

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

In the Matter of Instream Lease Application )	DETERMINATION and FINAL
IL-1159 and Preliminary and Final Award )	ORDER ON PROPOSED INSTREAM
of Mitigation Credits, Certificates 83857 )	LEASE and MITIGATION CREDIT
and 83732, Crook County )	PROJECT and TERMINATION OF
)	INSTREAM LEASE IL-1081/
)	MITIGATION CREDIT PROJECT
)	MP-138

**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**

Grass Butte, LLC  
1111 Main Street, Suite 700  
Vancouver, WA 98660

**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 8, 2010, the DRC Mitigation Bank and Grass Butte, LLC, filed an application to lease a portion of Certificates 83857 and 83651 and all of Certificate 83732 for instream use. The Department assigned the application number IL-1081.
2. The DRC Mitigation Bank also requested to use the project to generate mitigation credits in the Deschutes Groundwater Study Area. The Department assigned the mitigation project number MP-138.
3. The portion of Certificate 83651 originally proposed to be leased instream was removed from the lease prior the application being approved. In addition, 2.5 acres proposed to be leased instream under Certificate 83857 were removed from the original lease application.
4. A Final Order approving the instream lease and mitigation credit project was issued by the Department on July 27, 2010, as evidenced by Special Order Volume 81, Page 474.

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.

Following issuance of this order it was identified that there was a scrivener's error in the description of the number of acres on which the mitigation credit calculation was based. A Correction Order was issued by the Department on July 30, 2010, as evidenced by Special Order Volume 81, Page 546.

5. Under Instream Lease IL-1081, water was protected instream during the period May 6 through October 15.
6. Instream Transfer Application T-10730 affects the portion of Certificates 83857 and 83732 leased to instream use and used to generate mitigation credits. The transfer applicants, Grass Butte LLC and PremierWest Bank, have requested that the transfer application process be completed upon the close of the protest period, provided no protests are received. The protest period should close on approximately May 31, 2011. The transfer application requests to protect water instream during the period June 1 through November 8.
7. The Department has determined that instream lease IL-1081 requires modification to prevent injury and enlargement. Should the instream transfer be approved after the instream use has begun under IL-1081 and then the instream lease is terminated (the instream transfer taking its place), more water would be protected instream during the calendar year than allowed by Certificates 83857 and 83732. However, Instream Lease IL-1081 may be terminated and a new final order issued to prevent any injury and enlargement by re-describing the instream use such that it matches the proposed instream transfer. This instream lease application has been reassigned instream lease application number IL-1159.
8. Review of the original instream lease application (IL-1081) identified that Peoples Irrigation Company is not an identified Lessor on the lease. Irrigation districts (and other water providers) are required by rule (OAR 690-077-0076) to be a co-lessor on an instream lease for water rights served by a district. However, it appears that the lands described in Finding of Fact #10 are no longer within this irrigation district. Therefore, Peoples Irrigation Company does not need to be included on the lease application.
9. Review of the original instream lease application (IL-1081) identified that interest in a portion of the water rights to be leased instream had been conveyed from the original land owners. The lease application identifies Grass Butte, LLC, as the Lessor. Individual conveyance agreements (recorded Statutory Bargain and Sale and Statutory Warranty Deeds), along with supporting documentation, identify that interest in a portion of the rights to be leased is held by The Daniels Group (now known as Grass Butte LLC) and another portion is held by Emmett Ranch. The Department has determined that Grass Butte is an interest holder in the rights and is authorized to lease the pertinent portions of the water rights instream.

For the portion of the right held by Emmett Ranch, Emmett Ranch provided notarized consent to the lease on July 26, 2010.

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

**Certificate:** 83857 in the name of Peoples Irrigation Company  
**Priority Date:** 1892 and 1898

**Use:** Irrigation of 64.5 acres, being 13.4 acres from Point of Diversion (POD ) #1, 50.6 acres from POD #6, and 0.5 acres from POD #7

**Quantity:** **Rate:** 0.81 Cubic Foot per Second (CFS), being 0.17 CFS from POD #1, 0.63 CFS from POD #6, and 0.01 CFS from POD #7

**Duty:** 258.0 Acre-Feet (AF), being 53.6 AF from POD #1, 202.4 AF from POD #6, and 2.0 AF from POD #7

**Limit:** One-eightieth CFS per acre, not to exceed 4.0 AF per acre per year

**Source:** Crooked River, tributary of the Deschutes River

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	POD	Priority Date	Acres
14 S	14 E	WM	20	SW SW	6	1892	10.0
14 S	14 E	WM	29	NE NE	7	1898	0.5
14 S	14 E	WM	29	NE NW	6	1892	5.0
14 S	14 E	WM	29	NW NW	1	1892	2.4
14 S	14 E	WM	29	NW NW	6	1892	35.6
14 S	14 E	WM	29	SW NW	1	1892	3.0
14 S	14 E	WM	29	SE NW	1	1892	8.0

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	16 E	WM	8	NW SW	POD #1 - 1920 FEET NORTH & 340 FEET EAST FROM THE SW CORNER OF SECTION 8
14 S	14 E	WM	29	NE NW	POD #6 - 1085 FEET SOUTH & 970 FEET WEST FROM THE N ¼ CORNER OF SECTION 29
14 S	14 E	WM	20	SE SE	POD #7 – 325 FEET NORTH AND 120 FEET WEST FROM THE SE CORNER OF SECTION 20

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

**Certificate:** 83732 in the name of Butler Ranch, Inc.

**Priority Date:** 1892

**Use:** Irrigation of 11.0 acres

**Quantity:** **Rate:** 0.137 Cubic Foot per Second (CFS)

**Duty:** 44.0 Acre-Feet (AF)

**Limit:** Not to exceed 4.0 AF per acre per year

**Source:** Crooked River, tributary of the Deschutes River

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	14 E	WM	20	SW SW	11.0

**Authorized POD:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	14 E	WM	20	SE SW	1896 FEET SOUTH AND 1717 FEET EAST FROM THE WEST ¼ CORNER OF SECTION 20

12. Certificates 83857 and 83732 do not specify the irrigation season. However, the irrigation season is defined by Decree as February 1 to December 1.

13. 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.

14. The Lessor and Lessee have requested to protect water instream from the PODs on the Crooked River to Lake Billy Chinook. A portion of the water diverted at each POD returns to the Crooked River below the POD 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 hydrogeologic evaluation of where subsurface return flows occur is generally based on the following information: 1) the local shallow and regional ground water elevations, 2) the shallow and regional head gradient (i.e. ground water flow direction), 3) elevation of nearby streams, 4) elevation of closest gaining stream reaches, 5) distance from nearby streams and gaining stream reaches, and 6) local geologic information. When evaluating for return flows, the Department generally considers the place of use as a whole and where the majority of return flows occur based upon the presence of surface return flows (overland flow) and the factors described above for any subsurface return flows.

The place of use under each right proposed for instream lease is located in close proximity to the Crooked River. A portion of the water diverted to the place of use returns to the river system around the points of diversion or close to the place of use (specifically for those lands that receive irrigation water from POD #1 under Certificate 83857, located some distance upstream from the place of use) as a result of overland flow. Remaining return flows take the form of subsurface return flows. Subsurface returns would also return to the river system in the area of where Lone Pine Road crosses the Crooked River at River Mile 30.

The instream flows at the points of diversion or near the place of use have been reduced by 10% to account for surface return flows and instream flows at Lone Pine Road have been reduced to the consumptive portion of the rights to account for subsurface return flows.

15. The instream use has been modified from the lease application, as described in Finding of Fact #7 and #14, to prevent injury and enlargement and is as follows:

Crooked River, tributary to the Deschutes River

Resulting from Certificate 83857

Reach #1: From POD #1 (as described in Finding of Fact #14) to POD #7 (as described in Finding of Fact #14)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
83857	1892	0.17	53.6	June 1 – Nov. 8

Reach #4: At POD #7 (as described in Finding of Fact #14)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
83857	1892	0.17	53.6	June 1 – Nov. 8
	1898	0.01	2.0	
<b>Total:</b>		<b>0.18</b>	<b>55.6</b>	

Reach #5: From just below POD #7 to POD #6 (as described in Finding of Fact #14)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
83857	1892	0.17	53.6	June 1 – Nov. 8
	1898	0.006	1.8	
<b>Total:</b>		<b>0.176</b>	<b>55.4</b>	

Reach #6: At POD #6 (as described in Finding of Fact #14)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
83857	1892	0.80	256.0	June 1 – Nov. 8
	1898	0.006	1.8	
<b>Total:</b>		<b>0.806</b>	<b>257.8</b>	

Reach #7: From just below POD #6 to River Mile 30 where Lone Pine Road crosses the Crooked River

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
83857	1892	0.72	229.92	June 1 – Nov. 8
	1898	0.006	1.8	
<b>Total:</b>		<b>0.726</b>	<b>231.72</b>	

Reach #8: From River Mile 30 to Lake Billy Chinook

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
83857	1892	0.36	115.2	June 1 – Nov. 8
	1898	0.003	0.9	
<b>Total:</b>		<b>0.363</b>	<b>116.1</b>	

Resulting from Certificate 83732

Reach #1: At POD for Certificate 83732 (as described in Finding of Fact #18)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
83732	1892	0.137	44.0	June 1 – Nov. 8

Reach #2: From just below the POD for Certificate 83732 to River Mile 30 where Lone Pine Road crosses the Crooked River

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
83732	1892	0.12	38.32	June 1 – Nov. 8

Reach #3: From River Mile 30 to Lake Billy Chinook

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
83732	1892	0.06	19.8	June 1 – Nov. 8

16. Other conditions to prevent injury and enlargement are:

For the amount leased instream under Certificate 83732, the quantity of water leased from the point of diversion, together with the amount diverted at the old point of diversion, shall not exceed the quantity of water lawfully available at the original point of diversion.

17. There are supplemental water rights, Certificates 1327 and 83850, appurtenant to all or a portion of the lands described in Findings of Fact #10 and #11. The Lessor and Lessee have requested that these water rights not be included as part of this lease application. During the term of the lease, water use under these rights will also be suspended.
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 November 30, 2014, or upon approval of instream transfer T-10730. The lease will commence the date the final order is signed and on February 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 originally assigned this mitigation credit project number MP-138. As identified in Finding of Fact #7, the Department is modifying IL-1081 to prevent injury and enlargement. The instream lease has been re-assigned to IL-1159. The mitigation project is also re-assigned to number MP-154.
25. Notice of the mitigation credit project was originally provided by the Department under MP-138 pursuant to OAR 690-521-0300 (6) on June 15, 2010. 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. As part of the original public notice of the mitigation project, the Department identified that the project may result in 221.4 mitigation credits. However, on July 26, 2010, the applicants requested to amend the application (IL-1081) to reduce the number of acres of irrigation leased to instream use from 123.0 to 75.5 acres. Therefore, the number of mitigation credits that may be awarded to this project have also been reduced. The Department still finds that 135.9 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 Crooked River and General Zones of Impact.
28. The mitigation credits expire on December 31, 2014, or when the lease is terminated. If the lease is terminated during the instream use period (June 1 through November 8) and the instream use is replaced with instream water rights certificates issued upon approval of Instream Transfer T-10730/Mitigation Credit Project MP-124, the mitigation credits from MP-154 will no longer be valid. If T-10730 is approved during the instream use period, mitigation credits from MP-154 will be replaced by mitigation credits awarded to Mitigation Project MP-124.
29. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.
30. 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.
31. 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**

Because the instream use period is different than that proposed in T-10730, the instream lease (IL-1081), as executed, would result in injury and enlargement if T-10730 is approved and the lease is terminated during the same use period. Consistent with OAR 690-077-0077(8), if the Department determines that a proposed lease results in injury or enlargement after the lease has been executed, the Department shall terminate the lease unless the may be modified to prevent injury or enlargement. The existing lease has been modified to prevent injury and enlargement.

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. Instream Lease IL-1081 and Mitigation Credit Project MP-138, approved by Special Order Volume 81, Page 474, and Correcting Order Volume 81, Page 546, are terminated.
3. 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.
4. The lease will terminate on November 30, 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 (June 1 through November 8) 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. The lease has been modified to prevent injury and enlargement should a termination request be received during the allowed instream use period and Instream Transfer T-10730 is approved during the same period.
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 **135.9 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 **Crooked River and General Zones 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, 2014. However, if IL-1159 is terminated and a new mitigation project is approved under Instream Transfer T-10730/Mitigation Credit Project MP-124 during the same instream use period (June 1



through November 8), the mitigation credits from MP-138 will no longer be valid and the mitigation credits awarded to MP-124 will replace those credits.

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 25 day of April, 2011.

  
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 27 2011