

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

In the Matter of Instream Lease Application) DETERMINATION and
IL-479, Klamath County) FINAL ORDER ON PROPOSED
) INSTREAM LEASE

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.

Lessor

James Popson
JaCox Ranches Oreg., LTD
PO Box 435
Fort Klamath, OR 97626
jamespopson@gmail.com

Lessee

Klamath Basin Rangeland Trust (KBRT)
700 Main Street, Suite 201 A
Klamath Falls, OR 97601
clambert@kbrt.org

Findings of Fact

1. On November 12, 2013, James Popson of JaCox Ranches and the KBRT filed an application to renew instream lease IL-479, involving a portion of Certificates 10900, 10901 and 8679 (supplemental to Certificate 10901), and the entirety of Certificate 42822.
2. The above referenced certificates are also proposed for transfer to instream use under Instream Transfer Application T-11375 filed by JaCox Ranch and the KBRT. A Preliminary Determination was issued proposing to approve Instream Transfer Application T-11375 on August 26, 2013. However, a protest was filed on October 2, 2013. The Department is currently working with the applicants and the protestant. The KBRT and JaCox Ranch have requested that IL-479 be renewed while the issues raised in the protest are being resolved.
3. On March 6, 2014, the KBRT concurred that the footprint of Certificates 10900, 10901 and 8679 (supplemental to Certificate 10901) should be consistent with the footprint identified in Transfer Application T-11375, specifically for the portions in the NE SE and SE SE of Section 24, Township 33 South, Range 6 East, W.M. the footprint of each right has been modified as follows:

Certificate	Twp	Rng	Mer	Sec	Q-Q	Original Acres	Amended Acres
10900	33 S	6 E	WM	24	NE SE	20.00	19.70
	33 S	6 E	WM	24	SE SE	10.00	8.80

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.

Certificate	Twp	Rng	Mer	Sec	Q-Q	Original Acres	Amended Acres
10901/8679	33 S	6 E	WM	24	SE SE	15.00	9.30
Total						45.00	37.80

4. As part of the review process, the Department identified that certain portions of Certificates 10900 and 42822 are located under what is now Nicholson Road. Those portions, originally included in IL-479, may not be leased instream without consent of Klamath County. The portions located in the roadway appear to be as follows:

Certificate 10900

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	13	SE SW	0.9
33 S	6 E	WM	13	SW SE	1.8
33 S	6 E	WM	13	SE SE	1.8
33 S	7.5 E	WM	18	SW SW	1.8
33 S	7.5 E	WM	18	SE SW	1.6
Total					7.9

Certificate 42822

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	13	SE SW	0.9

5. This lease is subject to terms and conditions of a Stipulated Agreement signed by JaCox Ranch, the KBRT, Roger Nicholson, and the Oregon Water Resources Department. This Stipulated Agreement was incorporated into the original Final Order approving IL-479 issued by the Department on January 5, 2005, as evidenced by Special Order Volume 63, Page 26. It was also incorporated as part of the previous order approving a renewal of IL-479 issued by the Department on April 24, 2009, as evidenced by Special Order Volume 77, Page 484, which expired on September 30, 2013.
6. The terms of the Stipulated Agreement, as referenced in the orders issued approving instream leases IL-479 (Special Order Volume 63, Page 26, and Special Order Volume 77, Page 484) remain in effect and are incorporated by reference herein. A copy of this Stipulated Agreement is located in the instream lease file IL-479. Pursuant to the stipulated agreement, the lease of Certificate 10900 is subject to the following conditions:
- a. The quantity diverted into the Upper Sevenmile Creek Ditch to remediate for subsurface irrigation and stockwater shall be modified to 1.0 CFS from April 1 to October 1. Fifty acres shall be excluded from the lease during the period April 1 to July 19 and 80.0 acres shall be excluded from the lease during the period July 20 to October 1.
 - b. An additional 12.0 acres of irrigation were originally excluded from the instream lease during the 2004 irrigation season. These 12.0 acres, located in the SE 1/4 SW 1/4, Section 13, Township 33 South, Range 6 East, W.M., have since been incorporated back into the instream lease beginning in the 2005 irrigation season.
 - c. The combined total quantity of water leased instream; water diverted into Sevenmile Creek Ditch to remediate for subsurface irrigation on JaCox Ranch lands; and, any water diverted into Sevenmile Creek Ditch for direct irrigation (including stockwater) by JaCox

Ranch shall not exceed $7/17$ of the streamflows in Sevenmile Creek at the Sevenmile Creek Ditch POD during the duration of the lease.

- d. If flows are insufficient to provide full distribution of water as provided in subsections a. through c., the 1.0 CFS identified in subsection a. shall be delivered in full to the Upper Sevenmile Creek Ditch before remaining waters are distributed in favor of the quantity to be protected instream.
7. As part of a prior evaluation of IL-479, as described in Special Order Volume 63, Page 26, the Department found the following:
 - a. The Lessor originally requested to leave a portion of water out of the lease under certificates 10900 (0.5 CFS) and 10901 (0.025 CFS) to supply stockwater. However, the Wood River decree, under which these certificates were issued, limits the diversion of water for stock or domestic purposes. The Decree states that during the irrigation season such appropriations shall not be entitled to any water for stock or domestic purposes in addition to the quantity that they are entitled to divert for irrigation. While water is being leased instream during the irrigation season, no water may be diverted solely for livestock use.
 - b. At the time of its original review, the Department identified that use of water for irrigation purposes could not be suspended under all of the water rights to be leased, specifically under certificate 10900, which appropriates water through the Upper Sevenmile Ditch. The Department identified that a portion of the lands to which this water right is appurtenant would continue to be irrigated as a result of sub-irrigation and, therefore, use of water on these lands could not be suspended. These lands are located along four lateral ditches and are irrigated as a result of seepage from the ditch system. This is the same sub irrigation referenced briefly in Finding of Fact No. 6(a) and in association with the terms of the Stipulated Agreement. This water, in the amount of 1.0 CFS, was identified as sufficient for sub-irrigation and any stock watering and was not included as part of the instream flows resulting from the lease of Certificate 10900.
 8. The Department has since identified that there does not appear to be sub-irrigation along the ditches referenced in Finding of Fact No. 7(b). However, this 1.0 CFS is part of the Stipulated Agreement and shall continue to be incorporated as part of this lease.
 9. As part of continued evaluation, the Department has identified that the portion of Certificate 10900 involved in the lease application is a total of 720.1 acres of irrigation, domestic and stock use. However, based upon the Stipulated Agreement, the number of acres of irrigation associated with the instream use is reduced by 50.0 acres from April 1 to July 1 and by 80.0 acres from July 20 to October 1. The exact location of these acres has not been delineated. The rate for irrigation of 50.0 acres, at $1/50^{\text{th}}$ Cubic Foot per Second (CFS) per acre for irrigation, prior to July 1 is 1.0 CFS. The rate for irrigation of 80.0 acres, at $1/80^{\text{th}}$ CFS per acre thereafter, is 1.0 CFS. The water associated with this acreage, 1.0 CFS, is being used, consistent with the Stipulated Agreement, for remediation in Sevenmile Creek Ditch as identified in Finding of Fact No. 6(a).
 10. A description of the authorized place of use associated with Certificate 10900 for the lands involved in this lease application is provided in Finding of Fact No. 11. This description

includes the 50.00 acres and 80.0 acres referenced in Finding of Fact No. 9 that are not delineated and not included as part of the instream use established by this instream lease. The rates identified in Finding of Fact No. 11 reflect the reduced quantities based on Findings of Fact Nos. 3, 4, 6, 7, and 9.

11. The portion of the first right to be leased has been modified from the original lease, IL-479, and is as follows:

Certificate: 10900 in the name of JAMES T. DIXON (confirmed by Wood River (F) in the order record of the State Engineer in Volume 12, Page 269)

Use: IRRIGATION, DOMESTIC AND STOCK USE

Priority Date: 1891

Quantity: **Rate:** 13.4 CUBIC FEET PER SECOND (CFS) prior to July 20 (for Irrigation of 670.1 acres, domestic and stock)
8.0 CFS thereafter (for Irrigation of 640.1 acres, domestic and stock)

Limit/Duty: The amount of water to which this right is entitled, for the purposes of the aforesaid, is limited to 1/50th of one cubic foot per second per acre irrigated prior to July 20, and 1/80th of one cubic foot per second per acre irrigated thereafter, and shall not exceed 5.0 acre-feet per acre during the irrigation season.

Period of Use: April 1 to October 1

Source: SEVENMILE CREEK, tributary to Agency Lake

Authorized Point of Diversion: Not described on the Certificate

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	13	SW NE	36.80
33 S	6 E	WM	13	SE NE	26.40
33 S	6 E	WM	13	SE NW	14.40
33 S	6 E	WM	13	NE SW	30.00
33 S	6 E	WM	13	SE SW	27.90
33 S	6 E	WM	13	NE SE	39.90
33 S	6 E	WM	13	NW SE	40.00
33 S	6 E	WM	13	SW SE	38.20
33 S	6 E	WM	13	SE SE	38.20
33 S	6 E	WM	24	NE NE	20.00
33 S	6 E	WM	24	NW NE	40.00
33 S	6 E	WM	24	SW NE	39.90
33 S	6 E	WM	24	SE NE	20.00
33 S	6 E	WM	24	NE NW	31.20
33 S	6 E	WM	24	NW NW	8.80
33 S	6 E	WM	24	SW NW	22.40
33 S	6 E	WM	24	SE NW	38.40
33 S	6 E	WM	24	NE SW	20.00
33 S	6 E	WM	24	NW SW	6.00
33 S	6 E	WM	24	NE SE	19.70
33 S	6 E	WM	24	NW SE	35.00
33 S	6 E	WM	24	SW SE	5.00
33 S	6 E	WM	24	SE SE	8.80
33 S	7.5 E	WM	18	NE SW	9.20
33 S	7.5 E	WM	18	NW SW	28.00
33 S	7.5 E	WM	18	SW SW	38.20
33 S	7.5 E	WM	18	SE SW	37.70

Note: The above place of use description includes 50.0 acres and 80.0 acres that are excluded from the instream use generated by this Instream Lease consistent with the Stipulated Agreement. The location of this acreage has not been delineated.

12. Certificate 10900 does not describe the location of the Point of Diversion. The Wood River Decree describes the name of the ditch associated with this water right as the Upper Sevenmile or Upper Cox Ditch. Information provided with Transfer Application T-11375, identifies that the Point of Diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
33 S	6 E	WM	11	SE SE	150 FEET NORTH AND 960 FEET WEST FROM THE SE CORNER OF SECTION 11

13. There are two layered irrigation water rights, Certificates 45299 and 7641, appurtenant to a portion of the lands described in Finding of Fact No. 11 for Certificate 10900. The Lessor and Lessee have not requested that these water rights be included as part of this lease application. During the term of the lease, water use under these layered water rights will also be suspended.
14. The lease application also requests to lease a portion of Certificate 10901 for instream use. The Department has determined that some of the lands on which Certificates 10901 and 8679 (supplemental to Certificate 10901) are appurtenant are sub-irrigated from Sevenmile Creek during the irrigation season. Use of water under the existing water rights is subject to beneficial use without waste in accordance with ORS 536.310. These lands are located in close proximity to Sevenmile Creek and will continue to be sub-irrigated from the creek even if the irrigation use is removed for the term of this instream lease. Sevenmile Creek is the primary source of water for the following 6.2 acres under Certificate 10901 that will continue to receive water from the same source:

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	24	SW SW	4.00
33 S	6 E	WM	24	SE SW	2.20

Since use may not be suspended as a result of sub-irrigation from the same source, the above described portion of Certificate 10901 may not be leased to instream use without enlargement of the right as described in OAR 690-380-0100 (2). Subsequently, the associated portion of supplemental Certificate 8679 may not be leased to instream use. Therefore, the portions of Certificates 10901 and 8679 that may be leased instream are reduced as identified in the above table. This reduction is reflected in the findings below describing the portions of Certificate 10901 and Certificate 8679 available for instream lease.

15. In addition, the previous orders approving Instream Lease IL-479, as evidenced by Special Order Volume 63, Page 26, and Special Order Volume 77, Page 484, identified 165.3 acres of irrigation, domestic and stock use available to be leased instream under Certificate 10901. Based upon Findings of Fact Nos. 3 and 14, the number of acres to be leased instream shall be reduced to 155.4 acres.
16. The portion of the second right to be leased is as follows:

Certificate: 10901 in the name of JAMES T DIXON (confirmed by Wood River (F) in the order record of the State Engineer in Volume 12, Page 269)

Use: IRRIGATION of 155.4 acres, domestic and stock use

Priority Date: 1898

Quantity: **Rate:** 3.11 CFS prior to July 20
1.94 CFS thereafter

Volume: 777.0 Acre-Feet (AF)

Limit/Duty: The amount of water to which this right is entitled, for the purposes of the aforesaid, is limited to 1/50th of one cubic foot per second per acre irrigated prior to July 20, and 1/80th of one cubic foot per second per acre irrigated thereafter, and shall not exceed 5.0 acre-feet per acre during the irrigation season.

Period of Use: April 1 to October 1

Source: SEVENMILE CREEK, tributary to Agency Lake

Authorized Point of Diversion: Not described on the Certificate.

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	24	SW NW	17.30
33 S	6 E	WM	24	NE SW	20.00
33 S	6 E	WM	24	NW SW	20.00
33 S	6 E	WM	24	SW SW	11.00
33 S	6 E	WM	24	SE SW	37.80
33 S	6 E	WM	24	NW SE	5.00
33 S	6 E	WM	24	SW SE	35.00
33 S	6 E	WM	24	SE SE	9.30
Total Acres					155.40

17. Certificate 10901 does not describe the location of the Point of Diversion. The Wood River Decree describes the name of the ditch associated with this water right as the Melhase-Kingdon Ditch. Information provided with Transfer Application T-11375, identifies that the Point of Diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
33 S	6 E	WM	24	SW NW	1875 FEET SOUTH AND 390 FEET EAST FROM THE NW CORNER OF SECTION 24

18. For the portion of Certificate 8679 involved in the instream lease application, the previous orders approving Instream Lease IL-479, as evidenced by Special Order Volume 63, Page 26, and Special Order Volume 77, Page 484, for the portion of Certificate, identified 98.0 acres of irrigation, domestic and stock use to be leased instream. Based upon Findings of Fact Nos. 3 and 14, the number of acres of irrigation available to be leased instream shall be reduced to 88.1 acres.

19. The portion of the third right to be leased is as follows:

Certificate: 8679 in the name of JAS T. DIXON (perfected under Permit S-9371)

Use: IRRIGATION OF 88.1 ACRES

Priority Date: SEPTEMBER 25, 1928

Rate: 1.19 CUBIC FEET PER SECOND

Limit: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to ONE-EIGHTIETH of one cubic foot per second, or its equivalent in case of rotation.

Period of Use: May 11 to October 1, unless special permission is granted by the Oregon State Game Commission to divert water earlier than May 11.

Source: BLUE SPRINGS, tributary to SEVENMILE CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
33 S	6 E	WM	23	NE SE	NONE GIVEN
33 S	6 E	WM	24	NW SW	NONE GIVEN

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	24	SW SW	11.00
33 S	6 E	WM	24	SE SW	37.80
33 S	6 E	WM	24	SW SE	30.00
33 S	6 E	WM	24	SE SE	9.30
Total Acres					88.10

20. Certificate 8679 does not provide measured distances for the location of the point of diversion. Rather the certificate identifies the general location of Blue Springs. Based upon information provided by the Lessee and the revised application map for Instream Transfer Application T-11375, the POD is more accurately located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
33 S	6 E	WM	24	NW SW	1545 FEET NORTH AND 95 FEET EAST FROM THE SW CORNER OF SECTION 24

21. The Wood River Decree clarifies that Certificate 8679 is a supplemental irrigation use.
22. Certificate 8679 does not specify an annual duty per acre. The duty of other rights involved in this transfer, based on the Wood River Decree, is limited to 5.0 acre-feet per acre. However, the season of use associated with Certificate 8679 limits the maximum volume of water that could be diverted over the course of the season to 337.5 AF given the rate limit of up to 1.19 CFS and an irrigation season of May 11 to October 1. This is equivalent to 3.83 acre-feet per acre. Given that this is a supplemental use, it is a reasonable amount considering beneficial use without waste.

23. The portion of the fourth right to be leased is as follows:

Certificate: 42822 in the name of ANDREW AND DOROTHY POPSON (perfected under Permit S-35790)

Use: IRRIGATION of 55.7 ACRES

Priority Date: SEPTEMBER 24, 1971

Quantity: **Rate:** 0.98 CFS, with any deficiency in the available supply from drainage to be made up by appropriation from Sevenmile Creek.
Volume: 278.5 AF

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to ONE-FIFTIETH of one cubic foot per second, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 5.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: DRAINAGE DITCH and Sevenmile Creek, tributary to Agency Lake

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
33 S	6 E	WM	11	SE SE	SEVENMILE CREEK - 150 FEET NORTH AND 960 FEET WEST FROM SE CORNER OF SECTION 11
33 S	6 E	WM	13	SE NW NE SW SE SW	DRAINAGE - DRAINAGE COLLECTED BETWEEN POINTS 3320 FEET NORTH AND 20 FEET NORTH BOTH FROM SOUTHWEST CORNER OF THE SE SW OF SECTION 13

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	13	SE NW	13.60
33 S	6 E	WM	13	NE SW	10.00
33 S	6 E	WM	13	SE SW	10.30
33 S	6 E	WM	24	NE NW	8.80
33 S	6 E	WM	24	NW NW	13.00
Total Acres					55.70

24. Certificate 42822 does not specify an irrigation season. However, the irrigation season, consistent with the Wood River Decree, is April 1 to October 1.
25. 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). The 21 day public comment period closed on December 10, 2013. Comments were received on December 2, 2013, from Martha Pagel, an attorney with Schwabe, Williamson and Wyatt, on behalf of Roger Nicholson. Mr. Nicholson is a party to the Stipulated Agreement incorporated as part of this Final Order. Ms. Pagel, identified in her comments, that if this instream lease includes the conditions from the Stipulated Agreement, then Mr. Nicholson has no objections to the instream lease. A copy of the Stipulated Agreement as attached as part of the comments. No additional comments were received during the 21 day public comment period.
26. The Lessor and Lessee have requested to protect water instream from the POD for Certificate 10900, as described in Findings of Fact No. 12, to the mouth of Sevenmile Creek. A portion of the water diverted under Certificate 10900 returns to Sevenmile Creek within the proposed reach and is available to downstream water right holders. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected instream requires modification to account for return flows.

The place of use described below for Certificate 10900 is located in close proximity to Sevenmile Creek and will have approximately 20.0% return flows along the creek.

a) Certificate 10900

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	24	SW NW	6.00
33 S	6 E	WM	24	NW SW	6.00
Total Acres					12.00

Return flows associated with Certificate 10900 should be accounted for at approximately River Mile (RM) 15.52, where the lands intersect Sevenmile Creek in the SW NW of Section 24.

27. The Department previously identified the maximum possible quantity in the Sevenmile Creek Ditch associated with water diverted under Certificates 10900, 10904, 10922, and 10926 for Roger Nicholson as 20.8 CFS prior to July 20 and 13.0 CFS thereafter. This was described in Special Order Volume 77, Page 484, approving Instream Lease IL-479, in Finding of Fact No. 14. The number of acres of irrigation associated with the identified rates is 1040.0 acres, being 1/50th CFS per acre prior to July 20 and 1/80th CFS per acre thereafter. Based upon Finding of Fact No. 3, contained in this Final Order, the number of acres identified for instream use associated with JaCox Ranch for Certificate 10900 has been reduced by 1.5 acres. These acres were identified during the review of Instream Transfer Application T-11375, as being located on the east side of a fence and likely irrigated by Roger Nicholson. For purposes of this instream lease, the amount of water diverted down the ditch, as identified in Finding of Fact No 28, has been increased by the quantity associated with irrigation of the 1.5 acres under Certificate 10900.
28. Based upon review of the application, the above findings, and the stipulated agreement, the Department has determined that the portion of Certificate 10900 may be leased to instream use as described in the table below. In addition, this table describes how water will be allocated between the amount of water leased instream by JaCox Ranch and the amount diverted down the canal for Certificate 10900.

Reach #1: From Upper Sevenmile Ditch POD (as described in Finding of Fact No.12) to River Mile 15.52.

Leased Instream	Volume Instream	Maximum possible - Diverted into Canal for Mr. Nicholson*	Diverted into Canal for remediation as specified in the Stipulated Agreement	Maximum Possible - Canal Total	Period
12.82 CFS	762.85 AF	20.83 CFS	1.00 CFS	21.83 CFS	April 1 - April 30
10.85 CFS	667.01 AF	20.83 CFS	1.00 CFS	21.83 CFS	May 1 - May 31
9.86 CFS	586.81 AF	20.83 CFS	1.00 CFS	21.83 CFS	June 1 - June 30
7.89 CFS	297.32 AF	20.83 CFS	1.00 CFS	21.83 CFS	July 1 - July 19
6.90 CFS	301.03 AF	13.02 CFS	1.00 CFS	14.02 CFS	July 20 - Aug. 10
5.91 CFS	598.16 AF	13.02 CFS	1.00 CFS	14.02 CFS	Aug. 11 - Sept. 30

* Under certificates 10900, 10904, 10922, and 10926 for primary irrigation.

Reach #2: From River Mile 15.52 to Agency Lake.

Leased Instream	Volume Instream	Maximum possible - Diverted into Canal for Mr. Nicholson*	Diverted into Canal for remediation as specified in the Stipulated Agreement	Maximum Possible - Canal Total	Period
12.73 CFS	760.12 AF	20.83 CFS	1.00 CFS	21.83 CFS	April 1 - April 30
10.77 CFS	664.62 AF	20.83 CFS	1.00 CFS	21.83 CFS	May 1 - May 31
9.79 CFS	584.71 AF	20.83 CFS	1.00 CFS	21.83 CFS	June 1 - June 30
7.83 CFS	296.26 AF	20.83 CFS	1.00 CFS	21.83 CFS	July 1 - July 19
6.85 CFS	299.90 AF	13.02 CFS	1.00 CFS	14.02 CFS	July 20 - Aug. 10
5.87 CFS	595.92 AF	13.02 CFS	1.00 CFS	14.02 CFS	Aug. 11 - Sept. 30

* Under certificates 10900, 10904, 10922, and 10926 for primary irrigation.

29. Other conditions on the instream lease associated with Certificate 10900 are:

The combined total quantity of water to be protected instream; the amount of water diverted into the ditch to address subsurface irrigation; and, any amount diverted for direct irrigation and stock-watering by JaCox Ranch shall be as described in the relevant table in Finding of Fact No. 30 above and shall not exceed $\frac{7}{17}$ of streamflows in Sevenmile Creek during the period of the lease, and shall be subject to distribution as provided in Finding of Fact No. 7(d) above.

The Department has determined that a suitable regulatory device shall be installed by JaCox Ranch at the point of diversion for certificate 10900 to assure that appropriate portions of water are being diverted down the Upper Sevenmile Ditch and are being left instream past the point of diversion. Prior to this lease being exercised, an automatic splitting weir was installed at the point of diversion and the weir satisfies this condition. The weir should be maintained in good working order. Any need to modify or replace the weir should be done in consultation with the Department. In addition, it may become necessary to measure the quantity of water being diverted into Upper Sevenmile Ditch and the quantity of water left instream past the point of diversion. If this is determined necessary, the Department may require the installation of a suitable measuring device, which would be paid for by, or on behalf of, JaCox Ranch.

If determined necessary by the Department, JaCox Ranch shall install a suitable device for measuring and recording the quantity of water flowing past and/or into the diversion point. The type and plans of the measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.

The proposed distribution allows Mr. Nicholson to divert up to the full rate and duty allowed under the terms and conditions of certificates 10900, 10904, 10922, and 10926 as appurtenant to his lands at the Upper Sevenmile Ditch POD.

30. The applicant has requested to protect water instream under Certificate 8679 from the POD on Blue Springs, through the natural channel for Blue Springs and into Sevenmile Creek to its mouth. An instream reach is generally from the point of diversion to the mouth of the source stream (Blue Springs) but may be protected further if measurable in the receiving stream (Sevenmile Creek) (OAR 690-077-0015 (8)). The quantity that may be leased from Blue Springs is measurable into Sevenmile Creek and may be protected instream in Sevenmile Creek.
31. The Lessor and Lessee have requested to protect water instream under Certificate 42822, which has an identified source of drainage collected in a ditch with deficiency in supply made up from Sevenmile Creek. In conjunction with evaluation under Instream Transfer Application T-11375, the Department has identified that with irrigation discontinuing as a result of this instream lease, there will not likely be any water in the drainage ditch. Therefore, the source of water for the instream use will be Sevenmile Creek with the instream use beginning at the Sevenmile Creek POD described in Finding of Fact No. 23. This is also consistent with the definition of an instream water right, which by definition does not require a diversion or any other means of physical control over the water. ORS 537.322(3)

32. The Lessor and Lessee have requested to protect water instream from the PODs as described in Findings of Fact Nos. 17 (Certificate 10901), 20 (Certificate 8679), and 23 (Certificate 42822) to the mouth of Sevenmile Creek. A portion of the water diverted under Certificates 10901 and 8679 returns to Sevenmile Creek within the proposed reach and is available to downstream water right holders. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected instream requires modification to account for return flows.

The place of use described below for Certificates 10901 and 8679 is located in close proximity to Sevenmile Creek and will have approximately 20.0% return flows along the creek.

a) Certificate 10901

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	24	SW NW	17.30
33 S	6 E	WM	24	NW SW	20.00
33 S	6 E	WM	24	SW SW	9.00
33 S	6 E	WM	24	SE SW	17.80
Total Acres					64.10

Return flows associated with Certificate 10901 should be accounted for at the Melhase-Kingdon Ditch, located as described in Finding of Fact No. 17.

b) Certificate 8679

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	24	SW SW	9.00
33 S	6 E	WM	24	SE SW	17.80
Total Acres					26.80

Return flows associated with Certificate 8679 should be accounted for at approximately RM 6.84, where the lands intersect Sevenmile Creek in the SW SW of Section 24, Township 33 South, Range 6 East.

33. As identified in Findings of Fact Nos. 3, 4, and 14, the portion of Certificates 10901, 8679, and 42822 have been reduced from what was previously leased instream. The instream use associated with each right, therefore, also requires modification.

34. The instream use has been modified from the original Instream Lease and is as follows for Certificates 10901, 8679, and 42822:

Primary Instream: Sevenmile Creek, tributary to Agency Lake

Instream Reach #1: From the Upper Sevenmile Creek POD for Certificate 42822 (as described in Finding of Fact No. 23) to the Melhase Kingdon Ditch POD for Certificate 10901 (as described in Finding of Fact No. 17)

Certificate	Priority Date	April 1 – May 10	May 11 – July 19	July 20 – Sept 30	Instream Volume (AF)
		Instream Rate (cfs)	Instream Rate (cfs)	Instream Rate (cfs)	
42822	9/24/1971	-	0.98	0.98	278.50

Instream Reach #2: At the Melhase Kingdon Ditch POD for Certificate 10901

		April 1 – May 10	May 11 – July 19	July 20 – Sept 30	
Certificate	Priority Date	Instream Rate (cfs)	Instream Rate (cfs)	Instream Rate (cfs)	Instream Volume (AF)
42822	9/24/1971	-	0.98	0.98	278.50
10901	1898	2.27	2.27	1.94	777.00
Total		2.27	3.25	2.92	1055.50

Instream Reach #3: From immediately below the Melhase Kingdon Ditch POD for Certificate 10901 to Agency Lake

		April 1 – May 10	May 11 – July 19	July 20 – Sept 30	
Certificate	Priority Date	Instream Rate (cfs)	Instream Rate (cfs)	Instream Rate (cfs)	Instream Volume (AF)
42822	9/24/1971	-	0.98	0.98	278.50
10901	1898	2.08	2.08	1.78	712.90
Total		2.08	3.06	2.76	991.40

Supplemental Instream: Blue Springs, tributary to Sevenmile Creek

Instream Reach #1: From the Blue Springs POD for Certificate 8679 (as described in Finding of Fact No. 20) to the confluence with Sevenmile Creek and then into Sevenmile Creek to where the lands under Certificate 8679 intersect the south line of the SW SW of Section 24, T33S, R6E, W.M. (at approximately River Mile 6.84)

		April 1 – May 10	May 11 – July 19	July 20 – Sept 30	
Certificate	Priority Date	Instream Rate (cfs)	Instream Rate (cfs)	Instream Rate (cfs)	Instream Volume (AF)
8679	9/25/1928	-	1.19	1.19	337.24

Instream Reach #2: From the south line of the SW SW of Section 24, Township 33 South, Range 6 East (at approximately River Mile 6.84) to Agency Lake

		April 1 – May 10	May 11 – July 19	July 20 – Sept 30	
Certificate	Priority Date	Instream Rate (cfs)	Instream Rate (cfs)	Instream Rate (cfs)	Instream Volume (AF)
8679	9/25/1928	-	1.12	1.12	316.72

35. Other conditions to prevent injury and enlargement are:

Certificate 8679 is supplemental to the portion of Certificate 10901 being leased instream. Certificate 8679 shall only be protected instream when necessary to make up a deficiency of the rate and duty of the primary supply under certificate 10901 during the period for which water is being leased instream.

36. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water rights.

37. The protection of flows within the proposed reaches 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 no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
 - d. Return flows would re-enter the within the reach on Sevenmile Creek. Return flows associated with Certificates 10900, 10901 and 8679 have been accounted for as described in Findings of Fact Nos. 26, 28, 32, and 34. Any return flows resulting from the exercise of Certificate 42822 would re-enter the river downstream of the reach of the instream water right.
38. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reaches will provide for a beneficial purpose.
 39. The total monthly quantities of water to be protected instream under existing and proposed instream rights in the reaches do not exceed the estimated average natural flow.
 40. 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.
 41. 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. 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.
 42. If a right which has been leased is later proposed to be leased again, transferred and/or reviewed for 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.
 43. The Lessor and Lessee have requested that the lease terminate on September 30, 2018. The lease may commence on the date this final order is signed.
 44. The Lessor and Lessee have requested the option of terminating the lease early but only with consent of all parties to the lease.

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.

Now, therefore it is ORDERED:

1. The Lease as described herein is APPROVED.
2. During each year of 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 September 30, 2018. For multiyear leases, the lessor and lessee *shall* have the option of terminating the lease any time each year with written notice to the Department. The Lessor and/or Lessee may only terminate the lease early with the consent of all parties to the lease. However, if the termination request is received less than 30-days prior to the instream use period (April 1 through September 30) or after the water rights' original period of allowed use has begun, the Department may issue an order terminating the lease but use of water may not be allowed until the following calendar year, unless the Director determines that enlargement would not occur.

Dated at Salem, Oregon this 15 day of April, 2014.


Dwight French, Water Right Services Administrator, 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: APR 17 2014