



MEMORANDUM

TO: Water Resources Commission

FROM: Dwight French, Water Rights Services Administrator

SUBJECT: Agenda Item E, May 1, 2020
Water Resources Commission Meeting

Request for Adoption of Rules - OAR Chapter 690, Division 522, Deschutes Basin Water Management

I. Introduction

During this agenda item, the Water Resources Commission will be asked to consider the adoption of amendments to Oregon Administrative Rules (OAR) Chapter 690, Division 522 that would allow mitigation water developed under a mitigation project to be changed to mitigation credits and allow certain permit holders that have incremental development plans to re-assign mitigation credits to a different existing permit.

II. Background

On June 4, 2010, the Commission adopted the Deschutes Basin Water Management Rules, OAR Chapter 690, Division 522, relating to the Deschutes Basin Groundwater Mitigation Program. The rules operate in conjunction with the Deschutes Basin Groundwater Mitigation Rules in Division 505 and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules in Division 521.

The existing Division 522 rules clarify how the Department counts new, reduced, cancelled and partially cancelled groundwater permits; allows unused permanent mitigation credits to be reassigned; and clarifies how municipal and quasi-municipal permit holders can provide mitigation under incremental development plans. The rules also allow a mitigation project to provide direct mitigation for a specific groundwater application.

III. Discussion

The Department established a Rules Advisory Committee (RAC) to advise the Department on rule development (Attachment 1). The RAC met three times.

Under the current rules, a mitigation project is tied to a specific groundwater authorization and cannot be used or re-assigned to satisfy the mitigation obligation of any other groundwater authorization; whereas mitigation credits can be used to satisfy the mitigation obligations for one or more groundwater applications or permits. Currently if a permit holder that has mitigation

water does not prove up on the entirety of their permit, the mitigation water is lost and not able to be used for any other mitigation obligation.

The proposed rules would address this disparity by including provisions that would allow the Department to change mitigation water that was previously (prior to this rulemaking) developed under a mitigation project into mitigation credits, upon the permit holder filing a request with the Department. The credits would then be able to be used to satisfy another mitigation obligation through the existing rule OAR 690-522-0050.

While meeting with the RAC on these proposed changes, a member proposed a second change to the rules. Currently OAR 690-522-0050(1)(g) allows a permit holder that holds more than one municipal or quasi-municipal permit issued under OAR 690-505-0620 to re-assign mitigation credits between their own existing permits, provided the reassignment is consistent with the requirements of OAR 690-505-0610(4).

To increase flexibility, the proposed rules would amend OAR 690-522-0050(1)(g) to allow the permit holder of a municipal or quasi-municipal permit issued under OAR 690-505-0620 to re-assign mitigation credits to a permit held by a different municipal entity.

A Notice of Proposed Rulemaking Hearing was noticed on the Department's website and appeared in the *Oregon Bulletin* on January 1, 2020. The notice was also sent by electronic mail to the Department's listserv and other parties as required by law. The public comment period was open through January 31, 2020. A public hearing was held in Bend on January 22, 2020. The notice and public comment draft of the proposed rules is included in Attachment 2.

The Department received public comments from ClydeSnow, LLC on behalf of Shanda Asset Management, LLC; Jim Powell of Bend, Oregon; Adam Sussman on behalf of the Central Oregon Cities Organization; Oregon Department of Environmental Quality; League of Women Voters of Deschutes County; Patrick Griffiths of the City of Bend; and John Short of Water Right Services, LLC (Attachment 3). The Department's consideration and response to these comments are included (Attachment 4). The Department did not make changes to the proposed rules based on public comments.

IV. Commission Action

The Commission is asked to consider adoption of the proposed amendments to OAR Chapter 690, Division 522. The final proposed amended rules for adoption are included in Attachment 5.

V. Alternatives

1. Adopt the final proposed amended rules OAR Chapter 690, Division 522, as contained in Attachment 5.
2. Modify and adopt the proposed amended rules OAR Chapter 690, Division 522.
3. Direct Department staff to do further work on the rules and return to a future Commission meeting.

VI. Recommendation

The Director recommends Alternative 1, to adopt the final proposed amended rules OAR Chapter 690, Division 522, as contained in Attachment 5.

Attachments:

1. List of RAC Members
2. Notice and Public Comment Draft of Proposed Amended Rules – OAR Chapter 690, Division 522
3. Public Comments
4. Department Response to Public Comments
5. Final Proposed Amended Rules – OAR Chapter 690, Division 522



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Kate Brown, Governor

Water Resources Department
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OAR 690, Division 522 - Rules Advisory Committee

Participating Members

<u>Name</u>	<u>Affiliation</u>
Adam Sussman	Representing Central Oregon Cities Organization
Reagan Desmond	ClydeSnow, LLC
Danette Faucera	Oregon Department of Fish and Wildlife
Leslie Clark	Representing Deschutes Basin Board of Control
Kimberley Priestley	WaterWatch of Oregon
Gen Hubert	Deschutes River Conservancy

OFFICE OF THE SECRETARY OF STATE
 BEV CLARNO
 SECRETARY OF STATE

 A. RICHARD VIAL
 DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION
 STEPHANIE CLARK
 DIRECTOR

 800 SUMMER STREET NE
 SALEM, OR 97310
 503-373-0701

NOTICE OF PROPOSED RULEMAKING
 INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 690
 WATER RESOURCES DEPARTMENT

FILED
 12/24/2019 12:06 PM
 ARCHIVES DIVISION
 SECRETARY OF STATE

FILING CAPTION: Changing Mitigation Water to Mitigation Credits and Revising Criteria for Reassignment of Permanent Mitigation Credits

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 01/31/2020 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

CONTACT: Sarah Henderson	725 Summer Street NE.	Filed By:
503-986-0884	Suite A	Racquel Rancier
sarah.a.henderson@oregon.gov	Salem, OR 97301	Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 01/22/2020

TIME: 10:30 AM - 12:30 PM

OFFICER: Dwight French

ADDRESS: Oregon Water Resources
 Department

231 SW Scalehouse Loop

Suite 103

Bend, OR 97702

SPECIAL INSTRUCTIONS:

Members of the public must arrive and sign up by 11:00 am to testify. The hearing will close no later than 12:30 pm.

NEED FOR THE RULE(S):

OAR Chapter 690, Division 522, is used in conjunction with the Deschutes Basin Groundwater Mitigation Rules in Division 505, and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules in Division 521. Division 522 clarifies how the Department counts new, reduced, cancelled and partially cancelled groundwater permits under the allocation cap; allows unused permanent mitigation credits to be reassigned; and clarifies how municipal and quasi-municipal permit holders can provide mitigation under incremental development plans. The rules also allow a mitigation project to provide direct mitigation for a specific groundwater application, which is called mitigation water. Mitigation water, as defined in OAR 690-521-0200(9) means water that is legally protected for instream use from implementation of a mitigation project, calculated in acre-feet.

The first purpose of the proposed rulemaking is to include provisions that would allow the Department to change mitigation water developed under a mitigation project prior to the adoption of these rules into mitigation credits. Currently if a permit holder that has mitigation water does not prove up on the entirety of their permit, the mitigation water is lost and not able to be used for any other mitigation obligation.

With these proposed rules, if the permit holder is allowed to change the approved mitigation water to mitigation credit and does not prove up on the entirety of their permit, the credits would then be able to be used to satisfy another mitigation obligation through the existing rule OAR 690-522-0050.

The second purpose of the proposed rulemaking was at the request of the Rules Advisory Committee. Currently OAR 690-522-0050 (1) (g) allows a permit holder that holds more than one municipal or quasi-municipal permit issued under OAR 690-505-0620 to re-assign mitigation credits from one such existing permit to another existing permit of their own, provided the reassignment is consistent with the requirements of OAR 690-505-0610(4).

With the proposed rulemaking revising OAR 690-522-0050 (1) (g), the permit holder that holds a municipal or quasi-municipal permit issued under OAR 690-505-0620 would have the ability to re-assign mitigation credits to another such existing permit not only their own.

There are currently seven approved mitigation water projects that are located within five different zones within the Deschutes Basin Ground Water Study Area that may be able to take advantage of the results of the first purpose of this rulemaking. This proposed change could be the first step in making more mitigation credits available in zones that are currently lacking in availability.

The second purpose of this rulemaking has the potential to allow municipal and quasi-municipal permit holders to work together and re-assign mitigation credits where credits were not currently available.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

OAR Chapter 690, Divisions 505, 521 and 522; available for review at:

<https://www.oregon.gov/OWRD/programs/policylawandrules/OARS/Pages/Completed-Rulemaking.aspx>

FISCAL AND ECONOMIC IMPACT:

The Department anticipates that the proposed modification, if implemented, will have a positive fiscal and economic impact by providing the potential to assign mitigation in areas that have little or no mitigation credits presently available. The free market structure may impact the value of mitigation credits: the more credits that are available could make the price go down and the less credits available can make the price go up. If project water is converted to mitigation credits as allowed in the proposed rules, there may be more credits available in areas that have little or no mitigation credits presently. In areas where there are credits available, additional credits may cause the prices to decline, and thus those providing credits may see a decline in the amount they can charge for credits. However, in areas where there has not been credits available, this rulemaking could be the first step in being able to sell credits through

the existing rules of the Department, thus benefiting those that have experienced limitations on development due to a lack of credits available. Economically, additional credits will allow those seeking to develop groundwater, such as for domestic, irrigation, drinking water, or other purposes, to be able to proceed with using that water.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s).

The Water Resources Department has incurred some staff time to develop these rules, and will incur additional staff time to develop related materials and any necessary outreach to permit holders. The Department estimates this will be minimal and can be done with existing resources.

Up to nine permit holders may be economically affected by the rules to the extent that they sell mitigation credits that are changed from mitigation water as a result of these rules. However, they would not be able to immediately sell the credits. If they choose to go through this first step, then they would have to utilize the existing rules to sell credits. There is no fee for the change. If permit holders pursue conversion of mitigation water to mitigation credits, they then have the ability to re-assign the mitigation credits pursuant to the criteria outlined in OAR 690-522-0050, thereby giving cities and others within the Deschutes Basin the opportunity to purchase the mitigation credits.

In some areas of the basin, there is currently insufficient mitigation credits for municipal purposes. Those cities that need credits and wish to purchase them, will then be able to pursue development of their water rights necessary for economic growth.

A member of the public that needs to develop groundwater and needs to obtain mitigation credits may also benefit from being able to purchase these credits.

If sufficient credits are available, the price of credits may decline. Since the proposed modifications to Division 522 provide for greater flexibility, the Department does not anticipate additional costs of compliance by state and local government and the public; those that do not see a benefit can choose not to participate.

(2) Effect on Small Businesses:

(a) Estimate the number and type of small businesses subject to the rule(s);

There are seven permits that may be allowed to change their mitigation water over to credits; the holders of some of these permits may be small businesses. Based on what the Department knows about those permits, three are likely small businesses. While these are the small businesses that would be subject to the rules; the Department does anticipate that small businesses may benefit from those permit holders changing mitigation water into credits. However, the Department cannot predict the number of small businesses that may decide to purchase mitigation credits that result from these rules.

(b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s);

Under the rules, the permit holder may, in writing, request that the Department change their mitigation water to mitigation credits. The written request will require them to provide the application, permit, or certificate number for which the mitigation water was established and the mitigation project number, which the Department does not believe will take more than a few minutes to prepare. The associated cost will depend on the specific salaries paid by the small business to pay the person to prepare the written request. The Department does not anticipate additional costs associated with reporting and other administrative activities associated with this rule amendment. The Department is currently tracking and accounting mitigation pursuant to Division 505, 522 and 521.

(c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

The Department does not anticipate additional costs of compliance for equipment, supplies, labor or increased administration due to implementation of the rules. These proposed changes will provide greater flexibility. The small businesses may be subject to fluctuating free market value of credits, which already exists without these rules today.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The Department notified many small businesses, as well as local governments. One of the Rules Advisory Committee (RAC) members participated on behalf of two of the permits affected by these rules that are held by a small business. During the meeting, the RAC members discussed the impact to small business.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

690-522-0010, 690-522-0020, 690-522-0025, 690-522-0030, 690-522-0040, 690-522-0050, 690-522-0060

AMEND: 690-522-0010

RULE SUMMARY: States the purpose of the rules and their relationship to other rules for the Deschutes Groundwater Mitigation Program. The Division 522 rules operate in conjunction with the Deschutes Basin Groundwater Mitigation Rules in Division 505 and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules in Division 521. The existing Division 522 rules clarify how the Department counts new, reduced, cancelled and partially cancelled groundwater permits under the allocation cap; allows unused permanent mitigation credits to be reassigned; and clarifies how municipal and quasi-municipal permit holders can provide mitigation under incremental development plans. The rules also allow a mitigation project to provide direct mitigation for a specific ground water application. This rule section is modified to remove references to a prior work group in recognition of emerging needs in the Deschutes Basin Groundwater Study Area.

CHANGES TO RULE:

690-522-0010

Introduction Purpose

The following rules are based on recommendations of a Work Group convened by the Water Resources Department pursuant to House Bill 3494 (2005 Oregon Laws Ch. 669) and are intended to operate in conjunction with the Deschutes Basin Ground Water Mitigation Rules in OAR ~~690~~ Chapter 690, Divisions 505, and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules in OAR ~~690~~ Chapter 690, Division 521.

Statutory/Other Authority: ~~ORS 536.025~~, 536.027, 537.746

Statutes/Other Implemented: ~~ORS 669, OL 2005~~537.746, Or Laws 2005, ch 669, Or Laws 2011, ch 694

AMEND: 690-522-0020

RULE SUMMARY: This rule states the applicability of the OAR 690, Division 522 rules. The rules apply to mitigation credits and mitigation water established pursuant to the Deschutes Basin Ground Water Mitigation Program.

CHANGES TO RULE:

690-522-0020

Applicability ¶

The following rules apply to final orders, permits, and certificates issued pursuant to OAR 690-~~4~~, Division 505 after September 27, 2002, including but not limited to the change of mitigation water into mitigation credits.

Statutory/Other Authority: ~~ORS 536.025~~, 536.027, 537.746

Statutes/Other Implemented: ~~ORS 669, OL 2005~~ Laws 2011, ch 694, 537.746, Or Laws 2005, ch 669

ADOPT: 690-522-0025

RULE SUMMARY: Defines terms used in OAR chapter 690, division 522.

CHANGES TO RULE:

690-522-0025

Definitions

The following definitions apply to OAR chapter 690, division 522.

(1) "Department" means the Oregon Water Resources Department.

(2) "Mitigation credit" is a means of accounting for mitigation water, calculated in acre-feet, made available by a mitigation project. One mitigation credit is equal to one acre-foot of mitigation water. Mitigation credits are determined and awarded by the Department upon completion of the project and verification by the Department.

(3) "Mitigation obligation" means the amount of mitigation water needed for the appropriation of groundwater as determined by the Department under OAR chapter 690, division 505, calculated in acre-feet.

(4) "Mitigation project" means a project approved by the Department that results in mitigation water.

(5) "Mitigation water" means water that is legally protected for instream use from implementation of a mitigation project, calculated in acre-feet.

Statutory/Other Authority: ORS 536.027, ORS 537.746

Statutes/Other Implemented: Or Laws 2011, ch 694, ORS 537.746, Or Laws 2005, ch 669

AMEND: 690-522-0030

RULE SUMMARY: This rule defines what is not counted in the Deschutes Basin Ground Water Mitigation allocation cap. This change is a minor correction to update statutory authority and statutes implemented.

CHANGES TO RULE:

690-522-0030

Ground Water Appropriations within the Deschutes Ground Water Study Area ¶¶

The cumulative rate specified under 690-505-0500(1) shall not include:¶¶

- (1) Rates associated with offsets pursuant to 690-505-0610(8);¶¶
- (2) Rates associated with applications withdrawn after final order issuance pursuant to 690-505-0620;¶¶
- (3) Portion of rates approved by a final order issued under 690-505-0620 but not included in a water right permit issued following satisfaction of the mitigation requirement;¶¶
- (4) Rates associated with expired final orders pursuant to 690-505-0620(2);¶¶
- (5) Portions of rates associated with permits issued pursuant to 690-505-0620 and subsequently cancelled;¶¶
- (6) Rates associated with certificates issued pursuant to 690-505-0620 and subsequently canceled; and¶¶
- (7) Rates associated with the portion of use originally authorized under a permit issued pursuant to 690-505-0620 and not included in a subsequent certificate.

Statutory/Other Authority: ~~ORS 536.025~~, 536.027, 537.746

Statutes/Other Implemented: ~~Ch. 669, OL 2005; Ch. 537.746, Or Laws 2005, ch 6694, OL 2011~~ Laws 2011, ch 694

AMEND: 690-522-0040

RULE SUMMARY: This rule defines the incremental development plan reporting requirement for certain municipal or quasi-municipal groundwater permits. This rule change is a minor correction to update statutory authority and statutes implemented.

CHANGES TO RULE:

690-522-0040

Incremental Development in the Deschutes Ground Water Study Area ¶

(1) An incremental development plan under 690-505-0625 for municipal and quasi-municipal ground water permit applicants and permit holders may include offset pursuant to 690-505-0610(8).¶

(2) When providing incremental mitigation pursuant to OAR 690-505-0625, a municipal or quasi-municipal ground water permit holder may provide mitigation, offset, or a combination of both during each approved increment to coincide with each stage of development of the permit on the condition that the permit holder does not increase the rate or amount of water diverted under the permit before submitting the corresponding required mitigation or offset and documentary evidence.¶

(3) The report required under OAR 690-505-0625(1)(b) shall describe the annual volume of water used and the source of offset and mitigation used for that period.

Statutory/Other Authority: ~~ORS 536.025~~, 536.027, 537.746

Statutes/Other Implemented: ~~ORS 669, OL 2005~~537.746, Or Laws 2005, ch 669, Or Laws 2011, ch 694

AMEND: 690-522-0050

RULE SUMMARY: This rule identifies the circumstances in which mitigation credits can be reassigned. Changes as part of this rulemaking include in: (1) to clarify instances in which the Department may reassign permanent mitigation credits, in (1)(d) to specify that permanent mitigation credits may be reassigned if a groundwater permit is partially cancelled, and in (1)(g) to allow an existing municipal or quasi-municipal permit holder with an incremental development plan the ability to re-assign credits to another such existing permit including those not their own.

CHANGES TO RULE:

690-522-0050

Reassignment of Permanent Mitigation Credits ¶

(1) Notwithstanding OAR 690-521-0400(2), the Department may reassign part or all of permanent mitigation credits that were used to satisfy a mitigation obligation may be reassigned if:¶

(a) The ground water permit application to which the credits were assigned is denied or withdrawn;¶

(b) The ground water permit application to which the credits were assigned is amended and the mitigation obligation is reduced;¶

(c) The final order issued approving the ground water permit application to which the credits were assigned expires pursuant to OAR 690-505-0620;¶

(d) The ground water permit to which the credits were assigned is subsequently cancelled or partially cancelled resulting in a reduced mitigation obligation;¶

(e) The subsequent ground water certificate is issued for less ground water use than originally allowed under the permit and there is a corresponding reduction in mitigation obligation;¶

(f) The subsequent ground water certificate to which the credits were assigned is cancelled, or partially cancelled resulting in a reduced mitigation obligation; or¶

(g) The permit holder holds more than one municipal or quasi-municipal ground water permit issued mitigation credits are assigned to a permit for municipal or quasi-municipal use issued under OAR 690-505-0620 with an incremental development plan under OAR 690-505-0620~~5~~ and the permit holder requests to re-assign credits from one to another such existing permit to another existing permit of their own or to another municipal or quasi-municipal entity that holds a groundwater permit issued under OAR 690-505-0620 with an incremental development plan under OAR 690-505-0625, provided the reassignment is consistent with the requirements of OAR 690-505-0610.(4) and OAR 690-505-0625. The permit holder requesting the re-assignment of credits under this provision shall submit to the Department an updated incremental development plan.¶

(2) Mitigation credits available pursuant to this rule may be assigned by applicant or permit or certificate holder to any person or mitigation bank or assigned to satisfy a mitigation obligation.

Statutory/Other Authority: ~~ORS 536.025~~, 536.027, 537.746

Statutes/Other Implemented: ~~Ch. 669, OL 2005; Ch. 537.746, Or Laws 2005, ch 6694, OL 2011~~ Laws 2011, ch 694

ADOPT: 690-522-0060

RULE SUMMARY: This section outlines a new process, which allows mitigation project owners to work through the Department to change mitigation water developed under a specific mitigation project into mitigation credits. Mitigation credits awarded under this process are assigned to the original mitigation obligation under an existing permit or certificate, after which the project owner may utilize other existing rules to re-assign and satisfy other mitigation obligations within the Deschutes Basin.

CHANGES TO RULE:

690-522-0060

Change of Mitigation Water into Mitigation Credits

(1) For mitigation project applications submitted after the adoption of these rules, pursuant to 690-521-0300 (4), any person requesting mitigation credits through completion of a mitigation project, identified in 690-521-0300 (1), shall, in any application associated with the mitigation project, notify the Department that they intend to use the project to establish mitigation credits. For those that do not request to establish mitigation credits under the proposed project, the Department will consult before moving forward. ¶

(2) To apply to change mitigation water into mitigation credits a written request must be submitted to the Department no later than December 31, 2021.¶

(3) The written request to change mitigation water generated by a mitigation project into mitigation credits may be submitted to the Department by the permit holder(s) of record or certificate holder(s). The request will include:

- ¶
- (a) The application, permit, or certificate number for which the mitigation water was established; ¶
- (b) The mitigation project number; and ¶
- (c) Any other information requested by the Department. ¶

(4) Provided the written request is consistent with (2) and (3) of this section, the Department may issue an order to approve the change of mitigation water generated by the mitigation project into mitigation credits, consistent with the order approving the mitigation project. The order will: ¶

- (a) Award mitigation credits in any zone(s) where the mitigation project water is legally protected instream;¶
- (b) Assign the awarded mitigation credits to the existing permit or certificate to which the mitigation water was originally assigned and used to satisfy the originating mitigation obligation.¶

(5) After the award and assignment of the mitigation credits, the mitigation water will no longer be valid to meet a mitigation obligation.¶

(6) Approved mitigation credits become subject to the provisions of OAR Chapter 690, Division 521, and OAR Chapter 690, Division 522. Mitigation credits can only be reassigned in accordance with OAR 690-522-0050.

Statutory/Other Authority: ORS 537.027, ORS 537.746

Statutes/Other Implemented: ORS 537.746, Or Laws 2005, ch 669, Or Laws 2011, ch 694

**OAR Chapter 690, Division 522,
Deschutes Basin Water Management, Rules Hearing
January 22, 2020**

Audio #1:

Dwight French: Testing 1, 2, 3

Audio #2:

**Start time 10:38am*

Dwight French: The hearing is now in session, and is being (uh) tape recorded to maintain a permanent department record. My name is Dwight French and I'm going to be the hearing officer today. Today is January 22, 2020 and the time is 10:38. The purpose of this hearing is to provide an opportunity for public comment on proposed rules in OAR Chapter 690, Division 522, Deschutes Basin Water Management. The proposed rules include provisions that would allow the department to change mitigation water developed under a mitigation project, prior to the adoption of these rules into mitigation credits. And, uh, the rule includes provisions that have the potential to allow municipal and quasi-municipal permit holders to work together and re-assign mitigation credits where credits are not currently available. In addition to presenting oral comments at this hearing, anyone may submit written comments until 5:00pm on January 31st, 2020. Which is the close of the public comment period. Send comments to Rules Coordinator at OWRD, 725 Summer St NE, Suite A, Salem, OR 97301 or fax comments to (503) 986-0903 – Rules Coordinator, or email comments to, and I've got the address if you don't have it and you want to get it from me. Comments received after 5:00pm on January 31st, 2020 will not be reviewed or considered by the agency unless the agency decides to extend the public comment period for everyone. The department will not respond to questions during this hearing. After the close of the public comment period, department personnel will prepare a staff report, which will be available from the department. Ok, so, uh, Patrick, welcome.

Patrick Griffiths: Thank you.

Dwight French: I've got (uh) two people signed up to give comments, John Short and Patrick Griffiths. I've got two more people that have signed in, Reagan Desmond, representing Clyde Snow. And Jim Powell a citizen from Bend. And John if you have any public comments, I'll take those at this time.

John Short: Thank you. Bottom line, I'm certainly happy with the direction this is going, I don't have any issues with the intent. As one comment, I would say that other than the Metolius Zone, credits are available in every zone, so it's not for lack of credits that something like this should be done. But, um, I still think it's good, and I say that because part of your introduction said that some zones didn't have credits and that's incorrect. Um, they're either, Whychus this is the only one where credits are in process but not issued yet, and even those are available for lease. But so, besides that, my only concern on this was uh, I

understand the party that's wanting to have this rule change happen, and that makes sense to me as far as the old resort property or whatever that had those mitigation (um) made for that resort now wants a plan B. My only comment would be since this proposes to let that mitigation water be used everywhere it was protected, every zone it was protected, not just specifically the zone it was issued to mitigation, is that same flexibility then going to be granted to other credits that are already issued, (uh) examples are mitigation projects 168 and mitigation projects 123, where those projects specified a single zone but the water was protected, um, you have to look at it, I didn't go through every project, practically those are protected on down to the general zone. But those credits currently do not, uh, cannot be used in middle zone or general zone, or little. So I'm just sayin, hey, if, it seems like we should have it one way or the other, but not a special case for one credit holder, one mitigation holder and not for those others that are out there.

Dwight French: Ok, thanks John, is that...

John Short: I'm done

Dwight French: is that it for today? Ok. Patrick, welcome.

Patrick Griffiths: Hi Dwight, thank you. For the record, Patrick Griffiths the Water Resources Manager with the City of Bend. I'm here today in support of the proposed rules, um, simply, we think the added flexibility is a good thing for the rules as they stand today. We also feel that they still remain protective of the initial program intent. And that's it, we again thank the department for all the hard work with the rules committee and all of the back and forth that goes on administrative support for the rules process. So thanks again for being here Dwight, we appreciate it.

Dwight French: Alright, it is 10:45, and I'm going to go off the record and (um) I'll open it back up if others show up before 11 o'clock to testify.

**End Time: 10:45am*

ClydeSnow

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 CLARK W. SESSIONS^{oo}†
 JAKE TAYLOR^{oo}‡
 NATHAN B. WILCOX^{oo}

EDWARD W. CLYDE (1917-1991)

† SENIOR COUNSEL
^{oo} ADMITTED IN UTAH (NOT ADMITTED IN OREGON)
^{oo} ALSO ADMITTED IN CALIFORNIA
^{oo} ALSO ADMITTED IN DISTRICT OF COLUMBIA
^{oo} ALSO ADMITTED IN FLORIDA
^{oo} ALSO ADMITTED IN NEW YORK
^{oo} ALSO ADMITTED IN TEXAS
^{oo} ALSO ADMITTED IN UTAH
^{oo} ALSO ADMITTED IN WYOMING

January 31, 2020

Via Facsimile & U.S. Mail (503) 986-0903

Sarah Henderson
 Oregon Water Resources Department
 725 Summer St. NE, Suite A
 Salem, OR 97301-1271

RECEIVED

FEB 03 2020

OWRD

Re: OAR 690, Division 522 Rulemaking

Dear Sarah,

We submit these comments on the OAR 690, Division 522 Rulemaking “Changing Mitigation Water to Mitigation Credit and Revising Criteria for Reassignment of Permanent Mitigation Credits” on behalf of Shanda Asset Management, LLC (formerly Whitefish Cascade Forest Resources LLC) (“Shanda”).

Shanda appreciates the in-depth process and consideration of the Rules Advisory Committee in the drafting of these proposed rules and supports the rules in concept and as drafted. Conversion of project mitigation water to mitigation credits, from a time when the Deschutes Basin Mitigation Program (“Program”) was in its infancy to now when implementation is better understood, will enable water to be utilized and protected as intended by the Program. Shanda understands the process will be guided by the underlying orders approving the original mitigation projects and supports that approach as both equitable and efficient.

Simple conversion of mitigation water to mitigation credits will provide clarity and a currency that will benefit the Program, the river and the public. We appreciate the efforts of OWRD in the evolution of the Deschutes Basin Mitigation Program.

Very truly yours,

CLYDE SNOW & SESSIONS, P.C.


 Reagan Desmond

Cc: Chris Johnson



Central Oregon Cities Organization

Bend, Culver, La Pine, Madras, Maupin
Metolius, Prineville, Redmond, Sisters

January 27, 2020

Sarah Henderson
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

RE: Proposed Rules, OAR Chapter 690 Division 522 (Deschutes Basin Water Management)

Dear Ms. Henderson:

The Central Oregon Cities Organization (COCO) appreciates being a member of the Rules Advisory Committee and would like to thank you for an inclusive, efficient and well organized rulemaking effort.

COCO was formally created in 2002 and has grown to include the cities of Bend, Culver, La Pine, Madras, Maupin, Metolius, Prineville, Redmond and Sisters. COCO's purpose is to effectively and efficiently promote common interests of the cities in Central Oregon for issues such as transportation, economic development, school funding, tax reform, and water. COCO has specifically established a water subcommittee that meets each month to discuss basin-wide water issues, including these proposed rules.

Since 2002, new groundwater uses in the Deschutes Basin (the main water supply for COCO's members) require "mitigation." Historically, this mitigation has been developed in partnership with irrigation districts in the basin. However, even during the height of City/district collaboration the process for mitigation credit establishment was unpredictable, costly, time consuming and out of sync with long-term planning needs. With recent events in the Deschutes Basin (such as the need for some irrigation districts to forego winter storage to provide habitation restoration), the districts are feeling water supply insecurity and the historic process for establishing mitigation credits has all but ceased. This new reality coincided with the Bureau of Reclamation's 2016 Upper Deschutes Basin Study, which among other things estimated the need for up to 16,000 acre-feet of mitigation to meet the 50-year City and private water provider projected groundwater mitigation demand.

The proposed revisions to the rules in Chapter 690, Division 522 are not the long-term answer for addressing the basin's mitigation supply issues. However, the proposed revisions to 690-522-0050 and 690-522-0060 will provide needed flexibility to utilize existing mitigation that was established by legally protecting water instream. In particular, the proposed revisions to 690-522-0060 may facilitate the availability of mitigation credits in the Little Deschutes Zone of Impact, an area chronically lacking mitigation needed for groundwater pumping.

Meeting the Deschutes Basin's mitigation demand is of critical importance to COCO and a key component of a thriving Central Oregon economy. We applaud the Department for taking this action and taking this small but important step.

COCO supports the proposed changes to OAR Chapter 690, Division 522 and strongly encourages the Commission to adopt the rules as proposed.

Sincerely,

George Endicott,
Chair, Central Oregon Cities Organization

Received by OWRD

JAN 30 2020

Salem, OR



Oregon

Kate Brown, Governor

Department of Environmental Quality
Eastern Region Bend Office
475 NE Bellevue Drive, Suite 110
Bend, OR 97701
(541) 388-6146
FAX (541) 388-8283
TTY 711

January 30, 2020

Sarah Henderson
Flow Restoration Program Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

RE: ODEQ's Comments on Proposed Division 522 Rulemaking

Dear Ms. Henderson,

The Oregon Department of Environmental Quality (ODEQ) appreciates the opportunity to submit comments on the proposed Division 522 Rulemaking. The Deschutes Ground Water Mitigation Program prevents streamflow in the Deschutes River from being diminished by water withdrawals in order to protect scenic waterway flows, fish habitat, designated beneficial uses, and other water uses. Maintaining flow in the Deschutes River is essential for maintaining water quality in the Deschutes River. ODEQ is supportive of the Deschutes Ground Water Mitigation Program.

The proposed Division 522 Rulemaking has two purposes. The first purpose is to allow mitigation water to be turned into mitigation credits. Mitigation water is created when a permittee transfers or leases a water right instream to mitigate for a new use. Sometimes the permittee does not develop the full amount of water that they proposed to develop in their permit. In those situations, they might want to sell the extra mitigation water they created but did not need. The proposed rule allows permittees to convert their mitigation water into mitigation credits so that they can sell the extra mitigation credit that they did not use.

ODEQ recommends that the mitigation credit must have the same zone of impact (ZOI) as the mitigation water. If the ZOI was not determined for the mitigation water, then the ZOI should be determined before it can be converted into a mitigation credit. For example, if the mitigation water is an instream water right in the Little Deschutes, it cannot be used as a mitigation credit for a project that has localized impact on the Crooked River.

The second purpose is to allow permit holders with more than one municipal or quasi-municipal permit to reassign mitigation credits from one permit to another.

ODEQ recommends that mitigation credits may only be reassigned if the mitigation credit has the same ZOI as the use to be mitigated.

Received by OWRD

JAN 30 2020

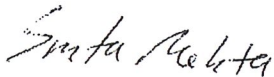
Salem, OR

In addition to the above comments on the proposed Division 522 rulemaking, ODEQ has the following ongoing concerns about the Deschutes Ground Water Mitigation Program.

- Irrigation efficiencies increase with new technology over time and result in more water loss to evapotranspiration and less water returned to streams through return flow. The Deschutes Ground Water Mitigation Program needs to periodically revise its consumptive use coefficients to accurately reflect irrigation efficiencies in the basin.
- In situations where a new water use results in a measurable and immediate impact on a specific stream reach, the corresponding mitigation credit must mitigate for the loss of streamflow in the same location, same season, and same volume of that impact. For example, if a permittee withdraws water from a well that is determined by OWRD's Groundwater Section to diminish streamflow in a stream reach by 1 cfs in the summer, then mitigation for that use should restore 1 cfs to that stream reach in the summer. This type of mitigation is especially necessary to protect water quality in stream reaches that are 303(d) listed for temperature, dissolved oxygen, or pH because these water quality characteristics are particularly sensitive to changes in streamflow.

Thank you for the opportunity to share our comments. If you have any questions, you can contact me at 541-633-2022.

Sincerely,



Smita Mehta
TMDL Basin Coordinator

Received by OWRD

JAN 30 2020

Salem, OR

JAN 22 2020

Salem, OR

In Response to Notice of Proposed Rulemaking Chapter 690 Water Resources Department

Thank you for taking the simple tools enacted in the late 1980's and creating a program which attempts to acknowledge and sustain the Deschutes Basin hydrological and aquifer resources.

The proposed rules seem to offer more flexibility in "using" the benefits from committed "mitigation water", and, as I understand it, will solve some of the administrative issues in the current program. They appear reasonable as long as the data actually supports the premise that the aquifers can afford the additional water extraction and the capped limits on the program are not excessive for aquifer sustainability.

That being said, I would like to offer several observations and concerns of the basic premises that are assumed or currently required in the mitigation program and in water management.

Gannett's, Lite's, Collins' and other's works in the basin's hydrology have certainly enhanced our understandings of the interrelationships of ground and surface waters; the Basin Study Workgroup's (BSWG') effort has brought the hydrology, precipitation projections, water quality, biology and irrigation practices – both its successes and faults – into the equation. But none of this newer knowledge or nuance seem to have impacted the old laws and their precepts or be reflected in the proposed rulemaking, notwithstanding Mr. Gannett's being chair of the Rule Making Advisory Committee. Even with the capped limit of mitigation water eligibility, how we perceive and manage water resources deserve our best efforts.

To wit:

- ORS 536.310 (penned in 1955) is referenced as the overriding principle of water management
 - (2) "It is in the public interest that integration and coordination of uses of water and augmentation of existing supplies for all beneficial purposes be achieved for the maximum economic development thereof for the benefit of the state as a whole"
 - (12) When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire to use them, preference shall be given to human consumption . . . and for livestock consumption . . . and thereafter other beneficial purposes . . . consistent with the principles of chapter 707, Oregon Laws 1955." (AKA ORS 536.320)
- ORS 536.320 (amended in 2015) requires the formulation of an "integrated state water resources strategy" in cooperation with multiple agencies, communities and public. It also requires "The Water Resources Commission shall review and update the integrated state water resources strategy every five years". It also provides for the development of "place-based integrated water resources" strategies addressing waters that are from sources within a single drainage basin or within an area that is a subset of a single drainage basin.
- OAR 690-521-0200 defines the "general zone of impact" appearing in OAR 690-505 relative to the Deschutes Basin means anywhere above the Madras gage on the Lower Deschutes River or, for wells . . . [having] a localized impact on surface water, anywhere within the impacted subbasin . . . as identified by the Department". OAR 690-505-0610 (4) codifies this concept by "mitigation water must be provided within the general zone of impact"

Considerations of mitigation and aquifers:

1. I hope this rulemaking does not constitute the “review and update” of the integrated state water resources strategy or suffices for a placed based strategy as mentioned in ORS 536.320
2. Having previously demonstrated the integral relationship of groundwater and surface water in the Deschutes Basin, Gannett et al published in 2001, data suggesting that despite the overall flow’s of groundwater in the Basin being bounded by The Deschutes Formation lava flows in the Upper Deschutes Basin and the John Day Formation and coalescing in the region of Pelton Dam, there were significant variations in aquifer recharge rates across the Basin per a “deep percolation model” with many wells populating regions with those different rates. (Illustrations attached). In the same publication were recharge projections of waters created by canal and on-farm losses [up to 1995 data] (illustration attached). In 2013, based on two decades of data, Gannett and Lite confirmed the impacts of canal loss on local well water levels with the caveat that changes in precipitation levels seemed to exert a far greater impact than did the canal waters. They also noted that “effects from increased pumping and decreased irrigation canal leakage extend south into the Bend area” and that the monitored wells were more heavily impacted by levels and flow in the Deschutes River than by either of the other “stressors” (climate and pumping) of the system. The Redmond area was not as fortunate in escaping those stressor impacts. BSWG data expands the understanding of what and how “stressors” are currently impacting the Basin.
 - o Canal leakage will continue to abate from current and planned piping projects.
 - o Data suggests that there are, indeed, variations in regional recharge and aquifers. In fact, known “perch aquifers” are purported to exist within irrigation districts.
 - o The focus of mitigation criteria for the Basin addresses only surface water as measured at the “Madras gage” as a surrogate for the underground aquifer(s)
 - o The current “zone of impact” for mitigation purposes recognizes only the larger southern basin, not any of the subzones. That allows water to be mitigated by transfer to surface waters or “aquifer recharge” anywhere in that larger area as long as the verification metric (vide supra) is satisfied. There is no requirement that the aquifer location of the extracted water, at minimum, have a recharge potential from the surface water replaced as mitigation for that extraction. This somehow seems counterintuitive, given Gannett’s evolving findings, that extraction from a low recharge rate aquifer in, e.g. the Little Deschutes Subzone near La Pine, will be adequately sustained and mitigated by inserting surface water into the system north of Bend.
3. The recent BSWG work also updated some of this older data, provided newer modeling as Gannett improved groundwater algorithms and stressed the additional changes expected in water supply from climatic conditions and ongoing efforts by districts in canal piping and, hopefully, on-farm efficiencies.
 - o These refinements are not incorporated into either a general or subzone integrated water resource strategy for either management or mitigation currently
 - o The newer modeling shows good correlation with historical data but has not been adequately vetted as yet for reliable predictive value.
 - o These are critical considerations for both surface and ground water predictions, management and mitigation strategies as precipitation cycles and proximity to river or leaking canals had significant impact on aquifer integrity.
4. The evolving USFW Habitat Conservation Plan (HCP) may shift the availability of mitigation water by its requirements or change regional aquifer recharge patterns because of where water is stored and managed as compared to the past practices

Alternatives ?

1. Include contemporary understanding and considerations in addition to those listed in ORS 536.310 as the “overriding principle” for water management. Today’s circumstances make water a critical resource for many aspects of our environment and well-being as well as economics. If the 1955 penned “maximum economic benefit.” provision were assiduously applied today, it might require most water be diverted towards marijuana productions and North Unit agriculture.
2. Include preservation of aquifers in the equation along with preserving surface water stream flows as the goal and metric of mitigation. This may require the designation of, at minimum, subzones or even smaller regions as “impact zones” if mitigation water provided distant to an extraction point is not deemed adequate to protect an aquifer.
3. Though only indirectly related to mitigation by its potential to provide adequate surface water supplies for aquifer recharge, utilize the existing provisions of ORS 536.320 to allow a “place-based integrated water resource strategy” for the Basin. Even if only as a temporary pilot project, allow our talented and well-respected regional and local OWRD watermasters and staff along with the Basin’s districts to consider water as a variable quantity resource and to experiment with water exchanges and management practices that are not necessarily restricted by priority rights or regulations that would preclude sharing the water resource where it would be put to the best “economic” or biological use based on Basin consensus. No “rights”, legal standing or major water laws should have to be changed for such a temporary experiment.

Thank you for the opportunity to comment

Jim Powell
Bend, Oregon

Received by OWRD

JAN 22 2020

Salem, OR

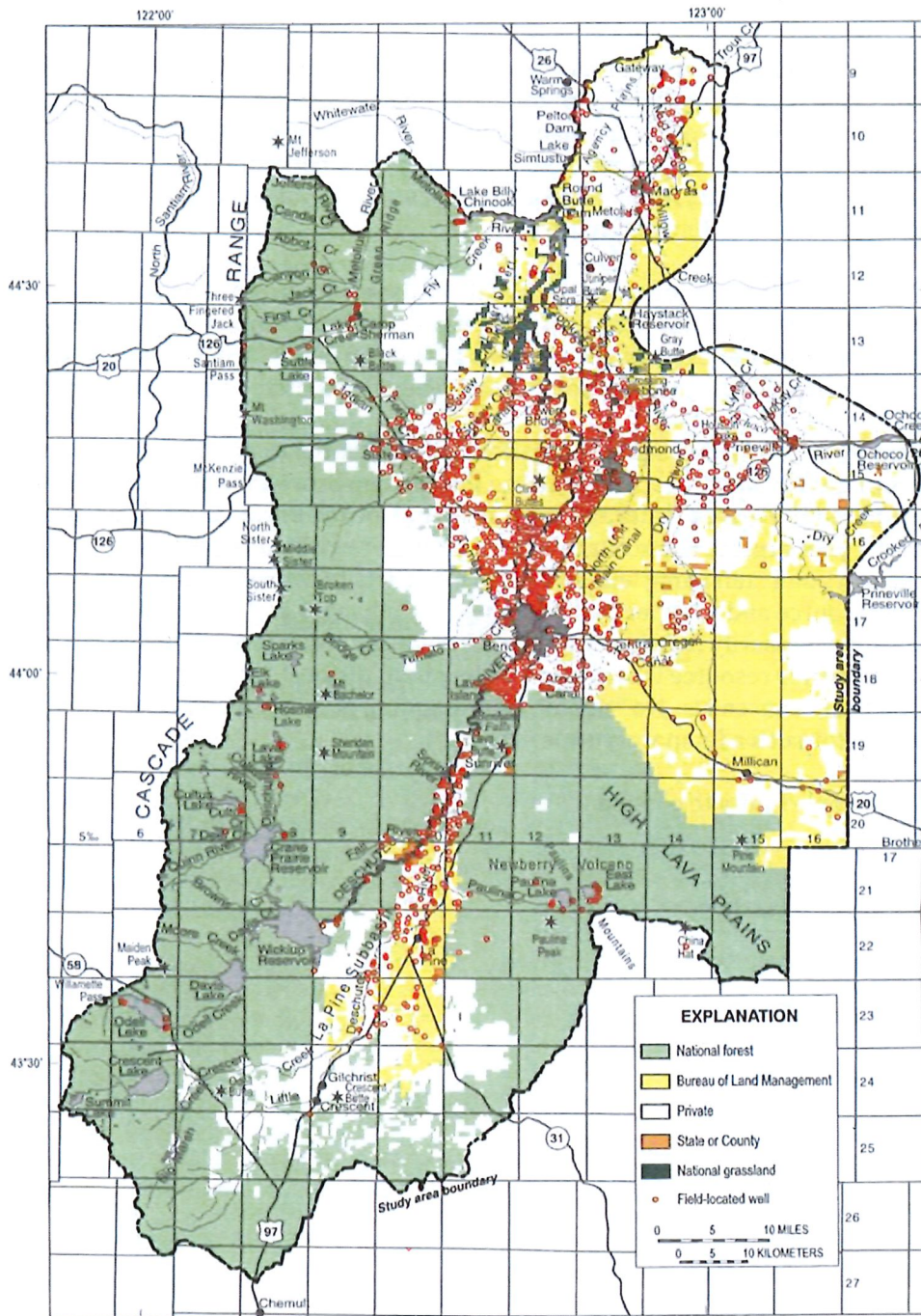


Figure 2. Location of field-located wells and land ownership in the upper Deschutes Basin, Oregon.

Received by OWRD

JAN 22 2020

Salem, OR

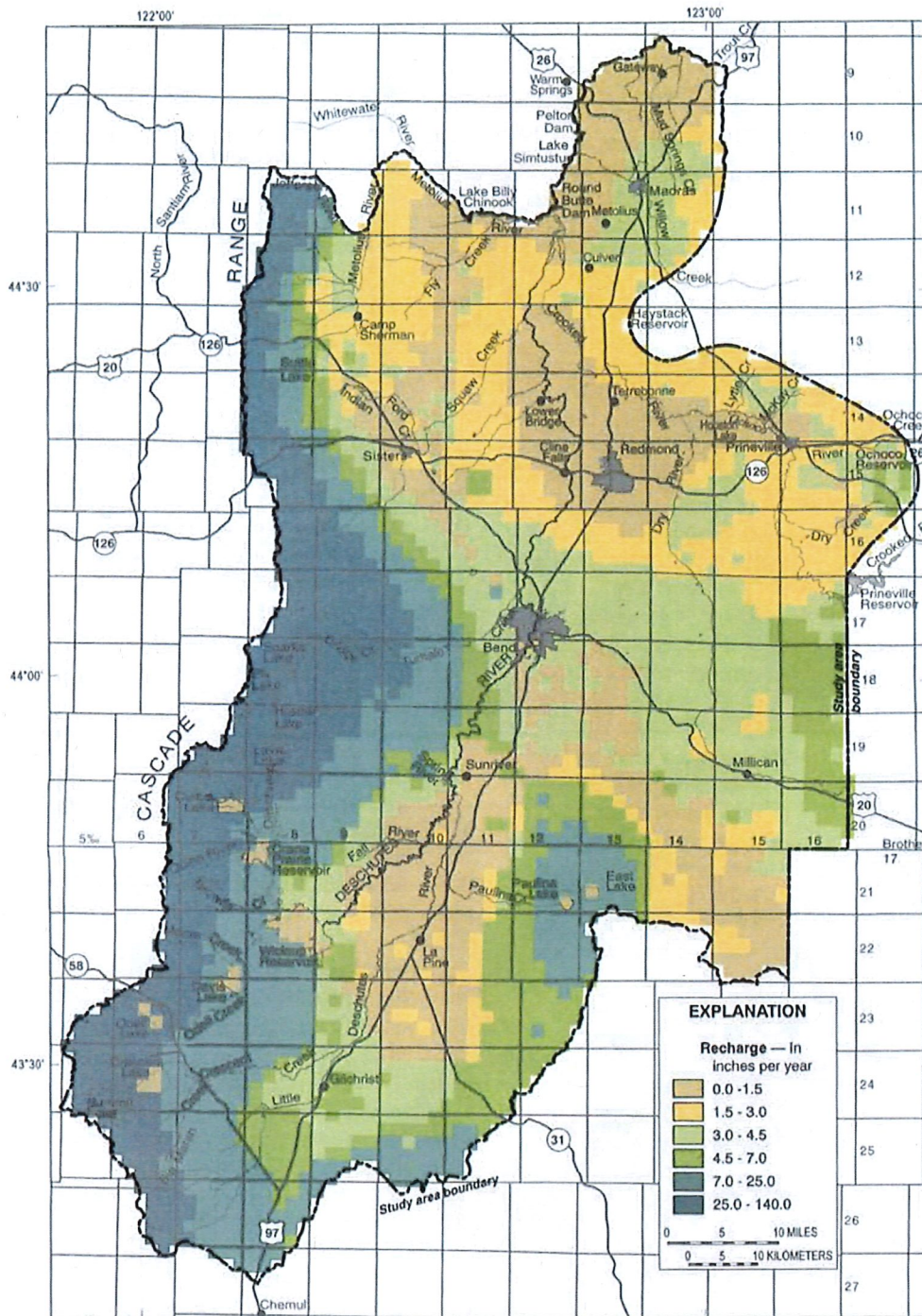


Figure 6. Deep Percolation Model grid and estimated recharge from infiltration of precipitation, 1993-95.

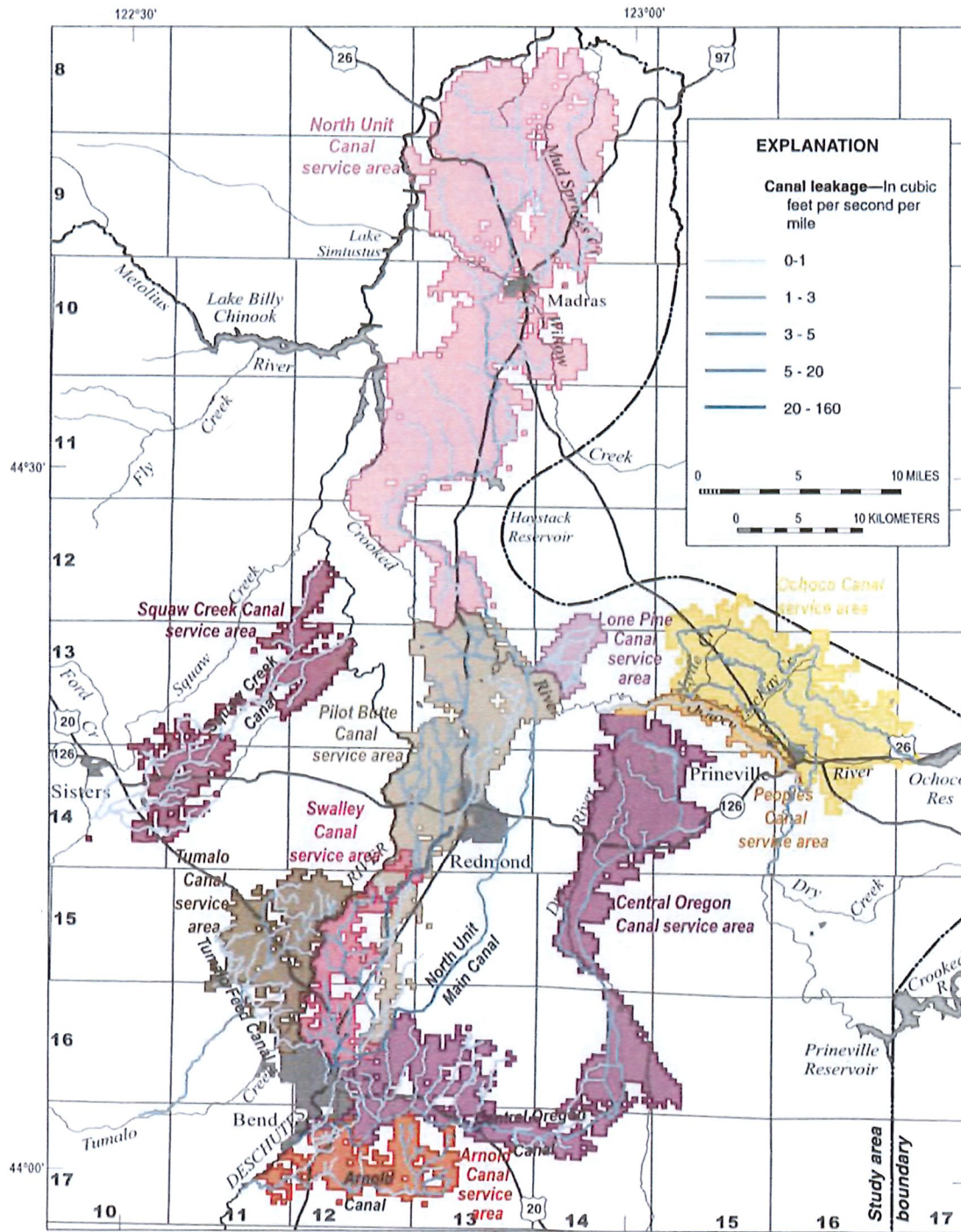
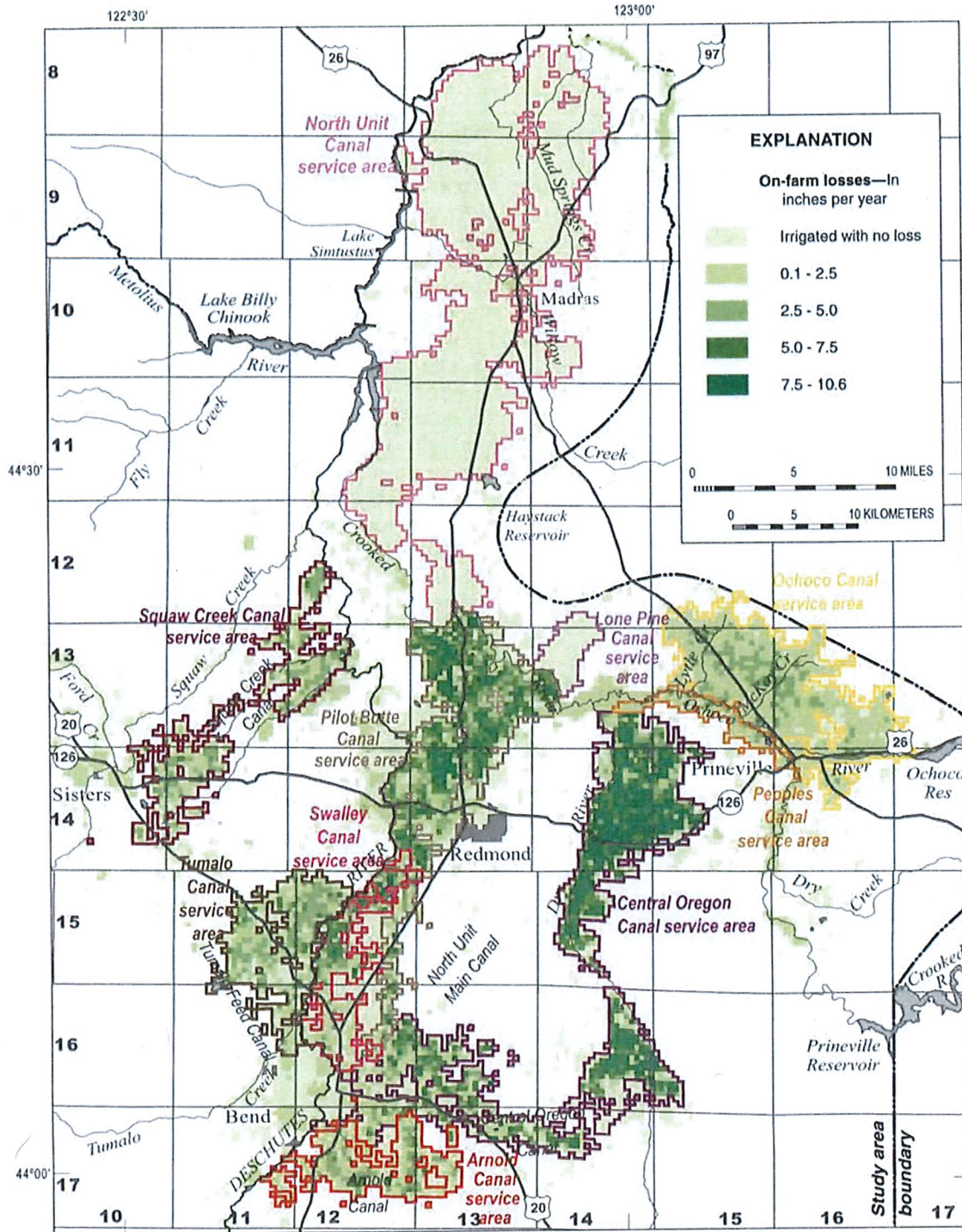


Figure 9. Mean annual recharge from canal leakage and on-farm losses in the upper Deschutes Basin, Oregon, 1993-95.



Received by OWRD

JAN 22 2020

Salem, OR



To: Oregon Water Resources Department
 Sarah Henderson
 725 Summer St. NE
 Suite A
 Salem, Oregon, 97301
sarah.a.henderson@oregon.gov

January 31, 2020

Re: "Changing Mitigation Water to Mitigation Credits and Revising Criteria for Reassignment of Permanent Mitigation Credits"

Although further study is necessary for us to better understand the Mitigation program, the League of Women Voters of Deschutes County would like to submit some general comments and concerns at this time.

Due to the difficulty of obtaining current information on groundwater in time for substantive comments we will continue to research this program and its impact on the community and the waters of the Deschutes Basin. Data has been difficult to find on current conditions; the best study we have was done between 1997 and 2008 and not published until 2013. Although funding to upgrade the information systems of the department has not been adequate in the past, we hope that in future the Department will continue to conduct studies and make them easily available online in a timely manner. We appreciate the "Deschutes Ground Water Mitigation Program" publication which has been of help in understanding the program.

We support rules that allow flexibility in assigning use of the waters of the Basin to best practices and highest purpose to manage water for all. Water management and cooperation are a concern and rules may need to change.

The increasing pressure on use and commodification of the ground water is of concern. Two stated goals of the rules are to make Mitigation Credits available in zones that currently do not have them and to make more credits available to bring down the costs. This would allow Municipal and quasi-municipal entities to meet the needs of growing populations but may mask the depletion of the resource to the public.

We are fortunate in the Region to have Water Masters that are dedicated professionals and public servants. We are trusting OWRD to oversee the program with a dedication to long term water reliability for all affected. All life needs water and the vast reservoir of high-quality water in the Deschutes Aquifer is of inestimable value.

Thank you for this opportunity to comment.

League of Women Voters of Deschutes County
 Geri Hauser, President

Prepared by:

Mary Powell, Water Resources Chair mbp@bendbroadband.com

Received by OWRD

JAN 31 2020

Salem, OR

League of Women Voters of Deschutes County, PO Box 1783, Bend OR 97709

Department Response to Public Comments

(Written) Public Comment #1 – ClydeSnow, LLC on behalf of Shanda Asset Management, LLC

“Shanda appreciated the in-depth process and consideration of the Rules Advisory Committee in the drafting of these proposed rules and supports the rules in concept and as drafted. Conversion of project mitigation water to mitigation credits, from a time when the program was in its infancy to now when implementation is better understood, will enable water to be utilized and protected as intended by the program. Shanda understands the process will be guided by the underlying orders approving the original mitigation projects and supports that approach as both equitable and efficient. Simple conversion of mitigation water to mitigation credits will provide clarity and a currency that will benefit the program, the river and the public. We appreciate the efforts of OWRD in the evolution of the Deschutes Basin Mitigation Program.”

Department Response to #1

The comments are supportive of the proposed changes to the rules. No changes to the proposed rules were made as a result of this comment.

(Written) Public Comment #2 – Jim Powell, Bend, Oregon

“The proposed rules seem to offer more flexibility in “using” the benefits from committed “mitigation water”,..., They appear reasonable as long as the data actually supports the premise that the aquifers can afford the additional water extraction and the capped limits on the program are not excessive for aquifer sustainability.”

“Additionally, offering several observations and concerns of the basic premises that are assumed or currently required in the mitigation program and in water management; the overriding principle of water management, the integrated state water resources strategy, defining the general zone of impact, and localized impacts on surface water. Considerations of mitigation and aquifers: hope rulemaking does not constitute the “review and update” of the integrated state water resources strategy or placed based strategy; recent Basin Study Workgroup’s (BSWG) expand on the “stressors” that are currently impacting the Basin, such as canal leakage, recharge, aquifers, mitigation criteria, zone of impact; have updated older data, not yet vetted.”

“Alternatives include contemporary understanding and consideration in addition to those listed in ORS 536.310 as the “overriding principle” for water management. Include preservation of aquifers in the equation along with preserving surface water stream flows as the goal and metric of mitigation. And though only indirectly related to mitigation by its potential to provide adequate surface water supplies for aquifer recharge, utilize the existing provisions of ORS 536.320 to allow a place based integrated water resource strategy for the Basin. Even if only as temporary pilot project.”

Department Response to #2

The Department staff reviewed this comment. The draft rules are not allowing additional groundwater pumping. The bulk of these comments extend beyond the scope of this rulemaking. No changes to the proposed rules were made as a result of this comment.

(Written) Public Comment #3 – Central Oregon Cities Organization (COCO)

“COCO appreciates being a member of the Rules Advisory Committee and would like to thank you for an inclusive, efficient and well organized rulemaking effort. COCO’s purpose is to effectively and efficiently promote common interests of the cities in Central Oregon for issues such as transportation, economic development, school funding, tax reform, and water; we meet monthly to discuss basin wide water issues. Historically, this mitigation has been developed in partnership with irrigation districts in the basin. However then was unpredictable, costly, time consuming and out of sync with long-term planning needs. Recent events in the Deschutes Basin, the districts are feeling water supply insecurity and the historic process for establishing mitigation credits has all but ceased. This new reality coincided with the BOR 2016 Upper Deschutes Basin Study, which among other things estimated the need for up to 16,000 acre-feet of mitigation to meet the 50 year City and private water provider projected groundwater mitigation demand.”

“The proposed revisions to the rules are not the long-term answer for addressing the basin’s mitigation supply issues, however will provide needed flexibility to utilize existing mitigation that was established by legally protecting water instream. In particular, may facilitate the availability of mitigation credits in the Little Deschutes Zone of Impact, an area chronically lacking mitigation needed for groundwater pumping. Meeting the Deschutes Basin’s mitigation demand is of critical importance to COCO and a key component of a thriving Central Oregon economy. We applaud the Department for taking this action and taking this small but important step. COCO supports the proposed changes and strongly encourages the Commission to adopt the rules as proposed.”

Department Response #3

The comments are supportive of the proposed changes. No changes to the proposed rules were made as a result of this comment.

(Written) Public Comment #4 – Oregon Department of Environmental Quality (ODEQ)

“ODEQ appreciates the opportunity to submit comments on the proposed rulemaking. The Program prevents streamflow in the Deschutes River from being diminished by water withdrawals in order to protect scenic waterway flows, fish habitat, designated beneficial uses, and other water uses. Maintaining flow in the Deschutes River is essential for maintaining water quality in the Deschutes River. ODEQ is supportive of the Deschutes Groundwater Mitigation Program. ODEQ recommends that the mitigation credit must have the same zone of impact as the mitigation water. If the zone was not determined for the mitigation water, then the zone

should be determined before it can be converted into a mitigation credit. For example, if the mitigation water is an instream water right in the Little Deschutes, it cannot be used a mitigation credit for a project that has localized impact on the Crooked River. ODEQ recommends that mitigation credits may only be reassigned if the mitigation credit has the same zone as the use to be mitigated.”

“In addition to the comments above, ODEQ has the following ongoing concerns about the Deschutes Ground Water Mitigation Program; irrigation efficiencies increases and result in more water loss to evapotranspiration and less water returned to streams through return flow. The Program needs to periodically revise its consumptive use coefficients; in situations where a new water use results in a measurable and immediate impact on a specific stream reach, the corresponding mitigation credit must mitigate for the loss of streamflow in the same location, same season, and same volume of that impact.”

Department Response #4

The draft rules support the recommendation made in the comment pertaining to the need for mitigation credits having the same zone of impact as the as the location of mitigation water. Some of the comment extends beyond the scope of this rulemaking. No changes to the proposed rules were made as a result of this comment.

(Written) Public Comment #5 – League of Women Voters of Deschutes County (LWV)

“Although further study is necessary for us to better understand the Mitigation program, the LWV would like to submit some general comments and concerns at this time. Due to the difficulty of obtaining current information on groundwater in time for substantive comments we will continue to research this program and its impact on the community and the water of the Deschutes basin. Data has been difficult to find on current conditions; the best study we have was done between 1997 and 2008 and not published until 2013. Although funding to upgrade the information systems of the department has not been adequate in the past, we hope that in future the Department will continue to conduct studies and make them easily available online in a timely manner. We appreciate the “Deschutes Ground Water Mitigation Program” publication which has been of help in understanding the program. We support rules that allow flexibility in assigning use of the waters of the Basin to best practices and highest purpose to manage water for all. Water management and cooperation are a concern and rules may need to change.”

“The increasing pressure on use and commodification of the ground water is of concern. Two stated goals of the rules are to make Mitigation Credits available in zones that currently do not have them and to make more credits available to bring down the costs. This would allow Municipal and quasi-municipal entities to meet the needs of growing populations but may mask the depletion of the resource to the public.”

“We are fortunate in the Region to have Watermasters that are dedicated professionals and public servants. We are trusting OWRD to oversee the program with a dedication to long term

water reliability for all affected. All life needs water and the vast reservoir of high-quality water in the Deschutes Aquifer is of inestimable value. Thank you for this opportunity to comment.”

Department Response #5

The comments do not suggest changes to the draft rules. The Department did not make any changes to the draft rules as a result of this comment.

(Verbal at Hearing) Public Comment #6 – Patrick Griffiths, City of Bend

“Hi Dwight, thank you. For the record, Patrick Griffiths the Water Resources Manager with the City of Bend. I’m here today in support of the proposed rules, um, simply, we think the added flexibility is a good thing for the rules as they stand today. We also feel that they still remain protective of the initial program intent. And that’s it, we again thank the department for all the hard work with the rules committee and all of the back and forth that goes on administrative support for the rules process. So thanks again for being here Dwight, we appreciate it.”

Department Response #6

The comments are supportive of the draft rules. The Department did not make any changes to the draft rules as a result of this comment.

(Verbal at Hearing) Public Comment #7 – John Short, Water right Services, LLC

“Thank you. Bottom line, I’m certainly happy with the direction this is going, I don’t have any issues with the intent. As one comment, I would say that other than the Metolius Zone, credits are available in every zone, so it’s not for lack of credits that something like this should be done. But, I still think it’s good, and I say that because part of your introduction said that some zones didn’t have credits and that’s incorrect. They’re either, Whychus is the only one where credits are in process but not issued yet, and even those are available for lease. But so, besides that, my only concern on this was, I understand the party that’s wanting to have this rule change happen, and that makes sense to me as far as the old resort property or whatever that had those mitigation made for that resort now wants a plan B. My only comment would be since this proposes to let that mitigation water be used everywhere it was protected, every zone it was protected, not just specifically the zone it was issued to mitigation, is that same flexibility then going to be granted to other credits that are already issued, examples are mitigation projects 168 and mitigation projects 123, where those projects specified a single zone but the water was protected, um, you have to look at it, I didn’t go through every project, practically those are protected on down to the general zone. But those credits currently do not, cannot be used in middle zone or general zone, or little. So I’m just saying, hey, if, it seems like we should have it one way or the other, but not a special case for one credit holder, one mitigation holder and not for those others that are out there.

Department Response #7

The Department agrees that there are currently mitigation credits in every zone except the Metolius. The proposed rules would give the ability to have more credits available in some of the zones of impact.

In the final orders for the seven mitigation water projects that are at issue in this proposed rulemaking, the Department included a finding of fact that stated which zones of impact the instream reach would benefit and that the mitigation water is protected through any possible downstream reaches. The two projects that are referenced in the comment do not have a finding of fact in the final orders describing which additional zones of impact, if any, the mitigation water would benefit and the mitigation water was not protected into any downstream reaches. This was done in concert with the requests from the applicants. The Department did not make any changes to the draft rules as a result of this comment.

Final Proposed Rules

1 **DIVISION 522**2 **DESCHUTES BASIN WATER MANAGEMENT**3
4 690-522-00105 Introduction Purpose

6 The following rules are ~~based on recommendations of a Work Group convened by the Water Resources~~
 7 ~~Department pursuant to House Bill 3494 (2005 Oregon Laws Ch. 669) and are intended to operate in~~
 8 conjunction with the Deschutes Basin Ground Water Mitigation Rules in OAR ~~690-d~~Chapter 690, Divisions
 9 505, and the Deschutes Basin Mitigation Bank and Mitigation Credit Rules in OAR ~~690-d~~Chapter 690, Division
 10 521.

11
12 Statutory/Other Authority: ~~ORS 536.025,~~ 536.027, 537.74613 Statutes/Other Implemented: ~~ORS 669, OL 2005~~537.746, Or Laws 2005, ch 669, Or Laws 2011, ch 69414
15 690-522-002016 Applicability ¶

17
18 The following rules apply to final orders, permits, and certificates issued pursuant to OAR ~~690-d,~~Division
 19 505 after September 27, 2002, including but not limited to the change of mitigation water into mitigation
 20 credits.

21
22 Statutory/Other Authority: ~~ORS 536.025,~~ 536.027, 537.74623 Statutes/Other Implemented: ~~ORS 669, OL 2005~~r Laws 2011, ch 694, 537.746, Or Laws 2005, ch 66924 690-522-002525 Definitions26 The following definitions apply to OAR chapter 690, division 522.¶27 (1) "Department" means the Oregon Water Resources Department.¶

28 (2) "Mitigation credit" is a means of accounting for mitigation water, calculated in acre-feet, made available
 29 by a mitigation project. One mitigation credit is equal to one acre-foot of mitigation water. Mitigation
 30 credits are determined and awarded by the Department upon completion of the project and verification
 31 by the Department.¶ (3) "Mitigation obligation" means the amount of mitigation water needed for the
 32 appropriation of groundwater as determined by the Department under OAR chapter 690, division 505,
 33 calculated in acre-feet.¶

34 (4) "Mitigation project" means a project approved by the Department that results in mitigation water.¶

35 (5) "Mitigation water" means water that is legally protected for instream use from implementation of a
 36 mitigation project, calculated in acre-feet.

Final Proposed Rules

1 Statutory/Other Authority: ORS 536.027, ORS 537.746

2 Statutes/Other Implemented: Or Laws 2011, ch 694, ORS 537.746, Or Laws 2005, ch 669

3 690-522-0030

4 Ground Water Appropriations within the Deschutes Ground Water Study Area ¶

5
6 The cumulative rate specified under 690-505-0500(1) shall not include:¶

7 (1) Rates associated with offsets pursuant to 690-505-0610(8);¶

8 (2) Rates associated with applications withdrawn after final order issuance pursuant to 690-505-0620;¶

9 (3) Portion of rates approved by a final order issued under 690-505-0620 but not included in a water right
10 permit issued following satisfaction of the mitigation requirement;¶

11 (4) Rates associated with expired final orders pursuant to 690-505-0620(2);¶

12 (5) Portions of rates associated with permits issued pursuant to 690-505-0620 and subsequently cancelled;¶

13 (6) Rates associated with certificates issued pursuant to 690-505-0620 and subsequently canceled; and¶

14 (7) Rates associated with the portion of use originally authorized under a permit issued pursuant to 690-
15 505-0620 and not included in a subsequent certificate.

16

17 ~~Statutory/Other Authority: ORS 536.025, 536.027, 537.746~~

18 ~~Statutes/Other Implemented: Ch. 669, OL 2005; Ch. 537.746, Or Laws 2005, ch 669, OL 2011~~ Laws 2011,
19 ch 694

20 690-522-0040

21 Incremental Development in the Deschutes Ground Water Study Area ¶

22

23 (1) An incremental development plan under 690-505-0625 for municipal and quasi-municipal ground
24 water permit applicants and permit holders may include offset pursuant to 690-505-0610(8).¶

25 (2) When providing incremental mitigation pursuant to OAR 690-505-0625, a municipal or quasi-
26 municipal ground water permit holder may provide mitigation, offset, or a combination of both during each
27 approved increment to coincide with each stage of development of the permit on the condition that the
28 permit holder does not increase the rate or amount of water diverted under the permit before submitting
29 the corresponding required mitigation or offset and documentary evidence.¶

30 (3) The report required under OAR 690-505-0625(1)(b) shall describe the annual volume of water used
31 and the source of offset and mitigation used for that period.

32

33 ~~Statutory/Other Authority: ORS 536.025, 536.027, 537.746~~

34 ~~Statutes/Other Implemented: ORS 669, OL 2005~~ 537.746, Or Laws 2005, ch 669, Or Laws 2011, ch 694

35 690-522-0050

36 Reassignment of Permanent Mitigation Credits ¶

Final Proposed Rules

1

2 (1) Notwithstanding OAR 690-521-0400(2), the Department may reassign part or all of permanent
 3 mitigation credits that were used to satisfy a mitigation obligation may be reassigned if:¶

4 (a) The ground water permit application to which the credits were assigned is denied or
 5 withdrawn;¶ (b) The ground water permit application to which the credits were assigned is
 6 amended and the mitigation obligation is reduced;¶

7 (c) The final order issued approving the ground water permit application to which the credits were
 8 assigned expires pursuant to OAR 690-505-0620;¶

9 (d) The ground water permit to which the credits were assigned is subsequently cancelled or partially
 10 cancelled resulting in a reduced mitigation obligation;¶

11 (e) The subsequent ground water certificate is issued for less ground water use than originally allowed
 12 under the permit and there is a corresponding reduction in mitigation obligation;¶

13 (f) The subsequent ground water certificate to which the credits were assigned is cancelled, or partially
 14 cancelled resulting in a reduced mitigation obligation; or¶

15 (g) ~~The permit holder holds more than one municipal or quasi-municipal ground water permit~~
 16 ~~issued~~ mitigation credits are assigned to a permit for municipal or quasi-municipal use issued under OAR
 17 690-505-0620 with an incremental development plan under OAR 690-505-0620~~5~~ and the permit holder
 18 requests to re-assign credits from one to another such existing permit to another existing permit of their own
 19 or to another municipal or quasimunicipal entity that holds a groundwater permit issued under OAR 690-
 20 505-0620 with an incremental development plan under OAR 690-505-0625, provided the reassignment is
 21 consistent with the requirements of OAR 690-505-0610 (4) and OAR 690-505-0625. The permit holder
 22 requesting the re-assignment of credits under this provision shall submit to the Department an updated
 23 incremental development plan.¶

24 (2) Mitigation credits available pursuant to this rule may be assigned by applicant or permit or certificate
 25 holder to any person or mitigation bank or assigned to satisfy a mitigation obligation.

26

27 Statutory/Other Authority: ~~ORS 536.025~~, 536.027, 537.746

28 Statutes/Other Implemented: ~~Ch. 669, OL 2005; Ch. 537.746, Or Laws 2005, ch 6694, OL 2011~~ Laws 2011,
 29 ch 694

30 690-522-0060

31 Change of Mitigation Water into Mitigation Credits

32 (1) For mitigation project applications submitted after the adoption of these rules, pursuant to 690-521-
 33 0300 (4), any person requesting mitigation credits through completion of a mitigation project, identified
 34 in 690-521-0300 (1), shall, in any application associated with the mitigation project, notify the
 35 Department that they intend to use the project to establish mitigation credits. For those that do not
 36 request to establish mitigation credits under the proposed project, the Department will consult before
 37 moving forward. ¶

38 (2) To apply to change mitigation water into mitigation credits a written request must be submitted to the

Final Proposed Rules

1 Department no later than December 31, 2021.¶

2 (3) The written request to change mitigation water generated by a mitigation project into mitigation credits
 3 may be submitted to the Department by the permit holder(s) of record or certificate holder(s). The
 4 request will include:

5 (a) The application, permit, or certificate number for which the mitigation water was established; ¶

6 (b) The mitigation project number; and ¶

7 (c) Any other information requested by the Department. ¶

8 (4) Provided the written request is consistent with (2) and (3) of this section, the Department may issue an
 9 order to approve the change of mitigation water generated by the mitigation project into mitigation credits,
 10 consistent with the order approving the mitigation project. The order will: ¶

11 (a) Award mitigation credits in any zone(s) where the mitigation project water is legally protected
 12 instream;¶

13 (b) Assign the awarded mitigation credits to the existing permit or certificate to which the mitigation
 14 water was originally assigned and used to satisfy the originating mitigation obligation.¶

15 (5) After the award and assignment of the mitigation credits, the mitigation water will no longer be
 16 valid to meet a mitigation obligation.¶

17 (6) Approved mitigation credits become subject to the provisions of OAR Chapter 690, Division 521, and
 18 OAR Chapter 690, Division 522. Mitigation credits can only be reassigned in accordance with OAR 690-522-
 19 0050.

20
 21 Statutory/Other Authority: ORS 537.027, ORS 537.746

22 Statutes/Other Implemented: ORS 537.746, Or Laws 2005, ch 669, Or Laws 2011, ch 694