

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

| | |
|---|-------------------------------------|
| In the Matter of Instream Lease Application) | DETERMINATION and |
| IL-1813 and Preliminary and Final Award of) | FINAL ORDER ON PROPOSED INSTREAM |
| Mitigation Credits for Mitigation Project) | LEASE and MITIGATION CREDIT PROJECT |
| MP-236, Deschutes County) | |

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

Pooled Instream Lease for several water right holders (described in Findings of Fact No. 3 and 6)

Co-Lessor

Three Sisters Irrigation District (TSID)
PO Box 2230
Sisters, OR 97759
manager@tsidweb.org

Lessee

Deschutes River Conservancy Mitigation Bank (DRCMB)
700 NW Hill Street, Suite 1
Bend, Oregon 97703
gen@deschutesriver.org

Findings of Fact

1. On May 19, 2020, the DRCMB and TSID, on behalf of several water right holders, filed an application to lease a portion of Certificate 74135 and the entirety of Certificate 93689 for instream use. The Department assigned the application number IL-1813.
2. Certificate 74135 describes the authorized place of use by township, range, section, quarter quarter, and tax lots. Some tax lot configurations have changed and some tax lots have been partitioned or subdivided since this certificate was issued and may no longer match those shown on the map of the water right of record. The portion of the water right to be leased as described in Finding of Fact No. 3 is consistent with the water right of record in so far as possible.

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.

3. The portion of the first right to be leased is as follows:

Certificate: 74135 Squaw Creek Irrigation District (now known as Three Sisters Irrigation District (perfected under the Squaw Creek Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 1, at Pages 121, 122, 123, 124, 435, 438, 445, 472, and 473)

Priority Date: 1895, 1899 and 1904

Use: Irrigation of 274.1 acres, being 213.0 acres under the 1895 priority date; 24.1 acres under the 1899 priority date; 37.0 acres under the 1904 priority date;
Pond Maintenance of 0.5 acre equivalent under the 1895 priority date.

Quantity: **Limit:** One-fiftieth of one cubic foot per second (CFS) per acre, or its equivalent for each acre irrigated during the irrigation season of each year.

Source: Whychus Creek (formerly known as Squaw Creek), tributary to the Deschutes River

Authorized Point of Diversion (POD):

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|------|-----|-----|-------|--|
| 15 S | 10 E | WM | 21 | SW SW | 998 FEET NORTH AND 1211 FEET EAST FROM THE SW CORNER OF SECTION 21 |

Authorized Place of Use:

| Twp | Rng | Mer | Sec | Q-Q | Tax Lot | Priority Date | Acres | Lessor |
|---|------|-----|-----|-------|---------|---------------|--------------|------------------------------|
| Irrigation Use – 274.1 acres total | | | | | | | | |
| (1895 - Mitigation Acres) (1899 and 1904 - Restoration only) | | | | | | | | |
| 14 S | 11 E | WM | 23 | NE SE | 800 | 1895 | 3.0 | Peter Green |
| 15 S | 11 E | WM | 4 | NW NE | 101 | | 23.3 | Karan Swaner |
| 15 S | 11 E | WM | 4 | SW NE | 101 | | 38.7 | |
| 15 S | 11 E | WM | 7 | NE SE | 600 | | 38.5 | John Schaad |
| 15 S | 11 E | WM | 7 | NW SE | 600 | | 30.5 | |
| 15 S | 11 E | WM | 7 | SW SE | 600 | | 40.0 | |
| 15 S | 11 E | WM | 7 | SE SE | 600 | | 39.0 | |
| <i>Sub Total:</i> | | | | | | | 213.0 | |
| 14 S | 11 E | WM | 30 | NE SW | 4701 | 1899 | 24.1 | Paul Drake and Diane Tolzman |
| <i>Sub Total:</i> | | | | | | | 24.1 | |
| 15 S | 10 E | WM | 24 | SW SE | 501 | 1904 | 26.0 | Janet Herring |
| 15 S | 10 E | WM | 24 | SE SE | 501 | | 9.0 | |
| 15 S | 10 E | WM | 24 | SE SE | 501 | | 2.0 | |
| <i>Sub Total:</i> | | | | | | | 37.0 | |
| Total: | | | | | | | 274.1 | |
| 0.5 acre equivalent of Pond Maintenance (Restoration only) | | | | | | | | |
| 15 S | 11 E | WM | 7 | NE SE | 600 | 1895 | 0.5 | John Schaad |
| Total: | | | | | | | 0.5 | |

4. Certificate 74135 does not specify the irrigation season. Nor is an irrigation season specified by Basin Program or Decree. For the purposes instream leasing, an irrigation season of March 1 through October 31, consistent with OAR 690-250, shall be used to establish when water may be protected instream.

5. Certificate 74135 describes the rate limit per acre as 1/50th cubic foot per second per (cfs) acre. Certificate 74135 has been modified by transfers, cancellation, and allocation of conserved water projects. The rate available per acre or rate per acre equivalent has been reduced as a result of previous transactions.

6. The second right to be leased is as follows:

Certificate: 93689 in the name of Willitts, LLC (perfected under the Squaw Creek Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 1, at Page 471)

Use: Irrigation of 5.0 acres

Priority Date: 1908

Quantity: **Rate:** 0.070 Cubic Foot per Second (CFS)

Volume: 15.0 Acre-Feet (AF)

Source: Whychus Creek (formerly known as Squaw Creek), tributary to the Deschutes River

Authorized Point of Diversion (POD):

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|------|-----|-----|-------|--|
| 15 S | 10 E | WM | 21 | SW SW | ORIGINAL POD - UNCLE JOHN DITCH – 140 FEET NORTH AND 1190 FEET EAST FROM THE SW CORNER OF SECTION 21 |
| 15 S | 10 E | WM | 21 | SW SW | NEW POD – 998 FEET NORTH AND 1211 FEET EAST FROM THE SW CORNER OF SECTION 21 |

Authorized Place of Use:

| Twp | Rng | Mer | Sec | Q-Q | Acres |
|-------------|------|-----|-----|-------|-------|
| 15 S | 10 E | WM | 10 | SW NW | 1.3 |
| 15 S | 10 E | WM | 10 | NW SW | 3.7 |
| Total Acres | | | | | 5.0 |

7. Certificate 93689 does not specify the irrigation season. Nor is an irrigation season specified by Basin Program or Decree. For the purposes instream leasing, an irrigation season of March 1 through October 31, consistent with OAR 690-250, shall be used to establish when water may be protected instream.
8. There may be supplemental irrigation water rights appurtenant to all or a portion of the lands described in Findings of Fact No. 3 and 6. During the term of the lease, water use under any supplemental or layered irrigation water right will also be suspended.
9. 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.
10. The lease application requests to protect water instream from Whychus Creek into the Deschutes River. An instream reach is generally from the point of diversion to the mouth of the source stream (Whychus Creek) but may be protected further if measurable in the receiving stream (the Deschutes River) (OAR 690-077-0015 (8)). The quantity that may be leased instream from Whychus Creek is measurable into the Deschutes River and may be protected instream in the Deschutes River.

11. The instream use will be conditioned to allow less water to be protected instream below TSID's point of diversion based upon instream measurements conducted by Department staff or others approved by the Department, which may show lower or higher levels of loss and allow the instream flows to be adjusted accordingly. The instream quantity may not exceed the instream quantity identified at the point of diversion.
12. The applicant has requested the instream use begin at the authorized point of diversion. The point of diversion is located within a known losing reach on Whychus Creek. The losing reach extends from the point of diversion located at approximately River Mile (RM) 24.5 to the OWRD gaging station 14076050 located in Sisters, at approximately RM 20.7. The Department's study on seepage loss monitoring water would be problematic. Therefore, to prevent enlargement of the water right, the instream use will be conditioned as set forth in Finding of Fact #11.

13. The instream use is as follows:

Whychus Creek, tributary to the Deschutes River

Instream Reach: At the POD (as described in Finding of Fact No. 3), located approximately at RM 24.5 to the mouth of Whychus Creek

| Certificate | Priority Dates | Use | Instream Rate (CFS) | Instream Volume (AF) | Instream Period |
|----------------|----------------|------------|---------------------|----------------------|---------------------------------|
| 74135 | 1895* | Irrigation | 2.983 | 639.0 | June 15 through September 30 |
| | 1899** | Irrigation | 0.338 | 72.3 | |
| | 1904** | Irrigation | 0.518 | 111.0 | |
| | 1895** | Pond Use | 0.007 | 1.50 | |
| 93689 | 1908** | Irrigation | 0.07 | 15.0 | |
| Totals: | | | 3.916 | 838.8 | |

*Instream flows for mitigation purposes
 **Instream flows for restoration purposes

14. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
15. The protection of flows within the proposed reach is appropriate, considering:
- The instream water use begins at the recorded point of diversion;
 - The location of confluences with other streams downstream of the point of diversion.
 - The known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
 - Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the reach of the instream water right.
16. Instream water rights, with a senior priority date, created through an instream lease generally replace portions of other instream water rights, which carry junior priority dates, established through minimum flow conversion or the state agency application process to establish new instream water rights. On Whychus Creek, during the period April 1 through September 30, the total quantities of water to be protected instream under the existing and

proposed instream rights within a portion of the reach from approximately T15S, R10E, Section 21 (approximately River Mile (RM) 24.5) to the confluence with Indian Ford Creek (just upstream from RM 20) will exceed the quantities identified as necessary for instream use for various fish life stages under Certificate 73224, which was created under ORS 537.341, an application process for state agencies to establish new instream water rights. During the period June 1 through October 31, the total quantities of water to be protected instream under the existing and proposed instream rights within another portion of the reach from T14S, R10E, Section 26 (approximately RM 16) to the mouth of Whychus Creek will exceed the quantities identified as necessary for instream use for various fish life stages under Certificate 73223, which was also created under ORS 537.341. However, the Department has identified that this instream lease will provide an additional beneficial purpose. The Oregon Department of Fish and Wildlife has identified that Whychus Creek is a high priority for flow restoration. In addition, the original instream flows established under Certificates 73224 and 73223 were based on flow needs for resident redband trout and did not account for flows necessary to support reintroduction of Mid-Columbia summer steelhead trout and spring Chinook salmon.

17. The Department has identified that during the term of this lease, the quantities protected instream may be additive to other existing instream water rights established within the same reach under ORS 537.341, 537.346, 537.348 or 537.470 during the months of April through October for the portion of the reach extending from approximately T15S, R10E, Section 21 (approximately RM 24.5) to the confluence with Indian Ford Creek (just upstream from RM 20)] and during the period June 1 through October 31 for the portion of the reach extending from T14S, R10E, Section 26 (approximately RM 16) to the mouth of Whychus Creek. In other portions of the identified reach, the quantities protected instream may be additive to other existing water rights established under ORS 537.348 and 537.470 and may replace a portion of existing water rights established under ORS 537.341 or 537.346 with an earlier priority date, unless otherwise specified in an order approving a new instream water right under these statutes.
18. 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.
19. 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.
20. 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.

21. The Lessor and Lessee have requested that the lease terminate on October 31, 2020. The lease may commence on the date this final order is signed.

Preliminary Award of Deschutes Basin Mitigation Credits

22. The Lessee, a mitigation bank chartered by the Water Resources Commission, has requested that a portion of the right to be protected instream be used to generate mitigation credits.

23. The Department assigned this mitigation credit project number MP-264.

24. 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). Comments were received by the Oregon Department of Environmental Quality in favor of the application.

25. The, the Department finds that **383.4** 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 **Whychus Creek and General Zones of Impact**.

26. The mitigation credits expire on December 31, 2020.

27. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.

28. 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.

29. 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 Lease as described herein is APPROVED.
2. 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.
3. The term of the lease will commence upon approval of the instream lease and terminate on October 31, 2020.
4. **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 **383.4** 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 **Whychus Creek and General Zones of Impact**.
5. 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.
6. The mitigation credits shall expire on December 31, 2020.
7. 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 day JUN 29 2020.



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
Thomas M. Byler, Director, Oregon Water Resources Department

Mailing date: JUN 30 2020

This document was prepared by Sarah Henderson. If you have any questions, please call 503-986-0884.