

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

In the Matter of Instream Transfer)	FINAL ORDER APPROVING
Application T-10508 and Mitigation Credit)	CHANGES IN CHARACTER OF USE
Project MP-112, Deschutes County)	AND PLACE OF USE, PARTIAL
)	CANCELLATION OF A
)	SUPPLEMENTAL WATER RIGHT,
)	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 540.510 establishes the process in which the Department may cancel a supplemental water right not included as part of the transfer application.

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.

Applicants

DESCHUTES RIVER CONSERVANCY
700 NW HILL STREET
BEND, OR 97701

CENTRAL OREGON IRRIGATION DISTRICT
1055 SW LAKE COURT
REDMOND, OR 97756

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.

Findings of Fact

Background

1. On December 20, 2007, Central Oregon Irrigation District (COID) and the Deschutes River Conservancy (DRC) filed an application to change the place of use and character of use of a portion of Certificate 83571 to instream use. The Department assigned the application number T-10508.

2. The portion of the right to be transferred is as follows:

Certificate: 83571 in the name of Central Oregon Irrigation District

Use: Irrigation of 60.12 acres, being 0.5 acre from POD #1 and 59.62 acres from POD #11

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

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

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

1/80th cubic foot per second (CFS) per acre during the period April 1 through April 30 & October 1 through October 31

1/60th CFS per acre during the period May 1 through May 14 & September 15 through September 30

1/32.4th CFS per acre during the period May 15 through September 14

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 Points of Diversion (POD):

Township		Range		Meridian	Sec	¼ ¼	Location
18	S	11	E	WM	13	SW NE	POD #1 (CENTRAL OREGON CANAL): 1520 FEET SOUTH AND 1535 FEET WEST FROM THE NE CORNER OF SECTION 13
17	S	12	E	WM	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	POD	Acres		
15	S	12	E	WM	1	SW SE	11	0.25
15	S	13	E	WM	5	SW SW	11	8.5
15	S	13	E	WM	8	NE SW	11	7.0
15	S	13	E	WM	8	NW SW	11	0.5

Township		Range		Meridian	Sec	¼ ¼		POD	Acres
15	S	13	E	WM	8	SW	SW	11	10.67
15	S	13	E	WM	8	SE	SW	11	0.8
15	S	13	E	WM	10	NE	NW	11	9.8
15	S	13	E	WM	16	NW	NW	11	2.5
15	S	13	E	WM	17	NE	NW	11	2.0
15	S	13	E	WM	17	NE	SW	11	7.1
15	S	13	E	WM	17	SE	SW	11	5.1
15	S	13	E	WM	19	SE	NE	11	4.3
15	S	13	E	WM	20	NW	SE	11	0.5
15	S	13	E	WM	21	SW	NW	11	0.6
18	S	12	E	WM	3	SE	NE	1	0.5

3. 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.

4. 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 #2), 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 PODs (described in Finding of Fact #2), 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.

POD #1

Priority Date	Season 1	Season 2	Season 3	Duty
October 31, 1900	0.006 CFS	0.008 CFS	0.011 CFS	4.93 AF
December 2, 1907			0.004 CFS	

POD #11

Priority Date	Season 1	Season 2	Season 3	Duty
October 31, 1900	0.743 CFS	0.991 CFS	1.311 CFS	589.34 AF
December 2, 1907			0.525 CFS	

5. A total of 2.73 AF of water, excluding transmission losses, may be beneficially used annually for primary irrigation from POD #1 under the portion of Certificate 83571 proposed for transfer.

6. A total of 324.96 AF of water, excluding transmission losses, may be beneficially used annually for primary irrigation from POD #11 under the portion of 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 has requested that the affected portion of Certificate 76714 be cancelled upon issuance of the Final Order approving T-10508.
8. The applicants are not the owners of the lands to which the water right described in Finding of Fact #2 is appurtenant. However, water right conveyance agreements have been completed and interest in the water rights has been conveyed to COID from preceding water right holders and/or the original landowner. The portion of the right to be transferred was appurtenant to lands owned by the identified landowners at the time interest in the water right was conveyed through a Quit Claim, a water right conveyance agreement.

Landowner at time water right was originally conveyed	Water Right Interest Holder	T	R	Sec	¼ ¼	Tax Lot	Acres
Albert Payton	COID	15S	12E	1	SW SE	1200	0.25
Sun Coast Development, LLC	COID	15S	13E	5	SW SW	1004	8.5
Redmond Communities	COID	15S	13E	8	NE SW	200	5.3
Kevin P. and Nancy G. Connelly	COID	15S	13E	8	NE SW	600	1.4
Tri-County Investors Limited Partnership IV	COID	15S	13E	8	NE SW	800	0.3
Tri-County Investors Limited Partnership IV	COID	15S	13E	8	NW SW	800	0.5
James M. and Connie L. Tittle	COID	15S	13E	8	SW SW	804	0.9
Kim D. Goin	COID	15S	13E	8	SW SW	801	0.77
KEB Antler Investment, LLC	COID	15S	13E	8	SW SW	700	4.0
						803	1.0
						900	4.0
Rise Up, Inc.	COID	15S	13E	8	SE SW	600	0.8
High Desert Redmond, LLC	COID	15S	13E	10	NE NW	105	9.8
Connie K. Graves	COID	15S	13E	16	NW NW	1100	2.5
Albert Wesley Payton	COID	15S	13E	17	NE NW	500	2.0
BTD Properties, LLC (original landowner) Creative Water Solutions (water right holder prior to conveyance to COID)	COID	15S	13E	17	NE SW	2900	7.1
BTD Properties, LLC (original landowner) Creative Water Solutions (water right holder prior to conveyance to COID)	COID	15S	13E	17	SE SW	2900	5.1
EMP Majestic Ridge, LLP	COID	15S	13E	19	SE NE	200	4.3
Gene Hoskin	COID	15S	13E	20	NW SE	3300	0.5
Samuel E. Blackwell	COID	15S	13E	21	SW NW	2800	0.35
Lou C. Shive	COID	15S	13E	21	SW NW	2900	0.25
Leroy C. Bennett and Kathleen M. Bennett	COID	18S	12E	3	SE NE	1400	0.5

9. Application T-10508 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; pollution abatement; and recreation.

10. Application T-10508 also proposes to use 48.93 acres of irrigation use (described in Finding of Fact #2) proposed for instream transfer for the purpose of establishing mitigation credits in the Deschutes Ground Water Study Area, and to use the remaining 11.19 acres of irrigation use for restoration purposes.
11. Application T-10544 proposes to change the place of use of the right to create the following instream reaches:

Reach #1 (Upper Reach) (restoration flows only): From Central Oregon Canal POD #1 to COID North Canal POD #11.

Reach #2 (Middle Reach) (restoration and mitigation flows): From COID North Canal POD #11 to Lake Billy Chinook (River Mile (RM) 120).

Reach #3 (Lower Reach) (restoration flows only): From Lake Billy Chinook (RM 120) to the mouth of the Deschutes River (RM 0).

12. The applicant proposes the following quantities of water to be transferred instream:

Reach #1:

Certificate	Priority Date	Rate Instream	Volume Instream
83571	October 31, 1900	Season 1: 0.003 CFS Season 2: 0.005 CFS Season 3: 0.008 CFS	2.73 AF

Reach #2:

Certificate	Priority Date	Rate Instream	Volume Instream
83571	October 31, 1900	Season 1: 0.416 CFS Season 2: 0.556 CFS Season 3: 1.029 CFS	330.41 AF

Reach #3:

Certificate	Priority Date	Rate Instream	Volume Instream
83571	October 31, 1900	Season 1: 0.047 CFS Season 2: 1.047 CFS Season 3: 0.047 CFS	20.14 AF

13. There are existing instream water rights within the same reach as that proposed for the new instream water right. One of these existing instream water rights, Certificate 59778 with a priority date of November 3, 1983, was established under ORS 537.346, the conversion of a minimum perennial streamflow to instream use. This instream water right is located from the confluence of the Spring River with the Deschutes River to the North Canal Dam (POD #11). There is also 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 24, 1990. Below Lake Billy Chinook, there are two other instream water

rights, Certificates 73188 and 73237, with priority dates of October 2, 1989 and January 16, 1996, respectively. These instream water rights were established pursuant to ORS 537.341, the state agency instream water right application process, and are located from the Pelton Regulation Dam on the Deschutes River to the mouth. The remaining instream water rights were established under ORS 537.348, the instream transfer process, and ORS 537.470, the allocation of conserved water process.

14. 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.
15. 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 #12, do not include the 45% transmission loss. The Department has determined that water may be protected instream solely under the 1900 priority date.
16. Notice of the transfer application was provided by the applicant to Deschutes County, Jefferson County, the City of Bend, Wasco County and the City of Maupin. Additionally, the Department provided notification of the proposed action to these local governments upon receipt of Transfer Application T-10508.
17. Notice of the application for transfer was published on January 1, 2008, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
18. On August 28, 2008, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10508 to the applicants. The cover letter for the draft Preliminary Determination set forth a deadline of September 27, 2008, for the applicants to respond and provide additional information necessary to complete and clarify the application. The additional information requested by the Department was received on August 28, September 4, October 6, and October 7, 2008. On August 28, 2008, the applicants concurred with the draft Preliminary Determination and requested that the Department proceed with issuance of a Preliminary Determination.
19. On October 28, 2009, the Department issued a Preliminary Determination proposing to approve Transfer Application T-10508 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 November 4, 2008, and in the Bend Bulletin on October 31,

2008, and November 7 and 14, 2008, 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 690-77-0075 and 690-380-4010)

20. The following portion of the right was leased instream and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.

Township	Range		Meridian	Sec	¼ ¼		Acres	Lease #	Lease Year
15	S	12	E	WM	1	SW SE	0.25	IL-758	2006
15	S	13	E	WM	8	SW SW	9.77	IL-807	2007
15	S	13	E	WM	10	NE NW	9.8	IL-706	2006
15	S	13	E	WM	16	NW NW	2.5	IL-761	2006
15	S	13	E	WM	17	NE NW	2.0	IL-758	2006
15	S	13	E	WM	17	NE SW	7.1	IL-633 IL-754	2005 2006
15	S	13	E	WM	17	SE SW	5.1	IL-633 IL-754	2005 2006
15	S	13	E	WM	20	NW SE	0.5	IL-371	2003 thru 2006
18	S	12	E	WM	3	SE NE	0.5	IL-852	2007

21. Water has been used within the last five years according to the terms and conditions of the right on the remaining portion of the right proposed for transfer, and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
22. 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-10508. Individual delivery systems were removed from the lands on which the portion of Certificate 83571 is proposed for transfer shortly after interest in the water right was conveyed to COID.
23. The proposed instream use requires modification to take into account return flows. The quantities requested to be protected instream in Reach #3, as described in Finding of Fact #12, account for return flows. A portion of the water diverted at the POD returns to the Deschutes River within the proposed reach and is available to downstream water right holders. Return flows from the existing use are back in the river system once river flows reach the Madras Gage. To prevent injury to downstream water right holders and enlargement of the right, the quantity of water that may be protected instream requires modification and return flows should be accounted for at the Madras Gage. The original Reach #3 proposed by the applicant accounted for return on the system higher than needed.
24. The applicants have also requested to protect water instream for mitigation purposes only down to Lake Billy Chinook and restoration flows down to the mouth of the Deschutes River. The reaches proposed by the applicants requires further modification to take into

account where water is to be protected and the location of return flows described in Finding of Fact #23.

25. The period during which water is requested to be protected instream requires modification to prevent injury and enlargement. The period requested by the applicant is 214 days. 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.
26. Based on Findings of Fact #23, #24, and #25, on August 28, 2008, the applicants agreed to modify the quantities to be transferred and protected instream as follows:

Reach 1 (Restoration flows only): Central Oregon Canal POD #1 COID North Canal to POD #11

Certificate	Priority Date	Instream Period	Instream Rate	Instream volume
83571	October 31, 1900	Season 1 (modified to end October 26)	0.003 CFS	2.73 AF
		Season 2	0.005 CFS	
		Season 3	0.008 CFS	

Reach 2 (Mitigation and Restoration flows): COID North Canal POD #11 to Lake Billy Chinook (RM 120)

Certificate	Priority Date	Instream Period	Instream Rate	Instream volume
83571	October 31, 1900	Season 1 (modified to end October 26)	0.413 CFS	327.69 AF
		Season 2	0.552 CFS	
		Season 3	1.020 CFS	

Reach 3 (Restoration flows only): Lake Billy Chinook (RM 120) to the Madras Gage

Certificate	Priority Date	Instream Period	Instream Rate	Instream volume
83571	October 31, 1900	Season 1 (modified to end October 26)	0.076 CFS	61.0 AF
		Season 2	0.103 CFS	
		Season 3	0.189 CFS	

Reach 4 (Restoration flows only with return flows accounted for): Madras Gage to mouth of Deschutes River (RM 0)

Certificate	Priority Date	Instream Period	Instream Rate	Instream volume
83571	October 31, 1900	April 1 – October 26	0.047 CFS	20.14 AF

27. The proposed change, as modified, would not result in enlargement of the right.
28. The proposed change, as modified, would not result in injury to other water rights.
29. The amount and timing of the proposed instream flow, as modified, is allowable within the limits and use of the original water right.

30. The protection of flows within the reaches identified in Finding of Fact #25 is appropriate, considering:
- a) The instream water right begins at the recorded points of diversion;
 - b) The location of confluences with other streams downstream of the points 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 within the proposed reach and have been accounted for in Reach #4.
31. 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 reaches 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 existing and 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 Oregon Department of Environmental Quality's (DEQ) 303d list of water quality limited streams for temperature and pH above Lake Billy Chinook and for nutrients, sedimentation and temperature below Lake Billy Chinook at the lower end of the river.
32. 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.
33. 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.
34. 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.

35. 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

36. Supplemental water right Certificate 76714 is 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 nor have they requested that Certificate 76714 be included as part of the transfer application. The applicant has requested that the affected portions of the supplemental water right under Certificate 76714 be cancelled upon issuance of the Final Order approving T-10508. A portion of Certificate 76714 to be cancelled has been quit claimed to COID. However, some portions of Certificate 76714 have not been quit claimed to COID. All persons who are owners of the property from which the primary irrigation rights under Certificate 83571 were quit claimed to COID were not provided prior notification of the intent to cancel Certificate 76714.

37. Supplemental water rights (layered water rights) must be included in a transfer application or cancelled.

38. Consistent with OAR 690-380-2250, the Department provided notice in the Preliminary Determination to COID and affected landowners (those owners of lands from which Certificate 76714 is to be cancelled) of its intent to cancel the portion of Certificate 76714 as described below unless within 30 days of the date of the notification, the applicant modified the application to include the supplemental right or withdrew the application. The applicant did not respond to the notice by modifying or withdrawing the application. In addition, no response was received from the affected landowners.

39. 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 60.12 acres, consisting of the following:
 POD #1: Irrigation of 0.5 acre
 POD #11: Irrigation of 59.62 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	W.M.	17	NE NE	CRANE PRAIRIE RESERVOIR DAM
18	S	11	E	W.M.	13	SW NE	POD #1 (CENTRAL OREGON CANAL): 1520 FEET SOUTH AND 1535 FEET WEST FROM THE NE CORNER OF SECTION 13

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 EAST FROM THE NORTH ¼ CORNER OF SECTION 29

Authorized Places of Use:

Township		Range		Meridian	Sec	¼ ¼	POD	Acres
15	S	12	E	WM	1	SW SE	11	0.25
15	S	13	E	WM	5	SW SW	11	8.5
15	S	13	E	WM	8	NE SW	11	7.0
15	S	13	E	WM	8	NW SW	11	0.5
15	S	13	E	WM	8	SW SW	11	10.67
15	S	13	E	WM	8	SE SW	11	0.8
15	S	13	E	WM	10	NE NW	11	9.8
15	S	13	E	WM	16	NW NW	11	2.5
15	S	13	E	WM	17	NE NW	11	2.0
15	S	13	E	WM	17	NE SW	11	7.1
15	S	13	E	WM	17	SE SW	11	5.1
15	S	13	E	WM	19	SE NE	11	4.3
15	S	13	E	WM	20	NW SE	11	0.5
15	S	13	E	WM	21	SW NW	11	0.6
18	S	12	E	WM	3	SE NE	1	0.5

40. 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 & 630 FEET <u>WEST</u> FROM THE <u>EAST</u> ¼ CORNER OF SECTION 29

Preliminary Award of Deschutes Basin Mitigation Credits

41. COID and the DRC (the applicants) have requested a portion of 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 COID and the DRC.
42. The Department assigned this mitigation credit project number MP-112.
43. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on March 4, 2008. No comments were received in response to that notice.

44. 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 27, 2008. Comments were received from OPRD. OPRD identified that this instream transfer, along with other instream allocations, will, over time, improve streamflows for recreation. OPRD was also supportive of having water protected instream April 1 through October 26.
45. No changes were made to the instream transfer as a result of comments received or consultation with the above named agencies.
46. The proposed transfer of 48.93 acres of irrigation use to instream use for mitigation purposes will provide 88.1 acre-feet of mitigation water. Therefore, 88.1 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/or General Zones of Impact.
47. A total of 266.69 AF is proposed to be transferred to instream use to establish mitigation and 88.1 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.
48. 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.
49. 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. No water will be protected instream during the 2008 calendar year. Water may begin to be protected instream during the 2009 calendar year. Mitigation credits awarded to this project may be valid beginning January 1, 2009.

Conclusions of Law

The changes in character of use and place of use to instream use proposed in application T-10508 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 shall 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-10508 are approved. The portion of the right that has been abandoned is cancelled.
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:

POD #1

Priority Date	Season 1	Season 2	Season 3	Duty
October 31, 1900	0.006 CFS	0.008 CFS	0.011 CFS	4.93 AF
December 2, 1907			0.004 CFS	

POD #11

Priority Date	Season 1	Season 2	Season 3	Duty
October 31, 1900	0.743 CFS	0.991 CFS	1.311 CFS	589.37 AF
December 2, 1907			0.525 CFS	

3. 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 #39. Modification of this supplemental water right shall reduce by 60.12 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 1 (Restoration flows only): Central Oregon Canal POD #1 to COID North Canal POD #11 (both as described in Finding of Fact #2)

Certificate	Priority Date	Instream Period	Instream Rate	Instream volume
83571	October 31, 1900	Season 1 (modified to end October 26)	0.003 CFS	2.73 AF
		Season 2	0.005 CFS	
		Season 3	0.008 CFS	

Reach 2 (Mitigation and Restoration flows): COID North Canal POD #11 to Lake Billy Chinook (RM 120)

Certificate	Priority Date	Instream Period	Instream Rate	Instream volume
83571	October 31, 1900	Season 1 (modified to end October 26)	0.413 CFS	327.69 AF
		Season 2	0.552 CFS	
		Season 3	1.020 CFS	

Reach 3 (Restoration flows only): Lake Billy Chinook (RM 120) to the Madras Gage

Certificate	Priority Date	Instream Period	Instream Rate	Instream volume
83571	October 31, 1900	Season 1 (modified to end October 26)	0.076 CFS	61.0 AF
		Season 2	0.103 CFS	
		Season 3	0.189 CFS	

Reach 4 (Restoration flows only with return flows accounted for): Madras Gage to mouth of Deschutes River (RM 0)

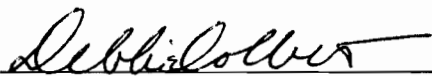
Certificate	Priority Date	Instream Period	Instream Rate	Instream volume
83571	October 31, 1900	April 1 – October 26	0.047 CFS	20.14 AF

5. 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.
6. 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. Stream channel losses and gains calculated based on available data and the use of water by senior appropriators will determine the amount of water to which this right is entitled downstream from the original point of diversion within the specified stream reach.
7. 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 other conditions and limitations as may be germane to instream rights, that are contained in Certificate 83571 and any related decree.
9. The former place of use of the transferred water shall no longer receive water as part of these rights.
10. **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, results in completion of the project and verification by the Department that the project is complete. Therefore, mitigation credits, in the amount of **88.1** 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 and General Zones of Impact**. The awarded mitigation credits are valid beginning January 1, 2009, the first calendar year that water will be protected instream under the new instream water right.

11. 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.
12. 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 29th day of December, 2008.


For Phillip C. Ward, Director

Mailing Date 12-31-2008