

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

In the Matter of Instream Transfer)	PRELIMINARY DETERMINATION
Application T-10623 and Mitigation)	PROPOSING APPROVAL OF A
Project MP-120 for Ground Water Permit)	CHANGE IN PLACE OF USE AND
Application G-16905, Deschutes and)	CHARACTER OF USE, PARTIAL
Klamath Counties)	CANCELLATION OF A WATER
)	RIGHT, AND APPROVAL OF A
)	MITIGATION PROJECT

Authority

ORS 540.505 to 540.580 establishes the process in which a water right holder may submit a request to transfer the point of diversion, place of use, or character of use authorized under an existing water right. OAR Chapter 690, Division 380 implements the statutes and provides the Department's procedures and criteria for evaluating transfer applications. OAR Chapter 690, Division 077 provides additional criteria for evaluating transfers to instream water rights.

OAR 690-505-0500 to 690-505-0630 establishes the process in which anyone may submit a ground water mitigation project to the Department for the purpose of providing mitigation for a ground water permit application in the Deschutes Ground Water Study Area.

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.

Applicant

Cascade Timberlands (Oregon), LLC
15 SW Colorado, Suite 3
Bend, Oregon 97702

Findings of Fact

Background

1. On May 12, 2008, Cascade Timberlands (Oregon), LLC, filed an application to change the place of use and character of use under a portion of Certificate 72196 to instream use. The Department assigned the application number T-10623.
2. The applicant requested to transfer Certificate 72196, which has since been cancelled and superseded by Certificate 83653.

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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3. On June 11, 2008, the applicant submitted a revised Water Right Transfer Supplemental Form C, changing the downstream extent of the reach from the mouth of the Little Deschutes River to Lake Billy Chinook.
4. On September 8, 2009, the applicant requested to amend the application to reduce the number of acres of irrigation use proposed for transfer. The portion of the water right no longer proposed for transfer is located as follows:

Township	Range	Meridian	Sec	¼ ¼	Acres
22	S	10 E	W.M.	32	NE SW 3.8
22	S	10 E	W.M.	32	NW SE 1.2

On October 19, 2009, the applicant also submitted a request to voluntarily cancel the portion of Certificate 83653 described above, contingent upon approval of Transfer Application T-10623.

5. The portion of the right to be transferred, as modified based on Finding of Fact #4, is as follows:

Certificate: 83653 in the name of LaPine Cooperative Water Association
Priority Date: 1897 and April 30, 1902
Acres: Irrigation of 283.5 acres, being 1.9 acres under the 1897 priority date and 281.6 acres under the April 30, 1902 priority date
Season of Use: April 1 to November 1
Quantity: **Rate:**
 April 1 to May 23 and August 20 to November 1
 Limited to 1/80th cubic foot per second (CFS) per acre
 May 23 to August 20
 Limited to 1/40th CFS per acre
Duty: Limited to 4.0 acre-feet (AF) per acre

Priority Date	April 1 to May 23 and August 20 to November 1	May 23 to August 20	Duty
1897	0.02 CFS	0.05 CFS	7.6 AF
April 30, 1902	3.52 CFS	7.04 CFS	1126.4 AF
Total	3.54 CFS	7.09 CFS	1134.0 AF

Source: Little Deschutes River, tributary to the Deschutes River

Authorized Point of Diversion (POD):

Township	Range	Meridian	Sec	¼ ¼	Location
23	S	9 E	W.M.	34	SW SW 550 FEET NORTH AND 1150 FEET EAST FROM THE SW CORNER OF SECTION 34

Authorized Place of Use:

Priority Date	Township	Range	Meridian	Sec	¼ ¼	Gov Lot	Tax Lot	Acres
April 30, 1902	22	S	10 E	W.M.	32	NE SW	3900	35.5
April 30, 1902	22	S	10 E	W.M.	32	NW SE	3900	38.1
April 30, 1902	22	S	10 E	W.M.	33	SW SW	4000	38.3
April 30, 1902	23	S	10 E	W.M.	4	NW NW	4	600
April 30, 1902	23	S	10 E	W.M.	4	SW NW	600	38.9

Priority Date	Township		Range		Meridian	Sec	¼ ¼		Gov Lot	Tax Lot	Acres
April 30, 1902	23	S	10	E	W.M.	5	NE	NE	1	100	28.7
April 30, 1902	23	S	10	E	W.M.	5	SW	NE		100	24.0
1897	23	S	10	E	W.M.	5	SW	NE		100	1.9
April 30, 1902	23	S	10	E	W.M.	5	SE	NE		100	39.1

6. Application T-10623 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.
7. Application T-10623 proposes to change the place of use of the portion of the water right, described in Finding of Fact #5, to create an instream reach from the POD to the mouth of the Little Deschutes, into the Deschutes River and down to Lake Billy Chinook.
8. The applicant proposes the quantities of water to be transferred and protected instream to be as follows:

Certificate	Priority Dates	Rate Instream	Volume Instream	Instream Period
83653	1897 and April 30, 1902	7.21 CFS @ 1/40 th	1154.0 AF	April 1 to November 1
		3.60 CFS @ 1/80 th		

9. The applicants propose that an instream water right established as a result of this instream transfer be additive to any 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 an 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.
10. The applicants have provided notification of the proposed action to Klamath and Deschutes Counties. Additionally, the Department provided notification of the proposed action to the Klamath and Deschutes Counties upon receipt of Transfer Application T-10623. Notice of the proposed action has also been provided to the City of Bend and Jefferson County.
11. Notice of the application for transfer was published on May 27, 2008, pursuant to OAR 690-380-4000. No comments were filed in response to the notice within the 30 day comment period ending June 26, 2008.
12. On September 12, 2008, the LaPine Cooperative Water Association (Association) submitted comments requesting that the proposed transfer (T-10623) not be approved. The Association indicated that if the transfer were to be approved, the Association would not have sufficient water to deliver to all lands described in Certificate 83653, issued in the name of the Association.
13. Comments were also received from the Oregon Department of Fish and Wildlife (ODFW) on December 5, 2008. ODFW made recommendations for shaping of the instream use and provided comments on the use of the project for mitigation purposes.

14. Comments were also received from the Oregon Parks and Recreation Department (OPRD) indicating that they would defer to recommendations from ODFW.
15. On August 10, 2009, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10623 to the applicants. The cover letter that accompanied the draft Preliminary Determination set forth a deadline of September 8, 2009, for the applicants to respond. On August 20 and September 1, 2009, the applicant provided the additional information requested by the Department. On September 8, 2009, the applicant requested to amend the application and on October 19, 2009, the applicant submitted a request to voluntarily cancel a portion of Certificate 83653.
16. On October 27, 2009, the Department sent a revised copy of the draft Preliminary Determination proposing to approve Transfer Application G-10623 to the applicants incorporating the amendment to the application and the request to cancel a portion of Certificate 83653. The applicants concurred with the draft Preliminary Determination on October 30, 2009, and requested that the Department proceed with issuance of a Preliminary Determination.

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

17. 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.
18. 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-10623.
19. The applicant has requested to protect water instream at the full rate and duty over the entire irrigation season (see Finding of Fact #8), which runs April 1 through October 31. The Department cannot protect the water over the entire irrigation season at the full rate and duty without enlargement of the water right and injury to other surface water rights. Therefore, the proposed instream use requires modification to prevent enlargement of the water right and injury to other surface water rights.
20. As identified in Finding of Fact #13, comments were received from ODFW. ODFW recommended that instream flows be protected up to the maximum rates allowed during the period July 1 through October 31. If any additional water is available, ODFW also recommended that instream flows be protected up to the maximum rate allowed during the month of April.
21. At the full rates and duty, the Department also cannot protect water instream during the period July 1 through October 31 without injury and enlargement. The Department's Watermaster suggested that the recommended instream period be reduced by a few days starting in July to allow water to be protected instream during the periods of lowest flow on the Little Deschutes River through October 31.

22. The proposed instream use requires modification to take into account return flows and stream flow losses. Return flows from the existing use return to the Little Deschutes River in the vicinity of the Little Deschutes gage near LaPine, located approximately at river mile 27. Also, the segment of the reach on the mainstem Deschutes River between the confluence with the Little Deschutes River and Bend is a losing reach and loses approximately 7% of its flows.
23. The number of acres of irrigation to be transferred instream has been modified as identified in Findings of Fact #4 and #5. The instream flows requested by the applicant, as described in Finding of Fact #8 require modification to account for this amendment to the application.
24. Based on Findings of Fact #19 through #23, on October 30, 2009, the applicant agreed to modify quantities of water to be protected instream as follows:

Instream Reach 1: From POD (as described in Finding of Fact #5) to the Little Deschutes gage near LaPine (approximately River Mile 27)

Priority Dates	Instream Period	Rate Instream	Volume Instream
1897	July 7 through August 19	0.05 CFS	1131.33
	August 20 through October 31	0.02 CFS	
April 30, 1902	July 7 through August 19	7.04 CFS	
	August 20 through October 31	3.52 CFS	

Instream Reach 2: From the Little Deschutes gage near LaPine (approximately River Mile 27) to the mouth of the Little Deschutes River

Priority Dates	Instream Period	Rate Instream	Volume Instream
1897	July 7 through October 31	0.02 CFS	510.3 AF
April 30, 1902		2.18 CFS	

Instream Reach 3: From the confluence of the Little Deschutes River and the Deschutes River to Lake Billy Chinook (River Mile 120)

Priority Dates	Instream Period	Rate Instream	Volume Instream
1897	July 7 through October 31	0.01 CFS	474.58 AF
April 30, 1902		2.03 CFS	

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 described in Finding of Fact #24 is allowable within the limits and use of the original water right.
28. The protection of flows within the proposed reach, as described in Finding of Fact #24, 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. The reach for an instream water right is typically from the point of diversion on the source stream to the mouth of that source stream. However, water may be protected further downstream if the quantity of water is measurable in the receiving stream, in this case the Deschutes River. The quantity of water proposed to be protected instream in Reach #3 is measurable in the mainstem Deschutes River, consistent with OAR 690-077-0015(8), and therefore, the reach may extend into the Deschutes River and down to Lake Billy Chinook.
 - c) There are known areas of natural loss of streamflow to the river bed downstream from the point of diversion that have been accounted for in Reach #3; and
 - d) The quantity of water to be protected instream in Reach #2 has been reduced to account for return flows. Any return flows resulting from the exercise of the existing water right re-enter the river downstream from the point of diversion approximately at River Mile 27 (Little Deschutes gage near LaPine) on the Little Deschutes River.
29. Within the proposed instream reach on the Little Deschutes River, there is an existing instream water right, Certificate 73226, established under ORS 537.341 (state agency application process), for the purpose of fish migration, spawning, egg incubation, fry emergence and juvenile rearing. There is also an existing instream water right, Certificate 83652, established under ORS 537.348 (instream transfer process) for the purpose of conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; pollution abatement; and recreation.

The Little Deschutes River is also on the Oregon Department of Environmental Quality's (DEQ) 303d list of water quality limited streams for a variety of water quality concerns.

30. Within the proposed instream reach on the mainstem Deschutes River, there are several existing instream water rights. There is one instream water right, Certificate 59777, established under ORS 537.346 (minimum streamflow conversion) for the purpose of supporting aquatic life and minimizing pollution, from the confluence of the Little Deschutes River to the confluence with Spring River. There is another instream water right, Certificate 59778, also established under ORS 537.346 for the purpose of supporting aquatic life and minimizing pollution, from the confluence with Spring River to the Central Oregon Irrigation District (COID) North Canal Dam. There is also a pending instream water right application, IS-70695, filed by the Oregon Department of Fish and Wildlife (ODFW) pursuant to ORS 537.341, with the Department to establish an instream water right from the COID North Canal Dam to Lake Billy Chinook. The remaining instream water rights were established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) and are generally located between the Central Oregon Canal and Lake Billy Chinook.

This portion of the Deschutes River is a designated State Scenic Waterway. The State Scenic Waterway designation provides for protection of flows necessary to maintain the free flowing character of the Deschutes River for fish and wildlife habitat, and recreation,

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

31. The existing instream water rights, established under ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency application process), within the proposed reach on the Little Deschutes River and the mainstem Deschutes River are sufficient to protect the monthly quantities of water necessary for various fishlife stages, supporting aquatic life, and minimizing pollution, but are not always met. By replacing a portion of these instream water rights, any instream water right created as a result of this transfer will provide for protection of streamflows identified as necessary for various fishlife stages, supporting aquatic life, and minimizing pollution, under an earlier priority date.
32. By adding to other instream water rights, established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process), located within the portion of the proposed reach located on the mainstem Deschutes River, a new instream water right established by this transfer would provide protection for additional streamflows necessary for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.
33. During the period July 7 through October 31, any instream water right established by this transfer application may replace a portion of instream water rights established pursuant to ORS 537.341 or 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.
34. The total monthly quantities of water proposed to be protected instream (as described in Findings of Fact #24) within the proposed reach will provide for a beneficial purpose and, in conjunction with other existing instream water rights, will not exceed the estimated average natural flow.

Partial Cancellation of a Water Right

35. On October 19, 2009, the applicant submitted an affidavit to voluntarily cancel a portion of Certificate 83653 contingent upon approval of Transfer Application T-10623.
36. 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.
37. The applicant has abandoned any and all interest in the portion of water right certificate number 83653 described as follows

Certificate: 83653 in the name of LaPine Cooperative Water Association

Priority Date: April 30, 1902

Acres: Irrigation of 5.0 acres

Season of Use: April 1 to November 1

Quantity: **Rate:**

April 1 to May 23 and August 20 to November 1

Limited to 1/80th cubic foot per second (CFS) per acre

May 23 to August 20

Limited to 1/40th CFS per acre

Duty: Limited to 4.0 acre-feet (AF) per acre

Priority Date	April 1 to May 23 and August 20 to November 1	May 23 to August 20	Duty
April 30, 1902	0.063 CFS	0.125 CFS	20.0 AF

Source: Little Deschutes River, tributary to the Deschutes River

Authorized Point of Diversion (POD):

Township	Range	Meridian	Sec	¼ ¼	Location	
23	S	9 E	W.M.	34	SW SW	550 FEET NORTH AND 1150 FEET EAST FROM THE SW CORNER OF SECTION 34

Authorized Place of Use:

Township	Range	Meridian	Sec	¼ ¼	Tax Lot	Acres	
22	S	10 E	W.M.	32	NE SW	3900	3.8
22	S	10 E	W.M.	32	NW SE	3900	1.2

Mitigation Project Review Criteria

38. Cascade Timberlands (Oregon), LLC has requested this instream transfer application be used to establish mitigation water for Ground Water Permit Application G-16905, filed by Cascade Timberlands (Oregon), LLC.
39. The Department assigned this mitigation credit project number MP-120.
40. The Department consulted with representatives from ODFW, Department of Environmental Quality (DEQ), 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 June 2, 2008. No comments were received in response to this notice.
41. Comments were submitted by ODFW on December 5, 2008, recommending instream flow protections, as described in Finding of Fact #20, and commenting upon the use of this project as mitigation. ODFW expressed concern that the instream reach for this mitigation project is located below the area of proposed ground water withdrawals. ODFW is concerned that the mitigation project may not offset potential impacts from the groundwater withdrawal upstream from the mitigation project, for example, impacts to local wetlands and/or springs. If there is diminishment of in-stream flows, ODFW requested that the requirement for mitigation be in the upper 10 or more miles of river above the proposed instream reach.
42. Ground Water Permit Application G-16905 has been determined to have a mitigation obligation of 640.0 AF in the Little Deschutes Zone of Impact, as described in the Proposed

Final Order issued proposing to approve this application on November 18, 2008. Mitigation must be provided in the Little Deschutes subbasin above the mouth of the Little Deschutes River. There is nothing in the review of the ground water permit application that suggests this project would not meet the requirements for mitigation.

43. On September 8, 2009, the applicant reduced the number of acres proposed to be transferred instream for mitigation purposes from 288.5 acres to 283.5 acres.
44. The proposed transfer of 283.5 acres of irrigation to instream use will provide 510.3 AF of mitigation water.
45. The proposed reach would protect instream flows within the Little Deschutes, Upper Deschutes, Middle Deschutes and General Zones of Impact. Mitigation water generated from this instream transfer may be used to satisfy the mitigation obligation of a ground water permit application with the Little Deschutes Zone of Impact.
46. Based upon Findings of Fact #40 through #45, the Department has determined that the proposed mitigation project will satisfy a portion of the mitigation obligation for Ground Water Permit Application G-16905. The remaining balance of the mitigation obligation (129.7 AF) must be made up from another mitigation project or by obtaining sufficient mitigation credits in the Little Deschutes Zone of Impact.
47. The applicant has two other mitigation projects pending with the Department, Mitigation Project MP-121 (instream transfer application T-10624) and Mitigation Project MP-123 (instream transfer application T-10672). These projects may supply all or a portion of the remaining balance of mitigation needed.
48. A total of 1131.33 AF may be protected instream and 510.3 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.
49. Mitigation water generated by this project may be used to satisfy a portion of the mitigation obligation for Ground Water Permit Application G-16905 upon completion of the approved project (the instream transfer) 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.
50. Mitigation water generated by this project may be available for mitigation use the first calendar year that water is protected instream under a new instream water right certificate.

Determination and Proposed Action

The changes in character of use and place of use to instream use proposed in application T-10623 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 and the abandoned portion of the right will be cancelled.

This mitigation project appears to result in mitigation pursuant to ORS 537.746 and OAR 690-505-0610.

If application T-10623 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-10623 are approved. The portion of the right that has been abandoned is cancelled.*
2. *Water right certificate 83653 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will be issued describing that portion of the right not affected by this transfer.*
3. *The instream water right shall provide for the protection of streamflows from the authorized point of diversion on the Little Deschutes to Lake Billy Chinook on the mainstem Deschutes River. The quantities of water to be protected under the instream water right are:*

Instream Reach 1: *From POD (as described in Finding of Fact #5) to the Little Deschutes gage near LaPine (approximately River Mile 27)*

<i>Priority Dates</i>	<i>Rate Instream</i>	<i>Instream Period</i>
1897	0.05 CFS	July 7 through August 19
	0.02 CFS	August 20 through October 31
April 30, 1902	7.04 CFS	July 7 through August 19
	3.52 CFS	August 20 through October 31

Instream Reach 2: *From the Little Deschutes gage near LaPine (approximately River Mile 27) to the mouth of the Little Deschutes River*

<i>Priority Dates</i>	<i>Rate Instream</i>	<i>Instream Period</i>
1897	0.02 CFS	July 7 through October 31
April 30, 1902	2.18 CFS	


Instream Reach 3: *From the confluence of the Little Deschutes River and the Deschutes River to Lake Billy Chinook (River Mile 120)*

<i>Priority Dates</i>	<i>Rate Instream</i>	<i>Instream Period</i>
1897	0.01 CFS	July 7 through October 31
April 30, 1902	2.03 CFS	

4. *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.*
5. *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 identified in a subsequent order establishing a new instream water right under these statutes.*

6. *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 83653 and any related decree.*
7. *The former place of use of the transferred water shall no longer receive water as part of this right.*
8. **Mitigation Water:** *Mitigation Water generated by this project will be used to satisfy a portion of the mitigation obligation for Ground Water Permit Application G-16905 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, the project will generate **510.3 AF** of Mitigation Water in the **Little Deschutes Zone of Impact**. Mitigation Water generated by this project will be available for use as mitigation water beginning the first calendar year that water will be protected instream under the new instream water right.*
9. *The instream certificate created from this transfer shall be identified as a mitigation project/source for a ground water permit, issued as a result of approval of Ground Water Permit Application G-16905. Within the instream certificate, the volume of mitigation water, the zone of impact in which the mitigation water was 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 4th day of November, 2009.


Phillip C. Ward, Director *rw*

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@wrd.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.