



# Oregon

John A. Kitzhaber, MD, Governor

## Water Resources Department

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July 11, 2014

### **Applicant**

Three Sisters Irrigation District  
PO Box 2230  
Sisters, OR 97759  
[manager@tsidweb.org](mailto:manager@tsidweb.org)

**SUBJECT:** Allocation of Conserved Water Application CW-77

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve Conserved Water Application CW-77.

If no protest is filed, the Department will issue a Final Order consistent with this Preliminary Determination. You should receive a copy of the Final Order shortly after the close of the protest periods for both the transfer and conserved water applications.

If a protest is filed, the application may be referred to a contested case proceeding. A contested case provides an opportunity for the proponents and opponents of the decision proposed in the Preliminary Determination to present information and arguments supporting their position to the Water Resources Commission.

Please do not hesitate to contact me at 503-986-0881 or [teri.k.hranac@wrд.state.or.us](mailto:teri.k.hranac@wrд.state.or.us), if I may be of assistance.

Sincerely,

Teri Hranac  
Allocation of Conserved Water  
Transfer and Conservation Section

Enclosure

cc: CW-77  
Brett Golden (via e-mail at [brett@deschutesriver.org](mailto:brett@deschutesriver.org))  
Gen Hubert (via e-mail at [Gen@deschutesriver.org](mailto:Gen@deschutesriver.org))  
District #11 Watermaster (via e-mail)  
Juniper Davis, OWEB (via e-mail at [juniper.davis@state.or.us](mailto:juniper.davis@state.or.us))





at the time the person submits the application, the person also must submit evidence that the district has approved the conservation application. ORS 537.465.

If an application for the allocation of conserved water is approved, the Department shall issue orders covering the changes in the original water rights and once the conservation project is finalized new certificates preserving the previously established priority of rights shall be issued to cover the unaffected portion of the water rights and separate new certificates describing the rights created by the allocation of conserved water. ORS 537.470(6).

ORS 537.455 to 537.500 authorize and establish the process in which a water right holder may submit a request for an allocation of conserved water. OAR Chapter 690, Division 18, implements the statutes and provides the Department's procedures and criteria for evaluating allocation of conserved water applications. OAR Chapter 690, Division 077 provides additional criteria for evaluating proposed instream water rights. The statutes and rules outlined above require the Department to review the application and any comments received to make its findings and determinations.

### Findings of Fact

1. On January 4, 2013, Three Sisters Irrigation District filed an Allocation of Conserved Water Application. The Department designated the application number CW-77.
2. Three Sisters Irrigation District requested an allocation of conserved water under Certificate 74135 issued in the name of Squaw Creek Irrigation District. On June 1, 2004, Squaw Creek Irrigation District changed its name to Three Sisters Irrigation District (TSID). TSID maintains the water delivery system for the benefit of the landowners in the area.
3. Three Sisters Irrigation District proposes to conserve water by replacing approximately 5,100 feet of open ditch on its main canal with 42" and 54" buried high density polyethylene (HDPE) pipe. Replacement of the existing open and leaky portions of the delivery system will eliminate seepage and evaporation losses conserving approximately 565 acre feet of water.
4. Canal or lateral piping with HDPE pipe is a proven water conservation technique.
5. The entirety of the right to be modified is:

**Certificate:** 74135, in the name of TSID. This right was confirmed by the Whychus [Squaw] Creek Decree.

**Priority Date, Quantity and Acres:**

Priority Date	Maximum Rate (cfs)	Acres (Equivalent)
1869	0.96	48.00
1885	1.58	79.05
1887	3.00	150.00
1889	4.03	201.50
1893	0.79	39.50
1895	114.33	5716.75

Priority Date	Maximum Rate (cfs)	Acres (Equivalent)
1899	2.18	108.80
1900	1.08	54.00
1901	0.45	22.30
1903	7.21	360.60
1904	17.41	870.60
Totals	153.02	7,651.10

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	WM	21	SW SW	998 FEET NORTH AND 1211 FEET EAST FROM THE SW CORNER OF SECTION 21

**Source:** Whychus [Squaw] Creek, a tributary of the Deschutes River.

**Authorized Place of Use:** Entirety of Certificate

6. The acreage under Certificate 74135 has been modified by cancellations completed pursuant to ORS 540 as listed below:

Priority Date	Acres (equivalent)	Acres Abandoned T-6854	Remaining Acres (equivalent)
1869	48.00		48.00
1885	79.05		79.05
1887	150.00		150.00
1889	201.50		201.50
1893	39.50		39.50
1895	5716.75		5716.75
1899	108.80		108.80
1900	54.00		54.00
1901	22.30		22.30
1903	360.60	-16.60	344.00
1904	870.60	-167.40	703.20
Totals	7,651.10	-184.00	7467.10

7. The rate associated with Certificate 74135 has been affected by transfers, cancellations, and allocations of conserved water. The approximate starting point for Certificate 74135 is as follows:

Priority Date	Max. Rate (cfs)	T-6854	CW-30	CW-34	CW-44	CW-49	CW-50	CW-51	CW-33	CW-56	CW-66	New Starting Point
1869	0.96											0.96
1885	1.58		-0.28									1.30
1887	3.00											3.00
1889	4.03											4.03
1893	0.79											0.79
1895	114.33			-1.50	-1.20	-1.20	-1.20	-1.20	-2.00	-1.20	-8.00	96.83
1899	2.18				-0.03	-0.03	-0.03	-0.03		-0.03		2.03
1900	1.08		-0.33									0.75
1901	0.45											0.45
1903	7.21	-0.33										6.88
1904	17.41	-3.35			-0.28	-0.28	-0.28	-0.28		-0.28		12.66
Totals	153.02	-3.68	-0.61	-1.50	-1.51	-1.51	-1.51	-1.51	-2.00	-1.51	-8.00	129.68

The starting point for Certificate 74135 is based on all previously approved Allocation of Conserved Water projects being completed and finalized. If projects are completed and finalized in a different order, or if there are other intervening transfers, cancellations, allocations of conserved water, or other modifications to the right, then the actual quantity of water available under Certificate 74135 may change.

8. Any previously approved or pending transfers, cancellations, allocations of conserved water, or other modifications to Certificate 74135, which are not listed in Finding of Fact #7 will cause a corresponding change to the rate, duty, and total number of acres served by Certificate 74135.
9. Based on the above adjusted starting point for Certificate 74135, conserved water application CW-77 proposes to conserve the following quantity of water:

Priority	Before Project		After Project		Conserved Water	
	Rate		Rate (CFS)		Rate (CFS)	Duty
	Maximum CFS	CFS/AC	Maximum CFS	CFS/AC	Maximum CFS	Maximum AF
1895	129.68	0.02	128.35	0.02	1.33	563.55

10. Water has been used within the five-year period prior to submission of the allocation of conserved water application, and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.
11. Diversion structures, canals, and ditches sufficient to deliver the full quantity of water allowed under the existing right were present within the five-year period prior to submission of Allocation of Conserved Water application CW-77.
12. The Applicant requests the priority date for any conserved water be the same as the originating right.
13. The Applicant funded 50% of the conservation project.
14. Allocation of Conserved Water Project CW-77 is complete and resulted in 1.33 cfs and 563.55 acre-feet of conserved water under Certificate 74135 with an 1895 priority. Pursuant to OAR 690-018-0012(1), TSID requests that 100% of the conserved water under Certificate 74135 be dedicated to the state as a new instream water right.

Priority	State's Portion		Applicant's Portion		Conserved Water	
	Maximum Rate (CFS)	Percentage	Maximum Rate (CFS)	Percentage	Maximum Rate (CFS)	Maximum Duty (Volume) AF
1895	1.33	100 %	0	0%	1.33	563.55

15. On March 28, 2013, TSID's representative provided notice of the proposed conservation project to the Land Use and Planning Department Deschutes County and the City of Sisters Planning Department as required by OAR 690-018-0040(22).
16. Three Sisters Irrigation District submitted a completed land use form signed by Deschutes County demonstrating the proposed use is consistent with local comprehensive land use requirements.

17. On July 8, 2013, the Department's District 11 Watermaster reviewed Allocation of Conserved Water Application CW-77 and determined that the conservation project would result in conserved water which could be allocated without harm to other rights provided the following condition is placed on the exiting right and the proposed the instream water right:

The existing or another suitable measuring device must be maintained and monitored on TSID's main canal in such a manner to render a reliable measurement.

18. The proposed allocation of conserved water project, as conditioned above, will not harm existing water rights; therefore, no reduction in the quantity of conserved water to be allocated is required to mitigate effects on other water rights.
19. In consultation with the Oregon Department of Fish and Wildlife (ODFW) and Oregon Parks and Recreation Department (OPRD), the Department has determined the water allocated to the state is necessary to support instream flows for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, and other ecological values, and recreation. The proposed instream right is located in an ODFW flow restoration priority watershed and is also in a reintroduction area for spring Chinook and summer steelhead. OAR 690-018-0050(4)(f).
20. The project is complete and no additional time is required. On June 26, 2014, TSID submitted a Request for Finalization.
21. Notice of the proposed conservation project was published in the Department's weekly notice on June 25, 2013, and in *The Bulletin* newspaper on June 23 and 30, 2013, as required under OAR 690-018-0050.

***Allocation of Conserved Water Review Criteria [OAR 690-018-0050]***

22. Allocation of Conserved Water Application CW-77 contains all the information required by OAR 690-018-0040.
23. As established in Finding of Fact #9, the proposed Allocation of Conserved Water project will result in a reduced diversion for the uses allowed under the original rights. OAR 690-018-0050(4)(a)
24. Consistent with Findings of Fact #17 and #18, the proposed Allocation of Conserved Water will not harm existing water rights. Therefore, no reduction in the quantity of conserved water to be allocated is required to mitigate for the effects on other water rights. OAR 690-018-0050(4)(b) and (d).
25. As established in Finding of Fact #16, CW-77 is consistent with the requirements established in OAR 690-005-0045 (Standards for Goal Compliance and Compatibility with Acknowledged Comprehensive Plans). OAR 690-018-0050(4)(c).

26. Pursuant to OAR 690-018-0050(4)(e), the new reduced rate for the existing use involved in this conserved water project under Certificate 74135 is as follows:

Priority Date	Maximum Rate (cfs)	Acres (Equivalent)
1869	0.96	48.00
1885	1.30	79.05
1887	3.00	150.00
1889	4.03	201.50
1893	0.79	39.50
1895	95.50	5716.75
1899	2.03	108.80
1900	0.75	54.00
1901	0.45	22.30
1903	6.88	344.00
1904	12.66	703.20
Totals	128.35	7467.10

(Finding of Fact #9).

27. In consultation with ODFW and OPRD, the Department has determined that the conserved water is needed to support instream uses. (Finding of Fact #19), OAR 690-018-0050(4)(f).
28. Consistent with ORS 537.470(3), TSID requested 100% of the conserved water be allocated for an instream water right to be held in trust by the Water Resources Department for the people of Oregon and the priority date of the instream right to be the same as the originating right. (Finding of Fact #14), OAR 690-018-0050(4)(g).
29. Three Sisters Irrigation District requested the Department protect the new instream water right created from the conserved water under Certificate 74135 from the authorized point of diversion on Whychus Creek at approximately river mile 23.5 to the mouth at river mile 0.0. OAR 690-018-0050(4)(h); OAR 690-077-0015(8).
30. Consistent with OAR 690-077-0015(8) and (10), the State's portion of the conserved water shall have a priority date of 1895, and shall be allocated as an instream water right for maintenance and enhancement of aquatic habitat, fish, wildlife, wildlife habitat and other ecological values, and recreation. The instream water right shall provide for the protection of flows in Whychus Creek from the authorized point of diversion located at approximately river mile 23.5:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	WM	21	SW SW	998 FEET NORTH AND 1211 FEET EAST FROM THE SW CORNER OF SECTION 21

To the mouth of Whychus Creek at the confluence with the Deschutes River at River Mile 0.0. (Findings of Fact #14 and #19).

31. The instream right shall allow the use and protection of flows from April 1 through October 31, or such other times as TSID is diverting water for a beneficial use. The amount and timing of the proposed instream flows are allowable within the limits and use of the original water right. OAR 690-077-0015(10).

Originating Certificate	Priority Date	Period of Use	Rate (CFS)
74135	1895	April 1 through October 31	1.33

32. The protection of flows within the proposed reaches are appropriate, considering:
- i. The instream water use begins at the recorded point of diversion;
  - ii. The location of confluences with other streams downstream of the point of diversion;
  - iii. There are no known areas of natural loss of stream flow to the river beds downstream from the point of diversion; and
  - iv. 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.
- OAR 690-077-0015(8).
33. The combination of instream rights for the proposed reach does not exceed the amount needed to provide increased public benefits, and does not exceed the estimated average natural flow or level occurring from the drainage system. OAR 690-077-0015(4) and (11).
34. Instream Water Right Certificates 73223 and 73224 established pursuant to ORS 537.336 (state agency process) with priority dates of October 11, 1990, exist for portions of the stream reach where the new instream water right is proposed. Certificate 73223 provides for a stream reach from Indian Ford Creek at river mile 19.5 to the mouth of Whychus [Squaw] Creek, to provide the required stream flow for migration, spawning, egg incubation, fry emergency, and juvenile rearing. Certificate 73224 provides for a stream reach from South Fork Whychus [Squaw] Creek at river mile 35.0 to Indian Ford Creek at river mile 19.5, to provide the required stream flow for migration, spawning, egg incubation, fry emergency, and juvenile rearing.
35. The flow targets at the time of establishing the instream water rights were based on the needs of resident redband trout and did not account for the flows necessary to support reintroduced Mid-Columbia summer steelhead trout and spring Chinook salmon. The current instream flows under Certificates 73223 and 73224 are insufficient for the reintroduction of anadromous runs of Mid-Columbia summer steelhead trout and spring Chinook salmon. Summer steelhead trout are listed as threatened under the federal Endangered Species Act. The additional flows beyond the established state agency instream water rights are necessary and will provide a public benefit as follows:
- a. Adult upstream migration. For steelhead (September-January) and for Chinook (May-August) flows need to be higher than the instream water rights for: 1) physical passage of large fish upstream over riffles and shallow bars, and 2) migration cues – relatively high flows to stimulate upstream movement to spawning grounds.
  - b. Spawning. Habitat Suitability Criteria for steelhead trout and Chinook salmon spawning indicate that the anadromous fish prefer water about 0.5 ft. deeper and



0.8 ft./sec. faster than resident rainbow trout. This equates to a much higher recommended flow for anadromous vs. resident spawning.

- c. Outmigration. Outmigrating juvenile steelhead trout (March-June) and Chinook salmon (February-March) will benefit greatly from might flows to facilitate emigration of juveniles downstream to the mainstem Deschutes.
- d. The proposed instream right is located in an ODFW flow restoration priority watershed.

OAR 690-077-0015(10) and (11).

- 36. By adding to other instream water rights established pursuant to ORS 537.335 (state agency process), ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) located within the proposed reach, any new instream water right established by this conserved water project would provide protection for additional flows identified as necessary for conservation, maintenance, and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, and other ecological values. OAR 690-077-0015(11).
- 37. There are no areas for which the conserved water is proposed to be used for out-of-stream uses. (Finding of Fact #14), OAR 690-018-0050(4)(h).
- 38. The project is complete. A Request for Finalization of the project has been submitted. No additional time is requested. (Finding of Fact #20), OAR 690-018-0050(4)(i).
- 39. No other conditions or limitations are needed to prevent or mitigate for harm to existing water rights. (Findings of Fact #17 and #18), OAR 690-018-0050(4)(j).

### **Determination and Proposed Action**

The project described in Allocation of Conserved Water Application CW-77, is consistent with the criteria in ORS 537.455 to 537.500, and OAR Chapter 690, Divisions 018 and 077. If protests are not filed pursuant to OAR 690-018-0050(6), the conserved water application will be approved.

- 1. The proposed change will result in a reduced diversion for the uses allowed under the original water right. Findings of Fact #9 and #26.
- 2. The proposed allocation of conserved water will not harm existing water rights. Finding of Fact #17.
- 3. The application is consistent with the requirements established in OAR 690-005-0045. Finding of Fact #16.

*If Allocation of Conserved Water Application CW-77 is approved, the Order will include the following:*

- 1. *The changes proposed in CW-77 are approved.*

2. *The quantity of water conserved and allocated 100% to the State is as follows:*

<b>Conserved Water Description</b>		
<b>Certificate</b>	<b>Priority</b>	<b>Maximum CFS</b>
74135	1895	1.33

*Finding of Fact #14.*

3. *The right to the use of the water is restricted to beneficial use at the places of use described, and is subject to all other conditions and limitations contained in Certificate 74135, and any related decree.*

4. *Water Right Certificate 74135 is modified. The reduced rate for the existing uses under Certificate 74135 is as follows:*

**Use:** *IRRIGATION, POND MAINTENANCE, INDUSTRIAL USE, AND STOCK WATER*

**Limit/Duty:** *1/50 Cubic Foot per Second per Acre, as modified by prior conserved water applications*

**Source:** *WHYCHUS [SQUAW] CREEK, tributary to the DESCHUTES RIVER*

**Priority, Rate, Acreage:**

<b>Priority Date</b>	<b>Maximum Rate (cfs)</b>	<b>Acres (Equivalent)</b>
1869	0.96	48.00
1885	1.30	79.05
1887	3.00	150.00
1889	4.03	201.50
1893	0.79	39.50
1895	95.50	5716.75
1899	2.03	108.80
1900	0.75	54.00
1901	0.45	22.30
1903	6.88	344.00
1904	12.66	703.20
<b>Totals</b>	<b>128.35</b>	<b>7467.10</b>

*Finding of Fact #26.*

5. *Water Use Measurement Conditions:*

a. *TSID shall maintain, monitor, and operate the existing measurement devices, or such other suitable measurement devices approved by the Director, on TSID's main canal in such a manner to render reliable measurements.*

b. *TSID shall maintain the meters or measuring devices in good working order.*

c. *TSID and the water users shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.*

6. An instream water right certificate shall be issued for the Whychus Creek to provide for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, and other ecological values, and recreation from the authorized point of diversion at approximately River Mile 23.5:

<i>Twp</i>	<i>Rng</i>	<i>Mer</i>	<i>Sec</i>	<i>Q-Q</i>	<i>Measured Distances</i>
15 S	10 E	WM	21	SW SW	998 FEET NORTH AND 1211 FEET EAST FROM THE SW CORNER OF SECTION 21

to the mouth of the Whychus Creek at river mile 0.0. Finding of Fact #30.

<i>Priority Date</i>	<i>Instream Period</i>	<i>Rate Instream</i>
1895	April 1 through October 31	1.33 cfs

The instream right created shall be additive to any instream water rights established pursuant to ORS 537.341, 537.346, 537.348 or 537.470. Findings of Fact #30 through #36.

Dated at Salem, Oregon this 14 day of July, 2014.

  
 \_\_\_\_\_  
 Dwight French, Water Rights Services Administrator for  
 DIRECTOR, Oregon Water Resources Department

Mailing Date: \_\_\_\_\_

## NOTICE OF RIGHTS

The Legislative Assembly finds that persons affected by actions taken by state agencies have a right to be informed of their rights and remedies with respect to those actions. ORS 183.415.

The commission shall notify the applicant and any other person requesting notice, of the action the commission intends to take under ORS 537.470(3). Any person objecting to the proposed allocation may file a protest requesting a contested case hearing before the commission. ORS 537.470(4).

If a protest to the proposed allocation of conserved water is received by the Department within 60 days of the mailing of the preliminary determination pursuant to ORS 537.470(4) and OAR 690-018-0050(4), the Director may work with the applicant and any protestant to determine whether the issues can be resolved through mutually agreeable conditions, or by modifying the application. OAR 690-018-0050(6).

If protests are received raising issues that cannot be resolved pursuant OAR 690-018-0050(6), the Director shall present the application, all protests and a recommendation for action to the Commission for review and action. OAR 690-018-0050(8).

The Commission shall examine the application, the protests and the Director's recommendation. If the Commission finds the allocation of conserved water is likely to injure existing water rights or is otherwise inconsistent with these rules, the Commission may direct the Department to hold a contested case hearing on the application pursuant to ORS 183.413 and OAR 690, Divisions 1 and 2 or to resume attempts to resolve the disputed issues. If the Commission finds the allocation of conserved water is not likely to injure existing rights and is otherwise consistent with OAR 690-018-0050, the Commission may authorize the Director to issue an order approving the application. OAR 690-018-0050(9).

In the event of a land use dispute, as defined in OAR 690-005-0015, the Director shall follow resolution procedures provided in 690-005-0040 (Resolution of Land Use Disputes). OAR 690-018-0050(10).