



Oregon

Kate Brown, Governor

Water Resources Department

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Salem, OR 97301

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SENT VIA CERTIFIED MAIL

DATE: MAR 21 2022

Applicant

JAMES R. & JEAN S. VERHEYDEN
18660 BULL SPRINGS ROAD
BEND, OREGON 97703

SUBJECT: Water Right Transfer Application T-13764 (MP-276)

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve instream transfer application T-13764 and mitigation project MP-276. 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.

IMPORTANT: Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. mail. Please consider mailing early to ensure the Department receives the protest by the deadline specified above.

Please do not hesitate to contact me at 503-979-9872 or Sarah.A.Henderson@water.oregon.gov if I may be of assistance.

Sincerely,



Sarah Henderson
Flow Restoration Program Coordinator
Transfer and Conservation Section

cc: Transfer Application file T-13764 (MP-276)
Jeremy Giffin, District 11 Watermaster (*via e-mail*)
John Short, Agent for the applicant (*via e-mail*) (johnshort@usa.com)
Bryce Withers, Water Right Services, LLC (*via e-mail*) (brycewrs@gmail.com)

encs

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

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Application T-13764, AND MITIGATION)	PROPOSING APPROVAL OF A CHANGE IN
PROJECT MP-276, DESCHUTES and)	PLACE OF USE AND CHARACTER OF USE
KLAMATH Counties)	AND PRELIMINARY AWARD OF
)	MITIGATION CREDITS

Authority

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. 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.

Applicant

JAMES R. & JEAN S. VERHEYDEN
18660 BULL SPRINGS ROAD
BEND, OREGON 97703

Findings of Fact

1. On July 6, 2021, James R. & Jean S. Verheyden, filed an application to change a portion of the place of use and character of use under Certificate 90239 to instream use. The Department assigned the application number T-13764.
2. On June 14, 2021, Certificate 90239 was cancelled by Special Order Volume 120, pages 807-816, which approved T-13456, and was superseded by Certificate 95746.

Pursuant to OAR 690-380-4030, any person may file a protest or standing statement within 30 days after the last date of publication of notice of this preliminary determination.

3. On September 9, 2021, the applicant's agent provided a revised map and application page removing the areas identified by the Watermaster that could not be transferred instream.
4. On August 23, 2021, Transfer Application T-13806 was filed, and on October 22, 2021, Transfer Application T-13857 was filed. These transfers modify the same right, described by Certificate 95746, that has been proposed to be modified in T-13764. Certificate 95746 shall be canceled after all transfer applications are processed and one remaining right certificate will be issued describing the lands not involved in the three transfer applications.
5. Notice of the application for transfer was published on July 13, 2021, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
6. Consistent with land use requirements, prior to submitting the instream transfer application, the applicant provided notification of the proposed action to the City of La Pine, Deschutes County, Jefferson County, Klamath County, the City of Bend and the Confederated Tribes of Warm Springs. Additionally, the Department provided notice of the proposed action to these local governments and the Tribe upon processing of Transfer Application T-13764.
7. On January 11, 2022, the Department mailed a copy of the draft Preliminary Determination proposing to approve Instream Transfer Application T-13764 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of February 9, 2022, for the applicants to respond. The applicants requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.

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

Certificate: 95746 in the name of LA PINE COOPERATIVE WATER ASSOCIATION (confirmed by Deschutes River decree of record at Salem, in the Order Record of the Water Resources Director in Volume 16, at Page 185)

Use: IRRIGATION of 20.0 ACRES

Priority Date: 1897

Rate: April 1 to May 23 and August 20 to November 1: 0.25 cubic foot per second (cfs)
May 23 to August 20: 0.50 cfs

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-FORTIETH of one cubic foot per second, or its equivalent for each acre irrigated, FROM MAY 23 TO AUGUST 20, and ONE-EIGHTIETH of one cubic foot per second, or its equivalent for each acre irrigated, FROM APRIL 1 TO MAY 23 AND FROM AUGUST 20 TO NOVEMBER 1, and shall be further limited to a diversion of not to exceed 4.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: LITTLE DESCHUTES RIVER, a tributary to the DESCHUTES RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
23 S	9 E	WM	34	SW SW	550 FEET NORTH AND 1150 FEET EAST FROM THE SW CORNER OF SECTION 34

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres
22 S	10 E	WM	34	SE NW	2803	15.1
22 S	10 E	WM	34	NE SW	2803	4.9
Total Acres						20.0

9. A total of 80.0 Acre-Feet (AF) of water may be beneficially used annually under the portion of existing Certificate 95746 proposed for transfer.
10. Transfer Application T-13764 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; pollution abatement; and to establish mitigation credits in the Deschutes Ground Water Study Area.
11. Transfer Application T-13764 proposes to change the place of use of the portion of the water right to create an instream reach from the POD on the Little Deschutes River, into the mainstem Deschutes River and down to Lake Billy Chinook.
12. The applicant proposed the quantities of water to be transferred instream be protected as follows:

Period	Rate (cfs)	Volume (acre-feet)
April 1 to May 23	0.25	80.0
May 23 to August 20	0.50	
August 20 to November 1	0.25	

13. 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)

14. 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.
15. 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-13764.
16. A portion of the water diverted at the POD returns to the Little Deschutes River below the POD and is available to downstream water right holders. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected instream requires modification to account for both surface and subsurface return flows.

The hydrogeologic evaluation of where subsurface return flows occur is generally based on the following information: 1) the local shallow and regional ground water elevations, 2) the shallow and regional head gradient (i.e. ground water flow direction), 3) elevation of nearby streams, 4) elevation of closest gaining stream reaches, 5) distance from nearby streams and gaining stream reaches, and 6) local geologic information.

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

A portion of the water diverted to the place of use returns to the Little Deschutes River through Long Prairie Slough. Remaining return flows take the form of subsurface return flows. Subsurface returns would also return to the river system in the area of the confluence of Long Prairie Slough and the Little Deschutes River, at approximately River Mile 28.6.

The instream flows at River Mile 28.6 have been reduced to the consumptive portion of the right to account for both surface and subsurface return flows.

17. The transfer application requests to protect water instream from the Little Deschutes River into the mainstem Deschutes River. An instream reach is generally from the point of diversion to the mouth of the source stream (Little Deschutes River) but may be protected further if measurable in the receiving stream (the Deschutes River) (OAR 690-077-0015 (8)). The quantity that may be leased instream from the Little Deschutes River is measurable into the Deschutes River and may be protected instream in the Deschutes River.
18. Also, the segment of the reach on the mainstem Deschutes River between the confluence with the Little Deschutes River and Bend is a losing reach and loses approximately 7% of its

flows. The quantity of water that may be protected instream in the mainstem Deschutes River requires additional modification to prevent injury and enlargement.

19. Based on Findings of Fact No. 16 through No. 18, the Department proposes to modify the quantities to be transferred and protected instream as follows:

Instream Reach 1: From POD (as described in Finding of Fact No. 8) to the confluence of the Little Deschutes River and Long Prairie Slough (approximately River Mile 28.6)

Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
1897	0.50	80.0	July 7 through August 19
	0.25		August 20 through October 31

Instream Reach 2: From the confluence of the Little Deschutes River and Long Prairie Slough (approximately River Mile 28.6) to the mouth of the Little Deschutes River

Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
1897	0.16	36.0	July 7 through October 31

Instream Reach 3: In the Deschutes River from the confluence with the Little Deschutes River to Lake Billy Chinook (approximately River Mile 120.0)

Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
1897	0.14	33.5	July 7 through October 31

20. The proposed changes, as modified, would not result in enlargement of the right.
21. The proposed changes, as modified, would not result in injury to other water rights.
22. The amount and timing of the proposed instream flow, as modified, is allowable within the limits and use of the original water right.
23. The protection of flows as modified, 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 and channel losses have been accounted for within Reach No. 3; and
 - d) Return flows resulting from the exercise of the existing water right would re-enter the river downstream of the point of diversion and within the reach of the instream water right. Return flows have been accounted for at River Mile 28.6 on the Little Deschutes River.

24. Within the proposed instream reaches on the Little Deschutes River, there is an existing instream water right, Certificate 73226, 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 existing instream water rights established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) for the purpose of conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; pollution abatement; and recreation.
25. The Little Deschutes River is also on the Oregon Department of Environmental Quality's (DEQ) 303d list of water quality limited streams for a variety of water quality concerns and a TMDL (Total Maximum Daily Load) study is underway.
26. Within the proposed instream reach on the mainstem Deschutes River, there are several existing instream water rights. 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. 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. 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 an instream water right from the COID North Canal Dam to Lake Billy Chinook. The remaining instream water rights were established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) and are generally located between the Central Oregon Canal and Lake Billy Chinook.

This portion of 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. In addition to flows for the designated Scenic Waterway, which are not always met during requested period for instream protection, this segment of the Deschutes River is on DEQ's 303d list of water quality limited streams and a TMDL (Total Maximum Daily Load) study is underway.

27. The existing instream water rights, established under ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency application process), within the proposed reach on the Little Deschutes River 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. 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 various fishlife stages, supporting aquatic life, and minimizing pollution under an earlier priority date.

28. 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, and pollution abatement.
29. During the period July 7 through October 31, any instream water right established by this transfer application may replace a portion of instream water rights established pursuant to ORS 537.341 or ORS 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or ORS 537.470, unless otherwise specified in an order approving a new instream water right under these statutes.
30. 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.

Preliminary Award of Deschutes Basin Mitigation Credits

31. James R. & Jean S. Verheyden (the Applicant) 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 James R. & Jean S. Verheyden.
32. The Department assigned this mitigation credit project number MP-276.
33. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on July 13, 2021. No comments were received in response to this notice.
34. The Department consulted with representatives from Oregon Department of Fish and Wildlife, Oregon Department of Environmental Quality (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 July 12, 2021. Comments were received by DEQ in response to this notice and in favor of the application.
35. As part of the revised public notice of the mitigation project, the Department identified that the project may result in 36.0 mitigation credits. This preliminary determination was based upon the proposal to transfer 20.0 acres of irrigation use to instream use with a priority date of 1897. The Watermaster has identified that any mitigation credits established by this project with the 1897 priority date will likely be 100% available. Irrigation of 20.0 acres has an average consumptive use of 36.0 acre-feet. However, this volume may only be protected instream to the mouth of the Little Deschutes River, the lower boundary of the Little Deschutes Zone of Impact.

36. As part of the public notice of the mitigation project, the Department also identified that mitigation credits may be available for use in the Little Deschutes, Upper Deschutes, Middle Deschutes, and General Zones of Impact.
37. Up to 33.5 AF may be protected instream in the mainstem Deschutes River, as identified in Finding of Fact No. 19. The reach of the instream use described in Finding of Fact No. 19 extends through the lower portion of the Upper Deschutes Zone of Impact and then into the Middle Deschutes Zone of Impact and ending at the General Zone of Impact.
38. Therefore, a maximum of **36.0** mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project. 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 and General Zone of Impact. Of the **36.0** mitigation credits that may be awarded to this mitigation project, up to **33.5** of those mitigation credits may also be used in the Upper Deschutes, Middle Deschutes, and General Zones of Impact.
39. The Department shall award final mitigation credits upon completion of the approved project by the applicant and verification by the Department that the project is complete. The issuance of a certificate for the proposed instream water right shall result in completion of the project and verification that the project is complete.
40. Mitigation credits awarded to this mitigation credit project will be valid beginning the first calendar year that water will be protected instream under any new instream water right created as a result of this instream transfer application.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-13764 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 credits pursuant to ORS 537.746 and OAR 690-521-0300 and 690-521-0400.

If Transfer Application T-13764 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-13764 are approved.*
2. *Water right certificate 95746 is modified. Certificate 95746 shall be cancelled upon approval or denial of Transfer Applications T-13806 and T-13857. A new certificate will be issued describing that portion of the right not affected by this transfer and transfer applications T-13806 and T-13857.*

3. *A new certificate confirming the instream water right shall be issued.*
4. *The instream water right shall provide for the protection of streamflows from the authorized point of diversion on the Little Deschutes to Lake Billy Chinook on the mainstem Deschutes River. The quantities to be protected under the instream water right are:*

Instream Reach 1: *From POD (as described in Finding of Fact No. 8) to the confluence of the Little Deschutes River and Long Prairie Slough (approximately River Mile 28.6)*

<i>Priority Date</i>	<i>Instream Rate (cfs)</i>	<i>Instream Volume (AF)</i>	<i>Period Protected Instream</i>
1897	0.50	80.0	July 7 through August 19
	0.25		August 20 through October 31

Instream Reach 2: *From the confluence of the Little Deschutes River and Long Prairie Slough (approximately River Mile 28.6) to the mouth of the Little Deschutes River*

<i>Priority Date</i>	<i>Instream Rate (cfs)</i>	<i>Instream Volume (AF)</i>	<i>Period Protected Instream</i>
1897	0.16	36.0	July 7 through October 31

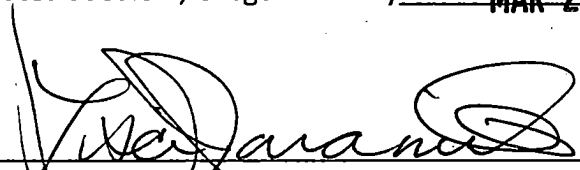
Instream Reach 3: *In the Deschutes River from the confluence with the Little Deschutes River to Lake Billy Chinook (approximately River Mile 120.0)*

<i>Priority Date</i>	<i>Instream Rate (cfs)</i>	<i>Instream Volume (AF)</i>	<i>Period Protected Instream</i>
1897	0.14	33.5	July 7 through October 31

5. *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.*
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 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.*
7. *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.*
8. *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 95746 and any related decree.*
9. *The former place of use of the transferred water shall no longer receive water as part of this right.*

10. **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 **36.0 credits**, as described herein, may be awarded to this mitigation project and assigned to James R. & Jean S. Verheyden. 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 Zone of Impact**. Of the 36.0 mitigation credits awarded to this project, up to **33.5 credits** may also be used in the **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.
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. As set forth in #4 and #10 above, the instream certificate shall specify 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.

Dated at Salem, Oregon this day MAR 21 2022.



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

This Preliminary Determination was prepared by Sarah Henderson. If you have any questions about the information in this document, you may reach me at (503) 979-9872. Or sarah.a.henderson@water.oregon.gov.

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

IMPORTANT: *Due to COVID-19, the Department's office is closed to walk-in services. The Department encourages the submission of protests by U.S. Mail. Please consider mailing early to ensure the Department receives the protest by the deadline.*

Notice Regarding Service Members: Active duty servicemembers have a right to stay these proceedings under the federal Servicemembers 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 The Oregon Military Department does not have a toll free number.