obligation for Groundwater Permit Application G-14908 upon completion of the project and verification by the Department that the project has been completed as proposed. Issuance of a new instream water right certificate, as described herein, results in completion of the project and verification by the Department that the project is complete. The project generates **1746.0 AF** of Mitigation Water in the **General Zone of Impact**. Mitigation Water generated by this project will be available for use as mitigation beginning the first calendar year that water will be protected instream under the new instream water right.
12. The instream certificate created from this transfer shall be identified as a mitigation project/source for a ground water permit, issued as a result of approval of Ground Water Permit Application G-14908. Within the instream certificate, the volume of mitigation water, the zone of impact in which the mitigation water was generated and may be used, and the volume of water dedicated instream solely for instream benefits shall also be specified.

Dated at Salem, Oregon this 29th day of March, 2013.



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

Mailing date: APR 03 2013