

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

In the Matter of Instream Transfer)	FINAL ORDER APPROVING OF A
Application T-11163 and Mitigation Credit)	CHANGE IN PLACE OF USE AND
Project MP-143, Deschutes and Klamath)	CHARACTER OF USE AND
Counties)	PRELIMINARY AND FINAL AWARD
)	OF MITIGATION CREDITS

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 690-521-0100 to 690-521-0600 establishes the process in which anyone may submit a ground water mitigation project to the Department for the purpose of establishing mitigation credits in the Deschutes Ground Water Study Area.

Pursuant to OAR 690-521-0400 (2), any mitigation credits awarded to a mitigation project are valid until used to fulfill a mitigation obligation of a ground water use in the Deschutes Ground Water Study Area. Valid mitigation credits may be assigned by any person or recognized mitigation bank to any person or other mitigation bank. Mitigation credits are used when a person submits to the Department documentary evidence that valid credits have been obtained and assigned to satisfy a mitigation obligation.

Applicant

PAULINA MEADOWS LLC
C/O LARRY KEITH
250 N HANSARD
LEBANON, OR 97355

Findings of Fact

Background

1. On December 9, 2010, Paulina Meadows LLC, Larry Keith, filed an application to change the place of use and character of use under Certificate 86022 to instream use. The Department assigned the application number T-11163.

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. While evaluating the proposed application, the Department identified that a portion of the lands on which the water right proposed for transfer is appurtenant are sub-irrigated and the water right could not be transferred without enlargement. On March 16, 2011, the Department received a request to amend the application to remove the following 11.4 acres of irrigation from the transfer application:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres
22 S	10 E	WM	15	SE SE	2802	7.8
22 S	10 E	WM	22	NE NE	100	3.6

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

Certificate: 86022 in the name of LaPine Cooperative Water Association (confirmed by Deschutes River (F))

Use: IRRIGATION of 42.5 ACRES

Priority Date: 1897

Rate: April 1 to May 23 & August 20 to November 1
 Limited to 1/80th cubic foot per second (cfs) per acre: 0.53 cfs
 May 23 to August 20
 Limited to 1/40th cfs per acre: 1.06 cfs

Duty: Not to exceed 4.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Period of Use: April 1 to November 1

Source: LITTLE DESCHUTES RIVER, tributary to the DESCHUTES RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
23 S	9 E	WM	34	SW SW	550 FEET NORTH AND 1150 FEET EAST FROM SW CORNER OF SECTION 34

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres
22 S	10 E	WM	15	SE SE	2802	14.9
22 S	10 E	WM	22	NE NE	100	27.6

4. A total of 170.0 acre-feet of water may be beneficially used annually under the portion of existing Certificate 86022 proposed for transfer.
5. Application T-11163 proposes to change the character of use to instream use for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; recreation; pollution abatement; and to establish mitigation credits in the Deschutes Ground Water Study Area.
6. Application T-11163 proposes to change the place of use of the portion of the water right, described in Finding of Fact #3, to create an instream reach from the POD to the mouth of the Little Deschutes, into the Deschutes River and down to Lake Billy Chinook.

7. The original application proposed the quantities water to be transferred instream to be protected follows:

Certificate	Priority Date	Rate Instream	Volume Instream	Instream Period
86022	1897	1.35 CFS @ 1/40 th 0.67 CFS @ 1/80 th	215.6 AF	April 1 through October 31

8. The applicant proposes that an instream water right established as a result of this instream transfer be additive to any 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 an instream water right established as a result of this instream transfer replace a portion of any existing instream rights established pursuant to ORS 537.246 (minimum streamflow conversion) and ORS 537.341 (state agency instream application process), with an earlier priority date.
9. Notice of the application for transfer was published on December 21, 2010, pursuant to OAR 690-380-4000. No comments were filed in response to the notice within the 30 day comment period ending January 19, 2011.
10. The applicant provided notification of the proposed action to Deschutes, Jefferson, and Wasco Counties, the cities of LaPine, Maupin, and Bend, and the Confederated Tribes of Warm Springs. Additionally, the Department provided notice of the proposed action to these local governments upon receipt of Transfer Application T-11163. On February 2, 2011, the Department also provided notice of the proposed action to Klamath County.
11. On March 16, 2011, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11163 to the applicant. The draft Preliminary Determination set forth a deadline of April 15, 2011, for the applicant to respond. The applicant requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
12. On March 17, 2011, the Department issued a preliminary determination proposing to approve Transfer T-11163 and mailed a copy to the applicant. Additionally, notice of the preliminary determination for the transfer application was published on the Department's weekly notice on March 22, 2011, and in The Bulletin newspaper on March 24, March 31, and April 7, 2011 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)

13. The portion of the right proposed to be transferred to instream use was leased instream within the last five years under instream lease IL-740 and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.

14. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Application T-11163.
15. The applicant has requested to protect water instream at the full rate and duty allowed for the amount of irrigation proposed for transfer in the original application (53.9 acres) over the entire irrigation season (see Finding of Fact #7), which runs April 1 through October 31. The number of acres of irrigation that may be transferred to instream use has been reduced based on Findings of Fact #2 and #3. In addition, the Department cannot protect the water over the entire irrigation season at the full rate and duty without enlargement of the water right and injury to other surface water rights. Therefore, the proposed instream use requires modification to prevent enlargement of the water right and injury to other surface water rights.
16. Comments have been received from ODFW on similar transfer applications submitted previously which requested to protect water instream at the full rate and duty over the entire irrigation season. ODFW recommended in these cases that instream flows be protected up to the maximum rates allowed during the period July 1 through October 31. If any additional water is available, ODFW also recommended that instream flows be protected up to the maximum rate allowed during the month of April.
17. At the full rates and duty, the Department also cannot protect water instream during the period July 1 through October 31 without injury and enlargement. The Department's Watermaster has suggested that the recommended instream period be reduced by a few days starting in July to allow water to be protected instream during the periods of lowest flow on the Little Deschutes River through October 31.
18. A portion of the water diverted at the POD returns to the Little Deschutes River below the POD 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 to account for both surface and subsurface return flows.

The hydrogeologic evaluation of where subsurface return flows occur is generally based on the following information: 1) the local shallow and regional ground water elevations, 2) the shallow and regional head gradient (i.e. ground water flow direction), 3) elevation of nearby streams, 4) elevation of closest gaining stream reaches, 5) distance from nearby streams and gaining stream reaches, and 6) local geologic information.

When evaluating for return flows, the Department generally considers the place of use as a whole and where the majority of return flows occur based upon the presence of surface return flows (overland flow) and the factors described above for any subsurface return flows.

A portion of the water diverted to the place of use returns to the Little Deschutes River through Long Prairie Slough. Remaining return flows take the form of subsurface return flows. Subsurface returns would also return to the river system in the area of the confluence of Long Prairie Slough and the Little Deschutes River, at approximately River Mile 28.6.

The instream flows at River Mile 28.6 have been reduced to the consumptive portion of the right to account for both surface and subsurface return flows

19. Also, the segment of the reach on the mainstem Deschutes River between the confluence with the Little Deschutes River and Bend is a losing reach and loses approximately 7% of its flows. The quantity of water that may be protected instream in the mainstem Deschutes River requires additional modification to prevent injury and enlargement.
20. Based on Findings of Fact #15 through # 19, the Department proposes to modify the quantities to be transferred and protected instream as follows:

Instream Reach 1: From POD (as described in Finding of Fact #3) to the confluence of the Little Deschutes River and Long Prairie Slough (approximately River Mile 28.6)

Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
1897	1.06	169.25	July 7 through August 19
	0.53		August 20 through October 31

Instream Reach 2: From the confluence of the Little Deschutes River and Long Prairie Slough (approximately River Mile 28.6) to the mouth of the Little Deschutes River

Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
1897	0.33	76.5	July 7 through October 31

Instream Reach 3: In the Deschutes River from the confluence with the Little Deschutes River to Lake Billy Chinook

Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
1897	0.31	71.1	July 7 through October 31

21. The proposed change, as modified, would not result in enlargement of the right.
22. The proposed change, as modified, would not result in injury to other water rights.
23. The amount and timing of the proposed instream flow as described in Finding of Fact #20 is allowable within the limits and beneficial use of the original water right.
24. The protection of flows as described in Finding of Fact #20 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. The reach for an instream water right is typically from the point of diversion on the source stream to the mouth of that source stream. However, water may be protected further downstream if the quantity of water is measureable in the receiving stream, in this case, the Deschutes River. The quantity of water proposed to be protected instream in Reach #3 is measureable in the mainstem Deschutes River, consistent with OAR 690-077-0015(8), and, therefore, the reach may extend into the Deschutes River and down to Lake Billy Chinook.

- c) There are known areas of natural loss of streamflow to the river bed downstream from the point of diversion that have been accounted for in Reach #3; and
- d) The quantity of water to be protected instream in Reach #2 has been reduced to account for return flows. Any return flows resulting from the exercise of the existing water right would re-enter the river downstream from the point of diversion approximately at River Mile 28.6 (confluence of the Little Deschutes River and Long Prairie Slough) on the Little Deschutes River.

25. Within the proposed instream reaches on the Little Deschutes River, there is an existing instream water right, Certificate 73226, established under ORS 537.341 (state agency application process), for the purpose of fish migration, spawning, egg incubation, fry emergence and juvenile rearing. There are also existing instream water rights established under ORS 537.348 (instream transfer process) for the purpose of conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; pollution abatement; and recreation.

The Little Deschutes River is also on the Oregon Department of Environmental Quality's (DEQ) 303d list of water quality limited streams for a variety of water quality concerns.

26. Within the proposed instream reach on the mainstem Deschutes River, there are several existing instream water rights. There is one instream water right, Certificate 59777, established under ORS 537.346 (minimum streamflow conversion) for the purpose of supporting aquatic life and minimizing pollution, from the confluence of the Little Deschutes River to the confluence with Spring River. There is another instream water right, Certificate 59778, also established under ORS 537.346 for the purpose of supporting aquatic life and minimizing pollution, from the confluence with Spring River to the Central Oregon Irrigation District (COID) North Canal Dam. There is also a pending instream water right application, IS-70695, filed by the ODFW pursuant to ORS 537.341 (state agency application process), with the Department to establish an instream water right from the COID North Canal Dam to Lake Billy Chinook. The remaining instream water rights were established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) and are generally located between the Central Oregon Canal and Lake Billy Chinook.

This portion of the Deschutes River is a designated State Scenic Waterway. The State Scenic Waterway designation provides for protection of flows necessary to maintain the free flowing character of the Deschutes River for fish and wildlife habitat, and recreation, which is a matter of statutory policy. In addition to flows for the designated Scenic Waterway, which are not always met during requested period for instream protection, this segment of the Deschutes River is on DEQ's 303d list of water quality limited streams and a TMDL (Total Maximum Daily Load) study is underway.

27. The existing instream water rights, established under ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency application process), within the proposed reach on the Little Deschutes River and the mainstem Deschutes River are sufficient to protect the

monthly quantities of water necessary for various fishlife stages, supporting aquatic life and minimizing pollution, but are not always met. By replacing a portion of these instream water rights, any instream water right created as a result of this transfer will provide for protection of streamflows identified as necessary for various fishlife stages, supporting aquatic life, and minimizing pollution, under an earlier priority date.

28. 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 portion of the proposed reach located on the mainstem Deschutes River, a new instream water right established by this transfer would provide protection for additional streamflows necessary for fish and aquatic habitat enhancement, pollution abatement and recreation.
29. During the period July 7 through October 31, any instream water right established by this transfer application may 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.
30. The total monthly quantities of water proposed to be protected instream (as described in Finding of Fact #20) within the proposed reach will provide for a beneficial purpose and, in conjunction with other existing instream water rights, will not exceed the estimated average natural flow.

Preliminary Award of Deschutes Basin Mitigation Credits

31. Paulina Meadows, LLC (the Applicant) has requested this instream transfer application be used to establish mitigation credits in the Deschutes Ground Water Study Area. The Applicant has requested that any mitigation credits generated from this project be assigned to Paulina Meadows, LLC.
 32. The Department assigned this mitigation credit project number MP-143.
 33. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on February 8, 2011. No comments were received in response to this notice.
 34. 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 February 4, 2011. Comments were received from the Oregon Parks and Recreation Department. These comments identified that additional instream flow will potentially benefit aquatic resources and improve the fishery resource.
 35. No changes were made to the instream transfer as a result of comments received or consultation with the above named agencies.
14. As part of the public notice of the mitigation project, the Department identified that the project may result in 97.0 mitigation credits. However, since the application was originally

submitted to the Department the number of acres of irrigation proposed for transfer has been reduced to 42.5 acres. Irrigation of 42.5 acres has an average consumptive use of 76.5 AF. However, this volume may only be protected instream in the Little Deschutes River. The quantity of water that may be protected instream downstream of the Little Deschutes River requires modification to account for streamflow losses on the Deschutes River, which reduces the amount of mitigation available from the project. In the Little Deschutes River up to 76.5 AF may be protected instream. This is the amount of mitigation available in the Little Deschutes Zone of Impact. Only up to 71.1 AF of this quantity may be protected instream in the mainstem Deschutes River. This is the amount of mitigation available in the Upper Deschutes, Middle Deschutes and General Zones of Impact.

36. Therefore, a maximum of 76.5 mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to Paulina Meadows, LLC. The mitigation credits may be used to mitigate for ground water permit applications and existing conditioned ground water permits and certificates, providing mitigation pursuant to the Deschutes Ground Water Mitigation Rules, OAR Chapter 690, Division 505, within the Little Deschutes, Upper Deschutes, Middle Deschutes and General Zones Zone of Impact. However, the number of mitigation credits that may be used in the Upper Deschutes, Middle Deschutes and General Zones of Impact may not exceed 71.1 mitigation credits.
37. A total of 169.25 AF (within Reach #1) is proposed to be transferred to instream use and 76.5 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.
38. The Department shall award final mitigation credits upon completion of the approved project by the applicant and verification by the Department that the project is complete. The issuance of a certificate(s) for the proposed instream water right shall result in completion of the project and verification that the project is complete. Mitigation credits awarded to this mitigation credit project (MP-143) may be valid the first year that water is protected instream under any new instream water right issued as a result of this transfer.

Conclusions of Law

The changes in character of use and place of use to instream use proposed in application T-11163 are consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075.

This mitigation project results in mitigation credits pursuant to ORS 537.746 and OAR 690-521-0300 and 690-521-0400.

Now, therefore, it is ORDERED:

1. The changes in character of use and place of use to instream use proposed in application T-11163 are approved.

2. Water right certificate 86022 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will be issued describing that portion of the right not affected by this transfer.
3. The instream water right shall provide for the protection of streamflows from the authorized point of diversion on the Little Deschutes to Lake Billy Chinook on the mainstem Deschutes River. The quantities to be protected under the instream water right are:

Instream Reach 1: From POD (as described in Finding of Fact #3) to the confluence of the Little Deschutes River and Long Prairie Slough (approximately River Mile 28.6)

Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
1897	1.06	169.25	July 7 through August 19
	0.53		August 20 through October 31

Instream Reach 2: From the confluence of the Little Deschutes River and Long Prairie Slough (approximately River Mile 28.6) to the mouth of the Little Deschutes River

Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
1897	0.33	76.5	July 7 through October 31

Instream Reach 3: In the Deschutes River from the confluence with the Little Deschutes River to Lake Billy Chinook

Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
1897	0.31	71.1	July 7 through October 31

4. 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.
5. 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 identified in a subsequent order establishing a new instream water right under these statutes.
6. 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 86022 and any related decree.
7. The former place of use of the transferred water shall no longer receive water as part of this right.
8. **Final Award of Mitigation Credits** may be made 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. Therefore, mitigation credits, in the amount of **76.5 credits**, as described herein, are awarded to this mitigation project and assigned to Paulina Meadows, LLC. Mitigation credits awarded may

be used to satisfy a mitigation obligation of a ground water permit applicant and/or ground water permit/certificate holder in the **Little Deschutes Zone of Impact**. Of the 76.5 mitigation credits awarded to this project, up to **71.1** of those credits may also be used in the **Upper Deschutes, Middle Deschutes and General Zones of Impact**. Any mitigation credits awarded will begin being valid the first year that water is to be protected instream under a new instream water right resulting from this mitigation project.

9. Mitigation credits are valid until used to satisfy a mitigation obligation of a ground water permit applicant and/or ground water permit/certificate holder within the Deschutes Ground Water Study Area pursuant to the Deschutes Ground Water Mitigation Rules. Mitigation credits are used when a person submits to the Department documentary evidence that valid credits have been obtained and assigned to satisfy a mitigation obligation.

Dated at Salem, Oregon this 25 day of May 2011.



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

Mailing date: MAY 27 2011