

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

In the Matter of Instream Transfer	)	FINAL ORDER APPROVING
Application T-11111, and Mitigation	)	A CHANGE IN PLACE OF USE
Project MP-142, Deschutes County	)	AND 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 ground water mitigation project to the Department for 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**

DESCHUTES RIVER CONSERVANCY(DRC)  
700 NW HILL ST STE. 1  
BEND, OR. 97703

**Applicant**

SWALLEY IRRIGATION DISTRICT(SID)  
64672 COOK AVENUE, SUITE #1  
BEND, OR. 97701

**Findings of Fact**

1. On July 22, 2010, DRC with SID filed an application to change the place of use and character of use under Certificate 74145 to instream use. The Department assigned the application number T-11111.
2. Notice of the application for transfer was published on July 27, 2010, pursuant to OAR 690-380-4000. No comments were filed in regard to this notice.

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.

3. On June 16, 2017, the Department issued a Preliminary Determination proposing to approve Transfer T-11111 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 June 26, 2017, and in The Bulletin newspaper on June 23 and 30, and July 7, 2017 pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.
4. Consistent with land use requirements, notice of the intent to file the instream transfer application was provided by the applicants to Deschutes County, Jefferson County, and the City of Bend Planning Divisions and to the Confederated Tribes of Warm Springs. Additionally, the Department provided notification of the proposed action to these local governments upon receipt of Transfer Application T-11111.
5. On March 8, 2016, the Department requested supporting documentation attesting to the use of water on the lands involved in this application. On November 22, 2016, the applicant submitted documentation supporting the evidence of use.
6. On April 17, 2017, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11111 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of May 8, 2017, for the applicants to respond. The applicants requested that the Department re-examine the application maps and include add back 0.7 acre of irrigation that was inadvertently removed by the Department and then proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
7. The portion of the right to be transferred is as follows:

**Certificate:** 74145 in the name of Swalley Irrigation District (confirmed by Deschutes River Decree)

**Use:** Irrigation of 13.0 Acres

**Priority Date:** September 1, 1899

**Season of Use:** April 1 through October 31, further limited as follows:

April 1 through April 30 & October 1 through October 31 described herein as Season 1, May 1 through May 14 & September 16 through September 30 described herein as Season 2, May 15 through September 15 described herein as Season 3

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

Season 1: limited to 1/83<sup>rd</sup> cubic foot per second (CFS) per acre.

Season 2: limited to 1/62<sup>nd</sup> CFS per acre

Season 3: limited to 1/33.45<sup>th</sup> CFS per acre

**Maximum Duty that can be applied to an acre:**

Not to exceed 9.58 acre-feet (AF) per acre per year.

The above listed rates and duty reflect allowance of a 43% transmission loss as determined by decree of the Circuit Court of Deschutes County, dated March 24, 1933. Those lands not served from the district's main canal system, but by direct pumping from the Deschutes River, are not allowed the 43% transmission loss.

**Source:** DESCHUTES RIVER, tributary to COLUMBIA RIVER

**Authorized Points of Diversion:**

POD	Twp	Rng	Mer	Sec	Q-Q	Measured Distances
3	17 S	12 E	WM	29	SE NE	SWALLEY MAIN CANAL- 985 FEET NORTH AND 617 FEET WEST FROM THE EAST 1/4 CORNER OF SECTION 29
15	15 S	12 E	WM	14	NW SE	ADDITIONAL DISTRICT DIVERSION- 2170 FEET NORTH AND 1350 FEET WEST FROM THE SE 1/4 CORNER OF SECTION 14

**Authorized Place of Use:**

IRRIGATION								
Lot	Twp	Rng	Mer	Sec	Q-Q	Acres	POD	Tax Lot Number as Listed on Certificate
4	16 S	13 E	WM	6	SW SW	13.0	3 & 15	400

8. Certificate 74145 contains an error in the description of the location for Additional District Diversion. This error is identified and corrected in Special Order Volume 61, Page 630, issued by the Department on September 30, 2004. This point of diversion should be described as follows:

POD	Twp	Rng	Mer	Sec	Q-Q	Measured Distance
15	15 S	12 E	WM	14	NE SE	ADDITIONAL DISTRICT DIVERSION: 2065.82 FEET NORTH AND 1401.41 FEET EAST FROM THE SOUTH ¼ CORNER OF SECTION 14

9. Certificate 74145 is a deficient water right. Since Certificate 74145 was issued, the amount of water that may be diverted under this certificate has been affected (reduced) by allocation of conserved water projects, instream transfers, and other Department actions. 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 No. 7), the total rate and duty for the water right would be exceeded. In the event water was diverted simultaneously to all authorized lands and uses described in the right at the maximum rates and duty allowed at the PODs (described in Finding of Fact No. 7 & 8), the portion of the right involved in this instream transfer would be limited as described in the tables below. These rates and duty are also the quantities by which diversion of water under Certificate 74145 shall be reduced over the full irrigation season, if this instream transfer is approved.

Irrigation Use			
Season 1	Season 2	Season 3	Duty
0.099 CFS	0.133 CFS	0.251 CFS	85.97 AF

10. A total of 71.01 AF of water from Irrigation, excluding transmission losses, may be beneficially used annually under the existing right for Irrigation purposes.
11. The applicants are not the owners of the land to which the water right described in Finding of Fact No. 7 is appurtenant. However, a water right conveyance agreement has been completed and interest in the water right has been conveyed to Swalley Irrigation District (SID) from the landowners described in the table below. The portion of this right to be transferred was appurtenant to land owned by the identified land landowners at the time interest in the water right was conveyed through a Quit Claim, a water right conveyance agreement.

Landowner	Water Right Interest Holder	Twp	Rng	WM	Sec	Q-Q	Acres	Tax Lot at time of Conveyance
Max and Angel Mills	SID	16 S	13 E	WM	6	SW SW	13.0	400

12. Instream Transfer Application T-11111 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 credits in the Deschutes Ground Water Study Area.
13. Transfer Application T-11111 proposes to change the place of use of the right to create an instream reach from Swalley Main Canal POD No. 3 (described in Finding of Fact No. 7) at approximately River Mile (RM) 164 to Lake Billy Chinook at approximately RM 120.
14. The applicant proposes the quantities of water to be transferred instream be protected as follows:

Instream Period	Instream Rate	Instream Volume
Season 1	0.089 cfs	71.01
Season 2	0.120 cfs	
Season 3	0.222 cfs	

15. The applicant has requested that any instream water right established because 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 has also requested that any instream water rights 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 a more senior priority date.

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

16. Water has been used within the last five years prior to submission of Transfer Application T-11111 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.
17. 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 Transfer Application T-11111.
18. The Department has also identified that the maximum rates and volume may not be protected instream over the entire irrigation season (April 1 through October 31) without exceeding the volume limitation and resulting in enlargement of the originating water right.
19. Based on continued evaluation of the transfer application, the Department proposes to modify the quantity of water requested to be protected instream to prevent injury and enlargement as follows:

**Instream Reach:** From the Swalley Main Canal POD No.3 (as described in Finding of Fact No. 7) to Lake Billy Chinook, at approximately RM 120

Certificate	Priority Date	Instream Period	Instream Rate	Volume Instream
74145	September 1, 1899	Season 1 (modified to end October 25)	0.089 CFS	71.01 AF
		Season 2	0.120 CFS	
		Season 3	0.222 CFS	

20. The proposed change, as modified, would not result in enlargement of the right.
21. The proposed change, as modified, would not result in injury to other water rights.
22. The amount and timing of the proposed instream flow, as modified, is allowable within the limits and use of the original water right.
23. 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.
24. Within the proposed instream reach on the main stem Deschutes River, there are several existing instream water rights. There are no instream water rights established under ORS 537.341 (state agency application process) and ORS 537.346 (minimum flow conversion). However, there is a pending instream water right application, IS-70695, filed by the Oregon Department of Fish and Wildlife (ODFW) pursuant to ORS 537.341, to establish an instream water right for anadromous and resident fish rearing from the Swalley Main Canal to Lake Billy Chinook, which if approved will have a priority date of September 19, 1990. 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 Swalley Main Canal and Lake Billy Chinook. These additional instream rights are generally for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values.
25. The pending instream water right, proposed to be established under ORS 537.341 (state agency application process), within the proposed reach on the Deschutes River may be sufficient to protect the monthly quantities of water necessary for anadromous and resident fish rearing but will likely not always be met and will have a priority date junior in comparison to other water rights on the Deschutes River. By replacing a portion of any instream right created at the request of state agencies, the proposed instream right will provide protection for streamflows previously identified as necessary for fish and wildlife habitat under an earlier priority date.

26. 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.
27. Within the proposed reach, 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 Waterway are at times not met during the requested periods for instream protection.
28. This segment of the Deschutes River is also on the Oregon Department of Environmental Quality's (DEQ) 303d list of water quality limited streams and a TMDL (Total Maximum Daily Load) study has been partially completed and is currently on hold.
29. During the period April 1 to October 25, 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.
30. The total monthly quantities of water to be protected under the existing and proposed instream rights within the proposed reaches will provide for a beneficial purpose and do not exceed the estimated average natural flow.

***Preliminary and Final Award of Deschutes Basin Mitigation Credits***

31. The DRC and SID have requested this instream transfer application be used to establish mitigation credits in the Deschutes Ground Water Study Area. The Applicants have requested that any mitigation credits generated from this project be assigned to SID and DRC.
32. The Department assigned this mitigation credit project number MP-142.
33. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on October 19, 2010. 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 22, 2010. Comments were received from Oregon Parks and Recreation Department in support of this Instream Transfer.
35. No changes were made to the instream transfer as a result of comments received or consultation with the above named agencies.

36. As part of the public notice of the mitigation project, the Department identified that the project may result in 23.4 mitigation credits. The transfer of 13.0 Acres to instream use will provide 23.4 acre-feet of mitigation water. Therefore, **23.4** mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to Swalley Irrigation District and the Deschutes River Conservancy. 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 General and Middle Deschutes Zones of Impact.
37. A total of 71.01 AF may be transferred to instream use and 23.4 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 the 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.

**Determination and Proposed Action**

The changes in character of use and place of use to instream use proposed in Transfer Application T-11111 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 Transfer Application T-11111 are approved.
2. Certificate 74145 is modified, 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 when the Department deems it necessary for record keeping purposes. Approval of this transfer shall reduce the amount of water lawfully available under the remaining portion of certificate 74145 by the following:

PODs No. 3 and No. 15:

Irrigation Use			
Season 1	Season 2	Season 3	Duty
0.099CFS	0.133 CFS	0.251 CFS	85.97 AF

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; recreation and pollution abatement as follows:

**Instream Reach:** From the Swalley Main Canal POD No.3 (as described in Finding of Fact No. 6) to Lake Billy Chinook, at approximately RM 120

Certificate	Priority Date	Instream Period	Instream Rate	Volume Instream
74145	September 1, 1899	Season 1 (modified to end October 25)	0.089 CFS	71.01 AF
		Season 2	0.120 CFS	
		Season 3	0.222 CFS	

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. 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.
6. 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.
7. 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 74145 and any related decree.
8. The former place of use of the transferred water shall no longer receive water as part of this right.
9. **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 a new instream water right certificate, as described herein, will result in completion of the project and verification by the Department that the project is complete. If completed as proposed, mitigation credits, in the amount of **23.4** credits, as described herein, may be awarded to this mitigation project and assigned to Swalley Irrigation District and the Deschutes River Conservancy. 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 **General and Middle Deschutes Zones of Impact**. Mitigation credits generated by this project will be available for use as mitigation beginning the first calendar year that water will be protected instream under a new instream water right.



10. 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.
11. The instream certificate created as a result of the approval of this transfer shall be identified as a mitigation credit project for a ground water permit applicant and/or ground water permit/certificate holder. 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 8<sup>th</sup> day of August, 2017.

  
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Dwight French, Water Right Services Administrator, for  
Thomas M. Byler, Director  
Oregon Water Resources Department

Mailing date: AUG 17 2017