

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

In the Matter of Instream Transfer)
 Application T-10356, Deschutes County)
)
)
) PRELIMINARY DETERMINATION
) PROPOSING APPROVAL OF A
) CHANGE IN PLACE OF USE AND
) CHARACTER OF USE

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.

Applicant

DESCHUTES RIVER CONSERVANCY (DRC)
 700 NW HILL STREET
 BEND OR 97701

Findings of Fact

Background

1. On April 2, 2007, the DRC filed an application to change the place of use and character of use under Certificate 74145 to instream use. The Department assigned the application number T-10356.
2. The portion of the right to be transferred is as follows:

Certificate: 74145 in the name of Swalley Irrigation District
Use: IRRIGATION of 8.14 ACRES
Priority Date: September 1, 1899
Source: DESCHUTES RIVER, tributary to COLUMBIA RIVER
Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
17 S	12 E	WM	29	SE NE	POD #3: SWALLEY MAIN CANAL: 985 FEET NORTH AND 617 FEET WEST FROM THE EAST ¼ CORNER OF SECTION 29
15 S	12 E	WM	14	NW SE	POD #15: ADDITIONAL DISTRICT DIVERSION: 2170 FEET NORTH AND 1350 FEET WEST FROM THE SE CORNER OF SECTION 14

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.

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Acres	Additional Information: Tax Lot Number Listed on Application†
17 S	12 E	WM	20	NW NE	2.14	100
17 S	12 E	WM	16	SW SE	2.00	2600
17 S	12 E	WM	17	SW SE	1.00	7900
17 S	12 E	WM	17	SW SE	1.00	8000
17 S	12 E	WM	17	SW SE	2.00	8200

† May be a different tax lot number than what is described on the water right certificate.

- The rate and duty associated with Certificate 74145 is dependent on whether the right is served by the main canal or a direct diversion right. There are a total of 4,561.105 acres listed on the certificate, of which 4,442.795 may be served by the canal, and 118.31 acres that are restricted to being served by direct diversions. The rights served by the canal are entitled to the following rates:

Season 1: April 1 - 30 & Oct. 1 – 31	Season 1 Rate: 1 cfs to 83.0 acres
Season 2: May 1 – 14 & Sept. 15 – 30	Season 2 Rate: 1 cfs to 62.0 acres
Season 3: May 15 - Sept. 14	Season 3 Rate: 1 cfs to 33.45 acres

The above rates include a 43% transmission loss allowed by the Court to compensate for seepage from the canal. This transmission loss is not allowed on direct diversion rates. The total rate of use described on the certificate is limited to 125.0 cfs measured at the points of diversion from the source.

The duty per acre associated with lands served by the canal shall not exceed 9.58 acre feet for each acre irrigated during the irrigation season as measured at the points of diversion from the source. For lands served by direct diversions, the duty per acre is limited to 5.46 acre feet.

Certificate 74145 has been modified (reduced) by allocation of conserved water projects CW-13 (Special Order Volume 61, Page 630), CW-40 (Special Order Volume 70, Page 143), CW-41 (Special Order Volume 71, Page 202), CW-47 (project approved, but not yet finalized, Special Order Volume 71, Page 221) and transfers T-8519 (Special Order Volume 55, Page 1010) which transferred 21.0 acres of direct diversion right to instream right (Certificate 76687), T-8154 (a place of use transfer, Special Order Volume 53, Page 1445), which did not prove up on 1.0 acre of canal diversion, which will be removed from the water right, and T-9308 (a place of use transfer approved by Special Order Volume 65, Page 472) also modified Certificate 74145 and includes 2.0 acres of inchoate canal diversion. The table below shows the initial rate and duty for Certificate 74145 and the reductions in rate and duty made by each of the described modifications. The rate and duty for the 2.0 acres associated with T-9308 are included in the initial rate and duty shown in the table below.

Consequently, the starting point for the rate and duty before this transfer associated with Certificate 74145 is approximately:

	Initial Rate / Duty	CW-13 Rate / Duty	T-8519 Rate / Duty	T-8154 Rate / Duty	CW-40 Rate / Duty	CW-41 Rate / Duty	CW-47 Rate/ Duty (Project not finalized)	Approximate Before T-10356 Rate/Duty*
Season 1 Rate (cfs)	54.340	(0.310)	(0.144)	(0.012)	(1.480)	(4.400)	(4.67)	43.324
Season 2 Rate (cfs)	72.746	(0.420)	(0.193)	(0.016)	(1.480)	(4.400)	(6.67)	59.567
Season 3 Rate (cfs)	125.000	(0.770)	(0.358)	(0.028)	(1.480)	(4.400)	(9.00)	108.964
Duty (AF)	4,3207.95	(417.00)	(114.66)	(9.02)	(627.10)	(1,864.37)	(3,157.62)	37,018.18

*This includes the inchoate rate and duty associated with T-9308, and any other transfers completed pursuant to ORS 540.580. Additionally, the rate and duty may have been further modified by other orders of the Department.

The table below then shows the rate and duty associated with the 8.14 acres proposed to be transferred. This was determined by subtracting the existing direct diversion rates from the approximate starting rate and duty for this water right, identified in the table above, and then by determining the maximum rate that could be applied simultaneously to all canal diversion acres. This is the amount that Certificate 74145 will be reduced by as a result of this transfer.

	Approximate Before T-10356 Rate/Duty	Direct Diversion Rate/Duty	Total Canal Diversion Rate/Duty	Canal Rate 1/X cfs/ac and Duty (if exercised simultaneously)	Rate/Duty Associated with 8.14 Canal Acres, including loss
Season 1 Rate (cfs)	43.324	(0.812)	42.512	1/104.508 cfs/ac	0.08
Season 2 Rate (cfs)	59.567	(1.088)	58.479	1/75.972 cfs/ac	0.11
Season 3 Rate (cfs)	108.964	(2.016)	106.948	1/41.542 cfs/ac	0.20
Duty	37,018.18 AF	(219.27) AF	36,798.91 AF	7.81 AF/ac	63.57 AF

The transferable portion of the water right, however, is the full rate and duty that can be applied to each acre (see first table contained in Finding of Fact #3) less the canal transmission losses, being:

	Transferable Rate/Duty Per Canal Acre	Transferable Rate/Duty Associated with 8.14 Canal Acres
Season 1 Rate	1cfs to 83.0 ac less 43%	0.06 cfs
Season 2 Rate	1cfs to 62.0 ac less 43%	0.07 cfs
Season 3 Rate	1cfs to 33.45 ac less 43%	0.14 cfs
Duty	9.58 AF/ac less 43% (or 5.46 AF/ac)	44.44 AF

- Two allocation of conserved water applications, CW-43 and CW-48, were received prior to transfer T-10356. Proposed Final Orders have been issued that would approve these applications. Both of these applications propose to affect Water Right Certificate 74145. If

either or both of these applications, or other applications affecting Certificate 74145, are approved prior to this transfer, then the final transferable portion and/or the amount that the water right certificate is reduced by may be subject to change.

- The applicant is not the owner of the lands to which the water right described in Finding of Fact #2 is appurtenant. However, water right conveyance agreements have been completed and interest in the water right has been conveyed from each landowner, described in the table below, to the DRC. The portion of this right to be transferred was appurtenant to lands owned by the identified landowners at the time interest in the water right was conveyed through a Quit Claim, a water right conveyance agreement.

Grantor (landowner)	Water Right Interest Holder	T	R	S	Q-Q	Tax Lot at time of Conveyance
Ted Wise & Martin F. Lofquist	DRC	17 S	12 E	20	NW NE	.100
A-1 Excavation, Inc.	DRC	17 S	12 E	16	SW SE	2600
Garth Jackson, President of Palmer Homes	Swalley Irrigation District	17 S	12 E	17	SW SE	7900
Garth Jackson, President of Palmer Homes	Swalley Irrigation District	17 S	12 E	17	SW SE	8000
Garth Jackson, President of Palmer Homes	Swalley Irrigation District	17 S	12 E	17	SW SE	8200

- On August 2, 2007, the applicant provided documentation to the Department demonstrating that on April 3, 2007, Swalley Irrigation District had conveyed ownership interest in the water right, which was appurtenant to tax lots 7900, 8000, and 8200, to the DRC.
- Application T-10356 proposes to change the character of use to instream use for conservation, maintenance and enhancement of aquatic and fish life, fish and wildlife habitat and other ecological values; recreation; and pollution abatement.
- Application T-10356 proposes to change the place of use of the right to create an instream reach from Swalley Main Canal POD #3 (described in Finding of Fact #2) at approximately RM 165 to the mouth of the Deschutes River at RM 0.0.
- The applicant originally proposed the quantities water to be transferred instream to be protected in two reaches as follows:

	Reach 1: POD #3 (RM 165) to RM 120.0	Reach 2: RM 120 to RM 0.0
Season 1 Rate (cfs): April 1 - 30 & Oct. 1 - 31	0.056 CFS	0.035 CFS
Season 2 Rate (cfs): May 1 - 14 & Sept. 15 - 30	0.075 CFS	0.035 CFS
Season 3 Rate (cfs): May 15 - Sept. 14	0.13 CFS	0.035 CFS
Duty (AF)	42.24 AF	14.65 AF

10. There are several existing instream water rights located within the same instream reaches proposed by the applicant. There are two existing instream water rights established through the state agency application process below Lake Billy Chinook and one pending application within the same reach above Lake Billy Chinook. The state agency established instream water rights are junior in priority date to the water right proposed for transfer. The remaining instream water rights were established through the instream transfer and allocation of conserved water processes.
11. The applicant has requested to replace a portion of instream water rights established pursuant to ORS 537.341 (minimum perennial streamflow) or 537.346 (state agency application) with a more senior priority date and be in addition to instream water rights established pursuant to ORS 537.348 (instream transfer) or 537.470 (allocation of conserved water).
12. Notice of the application for transfer was published on April 10, 2007, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
13. On June 20, 2007, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10356, with modifications to the rate protectable instream, to the applicant and Swalley Irrigation District. The cover letter that accompanied the draft Preliminary Determination set forth a deadline of July 31, 2007, for the applicant to respond. On July 12, 2007, the applicant provided additional information to the Department and requested that the Department reevaluate its injury determination so that the requested rate could be protected instream. On July 31, 2007, the Department e-mailed a revised draft Preliminary Determination to the applicant and Swalley Irrigation District proposing to approve Transfer Application T-10356, proposing to allow the full diversion rate to be transferred to instream use, without the 43 percent transmission loss. The cover letter that accompanied the revised draft Preliminary Determination set forth a deadline of August 31, 2007, for the applicant to respond. On August 2, 2007, the applicant requested that the Department proceed with issuance of a Preliminary Determination and on August 6 and 8, 2007, the applicant provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.

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 application T-10356.

16. At the full rate and duty that may be transferred to instream use (see Finding of Fact #3), water may be protected instream for a period of 208 days. The instream period requested by the applicant, April 1 through October 31, (see Finding of Fact #9) is 214 days.
17. Based upon Findings of Fact #3 and #16, on August 2, 2007, the applicant agreed to modify the quantities to be transferred and protected instream as follows:

	Reach 1: POD #3 (RM 165) to RM 120.0	Reach 2: RM 120 to RM 0.0
Season 1 Rate (cfs): April 1 - 30 & Oct. 1 - 25	0.06 CFS	0.03 CFS
Season 2 Rate (cfs): May 1 - 14 & Sept. 15 - 30	0.07 CFS	0.03 CFS
Season 3 Rate (cfs): May 15 - Sept. 14	0.14 CFS	0.03 CFS
Duty (AF)	44.44 AF	14.65 AF

18. There is an instream lease, L-559, presently in effect for a portion of the water right proposed for transfer to instream use. The portion of the right presently leased instream is associated with the portion conveyed by Ted Wise & Martin F. Lofquist, as described in Finding of Fact #5. The lease was approved by the Department on July 12, 2004, as evidenced by Special order Volume 60, Page 443 (and correcting order, Special Order Volume 60, Page 883). This lease is scheduled to terminate on October 31, 2008, and includes a condition allowing for early termination of the lease order. The applicant has requested that Instream lease L-559 be terminated upon issuance of the final order approving T-10356.
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 of the proposed instream flow and the timing of the proposed instream flow are allowable within the limits and use of the original water right as described in Finding of Fact #3.
22. The protection of flows within the proposed reaches 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 within the proposed reach and have been accounted for in Reach #2 (see Finding of Fact #17).

23. 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 reaches proposed by the applicant, there are several existing state agency applied instream water rights, which include the use of water for fish habitat, recreation, and aesthetics. There is also a pending instream water right application filed by Oregon Department of Fish and Wildlife for anadromous and resident fish rearing. In addition to flows for the designated Scenic Waterway and the existing and pending instream water right application, which are at times not met during requested period for instream protection, this segment of the Deschutes River is also on the Oregon Department of Environmental Quality's (DEQ) 303d list of water quality limited streams for temperature and pH above Lake Billy Chinook and for nutrients, sedimentation and temperature below Lake Billy Chinook at the lower end of the river.
24. By replacing a portion of state agency established instream water rights, Certificates 73188 and 73237, on the river below Lake Billy Chinook, the instream right will provide protection for streamflows identified as necessary for supporting aquatic life and recreation under an earlier priority date. By adding to other instream water rights located within the same reach proposed by this instream transfer application, the instream right will provide protection for additional streamflows necessary for fish and wildlife habitat enhancement, pollution abatement, and recreation.
25. The total monthly quantities of water to be protected under the proposed instream water right, in addition to other existing instream water rights established under ORS 537.348 and 537.470 in the proposed reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-10356 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.

If application T-10356 is approved, the final order will include the following:

1. *This order does not become effective until the order canceling Instream Lease L-559, is signed. If for any reason the order canceling Instream Lease L-559 does not become effective, then this order does not become effective.*
2. *The changes in character of use and place of use to instream use proposed in application T-10356 are approved.*
3. *Water Right Certificate 74145 is modified. A new certificate confirming the instream water right shall be issued. The Department shall issue a new water right certificate to supersede Certificate 74145 on a determination that it is necessary to produce a certificate to confirm*

that portion of the right not involved in this transfer. Approval of this transfer shall reduce the amount of water lawfully available under the remaining portion of Certificate 74145 by the quantities associated with the irrigation of 8.14 acres as measured at the canal diversion, being:

	Rate/Duty Associated with 8.14 Canal Acres, including loss
Season 1 Rate	0.08 cfs
Season 2 Rate	0.11 cfs
Season 3 Rate	0.20 cfs
Duty	63.57 AF

4. The instream water right shall provide for the protection of streamflows from POD #3 (Swalley Main Canal) to the mouth of the Deschutes River. The instream right consists of two reaches: Reach #1 extending from the point of diversion (RM 165) to Lake Billy Chinook (RM 120), and Reach #2 extending from Lake Billy Chinook (RM 120) to the mouth (RM 0). 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.

5. The quantities of water to be protected under the instream water right are:

	Reach 1: POD #3 (RM 165) to RM 120.0	Reach 2: RM 120 to RM 0.0
Season 1 Rate (cfs): April 1 - 30 & Oct. 1 - 25	0.06	0.03
Season 2 Rate (cfs): May 1 - 14 & Sept. 15 - 30	0.07	0.03
Season 3 Rate (cfs): May 15 - Sept. 14	0.14	0.03
Duty (AF)	44.44	14.65

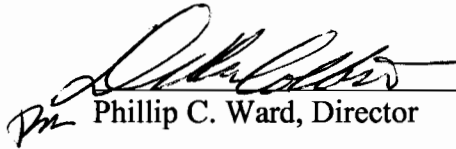
6. Stream channel losses and gains calculated based on available data and the use of senior appropriators will determine the amount of water to which this right is entitled downstream from the original point of diversion within the specified stream reaches.

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 74145 and any related decree.

9. *The former place of use of the transferred water shall no longer receive water as part of this right.*

Dated at Salem, Oregon this 8th day of August 2007.


Phillip C. Ward, Director

This Preliminary Determination was prepared by a Reimbursement Authority contractor. If you have questions about the information in this document, you may reach Bob Rice at 503-986-0885 or Robert.D.Rice@wrд.state.or.us.

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

