

Appendix E.3

Potential Local, State, and Federal Permit and Compliance Requirements for the Modernization Alternative

Some documents included in this are provided as they were originally produced and may not fully comply with Section 508 of the Rehabilitation Act. These materials include third-party reports, historical documents, maps, and technical drawings that cannot be readily converted into accessible formats.

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E.3 Potential Local, State, and Federal Permit and Compliance Requirements for the Modernization Alternative

E.3.1 Municipalities and Railroads

E.3.1.1 Deschutes County

Deschutes County Planning Department – Under OAR Chapter 340, Division 18, a Land Use Compatibility Statement (LUCS) would be submitted for County approval prior to construction. The LUCS is required supporting documentation for various state permits from DEQ (1200-C permit) and DSL (Removal-Fill permit).

The Project is consistent with the Deschutes County Comprehensive Plan’s Agricultural Lands Policies. Piping of the PBC and improved reliability of water delivery to COID patrons would preserve and maintain agricultural land uses in the Study Area and in lands served by COID within Deschutes County and downstream in Jefferson County.

The North Bend route option does not support the Historic and Cultural Resources Policies in the Deschutes County Comprehensive Plan, which include “encouraging the preservation of lands with significant historic or cultural resources.” This option would remove a segment of the PBC that is currently listed on the Comprehensive Plan’s Goal 5 Inventory of Cultural and Historic Resources.

The Project is consistent with the Deschutes County Development Code. Zoning designations within Deschutes County, including Exclusive Farm Use, Alfalfa Subzone (EFUAL), Exclusive Farm Use, Tumalo/Redmond/Bend Subzone (EFUTRB), Rural Industrial (RI), Multiple Use Agricultural (MUA10), Open Space and Conservation (OS&C), and Rural Residential (RR10), identify the operation, maintenance, and piping of existing irrigation systems as an outright permitted use within these zones.

The Suburban Low Density Residential (SR 2-1/2) zone does not list irrigation infrastructure as an outright permitted, conditional, or prohibited use. Further coordination with the County to determine the proper permitting procedures for piping in this segment of the canal is needed.

Public Right-of-Way Permits from Deschutes County would be required for the nine County roads being crossed by the piped PBC described in the Modernization Alternative. These permits would be obtained from the Deschutes County Road Department.

E.3.1.2 City of Bend

A LUCS would be submitted to the Bend Planning Division for approval prior to construction.

The Modernization Alternative is consistent with the Natural Features and Open Space goals and policies of the City of Bend Comprehensive Plan. The plan identifies irrigation canals as an example of “corridor or linear” open space that is found within the city. While piping the PBC would remove the canal as a linear open space water feature, the land above the piped canal alignment would remain a vegetated, undeveloped open space feature. Per Policy 2-10, the City would coordinate with COID to protect open space within the city.

City of Bend zoning designations, including Commercial Limited (CL), Commercial General (CG), Residential Urban Medium Density (RM), Residential Urban Standard Density (RS), and Public Facility (PF), do not identify irrigation infrastructure as an outright permitted, conditional, or prohibited use within the zones. Irrigation district facilities are permitted in the Industrial General

(IG) and Industrial Light (IL) zones. Further coordination with the City of Bend is recommended to determine the appropriate permitting procedures for each of these zones.

Tier 3 Right-of-Way Permits from the City of Bend would be required for the five city streets being crossed by the piped PBC described in the Modernization Alternative. These permits would be obtained from the Bend Community Development Department.

E.3.1.3 City of Redmond

A LUCS would be submitted to the Redmond Planning Department for approval prior to construction.

The Project would comply with the City of Redmond Comprehensive Plan Recreational Needs goals, policies, and principles. The plan includes policies to use canals as recreation linkages for trails throughout the city and to coordinate with COID to provide a connected trail network. The plan also includes a principle that multiuse trails shall be provided adjacent to canals and laterals, subject to COID review and approval. Piping of the canal would create additional linear space that may be used for a future trail alignment if an easement or use agreement can be obtained from COID. COID should coordinate with the City of Redmond to ensure that the Project allows for construction of future trails within City of Redmond easements after completion of the piping project.

City of Redmond zoning designations, including Strip Service Commercial (C1), Central Business District Commercial (C2), Special Service Commercial (C3), and General Residential (R4), do not identify irrigation infrastructure as an outright permitted, conditional, or prohibited use within the zones. Further coordination with City of Redmond is recommended to determine the appropriate permitting procedures for each of these zones. The Urban Holding Zone (UH-10) identifies the operation, maintenance, and piping of existing irrigation systems as an outright permitted use.

A Minor Site Development Permit from the City of Redmond would be required for the 14 city streets being crossed by the piped PBC described in the Modernization Alternative. These permits would be obtained from the Redmond Engineering Department.

E.3.1.4 BNSF Railway

For irrigation piping crossing railroad property, Utility License Agreements are required when utility facilities are installed, relocated, removed, or maintained along or across all BNSF Railway property. If surveying is necessary for the completion of an application, a Temporary Occupancy Permit must be executed in order to enter BNSF Railway right-of-way.

E.3.2 State of Oregon

E.3.2.1 Department of Environmental Quality

The National Pollutant Discharge Elimination System program, implemented by DEQ, would require a permit for construction activities including clearing, grading, excavation, dewatering, and materials and equipment staging and stockpiling that would disturb 1 acre or more of land and have the potential to discharge into a public waterbody. The proposed project would meet these conditions; therefore, prior to project construction, as appropriate, a 1200-C permit would be applied for.

Applicants for CWA Section 404 authorization from USACE are also required to obtain a Section 401 water quality certification from DEQ through a joint application process. COID would prepare a joint permit application for this Project, which would be reviewed by USACE and DSL.

COID would not begin construction until after the application is approved by both regulatory authorities. In addition, EPA must make a neighboring jurisdiction determination once the water quality certification is issued (CWA Section 401(a)(2)).

E.3.2.2 Oregon Department of State Lands

DSL implements the State of Oregon's Removal-Fill Law (ORS 196.800.990), which regulates the removal or fill of material in wetlands and waterways and requires any person who plans to remove or fill material within waters of the state to obtain a permit from DSL.

Before project implementation begins, COID would be required to consult with DSL. Consultation would entail delineating wetlands at project sites and determining the jurisdictional status of wetlands within and adjacent to canals and turnouts in the Project Area.

If the Project results in no more than 10 cubic yards of removal-fill activity or only temporarily impacts jurisdictional wetlands, the Project can be permitted under a General Authorization which requires notifying DSL. If the Project's removal-fill activity is limited to 0.2 acres of wetlands and does not result in impacts to waters, the Project can be permitted under a General Permit which requires submission of a joint permit application. If the project exceeds 0.2 acres of wetland impact or impacts waters, the Project would be permitted under an Individual Permit which also requires submission of a joint permit application.

The extent of wetland and water impacts from the Project, and the subsequent permit to DSL, depends largely on the jurisdictional status of wetlands found within or adjacent to canals and laterals within the Project Area. Per Oregon Removal-Fill statute, OAR 141-085-0515(9), an irrigation ditch is not jurisdictional under Oregon Removal-Fill permitting if it meets both of the following criteria:

- The ditch is operated and maintained for the primary purpose of irrigation.
- The ditch is dewatered outside for the irrigation season except for isolated puddles in low areas.

Canals and laterals in the Project Area are primarily used for irrigation, and areas that are predominantly dewatered annually outside the irrigation season would be considered non-jurisdictional. Canals and laterals that contain water year-round would not be considered exempt.

Per OAR 141-085-0515(8), a non-exempt irrigation ditch is jurisdictional under Oregon Removal-Fill permitting if it meets one of the following criteria:

- Created in wetlands, estuaries, tidal rivers or other waters of this state; or
- Created from upland and meet the following conditions:
 - The ditch contains food and game fish.
 - The ditch has a free and open connection to waters of this state.

Before construction activities begin, coordination and consultation with USACE would occur and measures would be taken as required to identify and mitigate impacts to potential jurisdictional wetlands and other waters of the state.

E.3.2.3 Statewide Land Use Planning Goals

The Project is consistent with Oregon’s Statewide Land Use Planning Goal 3, Agricultural Lands. Piping the PBC and improved reliability of water delivery to COID patrons would support agricultural land uses in the Study Area and in lands served by COID and would improve reliability for NUID patrons.

The North Bend and Redmond PBC piping options that propose piping in the existing PBC alignment do not support Statewide Land Use Planning Goal 5. Both of these options would remove segments of the PBC that are currently listed in the NRHP. Other alignment options would be supportive of Goal 5, as they would leave the historic canal sections in place. Construction activities for all piping options have the potential for impacts to archaeological resources. For more information on impacts to the historic built environment and archaeological resources, see the Cultural Resources Technical Report.

E.3.2.4 Oregon Department of Transportation

For an activity such as utility installation along or across a state highway, or an activity that requires the use of the state highway for other than a normal transportation activity, an utility encroachment permit is required. ODOT Maintenance District 10, based in Bend, Oregon, would be the local agency to issue the utility encroachment permit. Utility encroachment permit applicants are required to give a tribes advance notice of intended utility work on state highway right-of-way.

E.3.3 Federal

E.3.3.1 National Historic Preservation Act Section 106

Pursuant to 36 CFR 800 of NHPA (1966, as amended in 2000) and the regulations of the ACHP implementing Section 106 of the NHPA (54 U.S.C. 306108), federal agencies must take into account the potential effect of an undertaking on “historic properties,” which refers to cultural resources listed in or eligible for listing in the NRHP. Consultation with the Oregon SHPO to fulfill Section 106 obligations would be completed for the Project prior to implementation.

E.3.3.2 Clean Water Act Section 404

USACE administers Section 404 of the CWA with the oversight of EPA. This law regulates the dredge or fill of wetlands and other waters over which USACE has jurisdiction. USACE and EPA define wetlands as “those areas inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions” (EPA 2023).

Before project implementation begins, COID would be required to consult with USACE. Consultation would entail wetland determinations at project sites and determinations of the jurisdictional status of wetlands along Lost River and within and adjacent to canals and laterals in the Project Area.

If the Project results in no more than 25 cubic yards of fill and the loss of 1/10 acre of waters of the United States (NWP 18) or only temporarily impacts waters of the United States (NWP 33), the Project can be permitted under a Nationwide Permit with the submission of a joint permit application. If the Project exceeds 25 cubic yard of fill or results in the loss of more than 1/10 acres of water of the United States, the Project can be permitted under an Individual Permit with the submission of a joint permit application.

The extent of wetland and water impact as a result of the Project, and the subsequent permit to USACE, depends largely upon the jurisdictional status of wetlands within and adjacent to laterals and canals within the Project Area. Under Section 404(f)(1)(C) of the CWA, discharges of dredged or fill material associated with construction or maintenance of irrigation ditches, or with the maintenance (but not construction) of drainage ditches, are not prohibited by or otherwise subject to regulation under Section 404. Discharges of dredged or fill material associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant to and functionally related to irrigation ditches are included in the exemption for irrigation ditches. Under 33 CFR 323.4(a)(1)(iii)(C)(1)(i), “construction and maintenance of upland (dryland) facilities such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a Section 404 permit.”

On August 29, 2023, the EPA and Department of the Army issued a final rule to amend the final “Revised Definition of ‘Waters of the United States’ ” rule, published in the Federal Register on January 18, 2023. This final rule conforms the definition of “waters of the United States” to the U.S. Supreme Court’s May 25, 2023, decision in the case of *Sackett v. Environmental Protection Agency*. Parts of the January 2023 Rule are invalid under the Supreme Court’s interpretation of the CWA in the *Sackett* decision. Therefore, the EPA and Department of the Army have amended key aspects of the regulatory text to conform to the court’s decision.

The conforming rule, “Revised Definition of ‘Waters of the United States’; Conforming,” was published in the Federal Register and became effective on September 8, 2023.

On July 24, 2020, USACE and EPA signed a memorandum providing a clear, consistent approach regarding the application of exemptions from regulation under Section 404(f)(1)(C) of the CWA for construction or maintenance of irrigation ditches and the maintenance of drainage ditches. The guidance in the joint memorandum applies regardless of the definition of waters of the United States.

As defined in the 2020 joint memorandum, an irrigation ditch is a ditch that either conveys water to an ultimate irrigation use or place of use or that moves and/or conveys irrigation water away from irrigated lands. Construction and maintenance of irrigation ditches are considered exempt activities under Section 404 of the CWA. However, if construction or maintenance of irrigation ditches “represents a new use, and the activity would result in a reduction in reach or impairment of flow or circulation of jurisdictional waters, including wetlands,” the activity does not meet this exemption.

Canals and laterals at the proposed project sites are irrigation ditches. Proposed infrastructure modernization does not represent a new use, nor would it impair flow to jurisdictional waters. If any wetlands are present in the Project Area, they would be exempt from federal permitting requirements, as the infrastructure modernization would be considered maintenance or construction of irrigation ditches.

The construction and maintenance of irrigation canals and laterals and maintenance of drainage ditches may require the construction and/or maintenance of a farm road. Subsection 404(f)(1)(E) exemption for discharges of dredged or fill material associated with the construction or maintenance of farm roads applies where such related farm roads are constructed and maintained in accordance with BMPs. However, in 33 CFR 323.4(a)(6) and 40 CFR 232.3(c)(6), there must be assurance that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment would be otherwise minimized.

Before construction activities begin, coordination and consultation with USACE would occur and measures would be taken as required to identify and mitigate impacts to potential jurisdictional wetlands and other waters of the United States.

E.3.3.3 Farmland Protection Policy Act

The Farmland Protection Policy Act (7 U.S.C. 4201 et seq.) directs federal agencies to identify and quantify adverse impacts of federal programs to farmlands. The act's purpose is to minimize the number of federal programs that contribute to the unnecessary and irreversible conversion of agricultural land to nonagricultural uses. The proposed project would occur primarily in Exclusive Farm Use zones; however, all work would be done within existing and new easement agreements. The proposed project would support agricultural production and the intention of the act.

E.3.3.4 Endangered Species Act

The ESA establishes a national program for the conservation of threatened and endangered species and the preservation of the ecosystems on which they depend. The ESA is administered by USFWS for wildlife and freshwater species and by NMFS for marine and anadromous species. The ESA defines procedures for listing species, designating critical habitat for listed species, and preparing recovery plans. It also specifies prohibited actions and exceptions. Section 7 of the Act, called Interagency Cooperation, is the mechanism by which federal agencies ensure the actions they take, including those they fund or authorize, do not jeopardize the existence of any listed species. Under Section 7, federal agencies must consult with USFWS when any action the agency carries out, funds, or authorizes (such as through a permit) may affect a listed endangered or threatened species.

Improved water conveyance would result in higher-quality water within some of District's waterbodies and increase the available habitat for the species. In addition, the installation of a fish screen and removal of a partial barrier would prevent bull trout entrainment into the irrigation system and increase habitat availability for the species. Short-term impacts to water quality during construction are unlikely to adversely affect bull trout. Coordination with USFWS and NMFS regarding ESA-listed fish species is ongoing, and informal Section 7 consultation under the ESA as amended would be initiated following the public review period.

E.3.3.5 Magnuson-Stevens Act

The Magnuson-Stevens Act requires including EFH descriptions in federal fishery management plans, and it requires federal agencies to consult with NMFS on activities that may adversely affect EFH (Pub. L. No. 104-297). EFH can include all streams, lakes, ponds, wetlands, and other viable waterbodies, as well as most of the habitat historically accessible to salmon necessary for spawning, breeding, feeding, or growth to maturity. As the proposed action would not affect EFH, consultation under the Magnuson-Stevens Act is not required.

E.3.3.6 Safe Drinking Water Act

Since the Project would have no direct or indirect discharge to groundwater, permitting under the Safe Drinking Water Act is not required.

E.3.3.7 Migratory Bird Treaty Act

The MBTA implements various treaties and conventions between the United States and other countries including Canada, Japan, Mexico, and the former Soviet Union for the protection of migratory birds (16 U.S.C. 703–712). Under the act, taking, killing, or possessing migratory birds, or taking, destroying, or possessing their eggs or nests, is unlawful. The act classifies most species of

birds as migratory except for upland and nonnative birds such as pheasant, chukar, gray partridge, house sparrow, European starling, and rock dove.

E.3.3.8 Bald and Golden Eagle Protection Act

The BGEPA prohibits the taking or possessing of and commerce in bald and golden eagles, with limited exceptions (16 U.S.C. 668–668d). The act covers intentional acts or acts in “wanton disregard” of the safety of bald or golden eagles. Bald eagles may also be found foraging within COID in spring and summer months; however the Project’s activities are planned for the nonirrigation season (i.e., late fall and winter). No direct impacts are anticipated.

E.3.3.9 National Wild and Scenic Rivers Act

The designation of a river and river segments under the Wild and Scenic Rivers Act provides legal protections from adverse development and provides a mechanism for management of the river’s resources. No wild and scenic rivers occur within the Project Area.

E.3.5 References

- Activities Exempt under the Clean Water Act, 404(f)(1)(C) (1972). <https://www.epa.gov/cwa-404/overview-clean-water-act-section-404>
- Activities Exempt under the Clean Water Act, 404(f)(1)(E) (1972). <https://www.epa.gov/cwa-404/exemptions-permit-requirements-under-cwa-section-404>
- Activities Not Requiring Permits, 40 CFR 232.3(c)(6) (2023). <https://www.ecfr.gov/current/title-40/chapter-I/subchapter-H/part-232/section-232.3>
- Bald and Golden Eagle Protection Act, 16 U.S.C. 668–668d (1940). <https://www.fws.gov/law/bald-and-golden-eagle-protection-act#:~:text=The%20Bald%20and%20Golden%20Eagle,%2C%20nests%2C%20or%20eggs.>
- Compatibility with Acknowledged Comprehensive Plans, OAR 340-018 (2018). <https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=244085>
- Discharges Not Requiring Permits, 33 CFR 323.4(a)(6) (2023). <https://www.ecfr.gov/current/title-33/chapter-II/part-323>
- Effect of Undertaking on Historic Property, 54 U.S.C. § 306108 (2021). <https://www.govinfo.gov/app/details/USCODE-2021-title54/USCODE-2021-title54-subtitleIII-divsnA-app-dup4-chap3061-subchapI-sec306108>
- EPA (U.S. Environmental Protection Agency) (2023), Regulatory Text Changes to the Definition of Waters of the United States at 33 CFR 328.3 and 40 CFR 120.2 <https://www.regulations.gov/document/EPA-HQ-OW-2023-0346-0008>
- General provisions, 7 U.S.C. 4201 et seq. (2022). <https://www.govinfo.gov/app/details/USCODE-2022-title7/USCODE-2022-title7-chap73-sec4201>
- How Wetlands are Defined and Identified under CWA Section 404 (2023), <https://www.epa.gov/cwa-404/how-wetlands-are-defined-and-identified-under-cwa-section-404>
- Migratory Bird Treaty Act of 1918, 16 U.S.C. 703–712 (1918). <https://www.fws.gov/law/migratory-bird-treaty-act-1918>
- Minor Drainage, 33 CFR 323.4(a)(1)(iii)(C)(1)(i) (2023). <https://www.ecfr.gov/current/title-33/chapter-II/part-323>
- Protection of Historic Properties, 36 CFR § 800 (2023). <https://www.ecfr.gov/current/title-36/chapter-VIII/part-800?toc=1>
- Removal-Fill Jurisdiction by Type of Water, OAR 141-085-0515 (2012). <https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=15649>

State Waters and Ocean Resources; Wetlands; Removal and Fill, ORS 196.800.990 (2021).

https://www.oregonlegislature.gov/bills_laws/ors/ors196.html

Sustainable Fisheries Act, Pub. L. No. 104-297 (1996).

<https://www.congress.gov/104/plaws/publ297/PLAW-104publ297.pdf>