

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

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Application T-10391 and Mitigation Credit)	PROPOSING APPROVAL OF A
Project MP-108, Deschutes County)	CHANGE IN PLACE OF USE AND
)	CHARACTER OF USE, PARTIAL
)	CANCELLATION OF A
)	SUPPLEMENTAL WATER RIGHT,
)	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.

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 to voluntarily request that it be cancelled.

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.

Applicants

CENTRAL OREGON IRRIGATION DISTRICT
1055 SW LAKE COURT
REDMOND, OR 97756

DESCHUTES RIVER CONSERVANCY
700 NW HILL STREET
BEND, OR 97701

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.
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Findings of Fact

Background

1. On May 18, 2007, the Central Oregon Irrigation District (COID) and Deschutes River Conservancy (DRC) filed an application to change the place of use and character of use under Certificate 76358 to instream use. The Department assigned the application number T-10391.
2. This instream transfer application originally proposed to change the character of use to instream use for fish and wildlife habitat enhancement; pollution abatement; navigation; and recreation. The applicants amended the application on May 22, 2007, to remove navigation from the list of proposed uses.
3. On September 26, revised application maps were received replacing a couple of the maps submitted with the application. A corrected report of title and lien information was also received. On October 4 2007, the Department also received a corrected affidavit of use for certain lands described in the transfer application.
4. On September 26, 2007, Certificate 83571 was issued superseding Certificate 76358.
5. That portion of the right to be transferred is as follows:

Certificate: 83571 in the name of Central Oregon Irrigation District

Use: Irrigation of 39.58 acres

Priority Date: October 31, 1900 and December 2, 1907

Season of Use: April 1 through October 31, further limited as follows:

April 1 through April 30 & October 1 through October 31 described herein as Season 1

May 1 through May 14 & September 16 through September 30 described herein as Season 2

May 15 through September 15 described herein as Season 3

Maximum Quantity (Rate) that can be applied to an acre:

Season 1: limited to $1/80^{\text{th}}$ cubic foot per second (CFS) per acre

Season 2: limited to $1/60^{\text{th}}$ CFS per acre

Season 3: limited to $1/32.4^{\text{th}}$ CFS per acre

Maximum Duty that can be applied to an acre:

Not to exceed 9.91 acre-feet (AF) per acre per year.

The above listed rates and duty reflect allowance of a 45% transmission loss 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 (POD):

Township		Range		Meridian	Sec	¼ ¼	Survey Coordinates
17	S	12	E	W.M.	29	SE NE	POD #11 (COID NORTH CANAL): 850 FEET NORTH AND 630 FEET WEST FROM THE EAST ¼ CORNER OF SECTION 29

Authorized Places of Use:

Township		Range		Meridian	Sec	¼ ¼	Acres
15	S	13	E	WM	3	NW SW	6.40
15	S	13	E	WM	4	SW NE	1.70
15	S	13	E	WM	8	NE NW	1.50
15	S	13	E	WM	8	SE NW	8.00
15	S	13	E	WM	19	SW NE	0.20
15	S	13	E	WM	19	SE NW	4.45
15	S	13	E	WM	19	SW SW	15.00
15	S	13	E	WM	20	NE SE	2.33

6. Certificate 83571 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 #5), the total rate and duty for 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 PODs (described in Finding of Fact #5), the portion of the right involved in this transfer would be limited as described in the tables below. These rates and duty are also the quantities by which Certificate 83571 shall be reduced, if this transfer is approved.

Priority Date	Season 1	Season 2	Season 3	Duty
October 31, 1900	0.494 CFS	0.658 CFS	0.870 CFS	391.27 AF
December 2, 1907			0.349 CFS	

7. A total of 215.73 AF of water, excluding transmission losses, may be beneficially used annually for primary irrigation under the portion of existing Certificate 83571 proposed for transfer.
8. Supplemental right, Certificate 76714, is appurtenant to the same lands from which the primary right under Certificate 83571 is 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-10391.
9. The applicants are not the owners of the lands to which the water right described in Finding of Fact #5 is appurtenant. However, water right conveyance agreements have been completed and interest in the water rights has been conveyed to COID from each landowner described in the table below. The portion of this right to be transferred was appurtenant to

lands owned by the identified land landowners at the time interest in the water right was conveyed through a Quit Claim, a water right conveyance agreement.

Landowner	Water Right Interest Holder	T	R	Sec	¼ ¼	Current Tax Lot
David M. and Gail L. Wagenblast	COID	15S	13E	3	NW SW	1401
James C. and Tari R. Bradley	COID	15S	13E	4	SW NE	500
CHW Enterprises LLC	COID	15S	13E	8	NE NW	1000
CHW Enterprises LLC	COID	15S	13E	8	SE NW	1000
High Ridge Development LLC	COID	15S	13E	19	SW NE	701
High Ridge Development LLC	COID	15S	13E	19	SE NW	701
Redmond Investments LLC	COID	15S	13E	19	SW SW	1200
Tri-County Builders Corp.	COID	15S	13E	20	NE SE	1501

10. Application T-10391 proposes to change the character of use to instream use for fish and wildlife habitat enhancement; recreation; and pollution abatement.
11. Application T-10391 proposes to change the place of use of the right to create the following instream reach:

Reach: From COID North Canal POD #11 (described in Finding of Fact #5) to Lake Billy Chinook.

12. The applicant proposes the quantities of water to be transferred and protected instream be as follows:

Certificate	Priority Date	Rate Instream	Volume Instream
83571	October 31, 1900	Season 1: 0.272 CFS Season 2: 0.363 CFS Season 3: 0.672 CFS	215.73 AF

13. There are existing instream water rights within the same reach as that proposed for the new instream water right. All of the existing instream water rights were established under ORS 537.348, the instream transfer process, and ORS 537.470, the allocation of conserved water process. There is a pending instream water right application, filed by the Oregon Department of Fish and Wildlife (ODFW) pursuant to ORS 537.341 to establish an instream water right from POD #11 to Lake Billy Chinook, which if approved will have a priority date of September 19, 1990.
14. 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 instream application process), with an earlier priority date.

15. 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% 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 #12, do not include the 45% transmission loss. The Department finds that water may be protected instream solely under the 1900 priority date.
16. The application includes Land Use Information form completed and signed by a representative of the Deschutes County planning department. Additionally, the Department has provided notification of the proposed action to the City of Bend and Jefferson County.
17. Notice of the application for transfer was published on May 29, 2007, pursuant to ORS 540.520 and OAR 690-380-4000. No comments were filed in response to the notice.
18. On September 25, 2007, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10391 to the applicants. The draft Preliminary Determination set forth a deadline of October 24, 2007, for the applicants to respond. The additional information requested by the Department was received on September 26, 2007, and October 4, 2007. On October 1, 2007, the Department also sent a second red-lined draft Preliminary Determination to the applicant with modifications based upon the information provided and due to the issuance of Certificate 83571. On November 20, 2007, the applicants concurred with the draft Preliminary Determination and the red-lined changes and requested that the Department proceed with issuance of a Preliminary Determination.

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

19. Water has been used within the last five years according to the terms and conditions of the rights, and there is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
20. 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-10391.
21. The period during which water is requested to be protected instream requires modification to prevent injury and enlargement. At the full rates and duty allowed by the water right to be transferred instream, water may be protected instream for a period of 209 days. The period requested by the applicant is 214 days.

22. Based on the previous Finding of Fact, on October 1 and November 20, 2007, the applicants agreed to modify the quantities to be transferred and protected instream as follows:

Reach: COID North Canal POD #11 (as described in Finding of Fact #5) to Lake Billy Chinook

Certificate	Priority Date	Instream Period	Instream Rate	Instream volume
83571	October 31, 1900	Season 1 (modified to end October 26)	0.272 CFS	215.73
		Season 2	0.363 CFS	
		Season 3	0.672 CFS	

23. The proposed change, as modified, would not result in enlargement of the right.
24. The proposed change, as modified, would not result in injury to other water rights.
25. The amount and timing of the proposed instream flow are allowable within the limits and use of the original water right.
26. 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.
27. 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 reach proposed by the applicant, there are several existing instream water rights, which include the use of water for fish habitat, aquatic life, recreation, aesthetics, and minimizing pollution. There is also a pending instream water right application filed by ODFW for anadromous and resident fish rearing. In addition to flows for the designated Scenic Waterway and the pending instream water right application, which are at times not met during the 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.

28. By adding to other water rights leased or transferred instream at the same location, or created through the conserved water statutes, the instream right will 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.
29. By replacing a portion of instream rights created at the request of state agencies or under the minimum streamflow conversion process, the 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 earlier priority dates.
30. During the period April 1 through 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 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.
31. 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

32. There is an existing supplemental right, Certificate 76714, appurtenant to the portion of lands on which Certificate 83571 is proposed for transfer to instream use. The applicant has not submitted an affidavit certifying that the 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-10391. The portion of Certificate 76714 to be cancelled has been quit claimed to COID.
33. Consistent with OAR 690-380-2250, the Department provided notice (as part of the draft Preliminary Determination identified in Finding of Fact #18) to the applicants of the Department's intent to cancel the portions of the supplemental water right described below unless within 30 days of the date of the notification, the applicant modified the application to include the supplemental right or withdrew the application. No response was received to the notice.
34. That portion of the supplemental water right to be cancelled is as follows:
Certificate: 76714 in the name of Central Oregon Irrigation District
Use: Supplemental Irrigation of 39.58 acres
Priority Date: February 28, 1913
Source: Crane Prairie Reservoir, constructed under permit R-1687, tributary to the Deschutes River

Authorized PODs:

Township		Range		Meridian	Sec	¼ ¼	Survey Coordinates
21	S	8	E	W.M.	17	NE NE	CRANE PRAIRIE RESERVOIR DAM
17	S	12	E	W.M.	29	SE NE	POD #11 (COID NORTH CANAL): 850 FEET NORTH AND 630 FEET EAST FROM THE NORTH ¼ CORNER OF SECTION 29

Authorized Places of Use:

Township	Range	Meridian	Sec	¼ ¼	Tax Lot	Acres
15	S	13	E	WM	3	NW SW 1401 6.40
15	S	13	E	WM	4	SW NE 500 1.70
15	S	13	E	WM	8	NE NW 1000 1.50
15	S	13	E	WM	8	SE NW 1000 8.00
15	S	13	E	WM	19	SW NE 701 0.20
15	S	13	E	WM	19	SE NW 701 4.45
15	S	13	E	WM	19	SW SW 1200 15.00
15	S	13	E	WM	20	NE SE 1501 2.33

35. The Department has information that POD #11 (COID North Canal) described in Certificates 83571 and 76714 is the same diversion point. The location coordinates described in Certificate 76714 contain errors. The location coordinates should be:

Township		Range		Meridian	Sec	¼ ¼	Survey Coordinates
17	S	12	E	W.M.	29	SE NE	POD # 11 (COID NORTH CANAL): 850 FEET NORTH & 630 FEET <u>WEST</u> FROM THE <u>EAST</u> ¼ CORNER OF SECTION 29

Preliminary Award of Deschutes Basin Mitigation Credits

36. COID and the DRC (the Applicant) have 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 COID and the DRC.
37. The Department assigned this mitigation credit project number MP-108.
38. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on May 29, 2007. No comments were received in response to this notice.
39. The Department consulted with representatives from ODFW, DEQ, Oregon Parks and Recreation Department (OPRD), 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 29, 2007. Comments were received from ODFW and OPRD. ODFW identified that this project will provide effective instream

protection of flows during the irrigation season and also identified, along with general comments on the mitigation program, that instream flow protection is needed during the months outside of the irrigation season. OPRD identified that this instream transfer will enhance aesthetics and add water needed for recreation (boating opportunities). OPRD deferred to ODFW for appropriate timing of when flows should be protected instream.

40. The Department is unable to expand the period during which instream flows may be protected outside of the irrigation season, as recommended by ODFW, without causing injury to other water rights. The shaping proposed by the instream transfer application does protect water instream over almost the entire irrigation season at the maximum rates possible. Therefore, no modifications were made to the proposed instream period upon comments received.
41. The proposed transfer of 39.58 acres of irrigation use to instream use will provide 71.2 acre-feet of mitigation water. Therefore, 71.2 mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to COID and the DRC. 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 Middle Deschutes and/or General Zones of Impact.
42. A total of 215.73 AF is proposed to be transferred to instream use and 71.2 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.
43. 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(s) for the proposed instream water right shall result in completion of the project and verification that the project is complete. Mitigation credits may become valid the first calendar year that water is protected instream as a result of this transfer.
44. 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-10391 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 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 application T-10391 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-10391 are approved. The portion of the right that has been abandoned is cancelled.*
2. *Water Right Certificate 83571 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 83571 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 83571 by the following:*

<i>Priority Date</i>	<i>Season 1</i>	<i>Season 2</i>	<i>Season 3</i>	<i>Duty</i>
<i>October 31, 1900</i>	<i>0.494 CFS</i>	<i>0.658 CFS</i>	<i>0.870 CFS</i>	<i>391.27 AF</i>
<i>December 2, 1907</i>			<i>0.349 CFS</i>	

3. *The portion of Certificate 76714 that has been abandoned is cancelled. Water right certificate 76714 is modified. The Department shall issue a new water right 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 #34. Modification of this supplemental water right shall reduce by 39.58 acres the number of acres to which stored water may be applied for supplemental irrigation 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 as follows:*

Reach: from COID North Canal POD #11 (as described in Finding of Fact #5) to Lake Billy Chinook.

<i>Priority Date</i>	<i>Period Protected Instream</i>	<i>Instream Rate</i>	<i>Instream Volume</i>
<i>October 31, 1900</i>	<i>April 1 through April 30 and October 1 through October 26</i>	<i>0.272 CFS</i>	<i>215.73 AF</i>
	<i>May 1 through May 14 and September 15 through September 30</i>	<i>0.363 CFS</i>	
	<i>May 15 through September 14</i>	<i>0.672 CFS</i>	

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.*
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 other conditions and limitations as may be germane to instream rights, that are contained in Certificate 83571 and any related decree.*
9. *The former place of use of the transferred water shall no longer receive water as part of these rights.*
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 71.2 credits, as described herein, may be awarded to this mitigation project and assigned to COID and the DRC. 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 Middle Deschutes and General Zones of Impact. The awarded mitigation credits are valid beginning the first calendar year that water will be protected instream under the 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. 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 26th day of December, 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 Laura Snedaker at 503-986-0884 or Laura.K.Snedaker@wr.d.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.