

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

In the Matter of Instream Transfer)	FINAL ORDER APPROVING A
Application T-9150 and Mitigation Project)	CHANGE IN PLACE OF USE AND
MP-118 for Ground Water Permit)	CHARACTER OF USE, APPROVING A
Application G-16791, Deschutes County)	MITIGATION PROJECT, AND
)	PARTIAL CANCELLATION OF A
)	SUPPLEMENTAL WATER RIGHT

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 540.510 establishes the process in which the Department may cancel a supplemental water right not included as part of the transfer application.

OAR 690-505-0500 to 690-505-0630 establishes the process in which anyone may submit a ground water mitigation project to the Department for the purpose of providing mitigation for a ground water permit application in the Deschutes Ground Water Study Area.

Applicant

CENTRAL OREGON IRRIGATION DISTRICT (COID) 1055 SW LAKE COURT REDMOND OR 97756	DESCHUTES COUNTY 14 NW KEARNEY ST. BEND, OR 97701
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Findings of Fact

Background

1. On June 17, 2002, COID filed an application to change the place of use and to change the character of use to floating industrial under Certificate 76358. The Department assigned the application number T-9150.
2. On September 26, 2007, Certificate 83571 was issued superseding Certificate 76358.

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 April 28, 2008, the applicant submitted a request to amend the application. The applicant reduced the number of acres of irrigation proposed for transfer from 26.0 acres to 8.72 acres. The applicant also requested that the application be modified to change the character of use and place of use from irrigation to instream use.
4. In addition, Deschutes County was added as a co-applicant on April 28, 2008.
5. The portion of the right to be transferred is as follows:

Certificate: 83571 in the name of Central Oregon Irrigation District

Use: Irrigation of 8.72 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

May 1 through May 14 & September 16 through September 30

May 15 through September 15

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

Season 1: limited to 1/80th cubic foot per second (CFS) per acre

Season 2: limited to 1/60th CFS per acre

Season 3: limited to 1/32.4th CFS per acre

Maximum Duty that can be applied to an acre:

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

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	WM	29	SE NE	POD #11 (COID NORTH CANAL): 850 FEET NORTH AND 630 FEET WEST FROM THE EAST ¼ CORNER OF SECTION 29

Authorized Places of Use:

Township		Range		Meridian	Sec	¼ ¼	Acres
15	S	13	E	WM	16	NW SE	8.72

6. The Department has information that the season of use described in Certificate 83571 contains scrivener errors. Consistent with the Decree for the Deschutes River (Volume 12, Page 282), the irrigation season should be:

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 15 through September 30 described herein as Season 2

May 15 through September 14 described herein as Season 3

7. 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 #5), 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 #5), the portion of the right involved in this transfer would be limited as described in the tables below. These rates and duty are also the quantities by which Certificate 83571 shall be reduced, if this transfer is approved.

Priority Date	Season 1	Season 2	Season 3	Duty
October 31, 1900	0.109 CFS	0.145 CFS	0.191 CFS	86.2 AF
December 2, 1907			0.077 CFS	

8. A total of 47.53 AF of water, excluding transmission losses, may be beneficially used annually for primary irrigation under the portion of Certificate 83571 proposed for transfer.
9. 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 has requested that the affected portion of Certificate 76714 be cancelled upon issuance of the Final Order approving T-9150.
10. Application T-9150 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 any other ecological values; pollution abatement; and recreation. The applicant has also requested that this transfer be used to establish mitigation water for Ground Water Permit Application G-16791, filed by COID and Deschutes County Property and Facilities Department.
11. Application T-9150 proposes to change the place of use of the right to create an instream reach from COID North Canal POD #11 (described in Finding of Fact #5) to Lake Billy Chinook.
12. The applicant proposes that water be protected instream during the period April 1 through October 26. Season 3 would end on October 26.
13. The applicant proposes the quantities of water to be transferred instream to be protected as follows:

Certificate	Priority Date	Rate Instream	Volume Instream
83571	October 31, 1900	Season 1: 0.060 CFS Season 2: 0.080 CFS Season 3: 0.148 CFS	47.53 AF

14. There are existing instream water rights within 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.
15. The applicant proposes that any instream water right established as a result of this instream transfer to 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.
16. 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 by the applicant to be transferred instream, as described in Finding of Fact #13, do not include the 45% transmission loss. The Department finds that water may be protected instream solely under the 1900 priority date.
17. The application includes Land Use Information form completed and signed by a representative of Deschutes County. Additionally, the Department has provided notification of the proposed instream transfer action to the City of Bend, Deschutes County, and Jefferson County.
18. Notice of the application for transfer was originally published on July 2, 2002. Notice of the original application was also published in the Bulletin on October 31, November 6 and 13, 2002. No comments or protests were filed in response to this notice.
19. Notice of the application as an instream transfer was published on May 6, 2008, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
20. On March 9, 2009, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-9150 to the applicants. The cover letter that accompanied the draft Preliminary Determination set forth a deadline of April 7, 2009, for the applicants to respond and provide additional information requested by the Department. On March 31, 2009, the applicants and provided the information requested by the Department, which was necessary to complete the transfer application. On March 10 and 11, 2009, the applicants requested that the Department proceed with issuance of a Preliminary Determination.

21. On July 17, 2009, the Department issued a preliminary determination proposing to approve Transfer Application T-9150 and mailed a copy to the applicants. Additionally, notice of the preliminary determination for the transfer application was published on the Department's weekly notice on July 21, 2009, and in the Bend Bulletin on July 23 and 30, 2009, and August 6, 2009, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the Department's weekly notice or to the newspaper notice.

Instream Transfer Review Criteria [OAR 690-380-4010(2) and OAR 690-77-0075]

22. There is information in the application file suggesting that there has been an extended period of time during which the right was not exercised. However, Certificate 76358 (previous certificate to 83571) was issued within the five-year period prior to submittal of transfer T-9150 and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
23. 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-9150.
24. The proposed changes would not result in enlargement of the right
25. The proposed change would not result in injury to other water rights.
26. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
27. 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.
28. 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 and a TMDL (Total Maximum Daily Load) study is underway.

29. 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 necessary for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values; recreation; and pollution abatement.
30. By replacing a portion of instream rights created at the request of state agencies or under the minimum streamflow conversion process, the instream right will provide protection for streamflows previously identified as necessary for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values; recreation; and pollution abatement under earlier priority dates.
31. 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.
32. 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

33. 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 applicants have not submitted an affidavit certifying that the affected portions under Certificate 76714 have been abandoned. The applicants have requested that affected portions of the supplemental water rights under Certificate 76714 be cancelled upon issuance of the Final Order approving T-9150. The portion of Certificate 76714 to be cancelled has been quit claimed to COID.
34. Supplemental water rights (layered water rights) must be included in a transfer application or cancelled.
35. Consistent with OAR 690-380-2250, the Department notified the applicants (as part of the draft Preliminary Determination identified in Finding of Fact #20) to the applicant of the Department's intent to cancel the portions of the supplemental water right described below unless within 30 days of the date of notification, the applicant modified the application to include the supplemental right or withdrew the application. No response was received to the notice.

36. That portion of the supplemental water right to be cancelled is as follows:
Certificate: 76714 in the name of Central Oregon Irrigation District
Use: Supplemental Irrigation of 8.72 acres
Priority Date: February 28, 1913
Source: Crane Prairie Reservoir, constructed under permit R-1687, tributary to the Deschutes River

Authorized PODs:

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

Authorized Places of Use:

Township		Range		Meridian	Sec	¼ ¼	Tax Lot	Acres
15	S	13	E	WM	16	NW SE	900	8.72

37. 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	WM	29	SE NE	POD # 11 (COID NORTH CANAL): 850 FEET NORTH & 630 FEET <u>WEST</u> FROM THE <u>EAST</u> ¼ CORNER OF SECTION 29

Mitigation Project Review Criteria

38. COID and Deschutes County (the Applicants) have requested that this transfer be used to establish mitigation water for Ground Water Permit Application G-16791, filed by COID and the Deschutes County Property and Facilities Department.
39. The Department assigned this mitigation project number MP-118.
40. 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 690-505-0630 (2) on April 30, 2008. Comments were received from OPRD. OPRD stated that the proposed instream transfer, along with other transfers, would improve streamflows for recreation opportunities over time. OPRD was also supportive of protecting proposed instream flows during the period April 1 through October 26.
41. No changes were made to the instream transfer as a result of comments received or consultation with the above named agencies.

42. Ground Water Permit Application G-16791 has been determined to have a mitigation obligation of 15.7 AF in the General Zone of Impact, as described in the Final Order issued approving this application on April 2, 2009.
43. The proposed transfer of 8.72 acres of irrigation use to instream use may provide 15.7 acre-feet of mitigation water.
44. The proposed reach would protect instream flows within both the Middle Deschutes and General Zones of Impact. Mitigation water generated from this instream transfer may be used to satisfy the mitigation obligation of a ground water permit application within the General Zone of Impact.
45. Based upon Findings of Fact #42 through #44, the Department has determined that the proposed mitigation project, if completed as proposed, will satisfy the mitigation obligation for Ground Water Permit Application G-16791.
46. A total of 47.53 AF is proposed to be transferred to instream use and 15.7 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.
47. Mitigation water generated by this project may be used to satisfy the mitigation obligation for Ground Water Permit Application G-16791 upon completion of the approved project (the instream transfer) 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 change in place of use and change in character of use proposed in Transfer Application T-9150 are consistent with the requirements of ORS 540.505 to 540.580 and 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 water pursuant to ORS 537.746 and OAR 690-505-0610.

Now, therefore, it is ORDERED:

1. The change in place of use and change in character of use proposed in application T-9150 are approved. The portion of the right that has been abandoned is cancelled.

- 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:

Priority Date	Season 1	Season 2	Season 3	Duty
October 31, 1900	0.109CFS	0.145 CFS	0.191 CFS	86.2 AF
December 2, 1907			0.077 CFS	

- 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 #36. Modification of this supplemental water right shall reduce by 8.72 acres the number of acres to which stored water may be applied for supplemental irrigation under the right but does not reduce the total quantity of water available for supplemental irrigation.
- 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:

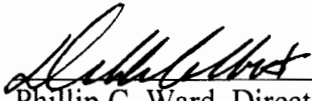
Reach: from COID North Canal POD #11 (as described in Finding of Fact #5) to Lake Billy Chinook.

Priority Date	Period Protected Instream	Instream Rate	Instream Volume
October 31, 1900	April 1 through April 30 and October 1 through October 26	0.060 CFS	47.53 AF
	May 1 through May 14 and September 15 through September 30	0.080 CFS	
	May 15 through September 14	0.148 CFS	

- 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.
- 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.
- 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 83571 and any related decree.
9. The former place of use of the transferred right shall no longer receive water under the right.
10. **Mitigation Water:** Mitigation Water generated by this project will be used to satisfy a portion of the mitigation obligation for Ground Water Permit Application G-16791 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, as described herein, results in completion of the project and verification by the Department that the project is complete. This project will generate **15.7 AF** of Mitigation Water in the **General Zone of Impact**.
11. The instream certificate created from this transfer shall be identified as a mitigation project/source for a ground water permit, issued as a result of approval of Ground Water Permit Application G-16791. Within the instream certificate, the volume of mitigation water, the zone of impact in which the mitigation water was 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 9th day of September, 2009.


Phillip C. Ward, Director *pc*

SEP 11 2009

Mailing date: _____