

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

In the Matter of Instream Transfer
Application T-13437 and Mitigation
Project MP-263, Deschutes County

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D R A F T PRELIMINARY
DETERMINATION PROPOSING APPROVAL
OF A CHANGE IN PLACE OF USE AND
CHARACTER OF USE AND PRELIMINARY
AWARD OF MITIGATION CREDITS AND
PARTIAL CANCELLATION OF A WATER
RIGHT

Authority

Oregon Revised Statutes (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 Rules (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.

ORS 540.510 establishes the process in which the Department may cancel a supplemental water right not included as part of the transfer application.

Applicant

CITY OF BEND
62975 BOYD ACRES ROAD
BEND, OREGON 97701

Findings of Fact

1. On May 13, 2020, the City of Bend filed an application to change a portion of the place of use and character of use under Certificate 94956 to instream use. The Department assigned the application number T-13437.
2. Notice of the application for transfer was published on May 26, 2020, pursuant to OAR 690-380-4000. No comments were received by the comment deadline, June 25, 2020.
3. Consistent with land use requirements, notice of the intent to file the instream transfer application was provided by the applicant to Deschutes County Community Development, Jefferson County Community Development, Wasco County Planning Department, City of Bend Planning Department, Sherman County Planning Department, and the Confederated Tribes of the Warm Springs. Additionally, the Department provided notification of the proposed action to these local governments and also the Bureau of Reclamation upon receipt of Transfer Application T-13437.
4. The portion of the right to be transferred is as follows:

Certificate: 94956 in the name of Central Oregon Irrigation District
Use: 15.0 equivalent acres of Municipal Use
Priority Date: October 31, 1900, December 2, 1907
Season of Use: April 1 through October 31, further limited as follows:
Season 1: April 1 through April 30 & October 1 through October 31
Season 2: May 1 through May 14 & September 15 through September 30
Season 3: May 15 through September 14

Maximum Quantity (Rate) that can be applied to an acre:
 Season 1: limited to 1/145.45th cubic foot per second (CFS) per acre
 Season 2: limited to 1/109.09th CFS per acre
 Season 3: limited to 1/58.91th CFS per acre

Maximum Duty that can be applied to an acre:
 Not to exceed 5.45 acre-feet (AF) per acre per year.

The above listed rates and duty reflect allowance of a 45% transmission loss on the main canals as determined by decree of the Circuit Court of Deschutes County, dated March 24, 1933. Those lands not served from the district main canal systems, but by direct pumping from the Deschutes River, are not allowed the 45% transmission loss.

Source: The Deschutes River, tributary to the Columbia River

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q Q	POD Name / Measured Distances
17 S	12 E	WM	31	NE SE	POD NO. 4 (DRAKE PARK SOUTH): 700 FEET NORTH AND 120 FEET WEST FROM THE SE CORNER OF NE¼ SE¼ OF SECTION 31

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres Equivalent	Water User
17 S	12E	WM	32	SW NW	15.0	City of Bend

5. Certificate 94956 is a deficient water right. If water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rates and duty allowed (described in Finding of Fact No. 4), the total rate and duty of the water right would be exceeded. In the event water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rates and duty allowed at the POD (described in Finding of Fact No. 4), the portion of the right involved in this instream transfer would be limited as described in the table below. These rates and duty are also the quantities by which the diversion at POD 4 under Certificate 94956 shall be reduced, if this instream transfer is approved.

Priority Date	Season 1	Season 2	Season 3	Seasonal Duty/Volume Limit
October 31, 1900	0.187 CFS	0.249 CFS	0.330 CFS	148.27 AF
December 2, 1907			0.132 CFS	

6. A total of 81.76 AF, excluding transmission losses, may be beneficially used annually for municipal use under the portion of Certificate 94956 proposed for transfer.
7. There is a supplemental right, Certificate 76714, appurtenant to the same lands on which the primary right Certificate 94956 is appurtenant and proposed to be transferred to instream use. The applicant has requested that the affected portion of Certificate 76714 be cancelled upon issuance of the Final Order approving T-13437.
8. Transfer Application T-13437 proposes to change the character of use to instream use for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, and other ecological values; recreation; and pollution abatement. The application also proposes to establish mitigation in the Deschutes Ground Water Study Area.
9. Transfer Application T-13437 proposes to change the place of use of the right to create an instream reach from Drake Park South (POD No. 4) to the mouth of the Deschutes River.
10. The applicant proposes that water be protected instream during the period April 1 through October 26. Season 1 would end on October 26.
11. The applicant proposed the following quantities water to be transferred instream:

Certificate	Priority Date	Rate Instream	Volume Instream
94956	October 31, 1900	Season 1: 0.103 CFS Season 2: 0.138 CFS Season 3: 0.255 CFS	81.76 AF

12. There are several existing instream water rights located within the same instream reach proposed by the applicant.
13. The applicant proposes that any instream water right established as a result of this instream transfer to be additive to existing instream water rights for the same reach established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process). The applicant also proposes that any instream water right established as a result of this instream transfer replace a portion of any existing instream rights established pursuant to ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency application process), with an earlier priority date.
14. The applicant has requested to protect water instream under the October 31, 1900 priority date. Water is diverted at the point of diversion during Season 3 under both the 1900 and 1907 priority dates. The quantity of water diverted under the 1907 priority date during Season 3 makes up a balance of water allowed by the Decree for transmission losses. Transmission losses account for 45 percent of the water diverted at the point of diversion and are not transferable to instream use. The quantities of water proposed by the applicant to be transferred instream, as described in Finding of Fact No. 11, do not include the 45 percent transmission loss. The Department finds that water may be protected instream solely under the 1900 priority date.

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

15. The portion of the right proposed for transfer under T-13437 was leased instream under IL-1377 during the term May 23, 2014 through October 31, 2016. Consequently, 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.
16. A diversion structure and pipe/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-13437.
17. 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 generally return to 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 to account for return flows at the Madras Gage.

18. The quantities to be protected instream require modification to prevent injury and enlargement, and is as follows:

Instream Reach No. 1: From POD No. 4 to the Madras Gage

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
94956	10/31/1900	Season 1: 0.103	81.76	April 1 – October 26
		Season 2: 0.138		
		Season 3: 0.255		

Instream Reach No. 2: From the Madras Gage to the mouth of the Deschutes River

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
94956	10/31/1900	0.101	41.9	April 1 – October 26

19. The proposed change, as modified, would not result in enlargement of the right.
20. The proposed change, as modified, would not result in injury to other water rights.
21. The amount and timing of the proposed instream flow, as modified, is allowable within the limits and use of the original water right.
22. 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 no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
 - d) Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the reach of the instream water right.
23. Within the proposed reach on the Deschutes River, there are existing instream water rights established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) located between Drake Park South POD and the mouth of the Deschutes River, which includes the use of water for fish habitat, aquatic life, recreation, aesthetics, and pollution abatement. There are two instream water rights (Certificates 73188 and 73237) established through the state agency application process (ORS 537.341) below Lake Billy Chinook for the purposes of fish habitat and various fish life stages, recreation and aesthetics, with priority dates of October 2, 1989 and January 16, 1996, respectively. There is presently one instream water right (Certificate 59777) within the proposed reach created as a result of ORS 537.346 and one pending instream water right application, filed by the Oregon Department of Fish and Wildlife pursuant to ORS 537.341 to establish an instream water right from the COID North Canal to Lake Billy

Chinook for anadromous and resident fish rearing, which if approved will have a priority date of September 19, 1990.

24. In addition, 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 Water way are at times not met during the requested periods for instream protection.
25. Portions of the proposed reach on the Deschutes River are also on the Department of Environmental Quality's 303d list of water quality limited streams and a TMDL (Total Maximum Daily Load) study is underway.
26. The proposed instream water right, to be established under ORS 537.341 (state agency application process), within the proposed reach on the Deschutes River is sufficient to protect the monthly quantities of water necessary for various fishlife stages, supporting aquatic life, and minimizing pollution, but may not always be met and will have a priority date junior in comparison to other water rights on the Deschutes River. The proposed instream use will have a priority date of October 31, 1900. 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; recreation; and pollution abatement under an earlier priority date.
27. By adding to other water rights, established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process), located within the proposed reach, a new instream water right established by this transfer would provide protection for additional streamflows necessary for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values; recreation; and pollution abatement.
28. During the period April 1 to October 26, any instream water right established by this transfer application may replace a portion of instream water rights established pursuant to ORS 537.341 or ORS 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or ORS 537.470 unless otherwise specified by an order approving a new instream water right under these statutes.
29. The total monthly quantities of water to be protected under the proposed instream right, in addition to the existing instream water rights, within the proposed reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

Partial Cancellation of a Water Right

30. There is an existing supplemental right, Certificate 76714, appurtenant to the portion of lands on which Certificate 94956 is proposed for transfer for instream use. The applicant has not submitted an affidavit certifying that affected portions under Certificate 76714 have been abandoned. The applicant has requested that affected portions of the supplemental water rights under Certificate 76714 be cancelled upon issuance of the Final Order approving T-13437.

31. The portion of the right to be cancelled is:

Certificate: 76714 in the name of CENTRAL OREGON IRRIGATION DISTRICT
Use: MUNICIPAL USE for 15.0 equivalent acres
Priority Date: FEBRUARY 28, 1913
Source: CRANE PRAIRIE RESERVOIR, constructed under permit R-1687, tributary to the DESCHUTES RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	12 E	WM	31	NE SE	CENTRAL OREGON 4: 700 FEET NORTH AND 120 FEET WEST FROM THE SE CORNER OF NE¼ SE¼ OF SECTION 31

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres Equivalent	Water User
17 S	12E	WM	32	SW NW	15.0	City of Bend

Preliminary Award of Deschutes Basin Mitigation Credits

- 32. The City of Bend has requested this instream transfer application be used to establish mitigation credits in the Deschutes Ground Water Study Area. The Applicant has requested that any mitigation credits generated from this project be assigned to the City of Bend.
- 33. The Department assigned this mitigation credit project number MP-263.
- 34. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on May 26, 2020. No comments were received in response to this notice.
- 35. 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 May 26, 2020. Comments were received from DEQ in favor of the application.
- 36. No changes were made to the instream transfer as a result of comments received or consultation with the above named agencies.

37. The number of mitigation credits may be determined by multiplying the number of equivalent acres of municipal use to be transferred instream by the max volume per acre and then multiplying by the consumptive use factor for the municipal use (15.0 acre feet equivalent * 5.45 acre feet per acre * 51.3 % consumptive use = 41.97 acre feet of mitigation water). Therefore, **41.97** mitigation credits may be awarded to this mitigation credit project and assigned to the City of Bend. 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 Middle Deschutes Zones of Impact.
38. A total of 81.76 AF is proposed to be transferred to instream use and 41.97 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.
39. The Department shall award final mitigation credits upon completion of the approved project. Issuance of the instream water right certificate confirms completion of the project and provides verification of the project's completion.
40. Mitigation credits awarded to this mitigation credit project will be valid beginning the first calendar year that water is protected instream under a new instream water right certificate 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-13437 appears 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 portion of the right should be cancelled. If protests are not filed pursuant to OAR 690-380-4030, the application will be approved and the abandoned portion of the 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-13437 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-13437 are approved. The portion of the right that has been abandoned is cancelled.*
2. *Water right certificate 94956 is modified and a new instream water right certificate shall be issued. The Department shall issue a new water right certificate to supersede certificate 94956 upon a determination that it is necessary to produce a certificate to describe that portion of the right not affected by this transfer. A new certificate confirming the instream water right will be issued. Approval of this transfer shall reduce the amount of water lawfully available under the remaining portion of Certificate 94956 by the following:*

Priority Date	Season 1	Season 2	Season 3	Seasonal Duty/Volume Limit
October 31, 1900	0.187 CFS	0.249 CFS	0.330 CFS	148.27 AF
December 2, 1907			0.132 CFS	

3. Certificate 76714 is modified. The Department shall issue a new water certificate on a determination that it is necessary to produce a certificate to confirm that portion of the water right not affected by the cancellation described in Finding of Fact No. 31. Modification of this supplemental water right will be decreased by 15.0 acres equivalent of municipal use to which stored water may be applied for supplemental use under the right.
4. The instream water right shall provide for the protection of streamflows for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values; pollution abatement; and recreation in the Deschutes River from the POD No. 4 (Drake Park South) (as described in finding of Fact No. 4) to the mouth of the Deschutes River.
5. The quantities to be protected instream is as follows:

Instream Reach No. 1: From POD No. 4 to the Madras Gage

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
94956	10/31/1900	Season 1: 0.103	81.76	April 1 – October 26
		Season 2: 0.138		
		Season 3: 0.255		

Instream Reach No. 2: From the Madras Gage to the mouth of the Deschutes River

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
94956	10/31/1900	0.101	41.9	April 1 – October 26

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.
8. 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.
9. 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 94956 and any related decree as may be germane to instream rights.

10. *The former place of use of the transferred water shall no longer receive water as part of the portion of this right transferred to instream use.*
11. ***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 **41.97** credits, as described herein, may be awarded to this mitigation project and assigned to the City of Bend. 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 Middle Deschutes 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.*
12. *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.*
13. *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 ____ day of _____ 2020.

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 503-986-0884 or Sarah.A.Henderson@oregon.gov