

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

In the Matter of Instream Transfer)	FINAL ORDER APPROVING A
Application T-11300 and Mitigation Credit)	CHANGE IN PLACE OF USE AND
Project MP-159, Deschutes County)	CHARACTER OF USE AND
)	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 groundwater 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

CITY OF SISTERS
PO BOX 39
SISTERS OR 97759

Agent

Adam Sussman
GSI Water Solutions, Inc.
1600 Western Blvd., Suite 240
Corvallis, OR 97333

Findings of Fact

Background

1. On September 23, 2011, City of Sisters filed an application to change the place of use and character of use under Certificate 67706 to instream use. The Department assigned the application number T-11300.

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. The applicant initially proposed that Recreation be included as a public use for the instream water right. On November 21, 2011, the applicant requested to amend the application such that Recreation would not be included as a public use for the instream water right.
3. The right to be transferred is as follows:

Certificate: 67706 in the name of CITY OF SISTERS (confirmed by decree of the Circuit Court of the State of Oregon for Crook County. The decree is of record at Salem, in the Order Record of the WATER RESOURCES DIRECTOR, in Volume 1, at Page 471.)

Use: MUNICIPAL USE

Priority Date: 1885

Rate: 0.20 CUBIC FOOT PER SECOND (CFS)

Limit: The right to the use of the water for the above purpose is restricted to beneficial use on the lands or place of use described and is subject to all other conditions and limitations contained in said decree.

Source: POLE CREEK, tributary to WHYCHUS CREEK (formerly SQUAW CREEK)

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	WM	19	NE NE	1,540 FEET SOUTH 36 DEGREES WEST FROM THE NE CORNER OF SECTION 19

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q
15 S	10 E	WM	4	NW NE
15 S	10 E	WM	4	NE SW
15 S	10 E	WM	4	NW SW
15 S	10 E	WM	4	SW SW
15 S	10 E	WM	4	SE SW
15 S	10 E	WM	4	SW SE
15 S	10 E	WM	5	NE SW
15 S	10 E	WM	5	SE SW
15 S	10 E	WM	5	NW SE
15 S	10 E	WM	5	SW SE
15 S	10 E	WM	5	SE SE
15 S	10 E	WM	8	NE NE
15 S	10 E	WM	8	SE NE
15 S	10 E	WM	9	NE NE
15 S	10 E	WM	9	NW NE
15 S	10 E	WM	9	SW NE
15 S	10 E	WM	9	SE NE
15 S	10 E	WM	9	NE NW
15 S	10 E	WM	9	NW NW
15 S	10 E	WM	9	SW NW
15 S	10 E	WM	9	SE NW

4. On September 23, 2011, City of Sisters filed a concurrent notification of intent to make a change in point of diversion, under Certificate 67706, due to government action pursuant to ORS 540.510(6). The Department assigned the notification number T-11301.

5. On November 7, 2011, the Department issued the Final Order approving the change in point of diversion, as evidenced by Special Order Volume 85, Pages 611 to 613. The new point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	9 E	WM	35	NW SE	3,825 FEET SOUTH AND 2,170 FEET WEST FROM THE NE CORNER OF SECTION 35

6. The Final Order approving T-11301 contained a scrivener's error in Finding of Fact #2. The correct certificate number is 67706. This certificate is correctly identified throughout the rest of the final order approving the change in point of diversion due to government action.
7. Application T-11300 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; and pollution abatement; and to establish mitigation credits in the Deschutes Ground Water Study Area.
8. Application T-11300 proposes to change the place of use of the right to create an instream reach from the point of diversion on Pole Creek, as described in Finding of Fact #5, to the mouth of Wychus Creek.
9. The applicant proposes the quantities of water to be transferred instream to be protected as follows:

Instream Period	Rate (cfs)	Volume (acre-feet)
Year-round (January 1 – December 31)	0.2	144.79

10. The applicant proposes that any instream water right established as a result of this instream transfer 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 instream application process), with an earlier priority date.
11. The applicant provided notification of the proposed action prior to submitting the transfer application to Deschutes County and the City of Sisters. Additionally, the Department provided notification of the proposed action to Deschutes County and the City of Sisters upon receipt of Transfer Application T-11300. Notice of the proposed action was also provided to Jefferson County on November 16, 2011. No comments were filed in response to these notices.
12. Notice of the application for transfer was published on October 4, 2011, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
13. On January 23, 2012, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11300 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of February 21, 2012, for the applicant to

respond. On February 3, 2012, GSI Water Solutions, on behalf of the applicant submitted comments on the draft Preliminary Determination and requested that the Department proceed with issuance of a Preliminary Determination.

14. The Department considered the comments and made some modifications to Findings of Fact #17 and #35. No substantive changes are being proposed as a result of review of these comments.
15. On February 22, 2012, the Department issued a preliminary determination proposing to approve Transfer T-11300 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 February 28, 2012, and in the Bend Bulletin newspaper on February 26, March 4, and March 11, 2012 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)

16. 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. The right was leased instream under IL-1079 beginning October 20, 2010, and was to extend through December 31, 2014, as evidenced by Special Order Volume 82, Page 1134. In addition, the applicant has submitted an affidavit asserting that the water right is not subject to forfeiture under ORS 540.610 (2). There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
17. Certificate 67706 is a municipal water right held by a municipality. According to the applicant, the full rate of water was previously diverted and conveyed through a transmission main to the City of Sisters. It appears that a diversion structure and pipeline sufficient to use the full amount of water allowed under the existing right was present within the five-year period prior to submittal of Application T-11300.
18. The proposed change would not result in enlargement of the right.
19. The proposed change would not result in injury to other water rights.
20. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
21. The protection of flows within the proposed instream 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. An instream reach is generally from the point of diversion to the mouth of the source stream (Pole Creek) but may be protected further if measureable in the receiving stream (Whychus Creek) (OAR 690-077-0015(8)). The quantity that may be transferred

instream from Pole Creek is measurable into Whychus Creek and may be protected instream in Whychus Creek;

- c) There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
 - d) Return flows are not believed to result from the exercise of the existing water right.
22. There was an instream lease, IL-1079, in effect for the water right proposed for transfer to instream use. The instream lease was approved by the Department on October 20, 2010, as evidenced by Special Order Volume 82, Pages 1134 to 1143. This instream lease was scheduled to terminate on December 31, 2014, but included a condition allowing for early termination of the lease order. This lease was identified as needing to be terminated before Transfer T-11300 could be approved. On December 14, 2011, a Final Order was issued terminating instream lease IL-1079, as evidenced by Special Order Volume 85, Page 789.
23. Other than the existing instream lease, there are no instream water rights on Pole Creek.
24. There are existing instream water rights on Whychus Creek. Within the proposed instream reach on Whychus Creek, there are two instream water rights established under ORS 537.341 (state agency instream water right application process) for various fish life stages. These existing instream water rights are sufficient to protect the monthly quantities of water necessary for various fish life stages but are not always met.
25. Within the proposed instream reach on Whychus Creek there are also several instream water rights established ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) for fish and wildlife habitat.
26. Whychus Creek and its tributaries are part of the Upper Deschutes Basin. Currently the Deschutes River and tributaries are on DEQ's 303d list of water quality limited streams and a TMDL (Total Maximum Daily Load) study is underway for the Upper Deschutes Basin, including Whychus Creek.
27. By adding to other water rights leased or transferred instream at the same location or created through the conserved water statutes, the instream right will provide protection for additional streamflows previously identified as necessary for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values; and pollution abatement.
28. By replacing a portion of any instream rights created at the request of a state agency or under the minimum streamflow conversion process, the instream right will provide protection for streamflows previously identified as necessary for various fish life stages under earlier priority dates.
29. During the period January 1 through December 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 to be protected under the existing and proposed instream rights in the reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

Preliminary Award of Deschutes Basin Mitigation Credits

31. City of Sisters (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 City of Sisters.
32. The Department assigned this mitigation credit project number MP-159.
33. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on October 4, 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 October 4, 2011. No comments were received in response to this notice.
35. Based on annual water use reporting, it does not appear that water has been used for municipal use under Certificate 67706 since 2000. It also appears, based on best available information, that the City of Sisters has additional water rights that may be used to provide for municipal water supply in place of this right. However, with the following conditions, the Department has determined that the transfer of Certificate 67706 may be used to generate mitigation credits:
 - a) Mitigation Credits generated by this project may only be assigned to the City of Sisters for mitigation of municipal use.
 - b) Mitigation Credits generated by this project may only be used to satisfy a mitigation obligation in the Whychus Creek Zone of Impact.
36. The proposed transfer of 144.79 AF of municipal use to instream use will provide 57.8 AF of mitigation water. Therefore, the 57.8 mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project, with the conditions identified in Finding of Fact #35, and assigned to the City of Sisters. The mitigation credits may be used to mitigate for municipal ground water permit applications and existing conditioned municipal ground water permits and certificates held by the City of Sisters, providing mitigation pursuant to the Deschutes Ground Water Mitigation Rules, OAR Chapter 690, Division 505, within the Whychus Creek Zone of Impact.

37. A total of 144.79 AF is proposed to be transferred to instream use and 57.8 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 for the proposed instream water right shall result in completion of the project and verification that the project is complete.
39. Mitigation credits awarded to this mitigation credit project will be valid beginning the first calendar year that water will be protected instream under any new instream water right created as a result of this instream transfer application. During the first calendar year that water is protected instream, if credits are used for a pending permit application, a new permit may not be issued until water has been legally protected instream consistent with OAR 690-505-0620(1)(b).

Conclusions of Law

The changes in character of use and place of use to instream use proposed in application T-11300 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-11300 are approved.
2. Water right certificate 67706 is cancelled. A new certificate confirming the instream water right shall be issued.
3. 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; and pollution abatement in Pole and Wychus Creeks from the authorized POD, located at:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	9 E	WM	35	NW SE	3,825 FEET SOUTH AND 2,170 FEET WEST FROM THE NE CORNER OF SECTION 35

to the mouth of Wychus Creek.

4. The quantities of water to be protected under the instream water right are:

Instream Period	Rate (cfs)
January 1 through December 31	0.2

5. 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.
6. 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.
7. 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.
8. 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 67706 and any related decree.
9. The former place of use of the transferred water shall no longer receive water as part of this right.
10. **Preliminary and Final Award of Mitigation Credits:** 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 the 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 57.8 credits, as described herein, are awarded to this mitigation project and assigned to the City of Sisters. Mitigation credits awarded to this project may be used to satisfy a mitigation obligation of a ground water permit application and/or ground water permit/certificate **held by the City of Sisters in the Whychus Creek Zone of Impact only**. Any mitigation credits awarded will begin being valid the first calendar year that water is to be protected instream under a new instream water right resulting from this mitigation project. During the first calendar year that water is protected instream, if credits are used for a pending permit application, a new permit may not be issued until water has been legally protected instream consistent with OAR 690-505-0620(1)(b).
11. Mitigation Credits generated by this project may only be assigned to the City of Sisters for mitigation of municipal use.

12. 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 and as limited herein. 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 19 day of April, 2012.


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

Mailing date: APR 20 2012