

**BEFORE THE WATER RESOURCES DEPARTMENT
OF THE
STATE OF OREGON**

In the Matter of Instream Lease Application)	RECONSIDERATION OF A FINAL
IL-1444 and Mitigation Project MP-194,)	ORDER RECORDED IN SPECIAL
Klamath and Deschutes Counties)	ORDER VOLUME 95 PAGES 569 –
)	574 APPROVING INSTREAM LEASE
)	APPLICATION IL-1444 AND
)	MITIGATION CREDIT PROJECT
)	MP-194

Authority

Oregon Revised Statute (ORS) 537.348 establishes the process in which a water right holder may submit a request to lease an existing water right for instream purposes. Oregon Administrative Rule (OAR) Chapter 690, Division 077 implements the statutes and provides the Department's procedures and criteria for evaluating instream lease applications.

OAR 690-521-0100 to 690-521-0600 establishes the process in which anyone may submit a ground water mitigation project to the Department for the purpose of establishing mitigation credits in the Deschutes Ground Water Study Area.

Lessor

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Lessee

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Findings of Fact

1. On March 12, 2015, Jim Lynes and the DRC Mitigation Bank filed an application to lease a portion of Certificate 86855 for instream use. The Department assigned the application number IL-1444.
2. The DRC Mitigation Bank also requested that this lease be used to establish mitigation credits. The Department assigned the application mitigation credit project number MP-194.
3. On April 15, 2015, the Department issued a Final Order approving Instream Lease Application IL-1444 and Mitigation Credit Project MP-194, as evidenced by Special Order Volume 95, Page 569. The instream use approved by the Department included an instream reach from the point of diversion on the Little Deschutes River to its mouth.
4. On April 21, 2015, the Department received a request from the DRC Mitigation Bank that the order be reconsidered. The request indicated that an error was made in the requested

This is a final order in other than contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60 day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

instream reach, which should have been from the point of diversion on the Little Deschutes River to its mouth and then into the mainstem Deschutes River to Lake Billy Chinook. The request for reconsideration did not include any modifications to the mitigation project.

5. The request for reconsideration was filed within the 60-day period specified in ORS 183.484. The Department has determined that the Final Order may be reconsidered.
6. On reconsidering the Final Order, the Department determined that the amount of water protected instream to the mouth of the Little Deschutes River is measurable into the Deschutes River. Under OAR 690-077-0015, water may be protected beyond the source stream and into a receiving stream if it is a measurable portion of the receiving stream. Therefore, the reach may extend into the Deschutes River to Lake Billy Chinook.
7. However, the portion of the Deschutes River at the confluence with the Little Deschutes River is within a losing reach of the river. The Deschutes River loses approximately 7 percent of its flows in the reach of the River extending from the confluence with the Little Deschutes River down to the City of Bend area. The Department has identified that the instream quantities extending into the mainstem Deschutes River must be reduced by 7 percent to account for streamflow losses.
8. The modified instream reach and instream quantities may be protected instream without any injury or enlargement. Modifications to the instream use and additional findings are reflected in Findings of Fact Nos. 15 through 17.
9. The portion of the right to be leased is as follows:

Certificate: 86855 in the name of ESTATE OF H. P. HOEY (confirmed by Deschutes River (F) Decree of record at Salem, in the Order Record of the Water Resources Director in volume 9, at Page 362)

Use: IRRIGATION of 7.35 ACRES

Priority Date: SEPTEMBER 1, 1898

Quantity: **Rate and Volume:**

April 1 to May 23 and August 20 to November 1	May 23 to August 20	Volume Limit (based on duty)
0.092 CFS	0.184 CFS	29.4 AF

Limit/Duty: The amount of water to which this right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purpose and shall not exceed 4 acre-feet per acre, measured at the point of diversion from the stream, which may be diverted at a rate not to exceed One-Fortieth of one cubic foot per second per acre from May 23 to August 20 and One-Eightieth of one cubic foot per second per acre from April 1 to May 23 and August 20 to November 1.

Source: Big Marsh Creek, tributary to Crescent Creek

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
24 S	7 E	WM	20	SW NE	7.35

10. The location of the point of diversion is not specified in the certificate. The Deschutes River Decree identifies that water is diverted by dams and ditches but does not specify a specific point of diversion. However, the application describes the approximate location of the diversion as:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
24 S	7 E	WM	20	SW SW	975 FEET NORTH AND 260 FEET EAST FROM THE SW CORNER OF SECTION 20

11. The lease application includes the information required under OAR 690-077-0076(3). The Department provided notice of the lease application pursuant to OAR 690-077-0077(1). No comments were received.
12. The quantity of water proposed to be protected instream, beginning at the point of diversion, requires a small modification. At the full rate and volume requested, the Department cannot protect the water over the entire instream period requested (April 1 through July 16, a 107 day period) without enlargement of the water right and injury to other surface water rights. Therefore, the proposed instream use requires modification to prevent enlargement of the water right and injury to other surface water rights. The Department has reduced the instream instream rate for the first part of the instream period to 0.09 CFS.
13. The proposed instream use requires modification to take into account return flows and stream flow losses. Return flows, approximately 10% of the diversion, from the existing use return to Big Marsh Creek immediately below the place of use.

The stretch of Crescent Creek between the confluence with Big Marsh Creek and the mouth is a losing stream reach and loses approximately 2% of its flows.

14. The reach for an instream water right is typically from the point of diversion on the source stream to the mouth of that source stream. However, water may be protected further downstream if the quantity of water is measurable in the receiving stream, in this case Crescent Creek and the Little Deschutes River. The quantity of water that may be protected instream in Big Marsh Creek is measurable in Crescent Creek and the quantity that may be protected instream in Crescent Creek is measurable in the Little Deschutes River, consistent with OAR 690-077-0015(8). Therefore, the reach may extend from Big Marsh Creek into Crescent Creek and into the Little Deschutes River.
15. The reach of the instream use is also requested to extend from the mouth of the Little Deschutes River and into the Deschutes River to Lake Billy Chinook. The quantity of water that may be protected instream from the Little Deschutes River into the Deschutes River is measurable in the Deschutes River, consistent with OAR 690-077-0015(8). Therefore, the reach may extend from the Little Deschutes River and into the mainstem Deschutes River.
16. The instream use in the Deschutes River must be reduced to account for stream flow losses. This stretch of the Deschutes River between the confluence with the Little Deschutes River and City of Bend loses approximately 7% of its flows.

17. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:

Big Marsh Creek, tributary to Crescent Creek

Instream Reach 1: From the POD (as described in Finding of Fact No. 10) to the lower end of the place of use, located approximately where the creek crosses the east boundary of the SE NW of Section 20, T24S, R7E, W.M.

Priority Date	Instream Period	Rate Instream	Volume Instream
9/1/1898	April 1 through May 22	0.090 CFS	29.4 AF
	May 23 through July 16	0.184 CFS	

Instream Reach 2: From just below the lower end of the place of use to the mouth of Big Marsh Creek

Priority Date	Instream Period	Rate Instream	Volume Instream
9/1/1898	April 1 through May 22	0.081 CFS	26.42 AF
	May 23 through July 16	0.166 CFS	

Crescent Creek, tributary to the Little Deschutes River

Instream Reach 3: In Crescent Creek, from the confluence with Big Marsh Creek to the mouth of Crescent Creek

Priority Dates	Instream Period	Rate Instream	Volume Instream
9/1/1898	April 1 through May 22	0.079 CFS	25.89 AF
	May 23 through July 16	0.162 CFS	

Little Deschutes River, tributary to the Deschutes River

Instream Reach 4: In the Little Deschutes River, from the confluence with Crescent Creek to the mouth of the Little Deschutes River

Priority Dates	Instream Period	Rate Instream	Volume Instream
9/1/1898	April 1 through May 22	0.079 CFS	25.89 AF
	May 23 through July 16	0.162 CFS	

Deschutes River, tributary to the Columbia River

Instream Reach 5: In the Deschutes River, from the confluence with the Little Deschutes River, to Lake Billy Chinook

Priority Dates	Instream Period	Rate Instream	Volume Instream
9/1/1898	April 1 through May 22	0.074 CFS	24.08 AF
	May 23 through July 16	0.151 CFS	

18. Other conditions to prevent injury and enlargement are:

Within the specified stream reach, the amount of water to which this right is entitled shall not exceed the quantity of water legally available at the original point of diversion. Stream channel losses and gains calculated based on available data and the use of water by senior appropriators will determine the amount of water to which this right is entitled downstream from the original points of diversion within the specified stream reach.

19. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
20. The protection of flows within the proposed reach is appropriate, considering:
 - a. The instream water use begins at the recorded point of diversion;
 - b. The location of confluences with other streams downstream of the point of diversion.
 - c. There are known areas of natural loss of streamflow to the river bed downstream from the point of diversion and have been accounted for in Instream Reach No. 3 and No. 5; and
 - d. Return flows resulting from the exercise of the existing water right would re-enter the river within the reach of the instream water right. The instream use has been reduced in Instream Reach No. 2 to account for return flows.
21. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach will provide for a beneficial purpose.
22. The total monthly quantities of water to be protected instream under existing and proposed instream rights in the reach do not exceed the estimated average natural flow.
23. If approved, this instream lease is not reasonably expected to significantly affect land use as prescribed by ORS 197.180, OAR Chapter 660, Divisions 30 and 31, and OAR Chapter 690, Division 5.
24. Based upon review of the application, information provided by the Department's Watermaster, and other available information, the Department finds that the lease will not result in injury or enlargement. The order approving this instream lease may be modified or revoked under OAR 690-077-0077 if the Department later finds that the lease is causing injury to any existing water right or enlargement of the original right.
25. If a right which has been leased is later proposed to be leased again, transferred and/or reviewed under an allocation of conserved water, a new injury review shall be required. For example, instream transfers will be subject to a full and complete review to determine consistency with the requirements of OAR Chapter 690, Division 380 and Division 077. Approval of this lease does not establish a precedent for approval of any future transactions.
26. The Lessor and Lessee have requested that the lease terminate on October 31, 2015. The lease may commence on the date this final order is signed.

Preliminary Award of Deschutes Basin Mitigation Credits

27. The Lessee, a mitigation bank chartered by the Water Resources Commission, has requested that the portion of the right to be protected instream be used to generate mitigation credits.
28. The Department assigned this mitigation credit project number MP-194.
29. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6). The Department also provided notice of the mitigation credit project to the Oregon

Department of Fish and Wildlife, Oregon Department of Environmental Quality, Oregon Parks and Recreation Department, Oregon Department of State Lands, the Oregon Department of Agriculture, and the Department's Watermaster pursuant to OAR 690-521-0300 (7) and OAR 690-505-0630 (2). No comments were received.

30. The lease of 7.35 acres of irrigation will result in 13.2 AF of mitigation water. Therefore, the Department finds that 13.2 mitigation credits may be awarded to this mitigation credit project and assigned to the DRC Mitigation Bank. The mitigation credits may be used to mitigate for ground water permit applications and existing conditioned ground water permits and certificates, providing mitigation pursuant to the Deschutes Ground Water Mitigation Rules, OAR Chapter 690, Division 505, within the Little Deschutes Zone of Impact.
31. The mitigation credits expire on December 31, 2015.
32. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.
33. The Department shall award final mitigation credits upon completion of the approved project by the applicant and verification by the Department that the project is complete. The issuance of the Final Order approving the proposed instream lease shall result in completion of the project and verification that the project is complete.
34. No precedent is set by this Final Order as to the amount of mitigation credits that may be generated by a subsequent mitigation credit project.

Conclusions of Law

The Department concludes that the lease will not result in injury or enlargement, OAR 690-077-0077. The lease conforms to the applicable provisions of OAR 690-077-0015.

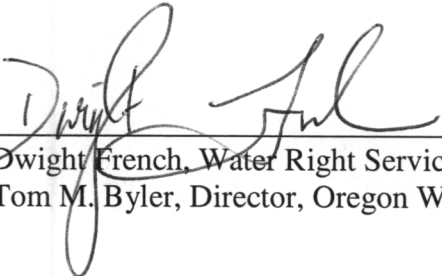
This mitigation project results in mitigation credits pursuant to ORS 537.746 and OAR 690-521-0300 and 690-521-0400.

Now, therefore it is ORDERED:

1. The Final Order approving Instream Lease IL-1444 and Mitigation Project MP-194 and entered at Special Order volume Page 95, Pages 569 through 574 is withdrawn. The instream lease and mitigation project are modified and APPROVED as described herein and issued with a new Special Order Volume and Page.
2. The Lease as described herein is APPROVED.
3. During the term of the lease, the former place of use will no longer receive water as part of these rights, any supplemental rights, or any other layered irrigation water rights, including ground water registrations and permits.
4. The term of the lease will commence upon approval of the instream lease and terminate on October 31, 2015.

5. **Final Award of Deschutes Basin Mitigation Credits:** Issuance of this Final Order results in completion of the project and verification by the Department that the project is complete. The Department concludes that the mitigation credit project is awarded mitigation credits, as described above, pursuant to OAR 690-521-0400 and ORS 537.746. Mitigation Credits, in the amount of **13.2** credits, as described herein, are awarded to this mitigation project and assigned to the DRC Mitigation Bank. Mitigation Credits may be used to satisfy a mitigation obligation of a ground water permit applicant and/or ground water permit/certificate holder in the **Little Deschutes Zone of Impact**.
6. Mitigation credits are valid until used (or until they expire or are terminated) to satisfy a mitigation obligation of a ground water permit applicant and/or ground water permit/certificate holder within the Deschutes Ground Water Study Area pursuant to the Deschutes Ground Water Mitigation Rules. Mitigation credits are used when a person submits to the Department documentary evidence that valid credits have been obtained and assigned to satisfy a mitigation obligation.
7. The mitigation credits shall expire on December 31, 2015.
8. The use and maintenance of the mitigation credits shall be subject to the terms and conditions of the DRC Mitigation Bank Charter.

Dated at Salem, Oregon this 27 day of May, 2015.


Dwight French, Water Right Services Division Administrator, for
Tom M. Byler, Director, Oregon Water Resources Department

Mailing date: MAY 29 2015

This document was prepared by Laura Wilke and if you have any questions, please call 503-986-0884.