

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

| | | |
|---|---|----------------------------|
| In the Matter of Instream Transfer |) | PRELIMINARY DETERMINATION |
| Application T-10544 and Mitigation Credit |) | PROPOSING APPROVAL OF A |
| Project MP-113, 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 540.510 establishes the process in which the Department may cancel a supplemental water right not included as part of the transfer application.

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

Findings of Fact

Background

1. On February 22, 2008, 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 83571 to instream use. The Department assigned the application number T-10544.

2. That portion of the right to be transferred is as follows:

Certificate: 83571 in the name of Central Oregon Irrigation District

Use: Irrigation of 118.99 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 1/80th cubic foot per second (CFS) per acre

Season 2: limited to 1/60th CFS per acre

Season 3: limited to 1/32.4th 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 |
|----------|---|-------|---|----------|-----|-------|-------|
| 14 | S | 13 | E | WM | 16 | SE SW | 0.24 |
| 14 | S | 13 | E | WM | 34 | NE SE | 8.00 |
| 15 | S | 13 | E | WM | 4 | NE NE | 5.00 |
| 15 | S | 13 | E | WM | 5 | SE NE | 4.50 |
| 15 | S | 13 | E | WM | 5 | NW SW | 30.20 |

| Township | | Range | | Meridian | Sec | ¼ ¼ | | Acres |
|----------|---|-------|---|----------|-----|-----|----|-------|
| 15 | S | 13 | E | WM | 5 | SW | SE | 3.77 |
| 15 | S | 13 | E | WM | 8 | SW | SW | 0.90 |
| 15 | S | 13 | E | WM | 8 | SE | SW | 19.62 |
| 15 | S | 13 | E | WM | 8 | SW | SE | 4.50 |
| 15 | S | 13 | E | WM | 9 | NW | NW | 2.00 |
| 15 | S | 13 | E | WM | 9 | NE | SE | 2.40 |
| 15 | S | 13 | E | WM | 10 | SW | NW | 5.40 |
| 15 | S | 13 | E | WM | 17 | NW | NW | 14.70 |
| 15 | S | 13 | E | WM | 18 | SW | SE | 4.00 |
| 15 | S | 13 | E | WM | 20 | NW | NW | 4.40 |
| 15 | S | 13 | E | WM | 20 | NW | SE | 0.18 |
| 15 | S | 13 | E | WM | 20 | SE | SE | 0.63 |
| 15 | S | 13 | E | WM | 21 | SW | NW | 0.50 |
| 15 | S | 13 | E | WM | 30 | NW | SE | 8.05 |

3. The Department has information that the season of use described in Certificate 83571 contains scrivener errors. Consistent with the Decree for the Deschutes River (Volume 12, Page 282), the irrigation season should be:

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 15 through September 30 described herein as Season 2.

May 15 through September 14 described herein as Season 3

4. 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 #2), 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 POD (described in Finding of Fact #2), 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 | 1.484 CFS | 1.978 CFS | 2.616 CFS | 1,176.27 AF |
| December 2, 1907 | | | 1.048 CFS | |

5. A total of 648.55 AF of water, excluding transmission losses, may be beneficially used annually for primary irrigation under the portion of existing Certificate 83571 proposed for transfer.

6. 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-10544.

7. The applicants are not the owners 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 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 |
|---|-----------------------------|-----|-----|-----|-------|-----------------|
| J. Pat and Carolyn Horton, Jayne I. Heyne, and Tyler Fitzsimons | COID | 15S | 13E | 5 | NW SW | 901 |
| Arrowood Development, LLC | COID | 15S | 13E | 30 | NW SE | 600 |
| Arrowood Development, LLC | COID | 15S | 13E | 17 | NW NW | 1302 |
| Arrowood Development, LLC | COID | 15S | 13E | 17 | NW NW | 1304 |
| Arrowood Development, LLC | COID | 15S | 13E | 17 | NW NW | 1306 |
| Arrowood Development, LLC | COID | 15S | 13E | 17 | NW NW | 1307 |
| Arrowood Development, LLC | COID | 15S | 13E | 17 | NW NW | 1308 |
| Elk Horn Development, LLC | COID | 15S | 13E | 8 | SE SW | 100 |
| Elk Horn Development, LLC | COID | 15S | 13E | 8 | SE SW | 200 |
| George A. and Jennifer Arthur | COID | 15S | 13E | 20 | NW NW | 201 |
| Pat C. Dean, Trustee, or successor in trust, under The Pat C. Dean Revocable Living Trust, dated March 15, 2005 | COID | 15S | 13E | 10 | SW NW | 500 |
| Gene W. and Judy R. Hoskin, Grant and Julie Hoskin, and Shannon and Tara Townsend | COID | 14S | 13E | 34 | NE SE | 2008 |
| Havnip Investment, LLC | COID | 15S | 13E | 8 | SW SE | 2200 |
| Duane and Kristeen M. Whipple | COID | 15S | 13E | 5 | SW SE | 1103 |
| Prescott S. and Brook L. Rice | COID | 15S | 13E | 9 | NW NW | 205 |
| Hayden H. Watson | COID | 15S | 13E | 4 | NE NE | 600 |
| Lorraine Hendricks | COID | 15S | 13E | 18 | SW SE | 2802 |
| Lorraine Hendricks | COID | 15S | 13E | 18 | SW SE | 2809 |
| Alterra Investments LLC | COID | 15S | 13E | 8 | SE SW | 1100 |
| A & M Ventures, LLC | COID | 15S | 13E | 9 | NE SE | 800 |
| Michael R. and Brenda L. Chilcott | COID | 15S | 13E | 20 | NW SE | 4900 |
| Samuel E. Blackwell, Jr. | COID | 15S | 13E | 21 | SW NW | 200 |
| Samuel E. Blackwell, Jr. | COID | 15S | 13E | 21 | SW NW | 300 |
| The DRT Living Trust, UTD August 31, 2005, David L. and Rose M. Noah, Trustees | COID | 14S | 13E | 16 | SE SW | 1101 |
| Richard A. and Judith L. Scorza | COID | 15S | 13E | 30 | NW SE | 701 |
| Charles and Dana Garner | COID | 15S | 13E | 8 | SW SW | 802 |
| WASABI WASABI, LLC | COID | 15S | 13E | 5 | SE NE | 302 |
| Suzanna F. Clarke | COID | 15S | 13E | 20 | SE SE | 300 |

8. Application T-10544 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 recreation.
9. Application T-10544 also proposes to use 96.85 acres of irrigation use proposed for instream transfer (described in Finding of Fact #2) for the purpose of establishing mitigation credits in the Deschutes Ground Water Study Area, and to use the remaining 22.14 acres of irrigation use for instream restoration purposes.
10. Application T-10544 proposes to change the place of use of the right to create the following instream reaches:

Reach 1 (restoration and mitigation flows): From COID North Canal POD #11 (described in Finding of Fact #2) to Lake Billy Chinook (River Mile (RM) 120).

Reach 2 (restoration flows only): From Lake Billy Chinook (RM 120) to the mouth of the Deschutes River (RM 0).

11. The applicant proposes that water be protected instream during the period April 1 through October 26. Season 3 would end on October 26.
12. The applicant proposes the quantities of water to be transferred and protected instream be as follows:

Reach 1: POD #11 to Lake Billy Chinook (RM 120)

| Certificate | Priority Date | Rate Instream | Volume Instream |
|-------------|------------------|---|-----------------|
| 83571 | October 31, 1900 | Season 1: 0.818 CFS Season 2: 1.091 CFS Season 3: 2.020 CFS | 648.55 AF |

Reach 2: Lake Billy Chinook (RM 120) to Mouth (RM 0)

| Certificate | Priority Date | Rate Instream | Volume Instream |
|-------------|------------------|--|-----------------|
| 83571 | October 31, 1900 | Season 1: 0.10 CFS Season 2: 0.10 CFS Season 3: 0.10 CFS | 39.85 AF |

13. There are existing instream water rights within the same reach as that proposed for the new instream water right. 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. Below Lake Billy Chinook, there are two other instream water rights, Certificates 73188 and 73237, with priority dates of October 2, 1989 and January 16, 1996, respectively. These instream water rights were established pursuant to ORS 537.341, the state agency instream water right application process, and are located from the Pelton Regulation Dam on the Deschutes River to the mouth. The remaining

instream water rights were established under ORS 537.348, the instream transfer process, and ORS 537.470, the allocation of conserved water process.

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 applicant has provided notification of the proposed action to the Cities of Bend and Maupin; Deschutes, Jefferson, and Wasco Counties; and the Confederated Tribes of the Warm Springs Reservation. Additionally, the Department provided notification of the proposed action to these local governments upon receipt of Transfer Application T-10544.
17. Notice of the application for transfer was published on March 11, 2008, pursuant to ORS 540.520 and OAR 690-380-4000. No comments were filed in response to the notice.
18. On August 6, 2008, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10544 to the applicants. The cover letter for the draft Preliminary Determination set forth a deadline of September 4, 2008, for the applicants to respond and provide additional information necessary to complete and clarify the application. Information requested by the Department was received on August 26, 2008. Additional information requested by the Department was also received on November 19, 2008, and December 3, 2008. On November 3, 2008, the applicants concurred with the draft Preliminary Determination 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 or the water right has been leased instream within the last five years, 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-10544 for a portion of the right proposed for transfer. A delivery system does not appear to have been in place within the five-year period prior to submission of the transfer application for other portions of the water right proposed for transfer. However, those portions appear to have been leased instream within the last five years under IL-807 in 2007 or IL-765 in 2006.
21. 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, which appears to be consistent with the period requested by the applicant (April 1 through October 26).
22. The proposed instream use requires modification to take into account return flows. The quantities requested to be protected instream in Reach #2, as described in Finding of Fact #12, account for return flows. A portion of the water diverted at the POD returns to the Deschutes River within the proposed reach and is available to downstream water right holders. Return flows from the existing use are back in the river system once river flows reach the Madras Gage. To prevent injury to downstream water right holders or enlargement, the quantity of water that may be protected instream requires modification and return flows should be accounted for at the Madras Gage. The original Reach #2 proposed by the applicant accounted for return flows higher on the system than needed.
23. The applicants have also requested to protect water instream for mitigation purposes only down to Lake Billy Chinook and restoration flows down to the mouth of the Deschutes River. The reaches proposed by the applicants require further modification to take into account where water is to be protected and the location of return flows described in Finding of Fact #22.

24. Based on Findings of Fact #21 through #23, on December 3, 2008, the applicants agreed to modify the quantities to be transferred and protected instream as follows:

Reach 1 (Mitigation and Restoration flows): COID North Canal POD #11 (as described in Finding of Fact #2) to Lake Billy Chinook (RM 120)

| Certificate | Priority Date | Instream Period | Instream Rate | Instream volume |
|-------------|------------------|---------------------------------------|---------------|-----------------|
| 83571 | October 31, 1900 | Season 1 (modified to end October 26) | 0.818 CFS | 648.55 AF |
| | | Season 2 | 1.091 CFS | |
| | | Season 3 | 2.020 CFS | |

Reach 2 (Restoration flows only): Lake Billy Chinook (RM 120) to Madras Gage

| Certificate | Priority Date | Instream Period | Instream Rate | Instream volume |
|-------------|------------------|---------------------------------------|---------------|-----------------|
| 83571 | October 31, 1900 | Season 1 (modified to end October 26) | 0.152 CFS | 120.67 AF |
| | | Season 2 | 0.203 CFS | |
| | | Season 3 | 0.376 CFS | |

Reach 3 (Restoration flows only): Madras Gage to Mouth (RM 0)

| Certificate | Priority Date | Instream Period | Instream Rate | Instream volume |
|-------------|------------------|----------------------|---------------|-----------------|
| 83571 | October 31, 1900 | April 1 – October 26 | 0.1 CFS | 39.85 AF |

25. The proposed change, as modified, would not result in enlargement of the right.
26. The proposed change, as modified, would not result in injury to other water rights.
27. The amount and timing of the proposed instream flow, as modified, are allowable within the limits and use of the original water right.
28. 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 within the proposed reach and have been accounted for in Reach #3.
29. 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 pollution abatement. 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 above Lake Billy Chinook and for nutrients, sedimentation and temperature below Lake Billy Chinook at the lower end of the river.

30. 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.
31. 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.
32. 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.
33. 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

34. 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-10544. The portion of Certificate 76714 to be cancelled has been quit claimed to COID.
35. Supplemental water rights (layered water rights) must be included in a transfer application or cancelled.
36. 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 applicant of the Department's intent to cancel the portions of the supplemental water right described below

unless within 30 days of the date of notification, the applicant modified the application to include the supplemental right or withdrew the application. No response was received to the notice.

37. 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 118.99 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 | Acres | | |
|----------|-------|----------|-----|-----|-------|-------|-------|
| 14 | S | 13 | E | WM | 16 | SE SW | 0.24 |
| 14 | S | 13 | E | WM | 34 | NE SE | 8.00 |
| 15 | S | 13 | E | WM | 4 | NE NE | 5.00 |
| 15 | S | 13 | E | WM | 5 | SE NE | 4.50 |
| 15 | S | 13 | E | WM | 5 | NW SW | 30.20 |
| 15 | S | 13 | E | WM | 5 | SW SE | 3.77 |
| 15 | S | 13 | E | WM | 8 | SW SW | 0.90 |
| 15 | S | 13 | E | WM | 8 | SE SW | 19.62 |
| 15 | S | 13 | E | WM | 8 | SW SE | 4.50 |
| 15 | S | 13 | E | WM | 9 | NW NW | 2.00 |
| 15 | S | 13 | E | WM | 9 | NE SE | 2.40 |
| 15 | S | 13 | E | WM | 10 | SW NW | 5.40 |
| 15 | S | 13 | E | WM | 17 | NW NW | 14.70 |
| 15 | S | 13 | E | WM | 18 | SW SE | 4.00 |
| 15 | S | 13 | E | WM | 20 | NW NW | 4.40 |
| 15 | S | 13 | E | WM | 20 | NW SE | 0.18 |
| 15 | S | 13 | E | WM | 20 | SE SE | 0.63 |
| 15 | S | 13 | E | WM | 21 | SW NW | 0.50 |
| 15 | S | 13 | E | WM | 30 | NW SE | 8.05 |

38.

39. 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 WEST FROM THE EAST ¼ CORNER OF SECTION 29 |

Preliminary Award of Deschutes Basin Mitigation Credits

40. COID and the DRC (the Applicant) have requested that a portion of 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.
41. The Department assigned this mitigation credit project number MP-113.
42. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on March 11, 2008. No comments were received in response to this notice.
43. 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 March 7, 2008. Comments were received from OPRD. OPRD identified that this instream transfer will enhance aesthetics and add water needed for fishery resources.
44. No modifications were made to the proposed instream use based upon comments received.
45. The proposed transfer of 96.85 acres of irrigation use to instream use for mitigation purposes will provide 174.3 acre-feet of mitigation water. Therefore, 174.3 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.
46. A total of 527.88 AF is proposed to be transferred to instream use for mitigation purposes and 174.3 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.

47. 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.
48. 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-10544 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-10544 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-10544 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>1.484 CFS</i> | <i>1.978 CFS</i> | <i>2.616 CFS</i> | <i>1,176.27 AF</i> |
| <i>December 2, 1907</i> | | | <i>1.048 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 #35. Modification of this supplemental water right shall reduce by 118.99 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 1 (Mitigation and Restoration flows): COID North Canal POD #11 (as described in Finding of Fact #2) to Lake Billy Chinook (RM 120)

| <i>Certificate</i> | <i>Priority Date</i> | <i>Instream Period</i> | <i>Instream Rate</i> | <i>Instream volume</i> |
|--------------------|----------------------|--|----------------------|------------------------|
| 83571 | October 31, 1900 | <i>Season 1 (modified to end October 26)</i> | 0.818 CFS | 648.55 AF |
| | | <i>Season 2</i> | 1.091 CFS | |
| | | <i>Season 3</i> | 2.020 CFS | |

Reach 2 (Restoration flows only): Lake Billy Chinook (RM 120) to Madras Gage

| <i>Certificate</i> | <i>Priority Date</i> | <i>Instream Period</i> | <i>Instream Rate</i> | <i>Instream volume</i> |
|--------------------|----------------------|--|----------------------|------------------------|
| 83571 | October 31, 1900 | <i>Season 1 (modified to end October 26)</i> | 0.152 CFS | 120.67 AF |
| | | <i>Season 2</i> | 0.203 CFS | |
| | | <i>Season 3</i> | 0.376 CFS | |

Reach 3 (Restoration flows only): Madras Gage to Mouth (RM 0)

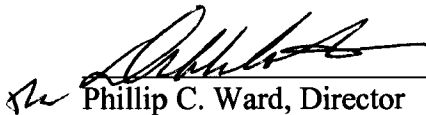
| <i>Certificate</i> | <i>Priority Date</i> | <i>Instream Period</i> | <i>Instream Rate</i> | <i>Instream volume</i> |
|--------------------|----------------------|------------------------|----------------------|------------------------|
| 83571 | October 31, 1900 | April 1 – October 26 | 0.1 CFS | 39.85 AF |

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 174.3 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. Any mitigation credits awarded will be valid beginning the first calendar year that water will be protected instream under the new instream water right resulting from this mitigation project.

- 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 9th day of December, 2008.


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 Wilke at 503-986-0884 or Laura.K.Wilke@wrdd.state.or.us.

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