



Oregon
Kate Brown, Governor

Water Resources Department
725 Summer St NE, Suite A
Salem, OR 97301
(503) 986-0900
Fax (503) 986-0904

May 6, 2016

VIA E-MAIL

JOHN AND PEGGY TEHAN
PO BOX 34
SISTERS, OR 97759

SUBJECT: Water Right Transfer Application T-11358

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11358. This document is an intermediate step in the approval process; water may not be used legally as proposed in the transfer application until a Final Order has been issued by the Department. Please read this entire letter carefully to determine your responsibility for additional action.

A public notice is being published in the Department's weekly publication and in the Nugget newspaper, simultaneously with issuance of the Preliminary Determination. The notice initiates a period in which any person may file either a protest opposing the decision proposed by the Department in the Preliminary Determination or a standing statement supporting the Department's decision. The protest period will end 30 days after the last date of newspaper publication.

If no protest is filed, the Department will issue a Final Order consistent with the Preliminary Determination. You should receive a copy of the Final Order about 30 days after the close of the protest period.

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 in a quasi-judicial proceeding.

Please do not hesitate to contact me at 503-986-0890 or Sarah.A.Henderson@ wrd.state.or.us if I may be of assistance.

Sincerely,

Sarah Henderson

Sarah Henderson
Transfer Specialist
Transfer and Conservation Section

cc: Transfer Application file T-11358
Jeremy T. Giffin, District 11 Watermaster (*via e-mail*)
Gen Hubert, Agent for the applicant (*via e-mail*)

encs

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

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Application T-11358, and Mitigation)	PROPOSING APPROVAL OF A
Project MP-165, Deschutes County)	CHANGE IN PLACE OF USE AND
)	CHARACTER OF USE AND PARTIAL
)	CANCELLATION OF A WATER
)	RIGHT AND PRELIMINARY AWARD
)	OF MITIGATION CREDITS

Authority

Oregon Revised Statute (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. Oregon Administrative Rule (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.

Applicants

JOHN AND PEGGY TEHAN
PO BOX 34
SISTERS, OR 97759

Findings of Fact

1. On February 22, 2012, JOHN AND PEGGY TEHAN filed an application to change the place of use and character of use under Certificates 67284 and 81663 to instream use. The Department assigned the application number T-11358.
2. Notice of the application for transfer was published on February 28, 2012, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.

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.
--

3. The applicant has provided notification of the proposed action to the City of Sisters, Deschutes County, Jefferson County, and the Confederated Tribes of Warm Springs. Additionally, the Department provided notification of the proposed action to these local governments and the City of Maupin and Wasco County, upon receipt of Transfer Application T-11358.
4. On January 19, 2016, the Department mailed a copy of the draft Preliminary Determination to the applicant proposing to approve Transfer Application T-11358 with modifications to the proposed instream use. The Department identified that the amount of water that may be transferred from irrigation use, considering beneficial use without waste, to instream use was less than the quantities proposed in the transfer application. The draft Preliminary Determination cover letter set forth a deadline of February 18, 2016, for the applicant to respond.
5. On January 22, 2016, the Department received a comment from the applicant's agent, the Deschutes River Conservancy (DRC). The DRC requested that the Department approve the transfer application as proposed in the original application. Specifically, the DRC requested that the full rates proposed for instream use at the point of diversion be protected instream within Reach No. 1, being from the point of diversion to River Mile 16.5. The DRC provided additional information to demonstrate that the full rate allowed is diverted at the point of diversion over the entire irrigation season. The DRC identified that the requested instream rates do not exceed the water right and that the full rate was regularly diverted all season long.
6. On February 29, 2016, the Department emailed a copy of the Revised Draft Preliminary Determination proposing to approve Transfer Application T-11358 to the applicant. The Revised Draft Preliminary Determination included consideration of the comments provided by the DRC and affirmed the findings of the original Draft Preliminary Determination. The revised draft Preliminary Determination email set forth a deadline of March 30, 2016, for the applicant to respond.
7. On March 8, 2016, the DRC submitted additional comments and information for consideration by the Department. The DRC requested that the Department review the additional information provided and the amount of water that could be protected instream within Reach No. 1 and No. 2. The applicant also provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
8. The Department has considered the additional information and comments provided by the DRC. Based upon continued evaluation, the Department has affirmed the findings of the original Draft Preliminary Determination and determined that the reductions to the quantities that may be protected instream in Reach No. 1 and Reach No. 2, as described in Finding of Fact No. 25, are appropriate. The quantity (volume) of water requested to be protected instream by the applicant in Transfer Application T-11358, is more water than can be used beneficially without waste for the portion of the right proposed for transfer.

Use of water under every water right is subject to the principle of beneficial use without waste in accordance with ORS 536.310. Beneficial use is the measure and the limit of all rights (ORS 540.610). Use of water under Certificates 67284 and 81663 are limited to an

amount actually beneficially used consistent with conditions in the water right certificate. The quantity of water that could legally be diverted includes reasonable losses in the conveyance and application of water; however, it does not include any quantity of water in excess of that needed to satisfy the use in a reasonably efficient manner.

The applicant has requested to change the character of use under Certificates 67284 and 81663 from irrigation use to instream use. All transfer applications are evaluated to determine whether the proposed change would result in injury or enlargement under OAR Chapter 690, Division 380. Changes in character of use through a water right transfer create a potential for enlargement of a water right by transferring more water than could be used beneficially without waste.

The Department has identified that the quantity described in Finding of Fact No. 25 is an amount that could be reasonably diverted for beneficial use without waste and without enlarging the original water right.

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

Certificate: 67284 in the name of FRANK L. SHAW (confirmed by Squaw Creek [Whychus Creek] Decree)
Use: IRRIGATION of 3.5 ACRES
Priority Date: 1883
Rate: 0.07 CUBIC FOOT PER SECOND (CFS)
Source: WHYCHUS CREEK (formally Squaw Creek), a tributary of the DESCHUTES RIVER

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	WM	9	SE NW	BUCHANAN DITCH - 2050 FEET SOUTH AND 1250 FEET WEST FROM THE NORTH 1/4 CORNER OF SECTION 9

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
15 S	10 E	WM	4	SE SE	3.5

10. Certificate 67284 does not specify the irrigation season. Nor is an irrigation season specified by Basin Program or Decree.
11. Certificate 67284 does not specify a duty limit per acre nor is one specified by Decree.
12. The portion of the second right to be transferred is as follows:
Certificate: 81663 in the name of JOHN T. TEHAN (confirmed by Squaw Creek [Whychus Creek] Decree)
Use: IRRIGATION of 7.6 ACRES
Priority Date: 1883
Rate: 0.152 CFS
Source: WHYCHUS CREEK (formally Squaw Creek), a tributary of the DESCHUTES RIVER

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	WM	9	SE NW	BUCHANAN DITCH - 2050 FEET SOUTH AND 1250 FEET WEST FROM THE NORTH 1/4 CORNER OF SECTION 9

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
15 S	10 E	WM	4	SE SE	7.6

13. Certificate 81663 does not specify the irrigation season. Nor is an irrigation season specified by Basin Program or Decree.
14. Certificate 81663 does not specify a duty limit per acre nor is one specified by Decree.
15. The applicants are not the owners of the lands to which the water rights described in Finding of Fact Nos. 9 and 12 are appurtenant. However, interest in the water rights has been retained by John and Peggy Tehan whereas the land was conveyed and warranted to the landowner described in the table below. The portion of the rights to be transferred was appurtenant to lands owned by the identified water right interest holder at the time interest in the water right was reserved through a statutory warranty deed.

Landowner	Water Right Interest Holder	Twp	Rng	Sec	Q-Q	Tax Lot at time of Conveyance	Acres
Rocky Mountain Land, LLC	John and Peggy Tehan	15 S	10 E	4	SE SE	101	3.5
Rocky Mountain Land, LLC	John and Peggy Tehan	15 S	10 E	4	SE SE	101	7.6

16. Transfer Application T-11358 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 recreation, and to establish mitigation credits in the Deschutes Ground Water Study Area.
17. Transfer Application T-11358 proposes to change the place of use of the right to create an instream reach from the POD to the mouth of Whychus Creek and then into the Deschutes River to Lake Billy Chinook.
18. The applicant proposes the quantities of water to be transferred instream be protected as follows:

Certificate	Priority Date	Instream Period	Instream Rate (cfs)	Instream Volume (AF)
67284	1883	April 1 to October 31	0.07	29.8
81663	1883	April 1 to October 31	0.152	64.4

19. The applicant has requested 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 has also requested that any instream water rights 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 a more senior priority date.

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

20. The rights were leased instream under IL-858 during the period July 27, 2007 through October 31, 2011 and there is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
21. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing rights were present within the five-year period prior to submittal of Transfer Application T-11358.
22. Use of water under the existing right is subject to beneficial use without waste in accordance with ORS 536.310. The applicant has requested an instream volume that would be equivalent to a duty of 8.49 AF per acre. The Department has identified that this is more water that can be used beneficially without waste and that the transfer to instream use would result in enlargement of the water right unless the instream quantity was reduced. Based upon additional information provided by the Watermaster, an appropriate equivalent volume per acre, considering the quantity of water that could be used beneficially and without waste is 5.5 AF per acre. A total of 61.05 AF, being 19.25 AF under Certificate 67284 and 41.8 AF under Certificate 81663.
23. A portion of the water diverted at the point of diversion returns to Whychus Creek around River Mile (RM) 16.5 as a result of sub-surface flow. To prevent injury and enlargement, the quantity of water that may be protected instream in Reach No. 2 has been adjusted to account for return flows at RM 16.5.

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

The hydrogeologic evaluation of where subsurface return flows occur is generally based on the following information: 1) the local shallow and regional ground water elevations, 2) the shallow and regional head gradient (i.e. ground water 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.

The place of use under each right proposed for instream use is located in close proximity to Whychus Creek. A portion of the water diverted to the place of use returns to the creek system around River Mile 16.5 as a result of sub-surface flow.

The instream flows at River Mile 16.5 have been reduced to the consumptive portion of the rights to account for subsurface return flows.

24. The transfer application requests to protect water instream from Whychus Creek into the Deschutes River. An instream reach is generally from the point of diversion to the mouth of the source stream (Whychus Creek) but may be protected further if measurable in the receiving stream (the Deschutes River) (OAR 690-077-0015 (8)). The quantities that may be transferred instream into Whychus Creek are measurable into the Deschutes River and may be protected instream in the Deschutes River.
25. Based on Findings of Fact No's. 22 through 24, the instream use has been modified from the original request and the quantities to be transferred and protected instream are as follows:

Instream Reach No. 1: From the POD (as described in Finding of Fact Nos. 9 and 12) to RM 16.5 on Whychus Creek

Certificate	Priority Date	Period Protected Instream	
		April 1 through October 31	
		Instream Rate (cfs)	Instream Volume (AF)
67284	1883	0.045	19.25
81663	1883	0.098	41.80
Totals		0.143	61.05

Instream Reach No. 2: From RM 16.5 to the mouth of Whychus Creek and then into the Deschutes River to Lake Billy Chinook (RM 120)

Certificate	Priority Date	Period Protected Instream	
		April 1 through October 31	
		Instream Rate (cfs)	Instream Volume (AF)
67284	1883	0.01	6.30
81663	1883	0.03	13.68
Totals		0.04	19.98

26. The proposed change, as modified, would not result in enlargement of the right.
27. The proposed change, as modified, would not result in injury to other water rights.
28. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
29. The protection of flows within the proposed reach is appropriate, considering:
- The instream water right begins at the recorded point of diversion;
 - The location of confluences with other streams downstream of the point of diversion;
 - There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
 - Return flows resulting from the exercise of the existing water right would re-enter the river downstream of RM 16.5 on Whychus Creek and have been accounted for within Reach No. 2.

30. Within the proposed reach on Whychus Creek, there are several existing instream water rights established under ORS 537.336 (state agency application process), ORS 537.348 (instream transfer process), and ORS 537.470 (allocation of conserved water process). There are two instream water rights established under ORS 537.336 within the proposed reach, being Instream Water Right Certificates 73223 and 73224 both with a priority date of October 11, 1990. The instream reach for Certificate 73223 extends from Indian Ford Creek at river mile 19.5 to the mouth of Whychus Creek. The instream reach for Certificate 73224 extends from the South Fork Whychus Creek at river mile 35.0 to Indian Ford Creek at river mile 19.5. Both instream rights are to provide streamflows for migration, spawning, egg incubation, fry emergency, and juvenile rearing. The remaining instream rights on Whychus Creek were established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) for fish and wildlife habitat and pollution abatement. These other instream rights are senior in priority date to Certificates 73223 and 73224.
31. Within the proposed reach on the Deschutes River, there are several existing instream water rights. 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 North Canal Dam to Lake Billy Chinook, which if approved will have a priority date of September 24, 1990. The remaining instream water rights are senior in priority date and were established under ORS 537.348, the instream transfer process, and ORS 537.470, the allocation of conserved water process, for fish and wildlife habitat, recreation, and pollution abatement.
32. In addition, 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 proposed reach, flows for the designated Scenic Waterway are at times not met during the requested periods for instream protection.
33. Instream water rights, with senior priority dates, established through the instream transfer and allocation of conserved water processes generally replace portions of other instream water rights, which carry junior priority dates established through the minimum flow conversion (ORS 537.346) or the state agency application process for establishing new instream water rights.
34. Within the proposed instream reach on Whychus Creek above the confluence with Indian Ford Creek, during the months of April through September, the total quantities of water to be protected within the proposed reach under the existing instream rights, established under ORS 537.348 and ORS 537.470, and the proposed instream right will exceed the quantities identified as necessary for instream use for various fish life stages under Certificate 73224, which was created under ORS 537.341, the state agency instream water right application process. However, the original instream flows established under Certificate 73224 were based on flow needs for resident redband trout and did not account for flows necessary to support reintroduction of Mid-Columbia summer steelhead trout and spring Chinook salmon.
35. The current instream flows on Whychus Creek under Certificate 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 higher 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.
36. Within the proposed reach on Whychus Creek above the confluence with Indian Ford Creek, during the months of April through September, by adding to other instream water rights established pursuant to ORS 537.341 (state agency application process), ORS 537.348 (instream transfer process and instream lease) and ORS 537.470 (allocation of conserved water process), any new instream water right established by this transfer 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.
37. Within the proposed reach on Whychus Creek during the month of October above the confluence with Indian Ford Creek and during the months of April through October below the confluence with Indian Ford Creek, the proposed instream use may add to other instream water rights established by ORS 537.348 and ORS 537.470. In addition, during the month of October above the confluence with Indian Ford Creek and during the months of April through October below the confluence with Indian Ford Creek the proposed instream use may replace a portion of Certificates 73224 and 73223, established under ORS 537.341, with an earlier priority date.
38. Within the proposed reach on the Deschutes River, the existing instream water rights, established under ORS 537.341 (state agency application process), 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 and have priority dates junior in comparison to other water rights on the Deschutes River. The proposed instream use will have a priority date of 1883. By replacing a portion of instream rights created at the request of state agencies or under the minimum streamflow conversion process, the proposed 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; and recreation under an earlier priority date.

39. Within the proposed reach on the Deschutes river, by adding to other instream water rights, established pursuant to ORS 537.348 (instream transfer process and instream lease) and ORS 537.470 (allocation of conserved water process), located within the proposed reach, any new instream water right established by this transfer 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.
40. 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.

Partial Cancellation of a Water Right

41. There is an existing supplemental right, Certificate 81664, appurtenant to the portion of lands on which Certificates 67284 and 81663 are proposed for transfer for instream use. The applicant has requested that affected portions of the supplemental water right under Certificate 81664 be cancelled upon issuance of the Final Order approving the T-11358. However, the applicant has not submitted an affidavit certifying that affected portions under Certificate 81664 have been abandoned.
42. Supplemental water rights (layered water rights) must be included in the transfer application or cancelled.
43. Consistent with OAR 690-380-2250, the Department is providing notice in the draft Preliminary Determination to the applicant of its intent to cancel the portion of Certificate 81664 as described below unless within 30 days of the date of the notification, the applicant modifies this transfer application to include the supplemental right, submits an application to move the supplemental right to another primary right with similar reliability concurrently with this transfer application, or withdraws the application.
44. The portion of the supplemental water right to be cancelled is as follows:

Certificate: 81664 in the name of JOHN T. TEHAN (perfected under Permit G-11105)
Use: SUPPLEMENTAL IRRIGATION of 11.1 ACRES
Priority Date: JUNE 22, 1990
Rate: 0.07 CUBIC FOOT PER SECOND
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 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 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year. This right is limited to any deficiency in the available supply of any prior right existing for the same land.
Source: ONE WELL in the SQUAW CREEK BASIN

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	WM	4	NE SE	290 FEET NORTH AND 95 FEET EAST FROM THE SW CORNER OF NESE OF SECTION 4

Authorized Place of Use to be Cancelled:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
15 S	10 E	WM	4	SE SE	11.1

Preliminary Award of Deschutes Basin Mitigation Credits

45. John and Peggy Tehan (the Applicants) have requested that 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 John and Peggy Tehan.
46. The Department assigned this mitigation credit project number MP-165.
47. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on September 22, 2015. No comments were received in response to this notice.
48. 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 September 15, 2015. No comments were received in response to the consultation.
49. The proposed transfer of 11.1 acres to instream use will provide 20.0 acre-feet of mitigation water. Therefore, 20.0 mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to the Deschutes River Conservancy. 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 General and Whychus Creek Zones of Impact.
50. A total of 61.05 AF is proposed to be transferred to instream use and 20.0 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.
51. 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.
52. 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.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-11358 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 and the abandoned 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-11358 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-11358 are approved.*
2. *Water right Certificate 67284 is cancelled. A new certificate confirming the instream water right shall be issued. A portion of the right not affected by this transfer is being transferred under Transfer Application T-11320; a new certificate will be issued describing the portion not being transferred by either T-11358 or T-11320.*
3. *Water right Certificate 81663 is cancelled. A new certificate confirming the instream water right shall be issued. A portion of the right not affected by this transfer is being transferred concurrently under Transfer Application T-11321.*
4. *Water right Certificate 81664 is cancelled. A new certificate will be issued describing that portion of the right not affected and cancelled by this transfer and Transfer Application T-11321.*
5. *The instream water right shall provide for the protection of streamflows as follows:*

Instream Reach No. 1: From the POD (as described in Finding of Fact Nos. 9 and 12) to RM 16.5 on Whychus Creek

Certificate	Priority Date	Period Protected Instream	
		April 1 through October 31	
		Instream Rate (cfs)	Instream Volume (AF)
67284	1883	0.045	19.25
81663	1883	0.098	41.80
<i>Totals</i>		0.143	61.05

Instream Reach No. 2: From RM 16.5 to the mouth of Whychus Creek and then into the Deschutes River to Lake Billy Chinook (RM 120)

Certificate	Priority Date	Period Protected Instream	
		April 1 through October 31	
		Instream Rate (cfs)	Instream Volume (AF)
67284	1883	0.01	6.30
81663	1883	0.03	13.68
<i>Totals</i>		0.04	19.98

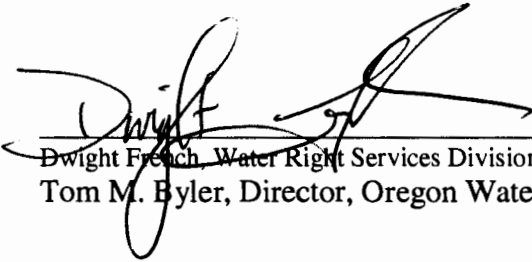
6. *Water rights upstream of the original point of diversion shall not be subject to regulation for flows in excess of the quantities to which this instream water right is entitled at the original point of diversion.*

7. *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 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.*
8. *Within the instream reach on Whychus Creek above the confluence with Indian Ford Creek, during the period April 1 through September 30, any instream water right established by this transfer application may be in addition to instream water rights established pursuant to ORS 537.341, ORS 537.346, ORS 537.348 and ORS 537.470, unless otherwise specified in an order approving a new instream water right under these statutes. During the month of October, 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 in an order approving a new instream water right under these statutes.*
9. *Within the reach on Whychus Creek below the confluence with Indian Ford Creek, during the period April 1 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 in an order approving a new instream water right under these statutes.*
10. *Within the reach on the Deschutes River, during the period April 1 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 in an order approving a new instream water right under these statutes.*
11. *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 67284 and 81663 and any related decree.*
12. *The former place of use of the transferred water shall no longer receive water as part of these rights.*
13. ***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 20.0 credits, as described herein, may be awarded to this mitigation project and assigned to the Deschutes Resource Conservancy. 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 **General and Whychus Creek Zones of Impact**. Mitigation*

credits generated by this project will be available for use as mitigation beginning the first calendar year that water will be protected instream under a new instream water right.

- 14. 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.*
- 15. The instream certificate created as a result of the approval of this transfer shall be identified as a mitigation credit project for a ground water permit applicant and/or ground water permit/certificate holder. 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 5 day of May 2016.



Dwight French, Water Right Services Division Administrator, for
Tom M. Byler, Director, Oregon Water Resources Department

This Preliminary Determination was prepared by Sarah Henderson. If you have questions about the information in this document, you may reach me at 503-986-0890 or Sarah.A.Henderson@wr.d.state.or.us.

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

Notice Regarding Service Members: Active duty service members have a right to stay proceedings under the federal Service Members Civil Relief Act. 50 U.S.C. App. §§501-597b. You may contact the Oregon State Bar or the Oregon Military Department for more information. The toll-free telephone number for the Oregon State Bar is: 1 (800) 452-8260. The toll-free telephone number of the Oregon Military Department is: 1 (800) 452-7500. The Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website is: <http://legalassistance.law.af.mil>