

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

In the Matter of the Proposed Short-Term)	DETERMINATION and
Lease of Existing Water Rights for Instream)	FINAL ORDER ON
Use, Certificates 10900, 10901, 8679 and)	PROPOSED INSTREAM
42822, Klamath County, Oregon)	LEASE

FINDINGS OF FACT

1. A Short-Term Lease Application was submitted to the Department by:

Lessor:	Lessee:
JaCox Ranch	Klamath Basin Rangeland Trust (KBRT)
PO Box 435	340 A Street, Suite 201
Fort Klamath, OR 97626	Ashland, OR 97520

2. The Instream Lease Application (the Application) included the required fees. The Department assigned this Application lease agreement number L-479.
3. The Application proposed to lease a portion of certificates 10900 and 10901 and all of certificates 8679 and 42822 for instream purposes. Under certificate 10900, the Lessor and Lessee (together "the Applicant") requested to lease 729.5 acres of irrigation to instream use. Under certificate 10901, the Applicant requested to lease 167.3 acres of irrigation, being 144.0 acres of primary irrigation and 23.3 acres of supplemental irrigation, to instream use. The Applicant also requested that a portion of water used under certificates 10900 and 10901 be left out of the lease for stockwatering purposes.

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 137-004-080 and OAR 690-01-005 you may either petition for judicial review or petition the Director for reconsideration of this order.

4. The Application proposed to lease water instream under each of the water rights identified in Finding 3 as follows:

Certificate	Priority Date	Instream Reach	Primary Rate Instream	Supplemental Rate Instream	Period Protected Instream	Primary Vol. Instream	Supp. Volume Instream
10900	1891	Upper Seven Mile Ditch POD to Agency Lake	9.905 CFS 9.0 CFS		April 1 - July 19 July 20 - Sept. 30	3466.026 AF	
10901	1898	Melhase Kingdon Ditch POD to Agency Lake	2.078 CFS 1.775 CFS	0.367 CFS 0.291 CFS	April 1 - July 19 July 20 - Sept. 30	710.925 AF	116.5 AF
8679	9/25/1928	Blue Springs Ditch to Agency Lake		1.35 CFS	May 11 - Sept. 30		500.0 AF
42822	9/24/1971	At the Drainage Ditch POD with any deficiency to be made up from the Upper Sevenmile Ditch POD to Agency Lake	1.0 CFS		May 11 - Sept. 30	283.0 AF	

5. The lease application includes the information required under OAR 690-077-0077(3). The Department provided notice of the lease application pursuant to OAR 690-077-0077(6) on December 23, 2003. No comments were received during the open comment period, which ended January 13, 2004. On March 18, 2004, the Department received a letter from Martha Pagel, attorney for Roger Nicholson, asserting that this proposed lease and Instream Lease Application L-480 would result in injury to water rights held by Mr. Nicholson.

On May 3, 2004, the Department received from the KBRT an April 30, 2004, letter from Martha Pagel, on behalf of Roger Nicholson, providing additional details regarding the injury concerns raised in the letter received by the Department on March 18, 2004.

6. Ms. Pagel indicated in her April 30, 2004, letter that if Mr. Nicholson's concerns on Sevenmile Creek (Instream Lease Application L-479) were addressed, he would not pursue any objections to the lease of water instream in Annie Creek (Instream Lease Application L-480).
7. On August 12, 2004, Department staff met with the Applicant, Mr. Nicholson, and their respective counsel. As a result of that discussion, the parties reached a stipulated agreement.
8. Pursuant to the stipulated agreement, the Applicant revised the Application as it relates to certificate 10900 as follows:
- 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 shall be 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., shall be incorporated back into the instream lease beginning in the 2005 irrigation season and for the duration of the lease.

- 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 $\frac{7}{17}$ 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.
9. Based upon continued evaluation of the Application, the Department has also found the following:
- a. The Applicant 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. Use of water for irrigation purposes may 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 has identified a portion of the lands to which this water right is appurtenant that will continue to be irrigated as a result of subirrigation and, therefore, use of water on these lands cannot 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 subirrigation referenced briefly in Finding 8(a) in association with the terms of the stipulated agreement. This water, in the amount of 1.0 CFS, not leased is sufficient for subirrigation and stockwatering and shall not be leased instream.
10. The Applicant has also previously clarified that certificate 10901 is not supplemental to certificate 10900 and is entirely for the purpose of primary irrigation, domestic and stock. In addition, on August 13, 2004, the Lessor requested to amend the application to exclude 2.0 acres from the lease under certificates 10901 and 8679 because these two acres are not appurtenant to lands owned by the Lessor.
11. Based upon Findings 8 and 9, the Department finds that the lease application requires modification in order to clarify the water rights to be leased. These rights are clarified as follows (changes are shown in bold text):

Certificate: 10900
Use: Primary irrigation, domestic and stock (**leasing a portion of the right**)
Acres: **2004 Leasing Season: 667.5 acres from April 1 to July 20 and 637.5 acres from July 20 to October 1**
2005 - 2008 Leasing Seasons: 679.5 acres from April 1 to July 20 and 649.5 acres from July 20 to October 1
Priority Date: 1891
Season of Use: April 1 to October 1
Quantity: **2004 Leasing Season:**
April 1 to July 20: **13.35 Cubic Feet per Second (CFS)**
July 20 to October 1: **7.97 CFS**
2005 - 2008 Leasing Seasons:
April 1 to July 20: 13.59 Cubic Feet per Second (CFS)
July 20 to October 1: 8.12 CFS
Duty (limited to 5.0 Acre-Feet (AF) per acre):
2004 Leasing Season: 3337.5 Acre-Feet (AF)
2005 - 2008 Leasing Season: 3397.5 AF
Source: Sevenmile Creek, tributary to Agency Lake

Authorized Point of Diversion (POD) - Upper Sevenmile Ditch POD:

Township		Range		Meridian	Sec	1/4	1/4	Location
33	S	6	E	W.M.	11	SE	SE	NA

Authorized Place of Use: The applicant originally requested to lease 729.5 acres of irrigated lands, as described in the Application, to instream use. However, the Department has identified that the number of acres of irrigation to be leased instream must be reduced by 50.0 acres from April 1 to July 20 and by 80.0 acres from July 20 to October 1. The exact location of these lands has not been delineated. However, these lands are not irrigated as a result of direct application of water but rather by subirrigation along lateral ditches. The Applicant has also requested to reduce the number of acres of irrigation to be leased instream further by 12.0 acres located in the SE 1/4 SW 1/4, Section 13, Township 33 South, Range 6 East, W.M. These 12.0 acres are to be irrigated to provide some stockwater to the applicant during the 2004 irrigation season and are to be added back into the lease after the end of the 2004 leasing season.

Certificate: 10901
Use: Irrigation, domestic and stock (**leasing a portion of the water right**)
Acres: **165.3 acres**
Priority Date: 1898
Season of Use: April 1 to October 1
Quantity: April 1 to July 20 (limited to 1/50th Cubic Foot per Second (CFS) per acre): **3.31 CFS**
July 20 to October 1 (limited to 1/80th CFS per acre): **2.07 CFS**
Duty (limited to 5.0 Acre-Feet (AF) per acre): **826.5 AF**
Source: Sevenmile Creek, tributary to Agency Lake

Authorized Point of Diversion (POD) - Melhase Kingdon Ditch POD:

Township		Range		Meridian	Sec	1/4 1/4		Location
33	S	6	E	W.M.	24	SW	NW	NA

Authorized Place of Use: The applicant originally requested to lease this entire water right to instream use. However, as identified by the Applicant in Finding 12, the number of irrigated acres to be leased instream must be reduced by 2.0 acres. These 2.0 acres are located in the SE 1/4 SE 1/4, Section 24, Township 33 South, Range 6 East, W.M.

Certificate: 8679

Use: Supplemental irrigation, domestic and stock (leasing a portion of the water right)

Acres: 98.0 acres (supplemental to certificate 10901)

Priority Date: September 25, 1928

Season 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.

Quantity: Rate: 1.32 CFS
Duty: 490.0 AF

Source: Blue Springs, tributary to Sevenmile Creek

Authorized Point of Diversion (POD) - Blue Springs Ditch POD:

Township		Range		Meridian	Sec	1/4 1/4		Location
33	S	6	E	W.M.	24	NW	SW	NA

Authorized Place of Use: The applicant originally requested to lease this entire water right to instream use. However, as identified by the Applicant in Finding 12, the number of irrigated acres to be leased instream must be reduced by 2.0 acres. These 2.0 acres are located in the SE 1/4 SE 1/4, Section 24, Township 33 South, Range 6 East, W.M

Certificate: 42822 (the applicant requested to lease the entire right instream) (no modifications were made to the water right for leasing purposes)

Use: Irrigation

Acres: 56.6 acres

Priority Date: September 24, 1971

Season of Use: April 1 to October 1

Quantity: Rate: 1.0 CFS
Duty: 283.0 AF

Source: Drainage Ditch with any deficiency in flow to be made up from Sevenmile Creek, tributary to Agency Lake

Authorized Points of Diversion (POD):

Township		Range		Meridian	Sec	1/4 1/4		Location
33	S	6	E	W.M.	24	SE NE SE	NW SW SW	Drainage Ditch - drainage collected in ditch between points 3320 feet North & 20 feet North, both from SW corner, SE SW, Section 13

Township		Range		Meridian	Sec	1/4 1/4		Location
33	S	6	E	W.M.	11	SE	SE	Upper Sevenmile Ditch POD - 150 feet North & 960 feet West from SE Corner, Section 11

Authorized Place of Use: See Certificate 42822.

12. Based upon review of the application, the above findings and the stipulated agreement, the Department has determined that the portion of Certificate 10900 being leased to instream use may be leased as described in the tables below. 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.

2004 Instream Lease:

Reach: From Upper Sevenmile Ditch POD (SE 1/4 SE 1/4, Section 11, T33S, R6E, W.M.; 150 feet North & 960 feet West from SE Corner, Section 11) to Agency Lake.

Leased Instream	Volume Instream	Maximum possible - Diverted into Canal for Mr. Nicholson*	Diverted into Canal for JaCox Ranch		Maximum Possible - Canal Total	Period
			Subirrigation & stockwatering	Direct Irrigation & Stockwatering		
13.00 CFS	773.55 AF	20.80 CFS	1.00 CFS	0.24 CFS	22.04 CFS	April 1 - April 30
11.00 CFS	676.36 AF	20.80 CFS	1.00 CFS	0.24 CFS	22.04 CFS	May 1 - May 31
10.00 CFS	595.04 AF	20.80 CFS	1.00 CFS	0.24 CFS	22.04 CFS	June 1 - June 30
8.00 CFS	301.49 AF	20.80 CFS	1.00 CFS	0.24 CFS	22.04 CFS	July 1 - July 19
7.00 CFS	305.45 AF	13.00 CFS	1.00 CFS	0.15 CFS	14.15 CFS	July 20 - Aug. 10
6.00 CFS	606.94 AF	13.00 CFS	1.00 CFS	0.15 CFS	14.15 CFS	Aug. 11 - Sept. 30

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

2005 - 2008 Instream Lease:

Reach: From Upper Sevenmile Ditch POD (SE 1/4 SE 1/4, Section 11, T33S, R6E, W.M.; 150 feet North & 960 feet West from SE Corner, Section 11) to Agency Lake.

Leased Instream	Volume Instream	Maximum possible - Diverted into Canal for Mr. Nicholson*	Diverted into Canal for JaCox Ranch for subirrigation and stockwatering	Maximum Possible - Canal Total	Period
13.00 CFS	773.55 AF	20.80 CFS	1.00 CFS	21.80CFS	April 1 - April 30
11.00 CFS	676.36 AF	20.80 CFS	1.00 CFS	21.80CFS	May 1 - May 31
10.00 CFS	595.04 AF	20.80 CFS	1.00 CFS	21.80CFS	June 1 - June 30
8.00 CFS	301.49 AF	20.80 CFS	1.00 CFS	21.80CFS	July 1 - July 19
7.00 CFS	305.45 AF	13.00 CFS	1.00 CFS	14.00 CFS	July 20 - Aug. 10
6.00 CFS	606.94 AF	13.00 CFS	1.00 CFS	14.00 CFS	Aug. 11 - Sept. 30

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

13. 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 stockwatering by JaCox Ranch shall be as described in the relevant table in Finding 12 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 8d above.
14. 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.
15. 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.
16. Based on continued evaluation and Findings 10 and 11, the Department finds that Certificates 10901, 8679, and 42822 may be leased as follows. The quantities to be leased instream have been modified in order to clarify the amount of water that may be leased. Certificate 10901 has also been modified to include back into the lease the quantity of water that had been set aside for livestock use. All modifications are shown in bold text:

Certificate	Priority Date	Instream Reach	Primary Rate Instream	Supplemental Rate Instream	Period Protected Instream	Primary Vol. Instream	Supp. Volume Instream
10901	1898	Melhase Kingdon Ditch POD to Agency Lake	2.41 CFS 2.07 CFS		April 1 - July 19 July 20 - Sept. 30	826.5 AF	
8679	9/25/1928	Blue Springs Ditch to Agency Lake		1.32 CFS	May 11 - Sept. 30		374.4 AF
42822	9/24/1971	At the Drainage Ditch POD with any deficiency to be made up from the Upper Sevenmile Ditch POD to Agency Lake	1.0 CFS		May 11 - Sept. 30	283.0 AF	

At 1.32 CFS and for a period of 143 days, from May 11 through September 30, 374.4 AF may be protected instream under certificate 8679.

17. Certificate 8679 is supplemental to the primary 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.

18. 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.
19. The lease will terminate on September 30, 2008, unless terminated or modified in the manner provided under the Stipulated Agreement. The lessor has requested the option of terminating the lease early, with 30 day written notice to the Department, prior to water being leased instream.

CONCLUSIONS OF LAW

The Department concludes that the lease, as modified above, will not result in injury or enlargement, pursuant to OAR 690-077-0077.

ORDER

Therefore, it is ORDERED:

1. That the Short-Term Lease L-479 described herein is APPROVED.
2. The authorized place of use, as described in the instream lease application and as modified in Finding 11 in the Findings of Fact Section, shall not be irrigated during the term of this lease under certificates 10900, 10901, 8679, and 42822.
3. Water is leased instream as follows for certificate 10900:

2004 Instream Lease:

Reach: From Upper Sevenmile Ditch POD (SE 1/4 SE 1/4, Section 11, T33S, R6E, W.M.; 150 feet North & 960 feet West from SE Corner, Section 11) to Agency Lake.

Leased Instream	Volume Instream	Maximum possible - Diverted into Canal for Mr. Nicholson*	Diverted into Canal for JaCox Ranch		Maximum Possible - Canal Total	Period
			Subirrigation & stockwatering	Direct Irrigation & Stockwatering		
13.00 CFS	773.55 AF	20.80 CFS	1.00 CFS	0.24 CFS	22.04 CFS	April 1 - April 30
11.00 CFS	676.36 AF	20.80 CFS	1.00 CFS	0.24 CFS	22.04 CFS	May 1 - May 31
10.00 CFS	595.04 AF	20.80 CFS	1.00 CFS	0.24 CFS	22.04 CFS	June 1 - June 30
8.00 CFS	301.49 AF	20.80 CFS	1.00 CFS	0.24 CFS	22.04 CFS	July 1 - July 19
7.00 CFS	305.45 AF	13.00 CFS	1.00 CFS	0.15 CFS	14.15 CFS	July 20 - Aug. 10
6.00 CFS	606.94 AF	13.00 CFS	1.00 CFS	0.15 CFS	14.15 CFS	Aug. 11 - Sept. 30

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

2005 - 2008 Instream Lease:

Reach: From Upper Sevenmile Ditch POD (SE 1/4 SE 1/4, Section 11, T33S, R6E, W.M.; 150 feet North & 960 feet West from SE Corner, Section 11) to Agency Lake.

Leased Instream	Volume Instream	Maximum possible - Diverted into Canal for Mr. Nicholson*	Diverted into Canal for JaCox Ranch for subirrigation and stockwatering	Maximum Possible - Canal Total	Period
13.00 CFS	773.55 AF	20.80 CFS	1.00 CFS	21.80CFS	April 1 - April 30
11.00 CFS	676.36 AF	20.80 CFS	1.00 CFS	21.80CFS	May 1 - May 31
10.00 CFS	595.04 AF	20.80 CFS	1.00 CFS	21.80CFS	June 1 - June 30
8.00 CFS	301.49 AF	20.80 CFS	1.00 CFS	21.80CFS	July 1 - July 19
7.00 CFS	305.45 AF	13.00 CFS	1.00 CFS	14.00 CFS	July 20 - Aug. 10
6.00 CFS	606.94 AF	13.00 CFS	1.00 CFS	14.00 CFS	Aug. 11 - Sept. 30

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

4. The combined total quantity of water to be protected instream; amount of water diverted into Upper Sevenmile Creek Ditch to address subsurface irrigation; and, any amount diverted for direct irrigation (including stockwatering) into Upper Sevenmile Creek Ditch by JaCox Ranch shall be as described in the relevant table in #3 above and shall not exceed $\frac{7}{17}$ of streamflows in Sevenmile Creek during the period of the lease.

If flows are insufficient to provide full distribution of water as provided in #3 above, the 1.0 CFS diverted into Upper Sevenmile Ditch to address subsurface irrigation, 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.

5. Water is leased instream as follows for certificates 10901, 8679 and 42822:

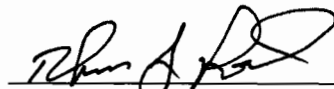
Certificate	Priority Date	Instream Reach	Primary Rate Instream	Supplemental Rate Instream	Period Protected Instream	Primary Vol. Instream	Supp. Volume Instream
10901	1898	Melhase Kingdon Ditch POD to Agency Lake	2.41 CFS 2.07 CFS		April 1 - July 19 July 20 - Sept. 30	826.5 AF	
8679	9/25/1928	Blue Springs Ditch to Agency Lake		1.32 CFS	May 11 - Sept. 30		374.4 AF
42822	9/24/1971	At the Drainage Ditch POD with any deficiency to be made up from the Upper Sevenmile Ditch POD to Agency Lake	1.0 CFS		May 11 - Sept. 30	283.0 AF	

6. A suitable regulatory device, as approved by the Department, shall be installed and maintained 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. JaCox Ranch shall maintain the regulatory device in good working order and shall replace or modify the regulatory device, in consultation with the Department, if determined necessary by 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.

7. 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.
8. Certificate 8679 is supplemental to the primary 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.
9. The lease will terminate on September 30, 2008. The lessor shall have the option of terminating the lease each year, prior to the lease being exercised (April 1), with 30 days written notice to the Department. In addition, the lease may be modified by the parties as provided in Paragraph VII. of the Stipulated Agreement, or the lease shall be terminated by the Department, as provided therein, if the lease is determined by the Department to result in injury or enlargement that cannot be prevented by modifying the lease terms.

Dated at Salem, Oregon this 5th day of JANUARY 2005.


Phillip C. Ward, Director