

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

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Application T-12860, AND MITIGATION)	PROPOSING APPROVAL OF A CHANGE IN
PROJECT MP-235, Klamath County)	PLACE OF USE AND CHARACTER OF USE
)	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 groundwater 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

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Applicant

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Agent

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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.

Findings of Fact

1. On March 5, 2018, C. Paul and Olivia Hackett and Robert and Tami Minnick filed an application to change the place of use and character of use under Certificate 91836 to instream use. The Department assigned the application number T-12860.
2. Notice of the application for transfer was published on March 13, 2018, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. Consistent with land use requirements, prior to submitting the instream transfer application, the applicant provided notification of the intent to file the instream transfer application to City of LaPine, Klamath County, Deschutes County, City of Bend, and Jefferson County. Additionally, the Department provided notice of the proposed action to City of LaPine, Klamath County, City of Bend, Jefferson County and Deschutes County upon receipt of Transfer Application T-12860.
4. On March 12, 2020, the Department issued a Draft Preliminary Determination (DPD) proposing to deny Instream Transfer Application T-12860 but included provisions under which the transfer could be approved. As part of the DPD, the Department identified several application deficiencies that needed to be addressed to complete the transfer application and allow the transfer application process to move forward favorably. The specific deficiencies were detailed in the cover letter accompanying that Draft Preliminary Determination. The deficiencies included:
 - a) Incomplete applicant contact information pursuant to OAR 690-380-3000(1).
 - b) A transfer application map with revisions to meet all current mapping requirements, specifically OAR 690-380-3100(2)(h).
 - c) A complete and consistent description of the delivery system. And clarification of the capacity of the delivery system, which does not appear to be consistently identified between transfer applications involving the same water right on the same property, pursuant to OAR 690-380-3000(10).
5. On April 3, 2020, Water Right Services (the Applicant's agent), on behalf of the Applicants, requested that the Department proceed with issuance of a Preliminary Determination and had previously provided the necessary information to demonstrate that the applicants are authorized to pursue the transfer. The deficiencies have been resolved and other requested information has been provided.
6. On May 7, 2020, the Department mailed a copy of the revised draft Preliminary Determination proposing to approve Transfer Application T-12860 to the applicants and their agent. The draft Preliminary Determination cover letter set forth a deadline of June 8, 2020, for the applicants to respond. The applicant's agent, on behalf of the applicants, requested that the Department proceed with issuance of a Preliminary Determination.

7. The transfer application proposes to change the place of use and character of use of Certificate 91836 to create an instream water right. Certificate 91836 was cancelled upon approval of Instream Transfer T-11508 on March 6, 2020, as evidenced by Special Order Volume 116, Page 239. A remaining right, Certificate 94936, was issued for the portion of Certificate 91836 not affected by that transfer.

8. The portion of the right proposed for transfer is as follows:

Certificate: 94936 in the name of H P. HOEY (confirmed by Deschutes River (F) Decree in the Order Record of the Water Resources Director in Volume 9, at Page 362)

Use: IRRIGATION of 1.07 ACRE

Priority Date: SEPTEMBER 1, 1898

Rate: up to 0.027 CUBIC FOOT PER SECOND (CFS), being 0.027 CFS from May 23 through August 20 and 0.013 CFS from April 1 to May 23 and August 20 to November 1

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 Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acre
24 S	7 E	WM	20	SW NE	1.07

9. 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 located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
24 S	7 E	WM	20	SW SW	975 FEET NORTH AND 260 FEET EAST FROM THE SW CORNER OF SECTION 20

10. A maximum of up to 4.28 Acre-Feet (AF) of water may be beneficially used annually under the existing right.

11. Transfer Application T-12860 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.

12. Transfer Application T-12860 proposes to change the place of use of the right to create an instream reach from the Point of Diversion (as described in Finding of Fact No. 9) to the mouth of Big Marsh Creek, into Crescent Creek to its mouth, then into the Little Deschutes River to its mouth, and then into the mainstem Deschutes River to Lake Billy Chinook.
13. The applicant proposes the quantities water to be transferred instream be as protected follows:

Instream Period	Instream Rate (CFS)	Instream Volume (AF)
April 1 to May 23	0.013	4.28
May 23 to August 20	0.027	
August 20 to November 1	0.013	

14. 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)

15. A portion of the right to be transferred has been leased instream under Instream Lease IL-1237 prior to submission of Instream Transfer Application T-12860, as evidenced by Special Order Volume 88, Page 98, beginning in the 2012 irrigation season and terminating on October 31, 2014. An additional instream lease, IL-1444, involving the same portion of Certificate 94936 (formerly Certificate 91836) as in Instream Lease IL-1237, was approved by the Department on April 15, 2015, as evidenced by Special Order Volume 95, Page 569, and by a Reconsideration Final Order, Special Order Volume 95, Page 1042, issued on May 27, 2015. The term for Instream Lease IL-1444 ended on October 31, 2015. There is no information in the record that would demonstrate that this portion of the right is subject to forfeiture under ORS 540.610.
16. For the remaining portion of Certificate 94936 involved in this transfer, it appears that water has been used within the five years prior to submission of Instream Transfer Application T-12860 according to the terms and conditions of the right, and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.

17. It appears that a diversion structure and ditch sufficient to use the full amount of water allowed under the existing right was present within the five-year period prior to submittal of Transfer Application T-12860.

18. The transfer application proposes to protect water instream as follows:

Big Marsh Creek, tributary to Crescent Creek

Instream Reach 1: From the POD (as described in Finding of Fact No. 9) to the mouth of Big Marsh Creek

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	April 1 through May 22	0.013 CFS	4.28 AF
	May 23 through August 19	0.027 CFS	
	August 20 through October 31	0.013 CFS	

Crescent Creek, tributary to the Little Deschutes River

Instream Reach 2: In Crescent Creek, from the confluence with Big Marsh Creek to the mouth of Crescent Creek at the confluence with the Little Deschutes River

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	April 1 through May 22	0.013 CFS	4.28 AF
	May 23 through August 19	0.027 CFS	
	August 20 through October 31	0.013 CFS	

Little Deschutes River, tributary to the Deschutes River

Instream Reach 3: In the Little Deschutes River, from the confluence with Crescent Creek to the mouth of the Little Deschutes River at the confluence with the Deschutes River

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	April 1 through May 22	0.013 CFS	4.28 AF
	May 23 through August 19	0.027 CFS	
	August 20 through October 31	0.013 CFS	

Deschutes River, tributary to the Columbia River

Instream Reach 4: In the mainstem Deschutes River, from the confluence with the Little Deschutes River to Lake Billy Chinook

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	April 1 through May 22	0.013 CFS	4.28 AF
	May 23 through August 19	0.027 CFS	
	August 20 through October 31	0.013 CFS	

19. The instream transfer application did not identify or propose any conditions to avoid taking away or impairing existing water rights.
20. The amount and timing of the proposed instream flow is not allowable within the limits and use of the original water right. If the full instream rates as requested by the transfer applicant (as described in Finding of Fact No. 18) are protected instream over the full irrigation season (April 1 to November 1, a period of 214 days) the maximum seasonal volume limit of 4.28 AF would be exceeded by 3.76 AF (a total of 8.04 AF over 214 days) resulting in enlargement of the right and potential injury to downstream water rights.
21. Return flows resulting from the exercise of the existing water right (as described in Finding of Fact No 8) re-enter Big Marsh Creek downstream of the point of diversion and are not accounted for within the proposed instream reach. Use of water at the place of use described in Finding of Fact No. 8 results in return flows, approximately 10% of the water diverted at the point of diversion returns to Big Marsh Creek immediately below the place of use. While there may be no immediate users downstream on Big Marsh Creek, there are downstream users within the remaining portion of the proposed instream reach. By rule, return flows shall be subtracted from the instream water right at the old point of diversion,

unless the return flows occur at a definite point a substantial distance below the old point of diversion (OAR 690-077-0075 (2)(c)(A)).

22. There are known areas of natural loss of streamflow to the river bed downstream from the point of diversion that are not accounted for within the proposed instream use and reaches. Within the proposed reach on Crescent Creek, the streambed loses approximately 2% of its flows. In addition, the riverbed of the mainstem of the Deschutes between the confluence with the Little Deschutes River and Lake Billy Chinook also loses approximately 7% of its flows. To prevent enlargement of the right and potential injury to other water rights, channel losses must be accounted for within the proposed instream reach. By rule, where an instream water right passes through an area of known natural losses, these losses shall be prorated between the instream water right and the balance of available flow (OAR 690-077-0075 (2)(c)(B)).
23. On January 29, 2019, comments were received from the Department of Environmental Quality (DEQ), in response to request for comments on the proposed mitigation credit project (MP-235), recommending a change in the shaping of the proposed instream use to maximize the instream benefit (see Finding of Fact No. 46). DEQ recommended changing the instream period to May 23 through August 19, which would change the instream rate to 0.022 CFS with a maximum instream volume of 4.28 AF. This recommended modification would be within the limits of the original water right.
24. Based on Findings of Fact Nos. 19 through 22, the instream use, as proposed in Finding of Fact No 18, will result in enlargement of the right and injury to other water rights.
25. However, on April 17, 2020, the Applicant’s agent on behalf of the applicants agreed to modify the instream use to account for return flows, channel losses and recommendations made by DEQ. Proposed Instream flows to be protected instream under Instream Transfer Application T-12860 are modified as follows:

Big Marsh Creek, tributary to Crescent Creek

Instream Reach 1: From the POD (as described in Finding of Fact No. 9) to where the creek crosses the northern boundary of the SW NE of Section 20, T24S, R7E, W.M.

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	May 23 through August 19	0.024 CFS	4.28 AF

Big Marsh Creek, tributary to the Crescent Creek

Instream Reach 2: In Big Marsh Creek, from where the creek crosses the northern boundary of the SW NE of Section 20, T24S, R7E, W.M. to the mouth of Big Marsh Creek at the confluence with Crescent Creek

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	May 23 through August 19	0.022 CFS	3.85 AF

Crescent Creek, tributary to the Little Deschutes River

Instream Reach 3: In Crescent Creek, from the confluence with Big Marsh Creek, to the mouth of Crescent Creek at the confluence with the Little Deschutes River

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	May 23 through August 19	0.021 CFS	3.77 AF

Little Deschutes River, tributary to the Deschutes River

Instream Reach 4: In the Little Deschutes River, from the confluence with Crescent Creek, to the mouth of the Little Deschutes River

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	May 23 through August 19	0.021 CFS	3.77 AF

Deschutes River, tributary to the Columbia River

Instream Reach 5: In the mainstem Deschutes River, from the confluence with the Little Deschutes River, to Lake Billy Chinook

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	May 23 through August 19	0.02 CFS	3.51 AF

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

29. The protection of flows within the proposed reach is 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.
 - c) There are known areas of natural loss of streamflow to the river bed downstream from the point of diversion that are accounted for in Reach No. 3 and No. 5; and
 - d) 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 and are accounted for in Reach No. 2.

30. The transfer application requests to protect water instream from Big Marsh Creek into Crescent Creek, then into the Little Deschutes River, and then into the mainstem Deschutes River. The reach for an instream water right is typically from the point of diversion on the source stream (Big Marsh Creek) to the mouth of the source stream. However, water may be protected further downstream if the quantity of water is measureable in the receiving stream, in this case Crescent Creek, the Little Deschutes River, and the Deschutes River (OAR 690-077-0015 (8)). The quantity of water that may be protected instream, as recommended by the Department and accounting for return flows and stream channel losses in Finding of Fact No. 25, from Big Marsh Creek (Reach 2) is measureable into Crescent Creek, the quantity that may be protected instream from Crescent Creek (Reach 3) is measurable into the Little Deschutes River, and the quantity that may be protected instream from the Little Deschutes River (Reach 4) is measurable into the Deschutes River. Therefore, if approved, the instream reach may extend from Big Marsh Creek into Crescent Creek, into the Little Deschutes River, and into the Deschutes River to Lake Billy Chinook.

31. The transfer applicant has requested that water be protected instream for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.

32. The Instream Transfer Application does request that the proposed instream use be additive to other existing instream water rights established by instream transfer and allocation of conserved water and replace portions of existing instream water rights established by a state agency application process and/or minimum streamflow conversion process, with an earlier priority date.

33. Within the proposed reach on Big Marsh Creek there are three existing instream water rights.
 - a. Certificate 73236, with a priority date of October 11, 1990, was established under ORS 537.341 (state agency application process) for the purposes of migration, spawning, egg incubation, fry emergence and juvenile rearing.

- b. Certificates 86854 and 91696, both with a with priority date of September 1, 1898, were established under ORS 537.348 (instream transfer process) for the purposes of fish and wildlife habitat.
- 34. Within the proposed reach on Crescent Creek there are five existing instream water rights.
 - a. Certificate 73234, with a priority date of October 11, 1990, established under ORS 537.341 (state agency application process), for the purposes of migration, spawning, egg incubation, fry emergence and juvenile rearing.
 - b. Certificates 84352, 87440, 88992, and 91923 with a priority date of April 7, 1911, were established under ORS 537.470 (allocation of conserved water process) for the purpose of fish and wildlife habitat.
 - c. The instream reach for Certificates 86854 and 91696, which begins on Big Marsh Creek, also extends into this reach on Crescent Creek.
- 35. Within the reach on the Little Deschutes River there is an existing instream water right, Certificate 73226, with a priority date of October 11, 1990, that was 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 eleven additional existing instream water rights, Certificates 83652, 86020, 86021, 86854, 87047, 87440, 84352, 90238, 88992, 91923, and 91696, with priority dates ranging from 1897 to April 7, 1911, established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process), for the purposes of conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; pollution abatement; and recreation.
- 36. Within the proposed instream reach on the mainstem Deschutes River, there are numerous existing instream water rights.
 - a. There is one instream water right, Certificate 59777, established under ORS 537.346 (minimum streamflow conversion) for the purpose of supporting aquatic life and minimizing pollution, from the confluence of the Little Deschutes River to the confluence with Spring River.
 - b. There is another instream water right, Certificate 59778, also established under ORS 537.346 for the purpose of supporting aquatic life and minimizing pollution, from the confluence with Spring River to the Central Oregon Irrigation District (COID) North Canal Dam.
 - c. There is also a pending instream water right application, IS-70695, filed by the ODFW pursuant to ORS 537.341 (state agency application process), with the Department to establish and instream water right from the COID North Canal Dam to Lake Billy Chinook.

- d. These existing and pending instream water rights have priority dates ranging from 1983 to 1990.
 - e. The remaining instream water rights were established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process). Most of these instream rights are located between the Central Oregon Canal and Lake Billy Chinook and have priority dates ranging from 1885 to 1961.
37. The existing instream water rights, established under and ORS 537.341 (state agency application process) and ORS 537.346 (minimum streamflow conversion), within the proposed reach on Big Marsh Creek, Crescent Creek, the Little Deschutes River, and the Deschutes River are sufficient to protect the monthly quantities of water necessary for supporting aquatic life and anadromous and resident fish habitat, 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 protection of stream flows identified as necessary for supporting aquatic life and anadromous and resident fish habitat under an earlier priority date.
38. By adding to other instream water rights, established pursuant to ORS 537.348 (instream transfer) and ORS 537.470 (allocation of conserved water process), located within the proposed reach on Big Marsh Creek, Crescent Creek, the Little Deschutes River and the Deschutes River, 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.
39. During the period May 23 through August 19, 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.
40. The portion of the instream reach on the Deschutes River, the Deschutes River is a designated State Scenic Waterway. The State Scenic Waterway designation provides for protection of flows necessary to maintain the free flowing character of the Deschutes River for fish and wildlife habitat, and recreation, which is a matter of statutory policy.
41. In addition to flows for the designated Scenic Waterway, instream flows are not always met during the requested period for instream protection.
42. The total monthly quantities of water proposed to be protected under the existing and proposed instream rights in the reach, as modified, will provide for a beneficial purpose and do not exceed the estimated average natural flow.

Preliminary Award of Deschutes Basin Mitigation Credits

43. C. Paul and Olivia Hackett and Robert and Tami Minnick (the Applicants) have requested 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 the Applicants with 60% going to the Hackett's and 40% going to the Minnick's.
44. The Department assigned this mitigation credit project number MP-235.
45. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on January 22, 2019. No comments were received in response to this notice.
46. 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 January 29, 2019. Comments were received from DEQ. In their comments, DEQ identified that Big Marsh Creek is on their 303d list for water quality limited streams for temperature year round for the beneficial use of bull trout spawning and juvenile rearing. U.S. Forest Service data from 2002 at the north end of Big Marsh Creek below the ditches indicates that the temperature criteria was exceeded from the start of the monitoring period (June 5) through September 29. Exceedances were greatest in June and July. Based in this information, DEQ recommends that water be protected instream during the period May 23 through August 19 to maximize the benefit to stream temperatures.
47. Based upon the recommendation from DEQ, the Department is recommending that the instream use be modified to protect water during the period May 23 through August 19.
48. As part of the public notice of the mitigation project, the Department identified that the project may result in 1.9 mitigation credits. Based upon continued evaluation of the project, the Department has determined that the transfer of 1.07 acres of irrigation use with a September 1, 1898 priority date will result in 2.0 Acre-Feet of mitigation water. Therefore, 2.0 mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to the Applicants.
49. The Applicants have requested that mitigation credits be assigned as follows:
 - a) C. Paul and Olivia Hackett: 1.2 Credits (60%)
 - b) Robert and Tami Minnick: 0.8 Credits (40%)
50. The proposed instream reach extends through the Little Deschutes Zone of Impact, a corner of the Upper Deschutes Zone of Impact, the Middle Deschutes Zone of Impact and into the General Zone of Impact. 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, Upper Deschutes, Middle Deschutes and General Zones of Impact.

51. The amount of water protected instream within each of these zones exceeds the 2.0 mitigation credits that may be awarded to this project.
52. A total of 4.28 AF is proposed to be transferred to instream use and 2.0 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.
53. 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 certificates for the proposed instream water right shall result in completion of the project and verification that the project is complete.
54. 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. This date will be specified in any final order issued approving this mitigation credit project.
55. Mitigation credits may be assigned and used as mitigation after water has been legally protected instream. This date will be specified in any final order issued approving this mitigation credit project.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in Instream transfer Application T-12860 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 pursuant to ORS 537.746 and OAR 690-521-0300 and OAR 690-521-0400.

If Transfer Application T-12860 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-12860 are approved.*
2. *Water right certificate 94936 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.*

3. The instream right shall provide for the protection of streamflows as follows:

Big Marsh Creek, tributary to Crescent Creek

Instream Reach 1: From the POD (as described in Finding of Fact No. 9) to where the creek crosses the northern boundary of the SW NE of Section 20, T24S, R7E, W.M.

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	May 23 through August 19	0.024 CFS	4.28 AF

Big Marsh Creek, tributary to the Crescent Creek

Instream Reach 2: In Big Marsh Creek, from where the creek crosses the northern boundary of the SW NE of Section 20, T24S, R7E, W.M. to the mouth of Big Marsh Creek at the confluence with Crescent Creek

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	May 23 through August 19	0.022 CFS	3.85 AF

Crescent Creek, tributary to the Little Deschutes River

Instream Reach 3: In Crescent Creek, from the confluence with Big Marsh Creek to the mouth of Crescent Creek at the confluence with the Little Deschutes River

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	May 23 through August 19	0.021 CFS	3.77 AF

Little Deschutes River, tributary to the Deschutes River

Instream Reach 4: In the Little Deschutes River, from the confluence with Crescent Creek to the mouth of the Little Deschutes River

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	May 23 through August 19	0.021 CFS	3.77 AF

Deschutes River, tributary to the Columbia River

Instream Reach 5: *In the mainstem Deschutes River, from the confluence with the Little Deschutes River to Lake Billy Chinook*

Priority Date	Requested Instream Period	Requested Instream Rate	Requested Instream Volume
9/1/1898	May 23 through August 19	0.02 CFS	3.51 AF

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. 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.*
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 specified by an order approving 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 Certificate 94936 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 2.0 credits, as described herein, may be awarded to this mitigation project. 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, Upper Deschutes, Middle Deschutes and General 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. They may be assigned and used as mitigation after water is legally protected instream.*

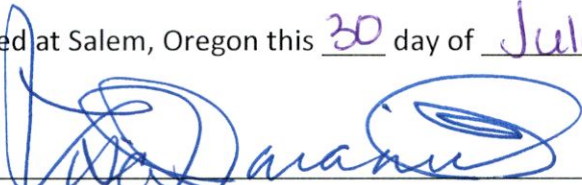
10. **Mitigation Credits shall be assigned as follows:**

- a) C. Paul and Olivia Hackett: 1.2 Credits
- b) Robert and Tami Minnick: 0.8 Credits

11. Mitigation credits are valid until used to satisfy a mitigation obligation of a ground water permit applicant and/or ground water permit/certificate holder within the Deschutes Ground Water Study Area pursuant to the Deschutes Ground Water Mitigation Rules. Mitigation credits are used when a person submits to the Department documentary evidence that valid credits have been obtained and assigned to satisfy a mitigation obligation.

12. The instream certificate created as a result of the approval of this transfer shall be identified as a mitigation credit project 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 30 day of July 2020.



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
Tom M. Byler, Director, Oregon Water Resources Department

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 these proceedings under the federal Service members Civil Relief Act. For more information contact the Oregon State Bar at 800-452-8260, the Oregon Military Department at 503-584-3571, or the nearest United States Armed Forces Legal Assistance Office through <http://legalassistance.law.af.mil>. The Oregon Military Department does not have a toll free number.

This Preliminary Determination was prepared by Laura Wilke. If you have any questions about the information in this document you may reach me at (503) 986-0888. Or Laura.K.Wilke@oregon.gov.



Oregon
Kate Brown, Governor

Water Resources Department

725 Summer St NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

July 30, 2020

Applicant

C. Paul and Olivia Hackett
2518 Chicago Ave.
Kingman, AZ 86401-4220

Applicant

Robert and Tami Minnick
1095 Alandale Ave SE
Albany, OR 97321

SUBJECT: Instream Transfer Application T-12860 / Mitigation Credit Project MP-235

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve Instream Transfer Application T-12860 and Mitigation Credit Project MP-235. 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 Bend Bulletin 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 503-986-0888 or Laura.k.Wilke@Oregon.gov if I may be of assistance. If you are unable to reach me, please call Sarah Henderson at 503-986-0884 or Sarah.A.Henderson@oregon.gov.

Sincerely,

A handwritten signature in blue ink that reads "Laura Wilke". The signature is cursive and fluid.

Laura Wilke
Transfer Specialist
Transfer and Conservation Section

cc: T-12860
Mitigation Credit File MP-235
Jeremy T. Giffin, District 11 Watermaster (*via e-mail*)
John A. Short, Agent for the applicant (*via e-mail*)
Linda Lee Miller, CWRE #47708 (*via e-mail*)

encs