

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

In the Matter of Instream Lease Application )  
 IL-1079 and Preliminary and Final Award )  
 of Mitigation Credits, Certificates 67706, )  
 65091, 65090, 13509, 13501, 10028, and )  
 3227, Deschutes County )

) DETERMINATION and  
 ) FINAL ORDER ON PROPOSED  
 ) INSTREAM LEASE and MITIGATION  
 ) CREDIT PROJECT

**Authority**

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. 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 #1**

City of Sisters  
 PO Box 39  
 Sisters, OR 97759

**Lessee**

Deschutes River Conservancy (DRC) Mitigation Bank  
 P.O. Box 1560  
 Bend, Oregon 97709  
[gen@deschutesriver.org](mailto:gen@deschutesriver.org)

**Findings of Fact**

1. On June 2, 2010, the City of Sisters and the DRC Mitigation Bank filed an application to lease all of Certificates 67706, 65091, 65090, 13509, 13501, 10028, and 3227 for instream use. The Department assigned the application number IL-1079.
2. The first right to be leased is as follows:

**Certificate:** 67706 in the name of City of Sisters

**Use:** Municipal Use

**Priority Date:** 1885

**Quantity:** 0.2 Cubic Foot per Second (CFS)

**Source:** Pole Creek, tributary to Whychus Creek (formerly Squaw Creek)

**Authorized Point of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	W.M.	19	NE NE	1540 FEET SOUTH 36 DEGREES WEST FROM THE NE CORNER OF SECTION 19

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.

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q
15 S	10 E	W.M.	4	NW NE
15 S	10 E	W.M.	4	SW
15 S	10 E	W.M.	4	SW SE
15 S	10 E	W.M.	5	E ½ SW ¼
15 S	10 E	W.M.	5	W ½ SE ¼
15 S	10 E	W.M.	5	SE SE
15 S	10 E	W.M.	8	E ½ NE ¼
15 S	10 E	W.M.	9	NE
15 S	10 E	W.M.	9	NW

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

**Certificate:** 65091 in the name of City of Sisters

**Use:** Municipal Use

**Priority Date:** November 17, 1967

**Quantity:** 1.45 Cubic Foot per Second (CFS)

**Source:** Pole Creek and Sisters Reservoir constructed under permit R-5054, tributary to Whychus Creek (formerly Squaw Creek)

**Authorized Point of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	W.M.	19	SE NE	CREEK DIVERSION: 1810 FEET SOUTH AND 1100 FEET WEST FROM THE NE CORNER OF SECTION 19
15 S	10 E	W.M.	19	NE NE	RESERVOIR OUTLET: 880 FEET SOUTH AND 750 FEET WEST FROM THE NE CORNER OF SECTION 19

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q
15 S	10 E	W.M.	4	SW NE
15 S	10 E	W.M.	4	SE NW
15 S	10 E	W.M.	4	S ½
15 S	10 E	W.M.	5	E ½ SW ¼
15 S	10 E	W.M.	5	SE ¼
15 S	10 E	W.M.	8	N ½ NE ¼
15 S	10 E	W.M.	8	SE NE
15 S	10 E	W.M.	9	W ½ NE ¼
15 S	10 E	W.M.	9	SE NE
15 S	10 E	W.M.	9	NW ¼
15 S	10 E	W.M.	9	NW SW

4. The third right to be leased is as follows:

**Certificate:** 65090 in the name of City of Sisters

**Use:** Storage of water for Municipal Use

**Priority Date:** August 10, 1967

**Quantity:** 6.3 Acre-Feet (AF)

**Source:** Pole Creek, tributary to Whychus Creek (formerly Squaw Creek)

**Authorized Place of Use (Reservoir Location):**

Twp	Rng	Mer	Sec	Q-Q
15 S	10 E	W.M.	19	NE NE

5. Certificates 67706, 65091, and 65090 all describe points of diversion and a reservoir that are located on Pole Creek Ditch. Pole Creek has historically been diverted from its natural channel and into Pole Creek Ditch. Recent restoration efforts have resulted in the installation of a headgate and modification of the stream channel to allow water in Pole Creek to flow past the ditch and continue downstream in the natural stream channel. Pole Creek Ditch is the actual diversion point for water out of Pole Creek and into the ditch. The Department has determined that, for purposes of instream leasing and restoration of streamflows, the ditch location on the creek may be used as the start point for the instream use created as a result of the lease of Certificates 67706, 65090 and 65090 to instream use. The head of Pole Creek Ditch is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	W.M.	19	SE NE	CREEK DIVERSION: 1810 FEET SOUTH AND 1100 FEET WEST FROM THE NE CORNER OF SECTION 19

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

**Certificate:** 13509 in the name of Sisters Domestic Water District

**Use:** Municipal Use

**Priority Date:** November 1, 1937

**Quantity:** 1.25 Cubic Foot per Second (CFS)

**Source:** 9 Springs, tributaries to Whychus Creek (formerly Squaw Creek)

**Authorized Points of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
16 S	9 E	W.M.	3	SW SW	Not described in Certificate
16 S	9 E	W.M.	10	NW NW	Not described in Certificate

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q
15 S	10 E	W.M.	4	SW SW
15 S	10 E	W.M.	4	SE SW
15 S	10 E	W.M.	4	NW SW
15 S	10 E	W.M.	8	NE NE
15 S	10 E	W.M.	9	NW NW
15 S	10 E	W.M.	9	NE NW

7. Water was originally diverted from the Springs under Certificate 13509 into a pickup ditch along the ridge between Pole Creek and Whychus Creek. The pick up ditch diverted water from the springs over the ridge and into a small channel tributary to Pole Creek. The pick up ditch still carries water from several of the springs over the ridge and into a tributary to Pole Creek. The Watermaster has identified that at least one of the springs flows into Whychus Creek. Other springs either only flow a few feet or flow into the pick up ditch. The Watermaster has estimated that there may be as much as 1.5 CFS flowing down the pick up ditch and over the ridge into the unnamed tributary to Pole Creek. The amount of water flowing down the pick up ditch appears to be more than the amount authorized (1.25 CFS) under Certificate 13509.

The Lessor and Lessee have requested that water from the springs be protected into Pole Creek. Certificate 13509 identifies that the springs are tributary to Whychus Creek (formerly Squaw Creek). However, the Department has determined that because there are sufficient flows in the pick up ditch that, for purposes of the lease, the springs may be considered tributary to the unnamed tributary to Pole Creek.

8. The fifth right to be leased is as follows:

**Certificate:** 13501 in the name of Sisters Domestic Water District

**Use:** Domestic and Municipal Supply

**Priority Date:** April 7, 1937

**Quantity:** 1.25 Cubic Foot per Second (CFS)

**Source:** Pole Creek Swamp Springs, tributary to Whychus Creek (formerly Squaw Creek)

**Authorized Points of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	9 E	W.M.	35	SW SE	Not described in Certificate

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q
15 S	10 E	W.M.	4	SW
15 S	10 E	W.M.	9	NW

9. Water was originally diverted from the Pole Creek Swamp Springs under Certificate 13501 into a pickup ditch which delivered water into Pole Creek Ditch. The pick up ditch has been abandoned and over the years has been disrupted by hikers. Presently the springs no longer flow down the pick up ditch. Instead they flow under natural conditions into the natural channel of Pole Creek, tributary to Whychus Creek.

10. The sixth right to be leased is as follows:

**Certificate:** 10028 in the name of Sisters Water User Association

**Use:** Municipal Use

**Priority Date:** February 11, 1929

**Quantity:** 0.2 Cubic Foot per Second (CFS)

**Source:** Springs, tributary to Whychus Creek (formerly Squaw Creek)

**Authorized Points of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	W.M.	8	SE SE	Not described in Certificate

**Authorized Place of Use (within the town of Sisters):**

Twp	Rng	Mer	Sec
15 S	10 E	W.M.	4

11. The Department has additional information indicating that the source of water for Certificate 10028 may not actually be springs but rather an overflow channel, which flows into Whychus Creek, for Pole Creek Ditch. According to the Watermaster, the point of diversion for Certificate 10028 is located within this overflow ditch. When water is diverted into Pole Creek Ditch by City of Sisters and Patterson Ranch any water that is not used flows into this overflow ditch and then into Whychus Creek. Water is only present at this location when there are unused flows from Pole Creek Ditch.

12. The seventh right to be leased is as follows:

**Certificate:** 3227 in the name of Sisters Domestic Water User Association

**Use:** Municipal Use

**Priority Date:** May 18, 1917

**Quantity:** 1.5 Cubic Foot per Second (CFS)

**Source:** Branton Ditch out of Whychus Creek (formerly Squaw Creek), tributary to the Deschutes River

**Authorized Point of Diversion (POD):** Branton Ditch

**Authorized Place of Use:** The Town of Sisters

13. Certificate 3227 does not describe the location of the Branton Ditch POD. However, the map associated with the water right shows the location of the POD as being within:

Twp	Rng	Mer	Sec	Q-Q
15 S	10 E	W.M.	9	SE NE

The Watermaster has identified that this ditch and POD may no longer exist.

14. 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.

15. The lease application requests to protect 1.45 CFS instream year round under Certificate 65091 and 6.3 AF (0.11 CFS) instream from April 1 through April 29 under Certificate 65090. The water stored in a reservoir under Certificate 65090 may be appropriated under Certificate 65091 as part of the maximum of 1.45 CFS authorized under that right. To prevent injury and enlargement, the Department has determined that up to 1.45 CFS may be protected instream with a portion of that being the 6.3 AF of stored water. 6.3 AF of stored water is equivalent to 0.009 CFS year round.

16. The lease application requests to protect water instream under Certificates 67706, 65091, and 65090 from Pole Creek into Whychus Creek. An instream reach is generally from the point of diversion to the mouth of the source stream (Pole Creek) but may be protected further if measurable in the receiving stream (Whychus Creek) (OAR 690-077-0015 (8)). The quantity that may be leased instream from Pole Creek is measurable into Whychus Creek and may be protected instream in Whychus Creek.

The lease application requests to protect water instream under Certificate 13509 from the Springs into Pole Creek and the into Whychus Creek. Certificate 13509 identifies that these springs are tributary to Whychus Creek. However, as identified in Finding of Fact #7, flows from several of the springs are carried through a pick up ditch and over the ridge into the Pole Creek subbbasin. An instream reach is generally from the point of diversion to the mouth of the source stream (the springs and into the pick up ditch) but may be protected further if measurable in the receiving stream (unnamed tributary to Pole Creek) (OAR 690-077-0015 (8)). The quantity that may be leased instream from the springs (1.25 CFS), which flow into the pick up ditch, is measurable into the unnamed tributary to Pole Creek. The quantity to be leased is also measurable into Pole Creek and then into Whychus Creek and may be protected instream in down to the mouth of Whychus Creek.

The lease application requests to protect water instream under Certificate 13501 from the Pole Creek Swamp Springs into Pole Creek and then into Whychus Creek. The Pole Creek Swamp Springs, as described in Finding of Fact #9, are no longer physically diverted into Pole Creek Ditch but flow under natural conditions into Pole Creek Swamp, which is tributary to the natural channel of Pole Creek. An instream reach is generally from the point of diversion to the mouth of the source stream (Pole Creek Swamp Springs) but may be protected further if measurable in the receiving stream (Pole Creek) (OAR 690-077-0015 (8)). The quantity that may be leased instream from Pole Creek Swamp Springs is measurable into Pole Creek and may be protected instream in Pole Creek. The quantity proposed to be protected instream is also measurable into Whychus Creek.

The lease application requests to protect water instream under Certificate 10028 from the Springs into Pole Creek and then into Whychus Creek. However, the Springs (or overflow channel) do not flow under natural conditions into Pole Creek but rather flow (when water is present as described in Finding of Fact #11) into Whychus Creek. Water may not be protected instream in Pole Creek. For Whychus Creek, an instream reach is generally from the point of diversion to the mouth of the source stream (the Springs) but may be protected further if measurable in the receiving stream (Whychus Creek) (OAR 690-077-0015 (8)). The quantity that may be leased instream from the Springs (or overflow channel) is not measurable into Whychus Creek and may not be protected instream in Whychus Creek.

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

**Springs, tributary to Whychus Creek (flow into a pick up ditch, which then flows into an unnamed tributary to Pole Creek)**

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
<b>Instream Reach:</b> From the Springs to the mouth of the pick up ditch in the NW SW of Sec 3, T16S, R9E, W.M.				
13509	11/1/1937	1.25	904.96	January 1 – December 31

**Unnamed tributary to Pole Creek**

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
<b>Instream Reach:</b> From the confluence of the pick up ditch with the unnamed tributary to Pole Creek to the mouth of the unnamed tributary to Pole Creek				
13509	11/1/1937	1.25	904.96	January 1 – December 31

**Pole Creek Swamp Springs, tributary to Pole Creek**

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
<b>Instream Reach:</b> From Pole Creek Swamp Springs (as described in Finding of Fact #8) to mouth of spring channel (confluence with Whychus Creek)				
13501	4/7/1937	1.25	904.96	January 1 – December 31

**Pole Creek, tributary to Whychus Creek**

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
<b>Instream Reach:</b> From the confluence of the unnamed tributary to Pole Creek and Pole Creek to Pole Creek Ditch POD (as described in Finding of Fact #5)				
13509	11/1/1937	1.25	904.96	January 1 – December 31
<b>Instream Reach:</b> From Pole Creek Ditch POD (as described in Finding of Fact #5) to confluence with Pole Creek Swamp				
67706	1885	0.2	144.79	January 1 – December 31
13509	11/1/1937	1.25	904.96	
65091 & 65090	11/17/1967	1.441	1043.24	
	8/10/1967	0.009	6.3	
<b>Totals</b>		<b>2.9</b>	<b>2099.29</b>	
<b>Instream Reach:</b> In Pole Creek, from confluence with Pole Creek Swamp to mouth of Pole Creek				
67706	1885	0.2	144.79	January 1 – December 31
13501	4/7/1937	1.25	904.96	
13509	11/1/1937	1.25	904.96	
65091 & 65090	11/17/1967	1.441	1043.24	
	8/10/1967	0.009	6.3	
<b>Totals</b>		<b>4.15</b>	<b>3004.25</b>	

**Springs, tributary to Whychus Creek**

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
<b>Instream Reach:</b> From POD (as described in Finding of Fact #10 to mouth of overflow channel (confluence with Whychus Creek)				
10028	2/11/1929	0.2	144.79	January 1 – December 31

**Whychus Creek, tributary to the Deschutes River**

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
<b>Instream Reach:</b> From confluence of Pole Creek and Whychus Cr to POD for Cert 3227 (as described in Finding of Fact #13)				
67706	1885	0.2	144.79	January 1 – December 31
13501	4/7/1937	1.25	904.96	
13509	11/1/1937	1.25	904.96	
65091 & 65090	11/17/1967	1.441	1043.24	
	8/10/1967	0.009	6.3	
<b>Totals</b>		<b>4.15</b>	<b>3004.25</b>	
<b>Instream Reach:</b> From POD for Cert 3227 to mouth of Whychus Creek				
67706	1885	0.2	144.79	January 1 – December 31
13501	4/7/1937	1.25	904.96	
13509	11/1/1937	1.25	904.96	
65091 & 65090	11/17/1967	1.441	1043.24	
	8/10/1967	0.009	6.3	
3227	5/18/1917	1.5	1085.95	
<b>Totals</b>		<b>5.65</b>	<b>5090.2</b>	

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, comments received, information provided by the Department's Watermaster, and other available information, the Department finds that the lease will not result in injury or enlargement. This finding is made through an abbreviated review recognizing that the 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 or transferred to an instream use under ORS 537.348 and OAR 690-077-0070 or OAR 690-077-0075 a new injury review shall be required. 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 future leases or transfers.
21. The Lessor has requested that the lease terminate on December 31, 2014. The lease will commence the date the final order is signed and on January 1 of each succeeding calendar year that the lease is in place.
22. The Lessor has requested the option of terminating the lease early with written notice to the Department.

**Preliminary Award of Deschutes Basin Mitigation Credits**

23. 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.
24. The Department assigned this mitigation credit project number MP-137.
25. 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 from the Oregon Parks and Recreation Department. These comments identified the additional instream flow will potentially benefit aquatic resources and improve the fishery resource.
26. No modifications were made to the lease based on the comments received.
27. The instream lease application includes several surface water rights held by the City of Sisters for municipal use. The Mitigation Bank is requesting that the portion of the instream lease involving Certificate 67706 be used to generate mitigation credits.
28. As part of the public notice of the mitigation project, the Department identified that the project may result in 0.0 or up to 57.8 mitigation credits. Based upon additional evaluation, the Department has determined that, with the following conditions, 57.8 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 Zone of Impact for the City of Sisters.

- a. Mitigation Credits generated by this project may only be assigned by the Deschutes River Conservancy Mitigation Bank to the City of Sisters for mitigation of municipal use.
- b. During the term of this mitigation project, the City of Sisters shall not divert water under any surface water rights in the Whychus Creek Basin for municipal use.

29. The mitigation credits expire on December 31, 2014.
30. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.
31. 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.
32. 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.


### **ORDER**

Therefore, it is ORDERED:

1. That the Lease as described herein is APPROVED.
2. The former place of use will no longer receive water as part of these rights, any supplemental rights, or any other layered water rights for irrigation use, including ground water registrations during the term of the lease.
3. The lease will terminate on December 31, 2014. For multiyear leases, the Lessor shall have the option of terminating the lease with written notice to the Department provided to both the Salem office and Watermaster office. Written notice of termination of a lease must be provided by all Lessors and the Lessee. The written notice to Salem office must include original signatures. The notice to the Watermaster office may be made by fax or e-mail. The lease may be terminated at any time during a calendar year. However, if the termination request is received less than 30-days prior to the period of allowed instream use (January 1 through December 31) or after the period of allowed use has begun for the water right(s) being leased, water may not be used under the right(s) leased until the following calendar year, unless the Director determines that enlargement would not occur.

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 **57.8 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 Zone of Impact for the City of Sisters**.
5. Mitigation Credits generated by this project may only be assigned by the Deschutes River Conservancy Mitigation Bank to the City of Sisters for mitigation of municipal use.
6. During the term of this mitigation project, the City of Sisters shall not divert water under any surface water rights in the Whychus Creek Basin for municipal use.
7. 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.
8. The mitigation credits shall expire on December 31, 2014.
9. 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 20<sup>th</sup> day of October, 2010.

  
Dwight French for  
PHILLIP C. WARD, DIRECTOR

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

Mailing date: OCT 20 2010