

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

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Application T-10292 and Mitigation Credit)	PROPOSING APPROVAL OF CHANGE
Project MP-93, Deschutes County)	IN PLACE OF USE AND CHARACTER
)	OF USE, PRELIMINARY AWARD OF
)	MITIGATION CREDITS, AND
)	PARTIAL CANCELLATION OF A
)	SUPPLEMENTAL WATER RIGHT

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.

Applicant

CENTRAL OREGON IRRIGATION DISTRICT (COID)
1055 SW LAKE COURT
REDMOND OR 97756

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 December 26, 2006, COID 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-10292.
2. On September 26, 2007, Certificate 83571 was issued superseding Certificate 76358.
3. The portion of the right to be transferred is as follows:

Certificate: 83571 in the name of Central Oregon Irrigation District

Use: Irrigation of 35.25 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

May 1 through May 14 & September 16 through September 30

May 15 through September 15

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.

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	WM	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	5	SE SW	28.25
15	S	13	E	WM	8	SW SW	7.0

- 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

- 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 #3), 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 #3), 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	0.440 CFS	0.586 CFS	0.775 CFS	348.44 AF
December 2, 1907			0.310 CFS	

- A total of 192.13 AF of water, excluding transmission losses, may be beneficially used annually for primary irrigation under the portion of Certificate 83571 proposed for transfer.
- 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 (clarified on March 10, 2009) that the affected portion of Certificate 76714 be cancelled upon issuance of the Final Order approving T-10292.
- The applicant is not the owners of the lands to which the water right described in Finding of Fact #3 is appurtenant. However, water right conveyance agreements have been completed and interest in the water rights has been conveyed to COID from preceding water right holders and/or the original landowner. The portion of the 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.

Landowner at time water right was originally conveyed	Water Right Interest Holder	T	R	Sec	¼ ¼	Tax Lot	Acres
Deschutes Land and Cattle Co., LLC	COID	15S	13E	5	SE SW	900	28.25
Tri-County Investors Limited Partnership IV	COID	15S	13E	8	SW SW	100	7.0

- Application T-10292 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 any other ecological values; pollution abatement; and recreation. The

applicant has also requested that this transfer be used to to establish mitigation credits in the Deschutes Ground Water Study Area.

10. Application T-10292 proposes to change the place of use of the right to create an instream reach from COID North Canal POD #11 (described in Finding of Fact #3) to Lake Billy Chinook.
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 instream to be protected as follows:

Certificate	Priority Date	Rate Instream	Volume Instream
83571	October 31, 1900	Season 1: 0.242 CFS Season 2: 0.323 CFS Season 3: 0.598 CFS	192.13 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 City of Redmond. Additionally, the Department has provided notification

of the proposed instream transfer action to the City of Bend, Deschutes County, and Jefferson County.

17. Notice of the application was published on January 9, 2007, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
18. On March 11, 2009, the Department mailed a copy of the Preliminary Determination proposing to approve Transfer Application T-10292 to the applicant. The cover letter that accompanied the Preliminary Determination set forth a deadline of April 9, 2009, for the applicants to respond and provide additional information requested by the Department. The additional information requested by the Department was received on March 31, 2009. On June 11, 2009, the applicants concurred with the Preliminary Determination and requested that the Department proceed with issuance of a Preliminary Determination.

Instream Transfer Review Criteria [OAR 690-380-4010(2) and OAR 690-77-0075]

19. There is information in the file that suggests there may have been an extended period during which water was not used for a portion of the right proposed for transfer. However, this portion of the right was leased instream within the last five years and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.

Township		Range		Meridian	Sec	¼ ¼		Acres	Lease #	Lease Year
15	S	13	E	WM	8	SW	SW	7.0	IL-298	2002

In addition, Certificate 76358 (preceding certificate to 83571) was issued confirming this right three years prior to the water right being leased instream.

20. Water has been used within the last five years according to the terms and conditions of the right on the remaining portion of the right proposed for transfer, and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
21. 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-10292.
22. The proposed change would not result in enlargement of the right.
23. The proposed change would not result in injury to other water rights.
24. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
25. 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.
26. 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 and a TMDL (Total Maximum Daily Load) study is underway.
27. 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.
28. 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.
29. 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.
30. 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

31. 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-10292. The portion of Certificate 76714 to be cancelled has been quit claimed to COID, as indicated in Finding of Fact #8.

32. 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 this notification, the applicant modifies the application to include the supplemental right or requests that the application be withdrawn.

33. 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 35.25 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	WM	17	NE NE	CRANE PRAIRIE RESERVOIR DAM
17	S	12	E	WM	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	5	SE SW 900 28.25
15	S	13	E	WM	8	SW SW 100 7.0

34. 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	WM	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

Mitigation Project Review Criteria

35. COID (the applicant) has requested 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.

36. The Department assigned this mitigation credit project number MP-93.

37. Shortly after filing the application, the applicant received comments from the Oregon Department of Fish and Wildlife (ODFW) and forwarded these comments to the Department on December 28, 2006. ODFW identified that this project will provide effective instream protecting 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.
38. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on January 2, 2007. No comments were received in response to this notice.
39. The Department consulted with representatives from ODFW, Department of Environmental Quality (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 January 2, 2007. Comments were received from OPRD. OPRD identified that the addition of instream flows will potentially benefit aquatic resources and improve fishery resources. While OPRD would defer to ODFW on any recommendations for when water is protected instream, they were also supportive of having water protected instream April 1 through October 26.
40. The Department is unable to expand the period during with 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 applicant does protect water over almost the entire irrigation season at the maximum rates possible. Therefore, no modifications were made to the instream transfer as a result of comments received or consultation with the above named agencies.
41. The proposed transfer of 35.25 acres of irrigation use to instream use for mitigation purposes will provide 63.5 acre-feet of mitigation water. Therefore, 63.5 mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to COID. 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 192.13 AF is proposed to be transferred to instream use to establish mitigation and 63.5 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 for the proposed instream water right shall result in completion of the project and verification that the project is complete.
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 change in place of use and change in character of use proposed in Transfer Application T-10292 appears to be consistent with the requirements of ORS 540.505 to 540.580 and 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 transfer application will be approved and the abandoned 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-10292 is approved, the final order will include the following:

- 1. The change in place of use and change in character of use proposed in application T-10292 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>0.440 CFS</i>	<i>0.586 CFS</i>	<i>0.775 CFS</i>	<i>348.44 AF</i>
<i>December 2, 1907</i>			<i>0.310 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 #33. Modification of this supplemental water right shall reduce by 35.25 acres the number of acres to which stored water may be applied for supplemental irrigation under the right but does not reduce the total quantity of water available for supplemental irrigation.*

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:*

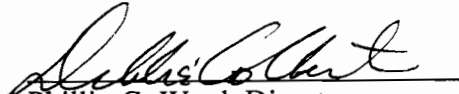
Reach: from COID North Canal POD #11 (as described in Finding of Fact #3) to Lake Billy Chinook.

<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>0.242 CFS</i>	<i>192.13 AF</i>
	<i>May 1 through May 14 and September 15 through September 30</i>	<i>0.323 CFS</i>	
	<i>May 15 through September 14</i>	<i>0.598 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 all other conditions and limitations contained in Certificate 83571 and any related decree.*
9. *The former place of use of the transferred right shall no longer receive water under the 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 63.5 credits, as described herein, may be awarded to this mitigation project and assigned to COID. 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/or General Zones of Impact. Any mitigation credits awarded will begin being valid the first calendar year that water is to be protected instream under a 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 18th day of June, 2009.


Phillip C. Ward, Director

This Preliminary Determination was prepared by Laura Wilke. If you have any questions about the information in this document, you may reach me at 503-986-0884 or Laura.K.Wilke@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.