



# Oregon

Theodore R. Kulongoski, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Phillip C. Ward, Director

**SUBJECT:** Agenda Item K, May 5, 2006  
Water Resources Commission Meeting

**Request for Approval of a Mitigation Bank Charter for Deschutes Irrigation LLC.  
Pursuant to the Deschutes Mitigation Bank and Mitigation Credit Rules (OAR  
Chapter 690, Division 521)**

#### I. Issue Statement

The Commission is asked to approve a mitigation bank charter for Deschutes Irrigation LLC substantially in the form of the draft charter in Attachment 1. The Commission is also asked to delegate responsibility for drafting the final language of the charter and to delegate final signature authority to the Director.

#### II. Background

On September 13, 2002, the Commission adopted the Deschutes Basin Mitigation Bank and Mitigation Credit Rules in order to implement ORS 537.746 (House Bill 2184, 2001 Legislative Session). House Bill 3494 passed in the 2005 legislative session, confirming the mitigation rules, as adopted, and deeming them satisfactory with respect to mitigation under ORS 390.805 to 390.925, 537.332 to 537.360 and 537.505 to 537.795.

The purpose of mitigation banks in the Deschutes Basin is to facilitate transactions among holders of mitigation credits and persons interested in acquiring mitigation credits. Without mitigation, the Department is required by law to deny ground water permit applications in the Deschutes Ground Water Study Area. Under the Commission's rules, anyone may apply for a mitigation bank charter. The mitigation bank charter may be approved or denied by the Commission following an opportunity for public comment.

On December 8, 2005, John Short, Deschutes Irrigation, LLC, submitted an application for a mitigation bank charter; an amended application was submitted on March 14, 2006 (Attachment 2). The Department assigned the mitigation bank charter application MB-3. Notice of the application was made in the Department's weekly notice on January 3, 2006. The comment period closed on January 24, 2006. Comments were received from Central Oregon Irrigation District (COID), the Deschutes River

Conservancy (DRC), and WaterWatch of Oregon (Attachment 3). None of the comments received supported the adoption of a charter for Deschutes Irrigation. The primary reasons were that 1) the bank proposes not to deal with temporary mitigation credits, which some commenters saw as the primary purpose of a bank; 2) the information submitted in the application was insufficient and incomplete; and 3) the bank would provide no additional services in the basin; and 4) the mitigation bank charter application is merely a request for recognition of authority.

There is presently one mitigation bank operating within the Deschutes Ground Water Study Area. A Mitigation Bank Charter was approved by the Commission on February 14, 2003, for the Deschutes Water Exchange.

### **III. Discussion**

Deschutes Irrigation LLC (DI) is an Oregon Limited Liability Corporation whose majority owner is John Short of Bend. The parent company is Emmet Ranch, LLC, which is owned by two additional individuals. Since its inception, DI has been the agent for many ground water applicants in the Deschutes Ground Water Study Area. According to his Mitigation Bank Charter Application, Mr. Short handles day-to-day operations including ground water engineering and application issues. DI has provided mitigation credits for approximately 10 ground water applicants, as evidenced by documentation submitted to the Department, and completed several mitigation credit transactions with other mitigation credit holders. Mr. Short identifies that many ground water permit applicants lack education as to the financial risks that may be involved in buying mitigation credits. The applicant hopes to minimize these financial risks through the mitigation bank charter strategy. The goals of the DI mitigation bank are described in the attached mitigation bank application (Attachment 2). As described in the mitigation bank charter application, the applicant intends to develop mitigation credits based solely on permanent instream transfers. Anyone, including a mitigation bank, may establish mitigation credits based on permanent instream transfers and may assign those credits to another credit holder or ground water permit applicant.

The draft mitigation bank charter in Attachment 1 was developed with DI and meets the requirements of ORS 537.746 and the Commission's rules under OAR Chapter 690, Division 521. Specifically, the draft mitigation bank charter includes the following:

1. A description of the bank operation plan and goals;
2. A provision that the DI, LLC will provide mitigation credits to small irrigators, municipalities, quasi-municipalities, and restoration groups needing to satisfy a mitigation obligation in the Deschutes Basin Ground Water Study Area;
3. A provision that the DI, LLC may develop and hold mitigation credits based only upon permanent instream transfers;
4. A provision that the DI, LLC does not intend to place any limitations on the size of mitigation credit transactions that it will conduct as a mitigation bank except as they relate to the size of its customers, which are primarily small irrigators with less than 5 acres;
5. Inclusion of appropriate limitations or restrictions on the transaction, replacement, tracking and accounting, and reporting of mitigation credits;

6. Inclusion, as required by rule, of requirements for the accounting and annual reporting of mitigation credits transactions and activities by zone of impact;
7. Statements indicating that the DI, LLC has authority to operate as a mitigation bank;
8. Provisions to address issues associated with a possible bank failure; and
9. Provisions to allow for modification of the charter, assignment of credits to another mitigation bank or credit holder, and to address enforcement and termination of the Charter.

The draft mitigation bank charter also contains provisions that allow the Department and the mitigation bank entity to modify the charter if determined necessary based on annual review of the charter agreement. Changes may be made with Commission approval to modify mitigation bank operation requirements if necessary or to address any bank-related water management issues. While the DI Charter is consistent with existing rules and statutes, the Department may consider a future rulemaking to address fees associated with mitigation bank applications and ways to ensure long term stability of any approved banks.

#### **IV. Alternatives**

The Commission may consider the following alternative actions:

1. Approve the mitigation bank charter for the DI, LLC substantially in the form of the draft charter in Attachment 1 and delegate responsibility for finalizing the language of the charter to the Director, as well as final signature authority.
2. Approve the draft mitigation bank charter in Attachment 1 with revisions and delegate finalizing the language of the charter to the Director, as well as final signature authority.
3. Not approve the proposed mitigation bank charter and request further evaluation by the Department.

#### **V. Recommendation**

The Director recommends Alternative 1, that the Commission approve the proposed mitigation bank charter for the Deschutes Irrigation, LLC substantially in the form of the draft charter in Attachment 1 and delegate responsibility to the Director for finalizing the language in the charter, as well as final signature authority.

Attachments:

1. Draft Mitigation Bank Charter for Deschutes Irrigation, LLC
2. Mitigation Bank Charter Application for Deschutes Irrigation, LLC
3. Copies of Public Comment, DI Mitigation Bank Charter Application

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