

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

In the Matter of Allocation of Conserved)
Water Application CW-66,)
Deschutes and Jefferson Counties) **FINAL ORDER APPROVING
ALLOCATION OF CONSERVED
WATER**

Authority

ORS 537.455 to 537.500 as amended by 2003 HB 2456, authorize and establish the process in which a water right holder may submit a request for an allocation of conserved water. OAR Chapter 690, Division 18, implements the statutes and provides the Department’s procedures and criteria for evaluating allocation of conserved water applications.

Applicant

THREE SISTERS IRRIGATION DISTRICT
PO BOX 2230
SISTERS, OR 97759

Agent

DESCHUTES RIVER CONSERVANCY
700 NW HILL
BEND, OR 97701

Findings of Fact

1. On December 22, 2009 Andy Fischer of the Deschutes River Conservancy, acting as the agent for Three Sisters Irrigation District, filed an Application for Allocation of Conserved Water. The Department assigned the application number CW-66.
2. The Applicant requests an Allocation of Conserved Water under Certificate 74135 in the name of Squaw Creek Irrigation District. On June 1, 2004 Squaw Creek Irrigation District, the named holder of Water Right Certificate 74135, changed its name to Three Sisters Irrigation District (TSID). TSID maintains the water delivery system for the benefit of the landowners in the area.
3. On July 5, 2005 TSID adopted an Allocation of Conserved Water policy pursuant to OAR 690-018-0025.
4. Water has been used within the last five years according to the terms and conditions of the right. There is no information in the record that would demonstrate the right is subject to forfeiture under ORS 540.610.

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.

5. A diversion structure, canal and ditches sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submission of Allocation of Conserved Water application CW-66.
6. The rate associated with Certificate 74135 has been affect by transfers, cancellations and allocations of conserved water. The approximate starting point for the certificate is as follows:

Priority Date	Acres (equivalent) Listed on Cert.	Abandoned Acres by T-6854	Acres (equivalent)
1869	48.0		48.0
1885	79.1		79.1
1887	150.0		150.0
1889	201.5		201.5
1893	39.5		39.5
1895	5716.8		5716.8
1899	108.8		108.8
1900	54.0		54.0
1901	22.3		22.3
1903	360.6	(16.6)	344.0
1904	870.6	(167.4)	703.2
Totals:	7,651.1	(184.0)	7,467.1

Priority Date	Max Rate (CFS)	Change in Maximum Rate (CFS) (Listed by date of approval)									Approximate Starting Point for CW-66
		Abandoned T-6854	CW-30	CW-34	CW-44	CW-49	CW-50	CW-51	CW-33	CW-56	
1869	0.96										0.96
1885	1.58		(0.28)								1.30
1887	3.00										3.00
1889	4.03										4.03
1893	0.79										0.79
1895	114.33			(1.50)	(1.20)	(1.20)	(1.20)	(1.20)	(2.00)	(1.20)	104.83
1899	2.18				(0.03)	(0.03)	(0.03)	(0.03)		(0.03)	2.03
1900	1.08		(0.33)								0.75
1901	0.45										0.45
1903	7.21	(0.33)									6.88
1904	17.41	(3.35)			(0.28)	(0.28)	(0.28)	(0.28)		(0.28)	12.66
Totals:	153.02	(3.68)	(0.61)	(1.50)	(1.51)	(1.51)	(1.51)	(1.51)	(2.00)	(1.51)	137.68

The starting points for Conserved Water CW-66 shown in Findings of Fact #6 and #17 are based on all previously approved Allocation of Conserved Water projects being completed and finalized. If projects are completed and finalized in a different order, or if there are other intervening transfers, cancellations, allocations of conserved water or other modifications to the right, then the actual quantity of water available under Water Right Certificate 74135 may change.

7. The conservation project involves replacing approximately 3.8 miles of the TSID Main Canal with dual 54-inch, High Density Polyethylene pipes. The portion of TSID's main canal that will be piped, extends from the authorized POD on Whychus Creek (RM 23.5) to Watson Reservoir. The replacement of open, unlined ditches with pipelines is a proven technology for conserving water.
8. Public notice was published in the Department's weekly notice on December 29, 2009 and in *The Bulletin* on December 31, 2009, January 7 and 14, 2010 as required under OAR 690-018-0050. No comments were received in response to the notice.
9. Pursuant ORS 537.485, the Applicant requests that 100% of the conserved water be protected under the 1895 priority of Water Right Certificate 74135.

10. The proposed Allocation of Conserved Water project will be completed in three increments and, when complete, will result in the conservation of approximately 6.00 cfs. The quantity of water allowed for diversion under Certificate 74135 will be reduced as described below:

Increment	Priority Date	Rate (cfs)
1	1895	2.466
2	1895	1.988
3	1895	1.546
Total:		6.000

11. The quantity of water conserved in each increment may be adjusted according to the actual results achieved for that increment.
12. The proposed instream right is not a measurable portion of the Deschutes River as defined by OAR 690-077-0015. Therefore the proposed instream right cannot be extended from Whychus Creek, the source stream, into the receiving stream, the Deschutes River.
13. The return flows from the proposed project begin to enter the Deschutes River at approximately River Mile 130.8. No return flows, from the proposed project, will re-enter Whychus Creek.
14. The proposed Allocation of Conserved Water will not harm existing rights because the instream reach is limited to Whychus Creek, and there are no return flows to Whychus Creek. The return flows begin to enter the Deschutes River at approximately River Mile 130.8.
15. On December 9, 2009 the Applicants provided notice of the proposed conservation project to the Land Use and Planning Departments of Jefferson County, Deschutes County and the City of Bend as required by OAR 690-018-0040(22).
16. Since no harm to other water rights will occur, no reduction in the quantity of conserved water to be allocated is required to mitigate for effects on other water rights.
17. After the allocation of conserved water, the water right held by the Applicant will allow use of the following quantities of water under the 1895 priority:

Certificate	Increment	Before Increment Maximum Rate (cfs)	Quantity Conserved (cfs)	After Project Maximum Rate (cfs)
74135	1	104.830	2.466	102.364
	2	102.364	1.988	100.376
	3	100.376	1.546	98.830
	Total Remaining on Certificate 74135 under 1895* priority:			98.830

*Non-1895 priority dates will not be affected by this project.

18. In consultation with the Oregon Department of Fish and Wildlife, Department of Environmental Quality, and Oregon Parks and Recreation Department, the Department has determined that conserved water is needed to support instream uses in Whychus Creek to

provide for the conservation, maintenance and enhancement of aquatic habitat, fish, wildlife, wildlife habitat and other ecological values.

19. Pursuant to OAR 690-018-0012(1), the Applicant proposes that 100% of the conserved water be allocated to the State for an instream water right. The Applicant further requests that 100% of the conserved water be allocated from the 1895 priority of Water Right Certificate 74135.
20. The Applicant requested the Department to protect the new instream water right from the authorized point of diversion as described in Finding of Fact #21, on Whychus Creek, into the Deschutes River and then to Lake Billy Chinook. An instream water right is generally from the authorized point of diversion to the mouth of the source stream but may be protected further if the right to be protected is measurable in the receiving stream. OAR 690-077-0015(8). At the time Allocation of Conserved Water Application CW-66 was submitted, the total quantity of water protected in Whychus Creek was not a measurable portion of the Deschutes River. Therefore the instream right created under this conservation project will be from the authorized point of diversion as described in Finding of Fact #21 to the mouth of Whychus Creek. However, at the time the Applicant requests finalization of any increment of CW-66, if the Applicant can demonstrate, to the satisfaction of the Director, that the quantity of water to be protected in Whychus Creek is a measurable portion of the Deschutes River, the Applicant may request that the instream reach be extended into the Deschutes River and then to Lake Billy Chinook. The Department will review and any such request to determine whether the request meets the requirements of OAR 690-077-0015.
21. The stream reach for the State's instream water right is from the previously authorized point of diversion located at:

Authorized Point of Diversion*:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
15 S	10 E	WM	21	SW SW	998 FEET NORTH AND 1211 FEET EAST FROM THE SW CORNER OF SECTION 21

*RM 23.5.

to the mouth of Whychus Creek at River Mile 0.0.

22. The instream use shall allow the use and protection of flows from April 1 through October 31, and at other times when TSID is diverting water.
23. The Applicant anticipates the conservation project will be completed in three increments. Increment I will be completed by September 30, 2010; Increment II will be completed by September 30, 2011; and Increment III will be completed by April 15, 2013. The Applicant has 60-days after the scheduled date of completion to file a notice of completion of the conservation project. Upon filing a notice of completion, the Applicant requests that the project be finalized pursuant to OAR 690-018-0062. Any increment may be finalized in advance of the scheduled date; however, if the Applicant is not able to complete any increment on schedule, a request for additional time must be received, by the Department, prior to the scheduled date for completion of that increment.

24. No other conditions or limitations are needed to prevent or mitigate for harm to existing water rights.
25. On June 8, 2010 the Department issued a Proposed Final Order, which recommended that Allocation of Conserved Water Application CW-66 be approved. No comments were received in response to that order.

Review Criteria

Pursuant to OAR 690-018-0050, in reviewing the application for Allocation of Conserved Water the Department has determined the following:

- A. Allocation of Conserved Water Application CW-66 contains all the information required by OAR 690-018-0040.
- B. The proposed Allocation of Conserved Water project will reduce the quantity of water diverted under Water Right Certificate 74135 by approximately 6.00 cfs, as established in Findings of Fact #10 and #17.
- C. Consistent with Finding of Fact #8 and #14, the proposed Allocation of Conserved Water will not harm other water rights. Therefore, no reduction in the quantity of conserved water to be allocated is required to mitigate for the affects on other water rights. (Finding of Fact #16).
- D. As established by Finding of Fact #15, the conservation project is consistent with the local comprehensive land use plan requirements established in OAR 690-005-0045.
- E. The new rate for the affected portion of Water Right Certificate 74135 is described in Finding of Fact #17.
- F. In consultation with the Departments of Fish and Wildlife, Environmental Quality and Parks and Recreation; the Department has determined that the conserved water is needed to support instream uses. (Finding of Fact #18).
- G. The Applicant requests that 100% of the conserved water be allocated for an instream water right to be held in trust by the Water Resources Department for the people of Oregon and that the priority date of the conserved water right is the same as the originating right. (Finding of Fact #19).

H. The State’s portion of the conserved water shall have an 1895 priority and shall be allocated as an instream water right for maintenance and enhancement of aquatic habitat, fish, wildlife, wildlife habitat and other ecological values and shall provide for the protection of flows in Whychus Creek from the authorized point of diversion for TSID at:

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
15 S	10 E	WM	21	SW SW	998 FEET NORTH AND 1211 FEET EAST FROM THE SW CORNER OF SECTION 21

*RM 23.5.

to the mouth of Whychus Creek at River Mile 0.0 and shall replace a portion of the instream water rights established pursuant to ORS 537.341 or 537.346 and shall be in addition to any instream water rights established pursuant to ORS 537.348 or 537.470, unless otherwise specified by a subsequent order establishing a new instream water right. The rights shall allow for the use and protection of flows from April 1 through October 31, and at other times when TSID is diverting water. (Findings of Fact #19 through #22).

- I. Pursuant Findings of Fact #10, #17 and #23, the Applicant will finalize the conservation project in three increments.
- J. Consistent with Finding of Fact #24, no other conditions or limitations are needed to prevent injury or mitigate for harm to existing water rights.

Conclusions of Law

The project described in Allocation of Conserved Water Application CW-66, is consistent with the criteria in ORS 537.455 to 537.500, as amended by 2003 HB 2456, and OAR Chapter 690, Division 018. Water will be conserved which can be allocated without harming other water rights.

Now; therefore, it is ordered that:

The changes proposed in CW-66 are approved.

- 1. The Applicant has until November 29, 2010 to file a notice of completion and request for finalization of Increment #1; until November 29, 2011 for Increment #2; and until June 14, 2013 for Increment #3; unless the Director grants an extension of time.
- 2. When the Applicant files a notice of completion, the project will be finalized, unless the Applicant requests, and the Director grants an extension of time for the purposes of finalization.

On receipt of the notice of completion of the conservation project described above, the Department shall:

3. Modify Certificate 74135. A new superseding certificate shall be issued to TSID for the remaining portion of Certificate 74135 upon a determination that it is necessary to produce a certificate to confirm that remaining portion of the water right. The Applicant requests that 100% of the water conserved by this project be allocated to the State for instream use. Therefore, approval of this Allocation of Conserved Water project reduces the amount of water lawfully available under the remaining portion of Certificate 74135 as described below:

Certificate	Increment	Before Increment Maximum Rate (cfs)	Quantity Conserved (cfs)	After Project Maximum Rate (cfs)
74135	1	104.830	2.466	102.364
	2	102.364	1.988	100.376
	3	100.376	1.546	98.830
Total Remaining on Certificate 74135 under 1895 priority:				98.830

The acreage, rate, duty and priority dates are subject to modification by any previously approved transfers, cancellations, corrections, allocations of conserved water, or other prior modification to Certificate 74135. The associated priority date and rate of the remaining right shall be approximately:

Priority	Acres (equivalent)	Maximum CFS
1869	48.0	0.96
1885	79.1	1.30
1887	150.0	3.00
1889	201.5	4.03
1893	39.5	0.79
1895	5716.8	98.83
1899	108.8	2.03
1900	54.0	0.75
1901	22.3	0.45
1903	344.0	6.88
1904	703.2	12.66
TOTAL:	7,467.1	131.68

The on-farm, maximum per acre rate, will not be affected by this conservation project.

The place of use shall be those lands described under Certificate 74135, as modified by any transfers completed pursuant to ORS 540.580 or other prior modifications.

All other conditions and limitations of the existing water right shall be included in the superseding certificate.

4. A new instream certificate shall be issued for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values in Whychus Creek from the authorized point of diversion (approximately River Mile 23.5) for Certificate 74135 at:

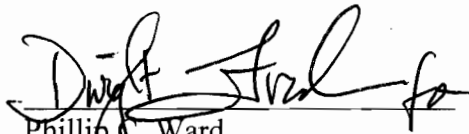
Authorized Point of Diversion:

TWP	RNG	MER	SEC	Q-Q	Survey Coordinates
15 S	10 E	WM	21	SW SW	998 FEET NORTH AND 1211 FEET EAST FROM THE SW CORNER OF SECTION 21

to the mouth of Whychus Creek at River Mile 0.0.

The instream water rights shall be 2.466 cfs for Increment #1; 1.988 cfs for Increment #2; and 1.546 cfs for Increment #3 (the instream rate will depend upon the actual quantity of water conserved by each increment) with a 1895 priority date, and shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346 and shall be in addition to any instream water rights established pursuant to ORS 537.348 or 537.470, unless otherwise specified by a subsequent order establishing a new instream water right. The rights shall allow for the use and protection of flows from April 1 through October 31, and at other times when TSID or its successor, divert water.

Dated at Salem, Oregon this 11 day of August, 2010.


 Phillip C. Ward
 Director

Date of Mailing: AUG 13 2010

This Final Order was prepared by Kody Thurgood. If you have any questions about the information in this document, you may reach me at 503-986-0892 or Kody.J.Thurgood@ wrd.state.or.us