

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

In the Matter of Instream Lease Application)	DETERMINATION and
IL-1074 and Preliminary and Final Award)	FINAL ORDER ON PROPOSED
of Mitigation Credits, Certificate 74135,)	INSTREAM LEASE and MITIGATION
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 #1

Pooled Instream Lease for several water right holders (described in Findings of Fact #2)

Lessor #2

Three Sisters Irrigation District (TSID)
PO Box 2230
Sisters, OR 97759
tsid@uci.net

Lessee

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

Findings of Fact

1. On May 7, 2010, the DRC Mitigation Bank and TSID, on behalf of several water right holders, filed an application to lease a portion of Certificate 74135 for instream use. The Department assigned the application number IL-1074.
2. On June 21, 2010, the DRC submitted a revised map for a portion of the right to be leased instream.
3. Certificate 74135 describes the authorized place of use by township, range, section, quarter quarter, and tax lots. Some tax lot configurations have changed and some tax lots have been partitioned or subdivided since this certificate was issued and no longer match those shown on the map of the water right of record. The portion of the water right to be leased is

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.

described in Finding of Fact #4 is consistent with the water right of record in so far as possible.

4. The right to be leased has been clarified from the lease application and is as follows:

Certificate: 74135
Priority Date: 1887 and 1895
Use: 196.93 acres, being 12.8 acres of Irrigation under the 1887 priority date and 184.13 acres of Irrigation under the 1895 priority date
Quantity: 3.939 Cubic Foot per Second (CFS), being 0.256 CFS under the 1887 priority date and 3.683 CFS under the 1895 priority date
Source: Whychus Creek (formerly known as Squaw Creek), tributary to the Deschutes River

Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Priority Date	Water Right Holder
15 S	10 E	WM	24	NW NW	200	32.0	1895	Kay Patterson
15 S	10 E	WM	24	SW NW	200	9.6	1895	Kay Patterson
15 S	11 E	WM	3	NW NW	1101	30.0	1895	Joseph Angel
15 S	11 E	WM	4	NW NE	100	25.0	1895	Karen Swaner
15 S	11 E	WM	4	SW NE	100	40.0	1895	Karen Swaner
15 S	11 E	WM	4	SW SW	401	30.6	1895	James Enger
15 S	11 E	WM	4	SE SW	402	16.93	1895	Karen Swaner
15 S	11 E	WM	6	NE SW	1200	12.8	1887	Robert Taylor

Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
15 S	10 E	WM	21	SW SW	998 feet North & 1211 feet East from the SW Corner of Section 21

5. Additional information submitted with the lease application, being the application map for the lands owned by Karen Swaner identified in Finding of Fact #4 as being located in the SE SW of Section 4, indicates that a portion of the right to be leased may be more accurately located as follows:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Priority Date	Water Right Holder
15 S	11 E	WM	4	NE SW	402	0.33	1895	Karen Swaner
15 S	11 E	WM	4	SE SW	402	16.6	1895	Karen Swaner

Since Certificate 74135 was issued in 1997, mapping techniques have advanced and improved. Certificate 74135 and its associated water right map identifies that there are a total of 40.0 acres in tax lot 402 in the SE SW of Section 4, Township 15 South, Range 11 East. The map submitted with the lease application identifies that tax lot 402 may not be fully contained within the SE SW and that a small portion of this 40.0 acres may be located in the NE SW of Section 4. This may be due to more accurate representation of survey lines such as tax lot boundaries and quarter quarter lines. The footprint (size and the shape) of tax lot 402 as shown on the lease application map appears to be the same as that shown on the Department's map for the water right of record. The portion of the right to be leased, as described in Finding of Fact #4, is consistent with the water right of record. While the location of tax lot 402 appears to have shifted slightly based on current mapping, the Department may not re-describe a water right under OAR 690, Division 77, within the instream leasing process. However, the Department has determined that the portion of the

right described in the lease application may be leased instream at this time consistent with how the water right is described in the water right of record. Should TSID pursue future modifications to this portion of the right, the District may need to file a transfer application, such as a District Transfer, to change and/or re-describe the water right to reflect the correct configuration.

6. Certificate 74135 does not specify the irrigation season. Nor is an irrigation season specified by Basin Program or Decree. For the purposes 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.
7. There is no duty associated with the water right proposed to be leased instream.
8. 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.
9. The instream use is as follows:
Whychus Creek, tributary to the Deschutes River

Instream Reach: From the POD (as described in Finding of Fact #2) to the mouth of Whychus Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
74135	1887	0.256	46.72	April 15 through July 15
	1895	3.683	672.0	
Totals		3.939	718.72	

10. Other conditions to prevent injury and enlargement are:

The portion of water protected instream under this lease shall be based at the same percentage of diversion and delivery rate that Three Sisters Irrigation District (TSID) is diverting to rights of the same priority within the district. Each Monday morning during the period of the instream period of this lease, TSID shall report to the District 11 Watermaster's office the percentage diverted under the 1887 and 1895 priority dates. This information only needs to be reported to the Watermaster's office once TSID is diverting water on a percentage basis. Subsequent reports only need to be made to the Watermaster's office when changes are made to the percentage of water being diverted. Once TSID begins diverting water on a percentage basis, the amount water leased instream shall be adjusted by that same percentage.

During the irrigation season, the amount of water diverted at the point of diversion under Certificate 74135 shall not exceed 147.411 CFS, or as further limited in a previous or subsequent order affecting Certificate 74135.

11. 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.
12. 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.

13. 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.
14. The Lessor has requested that the lease terminate on October 31, 2010.

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-136.
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). No comments were received.
18. No modifications were made to the lease based on the comments received.
19. The proposed lease of 196.93 acres of irrigation use to instream use will provide 354.5 AF of mitigation water. Therefore, the Department finds that 354.5 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, 2010.
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, 2010.
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 **354.5** 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, 2010.
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 29th day of June, 2010.

William E. Fisher
Phillip C. Ward, Director

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

Mailing date: JUN 29 2010