

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

In the Matter of Instream Lease Application) DETERMINATION and
 IL-1236 and Preliminary and Final Award) FINAL ORDER ON PROPOSED
 of Mitigation Credits, Certificates 81663) INSTREAM LEASE and MITIGATION
 and 67284, Deschutes County) 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

John Tehan
 PO Box 34
 Sisters, OR 97759

Lessee

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

Findings of Fact

1. On April 19, 2012, the DRC Mitigation Bank and John Tehan filed an application to lease a portion of Certificates 81663 and 67284 for instream use. The Department assigned the application number IL-1236.
2. The portion of the first right to be leased is as follows:

Certificate: 67284 in the name of Frank L. Shaw (confirmed by Decree)
Use: Irrigation of 3.5 acres
Priority Date: 1883
Quantity: **Rate:** 0.07 Cubic Foot per Second (CFS)
Limit: One-fiftieth CFS per acre
Source: Whychus Creek (formerly Squaw Creek), tributary to the Deschutes River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10E	WM	9	SE NW	BUCHANAN DITCH – 2050 FEET SOUTH AND 1250 FEET WEST FROM THE N ¼ CORNER OF SECTION 9

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	Acres
15 S	10 E	WM	4	SE SE	3.5

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

Certificate: 81663 in the name of John T. Tehan (confirmed by Decree)

Use: Irrigation of 7.6 acres

Priority Date: 1883

Quantity: **Rate:** 0.15 Cubic Foot per Second (CFS)

Limit: One-fiftieth CFS per acre

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

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10E	WM	9	SE NW	BUCHANAN DITCH – 2050 FEET SOUTH AND 1250 FEET WEST FROM THE N ¼ CORNER OF SECTION 9

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
15 S	10 E	WM	4	SE SE	7.6

4. Certificates 67284 and 81663 do not specify the irrigation season. Nor is an irrigation season specified by Basin Program or Decree. For the purposes of 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. 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.
6. 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 not measurable into the Deschutes River and may not be protected instream in the Deschutes River.
7. The quantity of water requested to be protected instream requires additional modification to account for both surface and subsurface return flows to prevent injury to downstream water users and enlargement.

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.

A portion of the water diverted to the place of use returns to the creek system around River Mile 10.0 as a result of subsurface return flows. The instream flows at River Mile 16.0 have been reduced to the consumptive portion of the rights to account for return flows.

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

Whychus Creek, tributary to the Deschutes River

Instream Reach #1: From POD (as described in Findings of Fact #2 and 3) to River Mile 16

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
67284	1883	0.07	19.25	June 1 through October 16
81663	1883	0.15	41.80	
Totals		0.22	61.05	

Instream Reach #2: From River Mile 16.0 to the mouth of Whychus Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
67284	1883	0.02	6.3	June 1 through October 16
81663	1883	0.05	13.7	
Totals		0.07	20.0	

9. There is a supplemental water right, Certificate 81664, appurtenant to all or a portion of the lands described in Findings of Fact # 2 and #3. The Lessor and Lessee have requested that this water right not be included as part of this lease application. During the term of the lease, water use under this right will also be suspended.
10. 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.
11. 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.
12. 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.
13. The Lessor has requested that the lease terminate on October 31, 2016. The lease will commence the date the final order is signed and on March 1 of each succeeding calendar year that the lease is in place.

14. The Lessor has requested the option of terminating the lease early with written notice to the Department.

Preliminary Award of Deschutes Basin Mitigation Credits

15. 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.
16. The Department assigned this mitigation credit project number MP-172.
17. 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 OPRD. These comments identified that additional streamflow may benefit aquatic resources and potentially improve recreational fishery resources in this area.
18. No modifications were made to the lease based on the comments received.
19. The lease of 11.1 acres of irrigation use to instream use generates 20.0 AF of mitigation water. Therefore, the Department finds that 20.0 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.
20. The mitigation credits expire on December 31, 2016.
21. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.
22. 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.
23. 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 October 31, 2016. 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 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 October 16) 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 **20.0 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, 2016.
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 5th day of July, 2012.


Dwight French, Water Right Services Administrator, for
PHILLIP C. WARD, DIRECTOR

Mailing date: JUL 09 2012

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