

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

In the Matter of Instream Transfer)	FINAL ORDER APPROVING A
Application T-10300 and Mitigation Credit)	CHANGE IN PLACE OF USE AND
Project MP-95, Deschutes County)	CHARACTER OF USE, PARTIAL
)	CANCELLATION OF CERTIFICATE
)	76714, 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.

ORS 540.621 establishes the process for the owner of land to which a water right certificate is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

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

CENTRAL OREGON IRRIGATION DISTRICT	DESCHUTES RIVER CONSERVANCY
1055 SW LAKE COURT	700 NW HILL STREET
REDMOND, OR 97756	BEND, OREGON 97701

This is an order in other than a contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60 day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080, you may either 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.

Findings of Fact

Background

1. On January 29, 2007, Central Oregon Irrigation District (COID) and Deschutes River Conservancy (DRC) filed an application to change the place of use and character of use under Certificate 76358 to instream use. COID and the DRC also requested to cancel the corresponding portion of Certificate 76714 for supplemental irrigation upon issuance of the final order approving the transfer. The Department assigned the application number T-10300.
2. This instream transfer application originally proposed to change the character of use to instream use for fish and wildlife habitat enhancement; pollution abatement; navigation; and recreation. On July 18, 2007, the applicant amended the application to exclude navigation as an instream beneficial use.
3. On September 26, 2007, Certificate 83571 was issued superseding Certificate 76358.
4. The portion of the right to be transferred is as follows:

Certificate: 83571 in the name of Central Oregon Irrigation District

Use: Irrigation of 39.40 acres

Priority Date: October 31, 1900 and December 2, 1907

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 1/80 cubic foot per second (CFS) per acre)

Season 2 (limited to 1/60 CFS per acre)

Season 3 (limited to 1/32.4 CFS per acre)

Maximum Duty that can be applied to an acre:

Not to exceed 9.91 acre-feet (AF) per acre per year

The above listed rates and duty reflect allowance of a 45% transmission loss as determined by decree of the Circuit Court of Deschutes County, dated March 24, 1933. Those lands not served from the district main canal systems, but by direct pumping from the Deschutes River, are not allowed the 45% transmission loss.

Source: The Deschutes River, tributary to the Columbia River

Authorized Point of Diversion (POD):

Township		Range		Meridian	Sec	¼ ¼	Survey Coordinates
17	S	12	E	W.M.	29	SE NE	POD #11 (COID NORTH CANAL): 850 FEET NORTH AND 630 FEET WEST FROM THE E ¼ CORNER OF SECTION 29

Authorized Place of Use:

Township		Range		Meridian	Sec	¼ ¼		Acres
14	S	13	E	WM	16	NW	SW	0.20
14	S	13	E	WM	16	NW	SW	0.15
14	S	13	E	WM	16	NW	SW	0.15
15	S	13	E	WM	20	NW	SE	0.50
15	S	13	E	WM	3	NW	NE	8.00
15	S	13	E	WM	3	SW	SE	18.40
15	S	13	E	WM	30	NE	SW	12.00

5. Certificate 83571 is a deficient water right. 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 #4), the total rate and duty for the water right would be exceeded. In the event water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rates and duty allowed at the POD (described in Finding of Fact #4), the portion of the right involved in this transfer would be limited as described in the table below. These rates and duty are also the quantities by which Certificate 83571 shall be reduced.

Priority Date	Season 1	Season 2	Season 3	Duty
October 31, 1900	0.491 CFS	0.655 CFS	0.866 CFS	389.49 AF
December 2, 1907			0.347 CFS	

6. A total of 214.75 acre-feet (AF) of water, excluding transmission losses, may be beneficially used annually for primary irrigation under the portion of existing Certificate 83571 proposed for transfer.
7. Supplemental right, Certificate 76714, is appurtenant to the same lands from which the primary right under Certificate 83571 is proposed to be transferred to instream use. The applicant requested that the affected portion of Certificate 76714 be cancelled upon issuance of the Final Order approving T-10300.
8. The applicants are not the owners of the lands to which the water right described in Finding of Fact #4 is appurtenant. However, water right conveyance agreements have been completed and interest in the water rights has been conveyed to COID from each landowner described in the table below. The portion of this right to be transferred was appurtenant to lands 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	T	R	Sec	¼ ¼	Current Tax Lot
Gilbert L. Daniels	COID	14S	13E	16	NW SW	1000, 1018 & 1019
Darren & Phyllis Kosanke	COID	15S	13E	20	NW SE	6100
Bryan Ball	COID	15S	13E	3	NW NE	501

Landowner	Water Right Interest Holder	T	R	Sec	¼ ¼	Current Tax Lot
Windridge Homes, Inc.	COID	15S	13E	3	SW SE	1701
Craig J. & Susan L. Davis	COID	15S	13E	30	NE SW	1401

9. Application T-10300 proposes to change the character of use to instream use for fish and wildlife habitat enhancement; pollution abatement; and recreation.
10. Application T-10300 proposes to change the place of use of the right to create the following instream reach:

Reach: From COID North Canal POD #11 (described in Finding of Fact #4) to Lake Billy Chinook.

11. The applicant proposes the quantities of water to be transferred and protected instream as follows:

Certificate	Priority Date	Rate Instream	Volume Instream
83571	October 31, 1900	Season 1: 0.271 CFS Season 2: 0.361 CFS Season 3: 0.669 CFS	214.75 AF

12. There are existing instream water rights for the same reach as that proposed for the new instream water right. All of the existing instream water rights were established under ORS 537.348, the instream transfer process, and ORS 537.470, the allocation of conserved water process. There is a pending instream water right application, filed by the Oregon Department of Fish and Wildlife (ODFW) pursuant to ORS 537.341 to establish an instream water right from POD #11 to Lake Billy Chinook, which if approved will have a priority date of September 19, 1990.
13. 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.
14. The applicant has requested to protect water instream under the October 31, 1900 priority date. Water is diverted at the point of diversion during Season 3 under both the 1900 and 1907 priority dates. The quantity of water diverted under the 1907 priority date during Season 3 makes up a balance of water allowed by the decree for transmission losses. Transmission losses account for 45% of the water diverted at the point of diversion and are not transferable to instream use. The quantities of water proposed to be transferred instream, as described in Finding of Fact #11, do not include the 45% transmission loss. The Department finds that water may be protected instream solely under the 1900 priority date.

15. Notice of the application for transfer was published on February 6, 2007, pursuant to ORS 540.520 and OAR 690-380-4000. No comments were filed in response to the notice.
16. On July 9, 2007, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10300 to the applicant. The draft Preliminary Determination set forth a deadline of August 8, 2007, for the applicant to respond. On July 18, 2007, 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.
17. On August 28, 2007, the Department issued a Preliminary Determination proposing to approve Transfer Application T-10300 and mailed a copy to the applicant. Additionally, notice of the Preliminary Determination for the transfer application was published in the Department's weekly notice on September 4, 2007, and in The Bulletin on September 1, 8, and 15, 2007, pursuant to ORS 540.520 and OAR 690-380-4020. No comments or protests were filed in response to the Department's weekly notice or to the newspaper notice. On October 22, 2007, and November 19, 2007, a red-lined draft Final Order was e-mailed to the applicant. This red-line draft order highlighted changes to the Preliminary Determination due to the issuance of Certificate 83571. On November 20, 2007, the applicant concurred with the red-lined changes.

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

18. 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.
19. 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-10300.
20. The period during which water is requested to be protected instream requires modification to prevent injury and enlargement. At the full rates and duty allowed by the water right to be transferred instream, water may be protected instream for a period of 209 days. The period requested by the applicant as described in Finding of Fact #11 is 214 days.

21. Based upon Finding of Fact #20, on July 18, 2007, the applicant agreed to modify the quantities to be transferred and protected instream as follows:

Reach: COID North Canal POD #11 (as described in Finding of Fact #4) to Lake Billy Chinook

Certificate	Priority Date	Instream Period	Instream Rate	Instream Volume
83571	October 31, 1900	Season 1 (modified to end October 26)	0.271 CFS	214.75 AF
		Season 2	0.361 CFS	
		Season 3	0.669 CFS	

22. The proposed change, as modified, would not result in enlargement of the right.
23. The proposed change, as modified, would not result in injury to other water rights.
24. The amount of the proposed instream flow and the timing of the proposed instream flow is allowable within the limits and use of the original water right.
25. 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 stream flow 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.
26. 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 reach proposed by the applicant, there are several existing instream water rights, which include the use of water for fish habitat, aquatic life, recreation, aesthetics, and minimizing pollution. There is also a pending instream water right application filed by ODFW 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 the requested period for instream protection, this segment of the Deschutes River is also on the Oregon Department of Environmental Quality's (DEQ) 303d list of water quality limited streams for temperature and pH.
27. By adding to other instream water rights located within the same reach proposed by this instream transfer application, the instream right will provide protection for additional streamflows necessary for fish and wildlife habitat enhancement, pollution abatement, and recreation.

28. During the period April 1 through October 26 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.
29. The total monthly quantities of water to be protected under the proposed instream right, in addition to the existing instream water rights, within the proposed reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

Partial Cancellation of a Water Right

29. There is an existing supplemental right, Certificate 76714, appurtenant to the portion of lands on which Certificate 83571 is proposed for transfer to instream use. The applicant has not submitted an affidavit certifying that the affected portions under Certificate 76714 have been abandoned. The applicant has requested that affected portions of the supplemental water rights under Certificate 76714 be cancelled upon issuance of the Final Order approving T-10300. The portion of Certificate 76714 to be cancelled has been quit claimed to the DRC.
30. Consistent with OAR 690-380-2250, the Department provided notice (as part of the draft Preliminary Determination identified in Finding of Fact #16) to the applicants of the Department’s intent to cancel the portions of the supplemental water right described below unless within 30 days of the date of this notification, the applicant modified the application to include the supplemental right or withdraws the application. No response was received to the notice.
31. The portion of the right to be cancelled is as follows:
Certificate: 76714 in the name of Central Oregon Irrigation District
Use: Supplemental Irrigation of 39.40 acres
Priority Date: February 28, 1913
Source: Crane Prairie Reservoir, constructed under permit R-1687, tributary to the Deschutes River

Authorized POD:

Township		Range		Meridian	Sec	¼ ¼	Survey Coordinates
21	S	8	E	W.M.	17	NE NE	CRANE PRAIRIE RESERVOIR DAM
17	S	12	E	W.M.	29	SE NE	POD # 11 (COID NORTH CANAL): 850 FEET NORTH AND 630 FEET EAST FROM THE N¼ CORNER OF SECTION 29

Authorized Place of Use:

Township		Range		Meridian	Sec	¼ ¼	Tax Lot	Acres
14	S	13	E	WM	16	NW SW	1000	0.20
14	S	13	E	WM	16	NW SW	1018	0.15
14	S	13	E	WM	16	NW SW	1019	0.15

Township		Range		Meridian	Sec	¼ ¼		Tax Lot	Acres
15	S	13	E	WM	20	NW	SE	6100	0.50
15	S	13	E	WM	3	NW	NE	501	8.00
15	S	13	E	WM	3	SW	SE	1701	18.40
15	S	13	E	WM	30	NE	SW	1401	12.00

32. The Department has information that POD #11 (COID North Canal) described in Certificates 83571 and 76714 is the same diversion point. The location coordinates described in Certificate 76714 contain errors. The location coordinates should be:

Township		Range		Meridian	Sec	¼ ¼		Survey Coordinates
17	S	12	E	W.M.	29	SE	NE	POD # 11 (COID NORTH CANAL): 850 FEET NORTH AND 630 FEET WEST FROM THE E¼ CORNER OF SECTION 29

Preliminary Award of Deschutes Basin Mitigation Credits

33. COID and the DRC (the Applicant) have 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 jointly to COID and the DRC.
34. The Department assigned this mitigation credit project number MP-95.
35. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300(6) on February 6, 2007. No comments were received in response to this notice.
36. The Department consulted with representatives from ODFW, DEQ, Oregon Parks and Recreation Department (OPRD), 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 7, 2007. Comments were received from OPRD. Comments were supportive of the proposed instream water right and identified that as more permanent instream water rights are established, the potential for summertime recreation on the river will improve.
37. No changes were made to the instream transfer as a result of comments received or consultation with the above named agencies.
38. The proposed transfer of 39.4 acres of irrigation to instream use will provide 70.9 acre-feet of mitigation water. The Department finds that 70.9 mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to COID and the DRC. 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 and General Zones of Impact.

39. A total of 214.75 AF is proposed to be transferred to instream use and 70.9 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.
40. 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 may become valid the first calendar year that water is protected instream as a result of this transfer.
41. Water will begin to be protected instream in the 2008 calendar year. Mitigation credits awarded to this mitigation credit project will be valid beginning January 1, 2008.

Conclusions of Law

The changes in character of use and place of use to instream use proposed in application T-10300 are consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075 and the abandoned portion of the right should be cancelled.

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-10300 are approved.
2. Water Right Certificate 83571 is modified. A new certificate confirming the instream water right shall be issued. The Department shall issue a new water right certificate to supersede Certificate 83571 on a determination that it is necessary to produce a certificate to confirm that portion of the right not involved in this transfer. Approval of this transfer shall reduce the amount of water lawfully available under the remaining portion of Certificate 83571 by the following amounts:

Priority Date	Season 1	Season 2	Season 3	Duty
October 31, 1900	0.491 CFS	0.655 CFS	0.866 CFS	389.49 AF
December 2, 1907			0.347 CFS	

3. The portion of Certificate 76714 that has been abandoned is cancelled. Water right certificate 76714 is modified. The Department shall issue a new water right certificate on a determination that it is necessary to produce a certificate to confirm that portion of the water right not affected by the cancellation described in Finding of Fact #31. Modification of this supplemental water right shall reduce by 39.40 acres the number of acres to which stored water may be applied for supplemental irrigation under the right.
4. 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; pollution abatement; and recreation in the Deschutes River as follows:

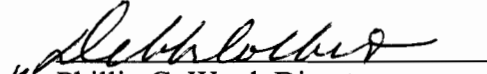
Reach: From COID North Canal POD #11 (as described in Finding of Fact #4) to Lake Billy Chinook.

Priority Date	Period Protected Instream	Instream Rate	Instream Volume
October 31, 1900	April 1 through April 30 and October 1 through October 26	0.271 CFS	214.75 AF
	May 1 through May 14 and September 15 through September 30	0.361 CFS	
	May 15 through September 14	0.669 CFS	

7. 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.
8. 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.
9. 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.
10. The former place of use of the transferred water shall no longer receive water as part of these rights.
11. **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 certificate results in completion of the project and verification by the Department that the project is complete. Therefore, mitigation credits, in the amount of 70.9 credits, as described herein, are awarded to this mitigation project and assigned to COID and the DRC. 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 **Middle Deschutes Zone of Impact and/or General Zone of Impact**. The awarded mitigation credits are valid beginning January 1, 2008, the first year that water will be protected instream under the new instream water right.
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. 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.

13. The 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 26th day of December, 2007.


Phillip C. Ward, Director

Mailing Date: DEC 27 2007