

## INSTREAM TRANSFER FEASIBILITY – SUMMARY LETTER

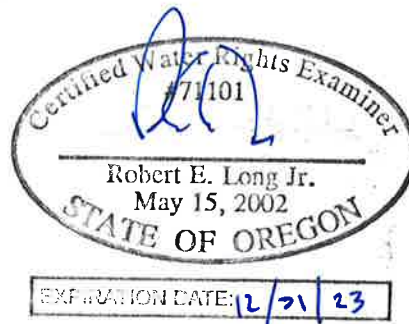
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**Date:** February 10, 2023

**Subject:** Clarification of CwM's February 2022 Water Rights Assessment Report

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On February 16, 2022, CwM-H2O (CwM) submitted a Water Rights Assessment and Action Plan report to the City of John Day (City). The goal of this report was to review the permitting and usage status of three groups of water rights within the City: the City's municipal supply rights, industrial and irrigation rights on City properties, and water rights down-gradient of the proposed new wastewater treatment plan. The second group of water rights, those non-municipal rights on City properties, are subject to Condition #17 of the City's Innovation Gateway Adaptive Reuse project grant funding. The language of the condition is as follows:

*"Water Right Certificates identified in the application are proposed for transfer instream. Water rights that are eligible for instream transfers shall be transferred instream. The Final Report shall include a copy of the final order approving the transfer and the instream certificates confirming the instream use for all water rights determined eligible and practicable by the Department."*

The City's grant application specified nine water certificates as part of the instream conservation portion of the Innovatio Gateway project (Table 1). CwM reviewed the water right files for these nine certificates to assess their usage history, current status, and eligibility for instream transfer if the February 2022 report. None of the nine certificates were found to be cancelled though most, if not all, have significant questions regarding their recent usage status (last five years) or admissibility for rebuttal of cancellation once a new review process is initiated at the Water Resources Department (OWRD).

This letter is intended to concisely summarize the key findings of the previous water right review report related to instream transfer feasibility. This letter also clarifies the questions of City claims to water rights on City properties based on newly acquired information.

Table 1 – Water Rights Listed in Grant Application							
Name	Permit	Cert.	Transfer	Source	Priority Date	Maximum Rate/Volume	Type of Use
Canyon Creek Placer	S-10988	11725	-	Canyon Creek (3 PODs)	8/12/1932	10.0 cfs (4,488 gpm)	Mining
San Juan Lumber	R-3287	36367	-	John Day River	6/3/1963 7/24/1963	17.28 AF	Industrial/ Manufacturing
	S-28872	36368	-	Old Mill Pond	7/23/1963	0.5 cfs (224 gpm)	Industrial/ Manufacturing
Blue Mt. Mill	G-5104	48135	-	Oregon Pine Sump	7/17/1970	0.15 cfs (67 gpm)	Industrial/ Manufacturing
Oregon Pine Products	S-49897	85675	-	John Day River	10/10/1986	0.15 cfs (67 gpm)	Industrial/ Manufacturing
Prairie Wood Products	NA*	87480	T-5865	John Day River	12/31/1863	0.375 cfs (168 gpm)	Industrial/ Manufacturing
Shank	NA*	25786	-	John Day River	12/31/1889	0.1625 cfs (73 gpm)	Irrigation
Grant Development	G-5109	48000	-	Sump in USFS Pond	7/23/1970	0.45 cfs (202 gpm)	Irrigation
Holmstrum	NA*	82663	T-5867	John Day River	12/31/1863 12/31/1875	3.325 cfs (1,492 gpm)	Irrigation and Livestock

\*Derived from the John Day River Decree.

### What Exactly is Required by the Grant Funding Condition?

The OWRD has multiple pathways defined for conserving water rights instream to preserve stream flows for environmental and recreational uses. Leases are short-term placements of a water right instream for a period of up to 5 years. During a lease, instream uses are considered beneficial use, preventing cancellation of a water right for non-use. Water rights revert back to their original state once the lease period expires. Instream transfers move a water right instream for either a time-limited period exceeding 5 years or in a permanent state.

CwM reviewed the language used in the City’s grant application and in the grant approval conditions to determine which type of instream water rights were intended. Based on the wording of Condition #17, which mentions the issuance of instream certificates as a result of the transfers, CwM believes that the grant condition requires the **permanent transfer** of the eligible water rights in question. Once the water right is transferred instream in this way, the City will no longer have the ability to use that water right for any municipal or other out-of-stream purpose.

### What Determines Eligibility?

The grant condition requires that all eligible rights are transferred instream. Eligibility is determined by water right type, history of use, and circumstances of non-use, if applicable. Only surface water

certificates and court-decreed surface water rights are eligible for instream transfers or leases. This immediately removes three of the nine certificates listed in the grant from eligibility:

- Cert. 36367 for **storage** in the San Juan Lumber ponds
- Cert. 48135 for **groundwater use** in industrial applications
- Cert. 48000 for **groundwater use** in irrigation

The remaining six certificates either originated as surface water use permits or from the John Day River Decree in 1930 and are therefore eligible for instream transfer based on their water right type. CwM next considered the usage history of the rights. Water rights not used at least once every five years are subject to cancellation. Cancellation does not occur automatically and must be initiated by the Department or by the water right holder. Though the OWRD did start the cancellation process for Cert. 11725 in the early 1990s, none of the nine water rights listed in the grant application or grant condition are currently listed as cancelled. However, CwM found that only two of the certificates, Cert. 25786 and Cert. 82663, show possible evidence of usage in the last five years based on available aerial photographs.

The presumption of cancellation for water rights that have not been used for five or more years may be rebutted under a variety of conditions defined in OAR 690-017-0800. Water rights with periods of non-use may only be eligible for instream transfer if the presumption of cancellation is rebuttable. It is CwM's understanding that the City may be able to refute the presumption of cancellation for the remaining surface water certificates under two of the six grounds for rebuttal:

- *A finding of forfeiture would impair the rights of cities and towns to the use of water, whether acquired by appropriation or purchase, or previously recognized by legislative act, or which may be acquired in the future (OAR 690-017-0800(2)(b))*
- *The owner of the property was unable to use the water due to economic hardship (OAR 690-017-0800(2)(c))*

## Rebutting the Presumption of Forfeiture

CwM has found evidence that two of the six surface water rights may be rebuttable based on economic hardship. The D.R. Johnson Lumber company closed down the John Day plant, which included the former San Juan Lumber mill (Certificate 36368), due to an economic downturn in the mid-2000s. Around the same time, the Prairie Wood Products company (Cert. 87480) reduced production activities in the region for economic reasons. CwM has been unable to locate official bankruptcy or foreclosure court records for these two companies, though it may be possible to argue this case to the OWRD with secondary records such as newspaper articles or City documents.

These two lumber mill certificates and the other four surface water certificates are all associated with the City by nature of land ownership. The City's intended use for all of these water rights was instream use as part of the Innovation Gateway project, as documented in the funding grant. The City can argue that forfeiture of any of the rights would impair the City's ability to make use of the rights for this purpose. An instream transfer provides the City with no direct benefits as far as water supply or

consumptive uses. Instead, the City benefits by meeting the conditions of the funding grant and by meeting the conservation goals of the Innovation Gateway project.

### City Properties and Water Right Places of Use

The City provided CwM with a complete list of taxlots owned by the City of John Day. CwM cross-referenced these lands with the places of use for each of the certificates in question. Holstrom irrigation and livestock Certificate 82663 was listed in the grant application in connection with two taxlots (13S31E23, TL 1101 and 13S31E23CA, TL 4301) that comprise the Malone Ball Field Park in eastern John Day. Upon closer review, CwM has confirmed that these two taxlots do not contain any of the acreage included in the place of use for Certificate 82663. The City therefore does not have the authority to propose an instream transfer of any portion of that water right.

Certificate 11725 was for non-consumptive mining use of water from Canyon Creek in placer mines along the creek in the early 1900s. Unlike irrigation or other use types, Certificate 11725 does not have a rate or volume based on acreage or some other duty. The rate of 10 cfs is linked to the points of diversion and most diverted water returned to Canyon Creek downstream. It is not clear, therefore, that the 0.04-acre property owned by the City within the certificate place of use (13S31E26CA, TL 3600) corresponds to any real amount of water. CwM believes that Certificate 11725 is not eligible for instream transfer.

Considering this information, the list of surface water rights potentially eligible for instream transfer by the City is reduced to four: Certificates 36368, 85675, 87480, and 25786 (Table 1).

In reviewing the list of City-owned taxlots, CwM identified several additional water rights that appear to be associated with City property (Table 2). The City may thus have claims to the water under these rights. However, these rights would be subject to the same presumption of cancellation conditions as the rights listed in the grant application. As these four additional rights were not listed in the grant application, they are not subject to the instream transfer condition of the grant. The City may still propose these rights for instream transfer or for instream lease under a separate process.

Permit	Cert.	Transfer	Source	Priority Date	Type of Use	Approximate Rate	Associated Taxlot
NA*	25285	NA	John Day River	12/31/1882	Irrigation	~0.01 cfs (4.5 gpm)	13S31E26BB, TL 0900
S-41457	49847			1/25/1977		0.03 cfs (13.5 gpm)	13S31E23CA, TL 4200
S-43650	51249			10/11/1978		0.045 cfs (20 gpm)	
S-45041	61931			4/2/1980		0.01 cfs (4.5 gpm)	13S31E22C, TL 1900

\*Derived from the John Day River Decree.

## Recommendations

- CwM recommends that the City prepare and submit permanent instream transfer applications for four of the surface water certificates listed in the grant application (Table 2). The transfer applications would be submitted together with a single rebuttal memorandum presenting the reasoning and evidence for rebuttal of the presumption of cancellation for the certificates. Doing so would meet the condition of the grant, even if the OWRD denies one or more of the proposed instream transfers.

Name	Permit	Cert.	Transfer	Source	Priority Date	Rate/Volume for Transfer	Type of Use
San Juan Lumber	S-28872	<b>36368</b>	-	Old Mill Pond	7/23/1963	0.5 cfs	Industrial/ Manufacturing
Oregon Pine Products	S-49897	<b>85675</b>	-	John Day River	10/10/1986	0.15 cfs	Industrial/ Manufacturing
Prairie Wood Products	NA	<b>87480</b>	T-5865	John Day River	12/31/1863	0.375 cfs	Industrial/ Manufacturing
Shank	NA	<b>25786</b>	-	John Day River	12/31/1889	0.19 cfs	Irrigation

- The two groundwater certificates (Certs. 48135 and 48000) and storage certificate (Cert. 36367) are not eligible for instream transfer. The City has the option to apply for a transfer to change the type of use from industrial or irrigation to municipal use. This kind of transfer application would also require an argument of rebuttal of forfeiture. The same arguments used for the instream transfers could be applied. If approved by the OWRD, the City would have the option to utilize those rights for portions of the Innovation Gateway project. The two groundwater certificates total 0.6 cfs (269 gpm).
- Mining Certificate 11725 is likely not eligible for instream transfer and the presumption of forfeiture is likely not rebuttable. The cancellation process was initiated by the OWRD in the early 1990s but not completed. CwM recommends that the City submit an application for voluntary cancellation of any portion of Certificate 11725 that is connected to City property.
- The City does not have any claim on the irrigation and livestock Certificate 82663 based on land ownership. The City can explain that this was discovered after further research into the place of use for the water right in its report back to the funding agency.