

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

In the Matter of Instream Transfer)
Application T-13615, Deschutes County)

D R A F T PRELIMINARY

) DETERMINATION PROPOSING APPROVAL
) OF A CHANGE IN PLACE OF USE AND
) CHARACTER OF USE AND PARTIAL
) CANCELLATION OF WATER RIGHT
) CERTIFICATES 265, 276, AND 30561

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.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and request voluntary cancellation.

Applicant

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Agent

Deschutes River Conservancy (DRC)
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Findings of Fact

1. On February 5, 2021, Deschutes Land Trust and the DRC filed an application to change the place of use and character of use under Certificates 265, 276, and 30561 to instream use. The Department assigned the application number T-13615.
2. Notice of the application for transfer was published on February 23, 2021, 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 Wasco County Planning Department, Jefferson County Planning Department, the City of Maupin, the City of Sisters, Sherman County Planning Department, the

Confederated Tribes of Warm Springs, and the Deschutes County Planning Department. Additionally, the Department provided notice of the proposed action to Wasco County Planning Department, Jefferson County Planning Department, the City of Maupin, the City of Sisters, Sherman County Planning Department, the Confederated Tribes of Warm Springs, and the Deschutes County Planning Department upon receipt of Transfer Application T-13615.

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

Certificate: 265 in the name of William E. Claypool (confirmed by Squaw (Whychus) Decree, entered of record at Salem in the Order Records in Volume 1, at page 120)
Use: Irrigation of 18.4 acres
Priority Date: 1897
Quantity: **Rate:** 0.42 Cubic Foot per Second (CFS)
Source: Whychus Creek (formerly Squaw Creek), tributary of the Deschutes River
Authorized Point of Diversion (POD): Not described by Certificate
Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	11 E	WM	3	SW NW	6.2
14 S	11 E	WM	3	SE NW	2.1
14 S	11 E	WM	3	NW SW	4.8
14 S	11 E	WM	3	SW SW	3.3
14 S	11 E	WM	10	NW NW	2.0
Total Acres					18.4

5. Certificate 265 does not describe the location of the point of diversion. However, additional information provided with the transfer application identifies that the point of diversion is located at River Mile 9.5. The Squaw (Whychus) Creek Decree identifies the name of the ditch as W.E. Claypool Ditch. The point of diversion is located approximately as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	11E	WM	9	SE NE	W.E. CLAYPOOL DITCH – 800 FEET WEST AND 130 FEET NORTH OF THE EAST ¼ CORNER OF SECTION 9, RIVER MILE 9.5 LATITUDE: 44.37284 NORTH LONGITUDE: -121.41525 WEST

6. Certificate 265 does not specify a rate limit per acre. By Decree, the rate is limited to 1/50th of a CFS per acre. There is also no duty associated with the water right proposed to be transferred instream. The applicants have requested to transfer 101.2 Acre-Feet (AF) to instream use, the equivalent of 5.5 AF per acre. The Department has determined that this quantity may be transferred instream without injury or enlargement.

7. Since Certificate 265 was issued in 1911, mapping techniques have advanced and improved. The map submitted with the transfer application identifies the place of use somewhat differently than shown on the original water right map showing the location of decreed water rights for the Squaw (Whychus) Creek Decree. This is likely due to more accurate representation of survey lines, sections and quarter-quarter lines. The footprint (size and the shape) of the right described in Certificate 265 appears to be the same as that shown on the Decree map for the water right of record. The portion of the right to be transferred, is consistent with the water right of record.

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

Certificate: 276 in the name of Walter S. Fullerton (confirmed by the Squaw (Whychus) Creek Decree entered of record at Salem, in the Order Records in Volume 1, at Page 120)
Use: Irrigation of 15.0 acres
Priority Date: August 1901
Quantity: **Rate:** 0.3 Cubic Foot per Second (CFS)
Source: Whychus Creek (formerly known as Squaw Creek), tributary of the Deschutes River

Authorized Point of Diversion (POD): Not described on Certificate

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	11 E	WM	16	SW NW	8.0
14 S	11 E	WM	17	SE NE	5.0
14 S	11 E	WM	17	NE SE	2.0
Total Acres					15.0

9. Certificate 276 does not specify a rate limit per acre. By Decree, the rate is limited to 1/50th of a CFS per acre. There is no duty associated with the water right proposed to be transferred instream. The applicants have requested to transfer 82.5 Acre-Feet (AF) to instream use, the equivalent of 5.5 AF per acre. The Department has determined that this quantity could be beneficially used without waste and may be transferred instream without injury or enlargement.

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

Certificate: 30561 in the name of A. N. Voorhees and Sons (perfected under Permit S-25548)
Use: Irrigation of 6.8 acres
Priority Date: May 26, 1958
Quantity: **Rate:** 0.13 CFS
Limit: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to one-fiftieth of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a

diversion of not to exceed 4.5 acre feet per acre for each acre irrigated during the irrigation season of each year.

Source: Whychus Creek (formerly known as Squaw Creek), tributary of the Deschutes River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	11 E	WM	17	SW SE	Not described on certificate

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	11 E	WM	16	SW NW	1.7
14 S	11 E	WM	17	NE SE	5.1
Total Acres					6.8

- Certificates 276 and 30561 do not provide a complete description of the location of the point of diversion. Based upon additional information provided by the applicant and the Department’s records, both certificates have the same point of diversion located as follows:

Twp	Rng	Mer	Sec	Q-Q	Longitude/Latitude and River Mile
14 S	11 E	WM	17	SW SE	Longitude 44.351816 North Latitude -121.437742 West; approximately at River Mile 11.25

- Certificates 275, 276, 30561, and the Squaw (Whychus) Creek Decree do not specify the irrigation season; nor is an irrigation season specified by Basin Program. However, Whychus Creek is a tributary of the Deschutes River, and the Deschutes River Decree specifies an irrigation season of April 1 through October 31. For the purposes of this instream transfer, the instream right shall be limited to a season of April 1 through October 31, consistent with the Deschutes River Decree.
- Transfer Application T-13615 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.
- Transfer Application T-13615 proposes to change the place of use of the rights to create an instream reach from the POD’s identified in Finding of Fact Nos. 5 and 11 on Whychus Creek to the mouth of Whychus Creek, into the Deschutes River to Lake Billy Chinook, at approximately River Mile 120, and then down to the mouth of Deschutes River.

15. The applicant proposes the quantities water to be transferred instream be as protected follows:

Certificate	Instream Rate (cfs)	Instream Volume (acre-feet)	Instream Period
265	0.277	101.2	April 15 – October 15
276	0.226	82.5	
30561	0.084	30.6	
Total	0.587	214.3	

16. 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)

17. Water has been used within the last five years 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.
18. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Transfer Application T-13615.
19. 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 (Deschutes River) (OAR 690-077-0015 (8)). The quantity that may be transferred instream in Whychus Creek is measurable, when combined with other transfers, leases, and allocation of conserved water instream water rights from Whychus Creek, into the Deschutes River and may be protected instream in the Deschutes River.
20. Transfer Application T-13615 requests to protect water instream from Whychus Creek into the Deschutes River to its mouth. A portion of the water diverted at the POD returns to the Deschutes River within the proposed reach and is available to downstream water right holders. Return flows from the existing use are generally back in the river system once river flows reach the Madras Gage. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected instream requires modification and return flows should be accounted for at the Madras Gage.

21. The instream use is as follows:

Whychus Creek, tributary to the Deschutes River

Instream Reach No. 1: At the POD as described in Finding of Fact No. 11 (approximately RM 11.25) to the POD described in Finding of Fact No. 5 (approximately RM 9.5)

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
276	August, 1901	0.226	82.5	April 15 through October 15
30561	5/26/1958	0.084	30.6	
Total Instream		0.310	113.1	

Instream Reach No. 2: At the POD as described in Finding of Fact No. 5 (approximately RM 9.5) to the mouth of Whychus Creek into the Deschutes River to the Madras Gage (approximately RM 100.1)

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
276	August, 1901	0.226	82.5	April 15 through October 15
30561	5/26/1958	0.084	30.6	
265	1897	0.277	101.2	
Total Instream		0.587	214.3	

Instream Reach No. 3: In the Deschutes River from immediately below the Madras Gage (approx. RM 100.1) to the mouth (RM 0.0)

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
276	August, 1901	0.074	27.0	April 15 through October 15
30561	5/26/1958	0.034	12.2	
265	1897	0.091	33.1	
Total Instream		0.199	72.3	

22. The proposed change, as conditioned in Finding of Fact #20, would not result in enlargement of the right.
23. The proposed change, as conditioned in Finding of Fact #20, would not result in injury to other water rights.
24. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
25. The protection of flows within the proposed reach is appropriate, considering:
 - a) The instream water right begins at the recorded points of diversion;
 - b) The location of confluences with other streams downstream of the points of diversion;

- c) There are no known areas of natural loss of streamflow to the riverbed downstream from the point of diversion; and
 - d) Return flows resulting from the exercise of the existing water right would re-enter the river within the reach of the instream water right below the POD. The quantity of water to be protected instream in Reach No. 3 has been reduced to account for return flows.
26. 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 is one instream water right established under ORS 537.336 within the proposed reach, being Instream Water Right Certificate 73223 with a priority date of October 11, 1990. The instream reach for Certificate 73223 extends from Indian Ford Creek at RM 19.5 to the mouth of Whychus Creek. The instream right is 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 Certificate 73223.

During the period June 1 through October 15, the total quantities of water to be protected instream under the existing and proposed instream rights within a portion of the reach from T14S, R11E, Section 17 (approximately RM 11.25) to the mouth of Whychus Creek will exceed the quantities identified as necessary for instream use for various fish life stages under Certificate 73223, which was created under ORS 537.341 (state agency process). However, the Department has identified this instream water right will provide an additional beneficial purpose. The Oregon Department of Fish and Wildlife has identified that Whychus Creek is a high priority for flow restoration. In addition, the original instream flows established under Certificate 73223 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.

27. The flow targets at the time of establishing instream water right 73223 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 Certificate 73223 is 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.
28. 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.
29. Within the proposed reach on Whychus Creek, by adding to other instream water rights established pursuant to ORS 537.336 (state agency application process), ORS 537.348 (instream transfer process and instream lease) and ORS 537.470 (allocation of conserved water process) for the period of June 1 through October 15, 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.
30. Within the proposed reach on Whychus Creek, the proposed instream use may replace a portion of Certificate 73223, established under ORS 537.336, with an earlier priority date for the period of April 15 to June 1.
31. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach on Whychus Creek will provide for a beneficial purpose and exceed the estimated average natural flow, but are significant for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values of the instream rights.

32. Within the proposed reach on the Deschutes River, there are several existing instream water rights. There is a pending instream water right application (App. IS-70695), 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.
33. 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.
34. Within the proposed reach on the Deschutes River, the existing instream water rights, established under ORS 537.336 (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 priority dates of 1897, August 1901 and May 26, 1958. 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, under an earlier priority date.
35. 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.
36. 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

37. On February 5, 2021, an affidavit certifying that a portion of water right Certificate 265 has been abandoned and the requested partial cancellation of the right was received from Deschutes Land Trust.

38. The portion of the right to be cancelled is as follows:

Certificate: 265 in the name of William E. Claypool (confirmed by decree of the Circuit Court of the State of Oregon for Crook County, and the said decree entered of record at Salem in the Order Record of the Board of Control of the State of Oregon, in Volume 1, at page 120)

Use: Irrigation of 8.1 acres

Priority Date: 1897

Quantity: **Rate:** 0.18 Cubic Foot per Second (CFS)

Source: Whychus Creek (formerly Squaw Creek), tributary of the Deschutes River

Authorized Point of Diversion (POD): Not described by Certificate

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	11 E	WM	3	SW NW	0.8
14 S	11 E	WM	3	SE NW	1.9
14 S	11 E	WM	3	NW SW	0.2
14 S	11 E	WM	3	SW SW	3.2
14 S	11 E	WM	10	NW NW	2.0
Total Acres					8.1

39. On February 5, 2021, an affidavit certifying that a portion of a water right Certificate 30561 has been abandoned and the requested partial cancellation of the right was received from Deschutes Land Trust.

40. The portion of the right to be cancelled is as follows:

Certificate: 30561 in the name of A. N. Voorhees and Sons (perfected under Permit S-25548)

Use: Irrigation of 10.9 acres

Priority Date: May 26, 1958

Quantity: **Rate:** 0.22 CFS

Limit: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to one-fiftieth of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 4.5 acre feet per acre for each acre irrigated during the irrigation season of each year.

Source: Whychus Creek (formerly known as Squaw Creek), tributary of the Deschutes River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	11 E	WM	17	SW SE	Not provided on certificate

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	11 E	WM	16	SW NW	0.3
14 S	11 E	WM	16	NW SW	0.2
14 S	11 E	WM	17	SE NE	3.7
14 S	11 E	WM	17	NE SE	6.6
14 S	11 E	WM	17	SE SE	0.1
Total Acres					10.9

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-13615 appear to be consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075 and the abandoned rights should be cancelled. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved, and the abandoned rights will be cancelled.

If Transfer Application T-13615 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-13615 are approved. The portion of the rights that have been abandoned are cancelled.*
2. *Water right certificates 265, 276, and 30561 are cancelled. New certificates confirming the instream water rights shall be issued.*
3. *The instream water rights shall provide for the protection of streamflows from the POD's identified in Finding of Fact Nos. 5 and 11 on Whychus Creek to the mouth of Whychus Creek, into the Deschutes River and down to the mouth of Deschutes River.*
4. *The quantities of water to be protected under the instream water right are:
Whychus Creek, tributary to the Deschutes River*

Instream Reach No. 1: *At the POD as described in Finding of Fact No. 11 (approximately RM 11.25) to the POD described in Finding of Fact No. 5 (approximately RM 9.5)*

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
276	August, 1901	0.226	82.5	April 15 through October 15
30561	5/26/1958	0.084	30.6	
Total Instream		0.310	113.1	

Instream Reach No. 2: At the POD as described in Finding of Fact No. 5 (approximately RM 9.5) to the mouth of Whychus Creek into the Deschutes River to the Madras Gauge (approximately RM 100.1)

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
276	August, 1901	0.226	82.5	April 15 through October 15
30561	5/26/1958	0.084	30.6	
265	1897	0.277	101.2	
Total Instream		0.587	214.3	

Instream Reach No. 3: In the Deschutes River from immediately below the Madras Gauge (approx. RM 100.1) to the mouth (RM 0.0)

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
276	August 1901	0.074	27.0	April 15 through October 15
30561	5/26/1958	0.034	12.2	
265	1897	0.091	33.1	
Total Instream		0.199	72.3	

5. *Water rights upstream of the original points of diversion shall not be subject to regulation for flows in excess of the quantities to which this instream water right is entitled at the original point of diversion.*
6. *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 points of diversion.*
7. *Within the proposed reach on Whychus Creek, the instream rights established by this transfer shall be additive to other instream water rights established pursuant to ORS 537.336 (state agency application process), ORS 537.348 (instream transfer process and instream lease), and ORS 537.470 (allocation of conserved water process) for the period of June 1 through October 15. During the period of April 15 to June 1, the instream rights established by this transfer shall replace a portion of Certificate 73223 (established under ORS 537.336) with an earlier priority date and shall be additive to other instream water rights established pursuant to ORS 537.348 and ORS 537.470 unless otherwise specified by an order approving a new instream water right under these statutes.*
8. *The instream rights established by this transfer, within the proposed reach on the Deschutes River, shall be additive 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), and shall replace the existing instream water rights established under ORS 537.336 (state agency application process) with an earlier priority date unless otherwise specified by an order approving a new instream water right under these statutes.*

9. *The right to the use of the water is restricted to beneficial use within the stream reaches described and is subject to all other conditions and limitations contained in Certificates 265, 276, and 30561 and any related decree.*
10. *The former place of use of the transferred water shall no longer receive water as part of these rights.*

Dated at Salem, Oregon this ____ day of _____ 2021.

D R A F T

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

This draft Preliminary Determination was prepared by Sarah Henderson. If you have questions about the information in this document, you may reach me at 503-979-9872 or Sarah.A.Henderson@oregon.gov.