

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

In the Matter of Instream Transfer	)	PRELIMINARY DETERMINATION
Application T-11102 and Mitigation Credit	)	PROPOSING APPROVAL OF A
Project MP-140, Crook County	)	CHANGE IN PLACE OF USE AND
	)	CHARACTER OF USE 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.

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**

CITY OF PRINEVILLE  
ATTN: JERRY BRUMMER  
387 NE 3<sup>rd</sup> STREET  
PRINEVILLE OR 97754

**Agent**

GSI WATER SOLUTIONS, INC.  
ATTN: ADAM SUSSMAN  
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**Findings of Fact**

**Background**

1. On July 7, 2010, Jerry Brummer, City of Prineville, filled an application to change the place of use and character of use under Certificates 75486 and 75488 to instream use. The Department assigned the application number T-11102.

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.

2. The first right to be transferred is as follows:

**Certificate:** 75486 in the name of CLAUDE P. WILLIAMS (perfected under Permit S-11411)  
**Use:** IRRIGATION of 20.0 ACRES  
**Priority Date:** SEPTEMBER 11, 1934  
**Rate:** 0.25 CUBIC FOOT PER SECOND (CFS)  
**Limit/Duty:** The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to ONE-EIGHTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to 4.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.  
**Source:** CROOKED RIVER, tributary to the DESCHUTES RIVER

**Authorized Point of Appropriation:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	15 E	WM	26	SE SE	AT THE SE CORNER OF SECTION 26

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	15 E	WM	26	NE SW	20.0

3. The second right to be transferred is as follows:

**Certificate:** 75488 in the name of CLAUDE P. WILLIAMS (perfected under Permit S-11619)  
**Use:** IRRIGATION of 17.0 ACRES  
**Priority Date:** MARCH 28, 1935  
**Rate:** 0.21 CFS  
**Limit/Duty:** The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 4.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.  
**Source:** CROOKED RIVER, tributary to the DESCHUTES RIVER

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	15 E	WM	26	SE SE	AT THE SE CORNER OF SECTION 26

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	15 E	WM	35	NE NE	17.00

4. A total of 80.0 Acre-Feet (AF) of water may be beneficially used annually under Certificate 75486 and a total of 68.0 AF of water may be beneficially used annually under Certificate 75488.

5. Certificates 75486 and 75488 do not specify the irrigation season. The irrigation season is February 1 to December 1 pursuant to the Crooked River Decree.

6. There are two supplemental water rights, Certificate 83850 and Certificate 33120, covering a portion of the lands proposed for transfer to instream use. All 20.0 acres of 75386 and all 17.0 acres of Certificate 75388 are covered by 37.0 acres of supplemental irrigation under Certificate 83850. And 19.6 acres of Certificate 75486 are also covered by 19.6 acres of supplemental irrigation under Certificate 33120. By rule, supplemental rights must be included with the transfer or cancelled. However, consistent with OAR 690-380-2240(5), the applicant is proposing, under transfer application T-11103, to move 37.0 acres of supplemental irrigation under Certificate 83850 to the location of another primary right with similar reliability to the existing primary rights. The Department is also proposing to cancel 19.6 acres under Certificate 33120 under Transfer T-11103. If T-11103 is approved, no supplemental irrigation will remain for the lands proposed for transfer to instream use under T-11102.
7. Application T-11102 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; recreation; and pollution abatement. Application T-11102 also proposes to establish mitigation credits in the Deschutes Ground Water Study Area.
8. Application T-11102 proposes to change the place of use of the right to create an instream reach from the authorized POD to Lake Billy Chinook.
9. The applicant proposes the following quantities water to be transferred and protected instream as follows:

Certificate Number	Instream Period	Rate (cfs)	Volume (acre-feet)
75486	May 6 through October 31	0.25	80.0
75488	May 6 through October 31	0.213	68.0
	<b>Total</b>	<b>0.463</b>	<b>148.0</b>

10. 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.
11. The applicant provided notification of the intent to file to proposed instream transfer to the City of Prineville, City of Maupin, Wasco County Planning Division, Crook County Planning Division, Jefferson County Planning Division, and the Confederated Tribes of the Warm Springs. Additionally, the Department provided notification of the proposed action upon receipt of Transfer Application T-10623.

12. Notice of the application for transfer was published on July 13, 2010, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
13. On July 21, 2011, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11102 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of August 19, 2011, for the applicants to respond. The applicants 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.

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

14. Certificates 75488 and 75486 have been leased instream during the last five years under IL-541 (2004 through 2008) and IL-1065 (2010). In addition, there is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
15. A diversion structure and ditch, pond, pipe, pumps and sprinklers 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-11102.
16. A portion of the water diverted at the POD returns to the Crooked River within the proposed reach below the POD and is available to downstream water right holders. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected instream requires modification to account for return flows.

When evaluating for return flows, the Department generally consider the place of use as a whole and where the majority of return flows occur based upon the presence any surface return flows and any subsurface return flows, considering the factors described below.

The hydrogeologic evaluation of where subsurface return flows occur is generally based on the following information: 1) the local shallow and regional groundwater elevations, 2) the shallow and regional head gradient (i.e. groundwater flow direction), 3) elevation of nearby streams, 4) elevation of closest gaining stream reaches, 5) distance from nearby streams and gaining stream reaches, and 6) local geologic information.

While no surface return flows have been observed, the place of use under each right proposed for transfer is located in close proximity to the Crooked River. A portion of the water diverted to the place of use returns to the river system as subsurface return flows around the point of diversion or close to the place of use. The instream flow for the 17.0 acres under Certificate 75488 has been reduced to consumptive use to account for return flow just below the point of diversion. The instream flow for the 20.0 acres under Certificate 75486 has been reduced to consumptive use to account for return flows at the confluence of McKay Creek with the Crooked River.

17. The applicant has requested to protect water instream at the full rates and duty allowed under each right during the period May 6 through October 31, a 179 day period. The instream rate requested, 0.213 CFS, for Certificate 75488 is actually higher than the maximum rate

allowed by that certificate, being 0.21 CFS. Based on a calculation using the full rate and duty of the two water rights, water may be protected instream for a period of 161 days under Certificate 75486 and 163 days under Certificate 75488. The Watermaster has identified that the Crooked River experiences low flows during the late summer in August and September and that there is a need for higher flows during the late irrigation season. The Department's Watermaster recommended instream period be reduced by a few days to start in late May to allow water to be protected instream during the periods of lowest flow on the Crooked River through October 31.

18. Based on Findings of Fact #16 and #17, on July 29, 2011, the applicant agreed to modify the quantities to be transferred and protected instream as follows:

Resulting from Certificate 75488:

Reach #1: At the authorized POD (as described in Finding of Fact #3)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
75488	3/28/1935	0.21	68.0	May 22 through October 31

Reach #2: From immediately below the authorized POD to Lake Billy Chinook.

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
75488	3/28/1935	0.09	30.6	May 22 through October 31

Resulting from Certificate 75486:

Reach #1: From the authorized POD (as described in Finding of Fact #2) to the confluence with McKay Creek

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
75486	9/11/1934	0.25	80.0	May 24 through October 31

Reach #2: From the confluence with McKay Creek to Lake Billy Chinook.

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
75486	9/11/1934	0.10	36.0	May 24 through October 31

19. The proposed changes, as modified, would not result in enlargement of the rights.
20. The proposed changes, as modified, would not result in injury to other water rights.
21. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water rights.
22. The protection of flows within the proposed reach is appropriate, considering:
  - a) The instream water rights will begin 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) Return flows resulting from the exercise of the existing water rights would re-enter the river within the proposed reach and have been accounted for at appropriate points within each proposed reach.
23. There are existing instream water rights established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) within the same reach as that proposed for each of the new instream water rights, which include the use of water for fish and wildlife habitat, aquatic life, recreation, and pollution abatement. There presently are no instream water rights within the proposed reach created as a result of ORS 537.346 (minimum flow conversion) or ORS 537.341 (state agency instream water right application process). However, 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 Bowman Dam to Lake Billy Chinook for anadromous and resident fish rearing, which if approved will have a priority date of May 11, 1990. Requested flows for this pending instream water right application are at times not available during the instream period identified in Finding of Fact #18.
24. This segment of the Crooked River is on DEQ's 303d list of water quality limited streams and a TMDL (Total Maximum Daily Load) study is underway.
25. The Department of Parks and Recreation has previously identified that protection of additional instream flows through this stretch of the Crooked River would be beneficial for the scenic and esthetic qualities of the river and any visitor-related river uses in Smith Rock State Park.
26. 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 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.
27. By replacing a portion of any instream rights created at the request of state agency or under the minimum streamflow conversion process, the instream right will provide protection for streamflows previously identified as necessary for anadromous and resident fish rearing under earlier priority dates.
28. During the period May 22 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 ORS 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or ORS 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 existing and proposed instream rights in the reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

***Preliminary Award of Deschutes Basin Mitigation Credits***

30. The City of Prineville has requested this instream transfer application be used to establish mitigation credits in the Deschutes Ground Water Study Area. The Applicant has also requested that any mitigation credits generated from this project be assigned to the City of Prineville.
31. The Department assigned this mitigation credit project number MP-140.
32. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on October 26, 2010. No comments were received in response to this notice.
33. 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 22, 2010. Comments were received from the Oregon Parks and Recreation Department. The comments received offered support for the proposed instream transfer.
34. No changes were made to the instream transfer as a result of comments received or consultation with the above named agencies.
35. The proposed transfer of 20.0 acres of irrigation under Certificate 75486 and 17.0 acres of irrigation under Certificate 75488 to instream use will provide 66.6 AF of mitigation water (36.0 AF from Certificate 75486 and 30.6 AF from Certificate 75488). Therefore, 66.6 mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to the City of Prineville. 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 Crooked River and General Zones of Impact.
36. A total of 148.0 AF is proposed to be transferred to instream use and 66.6 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.
37. 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.

## Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-11102 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. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved.

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-11102 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 application T-11102 are approved.*
2. *Water right certificates 75486 and 75488 are cancelled. New certificates confirming the instream water rights shall be issued.*
3. *The instream water rights 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 in the Deschutes River as follows:*

### Resulting from Certificate 75488:

#### Reach #1: At the authorized POD (as described in Finding of Fact #3)

<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (CFS)</i>	<i>Instream Volume (AF)</i>	<i>Instream Period</i>
75488	3/28/1935	0.21	68.0	May 22 through October 31

#### Reach #2: From immediately below the authorized POD to Lake Billy Chinook.

<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (CFS)</i>	<i>Instream Volume (AF)</i>	<i>Instream Period</i>
75488	3/28/1935	0.09	30.6	May 22 through October 31

### Resulting from Certificate 75486:

#### Reach #1: From the authorized POD (as described in Finding of Fact #2) to the confluence with McKay Creek

<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (CFS)</i>	<i>Instream Volume (AF)</i>	<i>Instream Period</i>
75486	9/11/1934	0.25	80.0	May 24 through October 31

#### Reach #2: From the confluence with McKay Creek to Lake Billy Chinook.

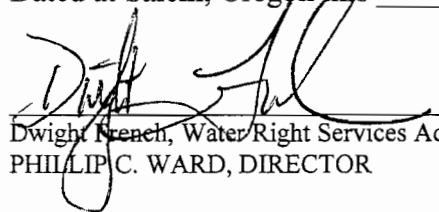
<i>Certificate</i>	<i>Priority Date</i>	<i>Instream Rate (CFS)</i>	<i>Instream Volume (AF)</i>	<i>Instream Period</i>
75486	9/11/1934	0.10	36.0	May 24 through October 31

4. *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.*



5. *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.*
6. *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 identified in a subsequent order establishing a new instream water right under these statutes.*
7. *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 Certificates 75486 and 75488 and any related decree.*
8. *The former place of use of the transferred water shall no longer receive water as part of this right.*
9. ***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 66.6 credits, as described herein, may be awarded to this mitigation project and assigned to the City of Prineville. 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 Crooked River and General Zones of Impact.***
10. *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 10 day of August, 2011.

  
Dwight French, Water Right Services Administrator, for  
PHILLIP C. WARD, DIRECTOR

This Preliminary Determination was prepared by a Reimbursement Authority contractor. If you have questions about the information in this document, you may reach Laura Wilke at 503-986-0884 or [Laura.K.Wilke@wrds.state.or.us](mailto:Laura.K.Wilke@wrds.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.*