

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

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Application T-10672 and Mitigation Credit)	PROPOSING APPROVAL OF A
Project MP-123, Klamath County)	CHANGE IN PLACE OF USE AND
)	CHARACTER OF USE, PARTIAL
)	CANCELLATION OF A WATER
)	RIGHT, AND PRELIMINARY 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 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

CASCADE TIMBERLANDS (OREGON), LLC
THOMAS RINGO
15 SW COLORADO, SUITE 3
BEND, OR 97702

Pursuant to OAR 690-380-4030, any person may file a protest or standing statement within 30 days after the last date of publication of notice of this preliminary determination.
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Findings of Fact

Background

1. On July 14, 2008, Cascade Timberlands (Oregon), LLC, filed an application to change the place of use and character of use under a portion of Certificate 13628 to instream use. The Department assigned the application number T-10672.
2. On September 21, 2009, Reed Marbut, agent for the applicant, submitted a request to amend the application to establish mitigation credits in the Deschutes Ground Water Study Area. Originally, the application had been identified as proposed mitigation for ground water permit application G-16905.
3. On June 30, 2010, Reed Marbut, agent for the applicant, submitted a request to further amend the application and remove 30 acres of irrigation originally proposed for transfer in the SW NE of Section 20, Township 24 South, Range 7 East.
4. On June 30, 2010, Reed Marbut, agent for the applicant, submitted a request to incorporate cancellation of a remaining portion (15.0 acres) of Certificate 13628, not proposed for transfer, contingent upon approval of Instream Transfer Application T-10672.
5. On December 16, 2010, Reed Marbut, agent for the applicant, submitted a request to further amend the application to remove 1.96 acres of irrigation from the application and submitted an affidavit to cancel these acres, contingent upon approval of Instream Transfer Application T-10672. In addition, the applicant also requested to amend the proposed instream reach to extend from the POD on Big Marsh Creek to the mouth of the Little Deschutes River. The original proposed reach extended into the Deschutes River to Lake Billy Chinook.

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

Certificate: 13628 in the name of ESTATE OF H. P. HOEY (confirmed by Deschutes River (F) Decree

Use: IRRIGATION of 93.04 ACRES

Priority Date: SEPTEMBER 1, 1898

Quantity:

Rate:

April 1 to May 23 and August 20 to November 1

Limited to 1/80th cubic foot per second (CFS) per acre

May 23 to August 20

Limited to 1/40th CFS per acre

Duty: Limited to 4.0 acre-feet (AF) per acre

April 1 to May 23 and August 20 to November 1	May 23 to August 20	Duty
1.16 CFS	2.33 CFS	372.16 AF

Limit/Duty: The amount of water to which this right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purpose and shall not exceed 4 acre-feet per acre, measured at the point of diversion from the stream, which may be diverted at a rate not to exceed One-Fortieth of one cubic foot per second per acre from May 23 to August 20 and One-

Eightieth of one cubic foot per second per acre from April 1 to May 23 and August 20 to November 1.

Source: Big Marsh Creek, tributary to Crescent Creek

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
24 S	7 E	WM	20	SE NW	29.40
24 S	7 E	WM	20	NE SW	33.39
24 S	7 E	WM	20	NW SW	30.25
Total Acres					93.04

7. The location of the point of diversion is not specified in the certificate. The Deschutes River Decree identifies that water is diverted by dams and ditches but does not specify a specific point of diversion. However, the application identifies that the diversion is through a series of submerged weirs at irregular intervals with the uppermost diversion located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
24 S	7 E	WM	20	SW SW	1000 FEET NORTH AND 400 FEET EAST FROM THE SW CORNER OF SECTION 20

8. Transfer application T-10672 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 and to establish mitigation credits in the Deschutes Ground Water Study Area.
9. Transfer application T-10672, as amended, proposes to change the place of use of the right to create an instream reach from the point of diversion on Big Marsh Creek, into Crescent Creek, into the Little Deschutes River, and to the mouth of the Little Deschutes River.
10. The original application proposed the quantities of water to be transferred instream be protected as follows:

Period	Rate (cfs)	Volume (acre-feet)
April 1 through May 22	1.56 CFS	500.0 AF
May 23 through August 19	3.13 CFS	
August 20 through October 31	1.56 CFS	

11. The applicants propose that an instream water right established as a result of this instream transfer be additive to any 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 an 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.

12. The applicants have provided notification of the proposed action to Klamath and Deschutes Counties. Additionally, the Department provided notification of the proposed action to the Klamath and Deschutes Counties upon receipt of Transfer Application T-10623. Notice of the proposed action has also been provided to the City of Bend and Jefferson County.
13. Notice of the application for transfer was published on July 22, 2008, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
14. On December 21, 2010, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10672 to the applicant. A copy of the draft Preliminary Determination was also sent to the attorney (agent) for the applicant by e-mail. The draft Preliminary Determination cover letter set forth a deadline of January 19, 2011, for the applicant to respond. On December 21, 2010, the Department also sent the attorney for the applicant a revised draft Preliminary Determination based upon comments from the applicant's attorney. The revised draft Preliminary Determination corrected a small error identified in the quantity of water to be protected instream in reach #4 and Reach #5. In addition, the amount of mitigation that may be awarded to the project was incorrectly identified.
15. On December 21, 2010, the attorney for the applicant provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer. On December 22, 2010, the applicant's attorney concurred with the draft Preliminary Determination, on behalf of the applicant, and requested that the Department proceed with issuance of a Preliminary Determination.

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

16. Water has been used within the last five years according to the terms and conditions of the portion of the right proposed for transfer, and there is no information in the record that would demonstrate that this portion of the right is subject to forfeiture under ORS 540.610.
17. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Transfer Application T-10672.
18. The applicant has requested to protect water instream at the full rate and duty allowed for the amount of irrigation use proposed for transfer in the original application (125 acres) over the entire irrigation season (see Finding of Fact #10), which runs April 1 through October 31. The number of acres of irrigation that may be transferred to instream use has been reduced based on Findings of Fact #3 and #5. In addition, the Department cannot protect the water over the entire irrigation season at the full rate and duty without enlargement of the water right and injury to other surface water rights. Therefore, the proposed instream use requires modification to prevent enlargement of the water right and injury to other surface water rights.

The Department's Watermaster recommended that water be protected instream starting May 15 to allow water to be protected instream after spring runoff and before flows are augmented by releases from Crescent Lake.

19. The proposed instream use also requires modification to take into account return flows and stream flow losses. Return flows, approximately 10% of the diversion, from the existing use return to Big Marsh Creek immediately below the point of diversion. Additional return flows, the remaining balance of the diversion minus consumptive use, return to Big Marsh Creek just below the place of use described in Finding of Fact #6.

The stretch of Crescent Creek between the confluence with Big Marsh Creek and the mouth is a losing stream reach and loses approximately 2% of its flows.

20. Based on Findings of Fact #18 and #19, on December 22, 2010, the applicant's attorney (agent) agreed, on behalf of the applicant, to modify quantities of water to be protected instream as follows:

Instream Reach 1: At the POD (as described in Finding of Fact #7)

Priority Date	Instream Period	Rate Instream	Volume Instream
9/1/1898	May 14 through May 22	1.16 CFS	371.4 AF
	May 23 through August 6	2.33 CFS	

Instream Reach 2: From just below the POD to the lower end of the place of use, located approximately where the creek crosses the east boundary of the SE NW of Section 20, T24S, R7E, W.M.

Priority Date	Instream Period	Rate Instream	Volume Instream
9/1/1898	May 14 through May 22	1.05 CFS	334.3 AF
	May 23 through August 6	2.09 CFS	

Instream Reach 3: From the lower end of the place of use, located approximately where the creek crosses the east boundary of the SE NW of Section 20, T24S, R7E, W.M., to the mouth of Big Marsh Creek

Priority Dates	Instream Period	Rate Instream	Volume Instream
9/1/1898	May 14 through August 6	0.99 CFS	167.5 AF

Instream Reach 4: In Crescent Creek, from the confluence with Big Marsh Creek to the mouth of Crescent Creek

Priority Dates	Instream Period	Rate Instream	Volume Instream
9/1/1898	May 14 through August 6	0.97 CFS	164.1 AF

Instream Reach 5: In the Little Deschutes River, from the confluence with Crescent Creek to the mouth of the Little Deschutes River

Priority Dates	Instream Period	Rate Instream	Volume Instream
9/1/1898	May 14 through August 6	0.97 CFS	164.1 AF

21. The proposed change, as modified, would not result in enlargement of the right.
22. The proposed change, as modified, would not result in injury to other water rights.
23. The amount and timing of the proposed instream flow, as modified, are allowable within the limits and use of the original water right.
24. The protection of flows within the proposed reach are 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. The reach for an instream water right is typically from the point of diversion on the source stream to the mouth of that source stream. However, water may be protected further downstream if the quantity of water is measurable in the receiving stream, in this case Crescent Creek and the Little Deschutes River. The quantity of water proposed to be protected instream in Reach #4 is measurable in Crescent Creek and the quantity proposed to be protected instream in Reach #5 is measurable in the Little Deschutes River, consistent with OAR 690-077-0015(8), and therefore, the reach may extend into Crescent Creek and into the Little Deschutes River to the mouth;
 - c. There are known areas of natural loss of streamflow to the river bed downstream from the point of diversion that have been accounted for in Reach #4; and
 - d. The quantity of water to be protected instream in Reach #2 and Reach #3 has been reduced to account for return flows. Any return flows resulting from the exercise of the existing water right re-enter the Big Marsh Creek just below the point of diversion and remaining return flows re-enter Big Marsh Creek downstream just below the place of use.
25. Within the proposed instream reach on Big Marsh Creek, there is an existing instream water right, Certificate 73236, with a priority date of October 11, 1990, established under ORS 537.341 (state agency application process), for the purpose of migration, spawning, egg incubation, fry emergence and juvenile rearing.

Within the proposed instream reach on Crescent Creek (#4), there is an existing instream water right, Certificate 73234, with a priority date of October 11, 1990, established under ORS 537.341 (state agency application process), for the purpose of migration, spawning, egg incubation, fry emergence and juvenile rearing.

Within the reach on the Little Deschutes River (#5), there is an existing instream water right, Certificate 73226, with a priority date of October 11, 1990, established under ORS 537.341 (state agency application process), for the purpose of fish migration, spawning, egg incubation, fry emergence and juvenile rearing. There are also three additional existing instream water rights, Certificates 83652, 86020, and 86021, established under ORS 537.348 (instream transfer process) for the purpose of conservation, maintenance and enhancement of

aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; pollution abatement; and recreation.

The Little Deschutes River is also on the Oregon Department of Environmental Quality's (DEQ) 303d list of water quality limited streams for a variety of water quality concerns.

26. The existing instream water rights, established under ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency application process), within the proposed reach on Big Marsh Creek, Crescent Creek, and the Little Deschutes River are sufficient to protect the monthly quantities of water necessary for various fishlife stages, supporting aquatic life, and minimizing pollution, but are not always met. By replacing a portion of these instream water rights, any instream water right created as a result of this transfer will provide for protection of streamflows identified as necessary for various fishlife stages, supporting aquatic life, and minimizing pollution, under an earlier priority date.
27. By adding to other instream water rights, established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process), located within the portion of the proposed reach located on the Little Deschutes River, a new instream water right established by this transfer would provide protection for additional streamflows necessary for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.
28. During the period July 7 through October 31, 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.
29. The total monthly quantities of water proposed to be protected instream (as described in Findings of Fact #20) within the proposed reach will provide for a beneficial purpose and, in conjunction with other existing instream water rights, will not exceed the estimated average natural flow.

Partial Cancellation of a Water Right

30. On June 30, 2010, an affidavit certifying that a portion of a water right (15.0 acres) has been abandoned and requesting cancellation of the right was received from the landowner, Scott Chambers. In addition, on December 16, 2010, an affidavit certifying that a portion of the water right (1.96 acres) has been abandoned and requesting cancellation of the right was received from Cascade Timberlands (Oregon), LLC, the water right holder. The right to be cancelled is as follows:

Certificate: 13628 in the name of Estate of H. P. Hoey (confirmed by Deschutes River (F) decree)
Use: Irrigation of 16.96 acres
Priority Date: September 1, 1898

Quantity:

Rate:

April 1 to May 23 and August 20 to November 1
Limited to 1/80th cubic foot per second (CFS) per acre
May 23 to August 20
Limited to 1/40th CFS per acre

Duty: Limited to 4.0 acre-feet (AF) per acre

April 1 to May 23 and August 20 to November 1	May 23 to August 20	Duty
0.21 CFS	0.42 CFS	67.84 AF

Limit/Duty:

The amount of water to which this right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purpose and shall not exceed 4 acre-feet per acre, measured at the point of diversion from the stream, which may be diverted at a rate not to exceed One-Fortieth of one cubic foot per second per acre from May 23 to August 20 and One-Eightieth of one cubic foot per second per acre from April 1 to May 23 and August 20 to November 1.

Period of Use: April 1 to November 1

Source: Big Marsh Creek, tributary to Crescent Creek

Authorized Point of Diversion: Unspecified on Certificate

Authorized Place of Use to be Cancelled:

Twp	Rng	Mer	Sec	Q-Q	Acres
24 S	7 E	WM	20	SE NW	0.60
24 S	7 E	WM	20	NE SW	6.61
24 S	7 E	WM	20	NW SW	9.75

Preliminary Award of Deschutes Basin Mitigation Credits

31. Cascade Timberlands (Oregon), LLC, (the Applicant) has 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 to Cascade Timberlands (Oregon), LLC.
32. The Department assigned this mitigation credit project number MP-123.
33. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on October 6, 2009. No comments were received in response to this notice.
34. The Department consulted with representatives from ODFW, DEQ, Oregon Parks and Recreation Department, Oregon Department of State Lands, the Oregon Department of Agriculture, and the Department's Watermaster pursuant to OAR 690-521-0300 (7) and OAR 690-505-0630 (2) on October 14, 2009. No comments were received in response to this consultation.
35. No changes were made to the instream transfer as a result of comments received or consultation with the above named agencies.

36. As part of the public notice of the mitigation project, the Department identified that the project may result in 252.0 mitigation credits. However, since the application was originally submitted to the Department the number of acres of irrigation proposed for transfer has been reduced to 93.04 acres. Irrigation of 93.04 acres has an average consumptive use of 167.5 AF. However, this volume may only be protected instream in Big Marsh Creek. The quantity of water that may be protected instream downstream of Big Marsh Creek requires modification to account for streamflow losses on Crescent Creek, which reduces the amount of mitigation available from the project. In the Little Deschutes River up to 164.1 AF may be protected instream. This is the amount of mitigation available in the Little Deschutes Zone of Impact.
37. Therefore, a maximum of 164.1 mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to Cascade Timberlands (Oregon), LLC. 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 Little Deschutes Zone of Impact.
38. A total of 371.4 AF (at the point of diversion) is proposed to be transferred to instream use and up to 164.1 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.
39. 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 for the proposed instream water right shall result in completion of the project and verification that the project is complete. Mitigation credits awarded to this mitigation credit project (MP-123) may be valid the first year that water is protected instream under any new instream water right issued as a result of this transfer.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in transfer application T-10672 appear to be 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. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved and the abandoned portion of the right will be cancelled.

This mitigation project appears to result in mitigation credits pursuant to ORS 537.746 and OAR 690-521-0300 and 690-521-0400.

If transfer application T-10672 is approved, the final order will include the following:

1. *The changes in character of use and place of use to instream use proposed in transfer application T-10672 are approved. The portion of the right that has been abandoned is cancelled.*

2. Water right certificate 13628 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will be issued describing that portion of the right not affected by this transfer and cancellation.
3. The instream water right shall provide for the protection of streamflows as follows:

Instream Reach 1: *At the POD (as described in Finding of Fact #7)*

Priority Date	Instream Period	Rate Instream	Volume Instream
9/1/1898	May 14 through May 22	1.16 CFS	371.4 AF
	May 23 through August 6	2.33 CFS	

Instream Reach 2: *From just below the POD to the lower end of the place of use, located approximately where the creek crosses the east boundary of the SE NW of Section 20, T24S, R7E, W.M.*

Priority Date	Instream Period	Rate Instream	Volume Instream
9/1/1898	May 14 through May 22	1.05 CFS	334.3 AF
	May 23 through August 6	2.09 CFS	

Instream Reach 3: *From the lower end of the place of use, located approximately where the creek crosses the east boundary of the SE NW of Section 20, T24S, R7E, W.M., to the mouth of Big Marsh Creek*

Priority Dates	Instream Period	Rate Instream	Volume Instream
9/1/1898	May 14 through August 6	0.99 CFS	167.5 AF

Instream Reach 4: *In Crescent Creek, from the confluence with Big Marsh Creek to the mouth of Crescent Creek*

Priority Dates	Instream Period	Rate Instream	Volume Instream
9/1/1898	May 14 through August 6	0.97 CFS	164.1 AF

Instream Reach 5: *In the Little Deschutes River, from the confluence with Crescent Creek to the mouth of the Little Deschutes River*

Priority Dates	Instream Period	Rate Instream	Volume Instream
9/1/1898	May 14 through August 6	0.97 CFS	164.1 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. Stream channel losses and gains calculated based on available data and the use of 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.

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 13628 and any related decree.*
9. *The former place of use of the transferred water right shall no longer receive water as part of this right.*
10. ***Preliminary Award of Mitigation Credits: Final Award of Mitigation Credits may be made upon completion of the project and verification by the Department that the project has been completed as proposed. Issuance of a new instream water right certificate, as described herein, will result in completion of the project and verification by the Department that the project is complete. If completed as proposed, mitigation credits in the amount of 164.1 credits, as described herein, may be awarded to this mitigation project and assigned to Cascade Timberlands (Oregon), LLC. 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 Little Deschutes Zone of Impact. Any mitigation credits awarded will begin being valid the first year that water is to be protected instream under a new instream water right resulting from this mitigation project.***
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.*

Dated at Salem, Oregon this 23 day of December 2010.



Dwight French for
PHILIP C. WARD, DIRECTOR

This Preliminary Determination was prepared by Laura Wilke. If you have questions about the information in this document, you may reach me at 503-986-0884 or Laura.K.Wilke@wrdd.state.or.us.

Protests should be addressed to the attention of Field Services Division, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.

