

acting on the behalf of the applicant. The Department assigned the application number T-9697.

2. On July 2, 2004, the transfer application was assigned to Grant D. and Jacqueline Fleming.
3. The applicant is requesting to transfer a portion of Certificate 80226 and the entirety of Certificate 80477. The portion of the rights to be transferred are as follows:

Certificate: 80226 in the name of Gary McCabe, Trustee, McCabe Family Trust
Use: Irrigation
Acres: 33.0 acres
Priority Date: May 12, 1944
Quantity: 0.413 Cubic Foot per Second (CFS)
Rate/Duty: 1/80 cfs per acre, not to exceed 3.0 acre-feet per acre per year
Source: Deschutes River, tributary to the Columbia River
Authorized Point of Diversion:

Township		Range		Meridian	Sec	¼ ¼	Location
14	S	12	E	W.M.	26	SW SE	765 feet North and 215 feet West from the SE Corner, SW SE, Section 26

Authorized Place of Use:

Township		Range		Meridian	Sec	¼ ¼	Tax Lot	Acres
14	S	12	E	W.M.	35	NW NW	4301	33.0

Certificate: 80477 in the name of Gary McCabe, Trustee, McCabe Family Trust
Use: Irrigation
Acres: 2.1 acres
Priority Date: May 12, 1944
Quantity: 0.026 Cubic Foot per Second (CFS)
Rate/Duty: 1/80 cfs per acre, not to exceed 3.0 acre-feet per acre per year
Source: Deschutes River, tributary to the Columbia River
Authorized Point of Diversion:

Township		Range		Meridian	Sec	¼ ¼	Location
14	S	12	E	W.M.	26	SW SE	765 feet North and 215 feet West from the SE Corner, SW SE, Section 26

Authorized Place of Use:

Township		Range		Meridian	Sec	¼ ¼	Tax Lot	Acres
14	S	12	E	W.M.	35	NW NW	4301	2.1

4. Up to 99.0 Acre-Foot (AF) of water may be diverted annually under this portion of certificate 80226, and up to 6.3 AF of water may be diverted annually under certificate 80477.

5. Application T-9697 proposes to change the character of use to instream use for fish and wildlife habitat enhancement, pollution abatement, and recreation, and to establish mitigation credits in the Deschutes Ground Water Study Area.
6. Application T-9697 proposes to change the place of use of the rights to create an instream reach from the authorized point of diversion to Lake Billy Chinook.
7. The applicant originally proposed the quantities water to be transferred instream to be protected follows:

Certificate	Period	Rate (cfs)	Volume (acre-feet)
80226	July 4 through October 31	0.413	99.0
80477	July 2 through October 31	0.026	6.3
Totals		0.439	105.3

8. On November 7, 2004, the applicant modified the quantities and period during which water is requested to be protected instream to protect water as follows:

Certificate	Period	Rate (cfs)	Volume (acre-feet)
80226	April 1 through October 31	0.233	99.0
80477	April 1 through October 31	0.015	6.3
Totals		0.248	105.3

9. There are three existing instream water rights, Certificates 76687, 80400, and 80856, within the same reach as that proposed for the new instream water right. These instream water rights were established through the instream transfer process under ORS 537.348. There is also a pending instream water right application (IS 70695) filed by the Oregon Department of Fish and Wildlife under ORS 537.341 for anadromous and resident fish rearing.
10. The applicant proposes that the instream water right be additive to the existing instream water rights for the same reach. The applicant has also identified that this instream transfer application is intended to replace a portion of the pending instream water right application, if approved, for the same reach.
11. Notice of the application for transfer was published pursuant to ORS 540.520 and OAR 690-380-4000. No comments were filed in response to the notices.
12. Water has been used within the last five years according to the terms and conditions of the right and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.

13. A pump, pipeline, and sprinkler system sufficient to use the full amount of water allowed under the existing right, for the lands to be transferred, are present.
14. The proposed change would not result in enlargement of the right.
15. The proposed change would not result in injury to other water rights.
16. The amount and timing of the proposed instream flow are allowable within the limits and use of the original water rights.
17. 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) Any 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.
18. 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.
19. Within the reach proposed by the applicant, the Deschutes River is a designated State Scenic Waterway. The protection of flows necessary to maintain the free flowing character of the Deschutes River for fish and wildlife habitat, and recreation is a matter of statutory policy. Also, as noted in Finding of Fact 9, the Oregon Department of Fish and Wildlife (ODFW) has applied for an instream water right, which will have a priority date of September 24, 1990 if approved, through this reach for anadromous and resident fish rearing. In addition to flows for the designated Scenic Waterway and the pending instream water right application, which are at times not met during requested period for instream protection, this segment of the Deschutes River is also on the Department of Environmental Quality's 303d list of water quality limited streams for temperature and pH.
20. By adding to other existing instream water rights for the same location, the instream right will provide protection for additional streamflows necessary for fish and wildlife habitat enhancement, pollution abatement, and recreation.

Preliminary Finding of Deschutes Basin Mitigation Credits

21. Grant and Jacqueline Fleming have requested this instream transfer application be used to establish mitigation credits in the Deschutes Ground Water Study Area. Grant and

Jacqueline Fleming have requested that any mitigation credits generated from this project be assigned to Grant and Jacqueline Fleming.

22. The Department assigned this mitigation credit project number MP-24.
23. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on June 22, 2004. No comments were received.
24. The Department consulted with representatives from Oregon Department of Fish and Wildlife (ODFW), Oregon Department of Environmental Quality, Oregon State Parks and Recreation Department, Oregon Division 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 6, 2004. Comments were received from ODFW. ODFW made specific recommendations on how to enhance resource benefits and make the most effective use of the mitigation project and the mitigation water (credits) generated by the project. ODFW recommended, as an alternative to the proposed shaping, that any new instream water rights created as a result of this transfer be shaped such that water could be protected year round.
25. Based upon comments from ODFW, the applicant modified the application to protect water instream over the full irrigation season, being April 1 through October 31 at a rate of 0.233 CFS for certificate 80226 and 0.015 CFS for certificate 80477. These changes are reflected in Finding of Fact 8.
26. The Department has determined that this mitigation project will provide 63.2 acre-feet of mitigation water. Therefore, **63.2** mitigation credits may be awarded to this mitigation credit project and assigned to Grant and Jacqueline Fleming. 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 **Middle Deschutes Zone of Impact and/or the General Zone of Impact**.
27. The amount of mitigation water described is a portion of the total volume to be transferred instream, being 105.3 AF. The remaining balance of water transferred instream, and not used for mitigation, will benefit instream flows.
28. 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.

Conclusions of Law

The changes in place of use and character of use proposed in application T-9697 are consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075.

The 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 proposed changes in place of use and character of use proposed in application T-9697 are approved.
2. The proposed change shall be effective upon issuance this Final Order.
3. Certificate 80477 is cancelled. A new instream water right is hereby issued. In addition, Certificate 80226 is cancelled and a new instream water right for the portion of the right transferred to instream use is hereby issued. A new certificate will be issued describing that portion of Certificate 80226 involved in this transfer.
4. The quantities of water to be protected under the instream water right are:

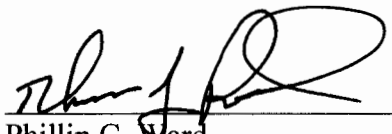
Period	Rate (cfs)
April 1 through October 31	0.233
April 1 through October 31	0.015
Total	0.248

5. A description of the river reach to which these rights are appurtenant is as follows: From the authorized point of diversion (SW ¼ SE ¼, Section 26, T14S, R12E, W.M.; 765 feet North and 215 feet West from the SE Corner, SW ¼ SE ¼, Section 26) to Lake Billy Chinook.
6. The instream right established by this transfer shall replace a portion of any instream water rights established pursuant to ORS 537.341 or 537.346 and be in addition to existing instream water rights established pursuant to ORS 537.348 or 537.470 during the period April 1 through October 31 of each year unless otherwise specified by a subsequent order establishing a new instream water right under these statutes.
7. No further application of water and water rights for irrigation or any other purpose shall be made under Certificates 80477 and 80226 for the portions of those rights involved in this transfer.
8. **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 attached instream water right certificates results in

completion of the project and verification by the Department that the project is complete. Therefore, mitigation credits, in the amount of **63.2 credits** described herein, are awarded to this mitigation project and assigned to Grant and Jacqueline Fleming. These mitigation credits may be used to satisfy a mitigation obligation of a ground water permit applicant and/or ground water permit/certificate holder in the **Middle Deschutes and/or General Zone of Impact**.

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.
10. Each instream certificate created as a result of the approval of this transfer shall be identified as a mitigation credit project. Within each instream certificate, the number of mitigation credits, the zone of impact in which the mitigation credits were 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 24th day of March, 2005.


Phillip C. Ward
Director

Mailing date: APR 05 2005