



November 3, 2022

Project No. 2111007

Corum Ketchum, Interim City Manager
City of John Day
450 East Main St
John Day, OR 97845

c/o: Aaron Lieuallen, Senior Project Manager
c/o: Nick Green, Catalyst Public Policy Advisors

RE: INSTREAM TRANSFER ELIGIBILITY FOR GRANT FUNDING

Dear Mr. Ketchum:

On July 28, 2022, the City of John Day (City) received approval of their Innovation Gateway Adaptive Water Reuse grant proposal (application #WPG-0034-21) from the Oregon Water Resources Department (OWRD). The grant approval comes with seventeen Conditions of Agreement, most of which pertain to regular reporting, routine inspection, and record keeping associated with the project. Condition #17 requires the City to transfer eligible water rights instream that are connected to City lands purchased for the construction of the Water Reclamation Facility (WRF). The release of grant funds is dependent upon satisfaction of this condition.

In the grant application, the City proposed the instream transfer of nine water right certificates as an environmental benefit to the John Day River of the proposed project. The City identified these nine water rights as being connected, at least in part, to lots purchased by the City for WRF purposes. Five of these certificates (Certs. 87480, 36368, 36367, and 85675) were proposed to be transferred instream in their full amounts, totaling 1.175 cfs (527 gpm) and 17.28 ac-ft. A portion of each of the remaining four certificates (Certs. 48000, 25786, 82663, and 11725) was proposed for instream transfer. The use types of the nine certificates included mining, industrial, manufacturing, irrigation, and livestock. In total, the City proposed about 1.177 cfs (530 gpm) and 18.7 ac-ft of water rights to dedicate instream as part of the grant application.

CwM-H2O (CwM) prepared a Water Rights Assessment and Action Plan technical memorandum for the City in early 2022 (draft reported dated February 16, 2022). In this report, CwM evaluated the history and current status of the nine certificates listed for instream transfer in the grant application. While none of the certificates have been cancelled by the OWRD, there are significant questions regarding their history, causes of non-use, and location of the certificates on City properties.

The successful instream transfer of any of the nine proposed certificates will require communication and collaboration with counsel and with the OWRD. Many of the rights may require economic rebuttal of forfeiture to avoid their cancellation. CwM proposes four tasks to

assist the City with clarifying the status of the water rights, addressing the instream transfer condition of the OWRD grant approval, and preparing instream transfers for eligible rights:

- Task 1 – Summary and Clarification Letter
- Task 2 – Rebuttal of Forfeiture Discussion with Counsel
- Task 3 – Pre-Application Meetings with OWRD
- Task 4 – Preparation of Instream Transfers for Eligible Rights

Scope of Work

Task 1 – Summary and Clarification Letter

CwM's February 2022 report to the City discusses the known history of each of the nine water rights associated with the grant application. The report also includes recommendations regarding instream transfers and the potential need for rebuttal of forfeiture for select certificates. In Task 1, CwM will prepare a concise clarification letter summarizing the key findings and conclusions of the report and discussing any information gaps remaining in the process.

One finding of the report was that the water right area of use and the City taxlots listed in the application did not appear to overlap for two of the certificates listed for instream transfer (Certs. 11725 and 82663). In order to assess if this conclusion was accurate, CwM will coordinate with City staff to acquire spatial information for all City-owned lands. The comprehensive City property data will be cross-referenced against the OWRD water right database information for the nine listed certificates. The Task 1 summary letter will discuss the findings of this secondary review.

Deliverables: Summary and Clarification Letter

Task 2 – Rebuttal of Forfeiture Discussion with Counsel

Water rights become subject to cancellation by the OWRD after a five-year period of non-use (OAR 690-017-0005). Cancellation does not occur automatically and must be initiated by the OWRD or by the land owner associated with the water right. The February 2022 CwM report found that none of the nine certificates listed for instream transfer had been cancelled. However, all but two of the water rights were found to have been apparently unused for at least 15 years. The preservation of these rights would depend on the successful rebuttal of the assumption of cancellation (OAR 690-017-0800).

There are multiple grounds on which the OWRD's presumption of forfeiture and cancellation can be argued. These include arguments of economic hardship, factors of land use classification, and possible impacts to municipal processes (OAR 690-017-0800). It may be possible to rebut the forfeiture of five of the listed certificates (Certs. 36367, 36368, 48135, 85675, 87480) that were related to lumber mill activities in the City up to the early 2000s on a basis of economic hardship.

As CwM recommended in the February 2022 report, legal counsel should be approached regarding the details of the rebuttal process and the chances of successful rebuttal of these water

rights. In Task 2, CwM will coordinate with the City to meet with legal counsel to discuss the rebuttal process.

Task 3 – Pre-Application Meetings with OWRD

After the completion of Task 2, the City should have a final list of water rights that will be prioritized for instream transfer based on current use status and the possibility of rebutting the assumption of forfeiture. In Task 3, CwM will arrange a meeting with OWRD staff to present the proposed instream transfers.

The intent of these meetings is to inform OWRD of the City’s plans and to receive feedback from the Department on eligibility for transfer. Besides the eligibility of the certificates based on rebuttal of cancellation, a major question for discussion with the Department is the suitability of groundwater rights (Certs. 48135 and 48000) and storage rights (Cert. 36367) for instream transfer in the John Day River.

Deliverables: Summary and Clarification Letter

Task 4 – Preparation of Instream Transfers for Eligible Rights

In Task 4, CwM will prepare instream transfer applications for all of the listed certificates that are deemed eligible for transfer after the completion of Tasks 2 and 3. For this proposal, CwM assumes that at least six instream transfers will be prepared for submittal to the OWRD. This group of six applications would include certificates determined to be valid through regularly use and the industrial rights that are successfully rebuttable. CwM assumes that the mining right (Cert. 11725) and some of the industrial rights may not be eligible for transfer.

Deliverables: Instream Transfer Applications (about 6)

Cost Estimate and Schedule

Please see the attached time and materials cost estimate to provide the above services. CwM estimates that approximately 112 hours of professional time will be required to support the proposed services for an estimated cost of approximately **\$17,480**. This cost does not include the OWRD review fees for the instream transfer applications.

A breakdown of the cost estimate is included as Attachment 1 - Cost Estimate. We anticipate that the proposed tasks can be completed in approximately **8 weeks** of approval of this scope of work and receipt of all necessary water use data from the City.

Contract and Work Order Authorization

Accompanying this scope of work, you will find CwM’s Work Order Authorization (WOA) for the proposal (Attachment 2). Please sign a copy of the WOA and return it for our records. The work

proposed will be completed under Master Services Contract with the City of John Day (dated August 9, 2022). Please do not hesitate to call or email me with any questions.

Sincerely,

CwM H2O, L.L.C.



Robert Long, RG, LHG, CWRE
Principal Consultant

Attachments:

- 1) Cost Estimate
- 2) Work Order Authorization

| Task | Description | Labor Hours | Labor | Outside Services, Affiliates and Expenses | Total |
|---------------|--|-------------|----------|---|----------|
| 1 | Summary and Clarification Letter | 11 | \$1,740 | \$0 | \$1,740 |
| 2 | Rebuttal of Forfeiture Counsel Discussions | 13 | \$2,320 | \$0 | \$2,320 |
| 3 | Meetings with OWRD | 13 | \$2,220 | \$0 | \$2,220 |
| 4 | Preparing Applications for Instream Transfer | 75 | \$11,200 | \$0 | \$11,200 |
| | | | | | |
| | | | | | |
| TOTALS | Project Total | 112 | \$17,480 | \$0 | \$17,480 |

Attachment 2
2111007 – City of John Day Instream Transfer
John Day, Oregon
Work Order Authorization 001

CwM H2O, LLC

| Project Name and Site | Client Reference No. | CwM H2O Project No. |
|-----------------------|----------------------|---------------------|
| Instream Transfers | 2111 | 2111007 |

SCOPE OF SERVICES

The scope of services is outlined in the attached proposal, dated November 3, 2022. This scope includes four tasks intended to review and examine the nine water right certificates proposed for potential instream transfer, discuss the process with legal counsel and OWRD, and to prepare instream transfer applications for selected certificates.

AGREEMENT COST

Time and Materials estimate: \$17,480

SCHEDULE

The project will commence once CwM receives the signed documents. Estimated time of completion is approximately six weeks, assuming all necessary production and consumption data is provided by the City.

The work covered by this Work Order Authorization shall be performed under the terms and conditions of our active contract with the City of John Day. Please endorse the signature page of this document and return to CwM-H2O, LLC. Thank you.

Corum Ketchum, Interim City Manager
City of John Day

CwM-H2O, LLC



By:
Authorized Representative

By:
Authorized Representative
Robert E. Long Jr.

Its:

Its: Member Manager

Date: _____

Date: November 3, 2022