

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

In the Matter of Instream Lease Application)	DETERMINATION and
IL-1533 and Preliminary and Final Award)	FINAL ORDER ON PROPOSED
of Mitigation Credits for Mitigation Project)	INSTREAM LEASE and MITIGATION
MP-210, Deschutes County)	CREDIT PROJECT

Authority

Oregon Revised Statute (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. Oregon Administrative Rule (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

Pooled Instream Lease for several water right holders (described in Finding of Fact No. 5)

Co-Lessor

Three Sisters Irrigation District (TSID)
PO Box 2230
Sisters, OR 97759
manager@tsidweb.org

Lessee

Deschutes River Conservancy (DRC) Mitigation Bank
700 NW Hill Street, Suite 1
Bend, Oregon 97703
gen@deschutesriver.org

Findings of Fact

1. On March 31, 2016, 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-1533.
2. During the review of the lease application, the Department identified that the lease application described more acres (25.6 acres) for the portion of the water right appurtenant to the property identified as being owned by Paul Drake and Diane Tolzman than were available to be leased to instream use. The number of acres available has been clarified as 24.1 acres.

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.

3. On April 11, 2016, the Department requested revised application maps for three of the properties involved in the instream lease application. Revised maps were received on April 11 and 14, 2016.
4. 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 as described in Finding of Fact No. 5 is consistent with the water right of record in so far as possible.
5. The portion of the right to be leased has been modified from the lease application and is as follows:

Certificate: 74135 Squaw Creek Irrigation District (now known as Three Sisters Irrigation District (perfected under the Squaw Creek Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 1, at Pages 121, 122, 123, 124, 435, 438, 445, 472, and 473)

Priority Date: 1895, 1899, and 1904

Use: 298.2 acres of Irrigation, being 237.1 acres under the 1895 priority date, 24.1 acres under the 1899 priority date, and 37.0 acres under the 1904 priority date

0.5 acre equivalent of Pond Maintenance under the 1895 priority date

Quantity: **Limit:** One-fiftieth of one cubic foot per second per acre, or its equivalent for each acre irrigated during the irrigation season of each year.

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

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Priority Date	Acres	Lessor
Irrigation Use – 298.2 acres								
14S	11E	WM	30	NE SW	4701	1899	24.1	Paul Drake & Diane Tolzman
15S	10E	WM	24	SW SE	500	1904	19.0	Janet Herring
15S	10E	WM	24	SW SE	501	1904	7.0	
15S	10E	WM	24	SE SE	500	1904	9.0	
15S	10E	WM	24	SE SE	501	1904	2.0	
15S	11E	WM	4	NW NE	100	1895	25.0	Karen Swaner
15S	11E	WM	4	SW NE	100	1895	40.0	
15S	11E	WM	4	SW SW	401	1895	24.1	James Enger
15S	11E	WM	7	NE SE	600	1895	38.5	John Schaad
15S	11E	WM	7	NW SE	600	1895	30.5	
15S	11E	WM	7	SW SE	600	1895	40.0	
15S	11E	WM	7	SE SE	600	1895	39.0	
0.5 acre equivalent of Pond Maintenance								
15S	11E	WM	7	NE SE	600	1895	0.5	John Schaad

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	WM	21	SW SW	998 FEET NORTH AND 1211 FEET EAST FROM THE SW CORNER OF SECTION 21

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. Certificate 74135 has been modified by transfers, cancellation, and allocation of conserved water projects. The rate available per acre or rate per acre equivalent has been reduced as a result of previous transactions. Based upon review of known transactions, the rate available at the POD for the water use described in Finding of Fact No. 5 is as follows:

Priority Date	Diversión Rate
Irrigation Use	
1895	4.043 Cubic Feet per Second (CFS)
1899	0.483 CFS
1904	0.740 CFS
Pond Maintenance	
1895	0.009 CFS
Total	5.275 CFS

8. There is no duty associated with the water right proposed to be leased instream. However, TSID (Co-Lessor) has requested to lease the equivalent of approximately 3.0 acre-feet per acre to instream use for irrigation use. This appears to be a reasonable amount of water considering beneficial use without waste.
9. There may be supplemental irrigation water rights appurtenant to all or a portion of the lands described in Finding of Fact No. 5. During the term of the lease, water use under any supplemental or layered irrigation water right will also be suspended.
10. 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.
11. 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 measurable into the Deschutes River and may be protected instream in the Deschutes River.
12. The instream use has been clarified from the original lease application and is as follows:
Whychus Creek, tributary to the Deschutes River

Instream Reach: From the POD (as described in Finding of Fact No. 5) to the mouth of Whychus Creek and then into the Deschutes River to Lake Billy Chinook

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
74135	1895	3.802	716.34	April 1 through July 4
	1899	0.386	72.66	
	1904	0.592	111.55	
	Total Instream	4.780	900.55	

13. 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 1895, 1899, and 1904 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 117.255 CFS, and as further limited in previous or subsequent orders affecting Certificate 74135.

14. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
15. The protection of flows within the proposed reach 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. Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the reach of the instream water right.
16. Instream water rights, with a senior priority date, created through an instream lease generally replace portions of other instream water rights, which carry junior priority dates, established through minimum flow conversion or the state agency application process to establish new instream water rights. During the months of April through July, the total quantities of water to be protected under the existing and proposed instream rights in the reach will exceed the quantities identified as necessary for instream use for various fish life stages under Certificates 73223 and 73224, which were created under ORS 537.341, an application process for state agencies to establish new instream water rights. However, the Department has identified that this instream lease will provide an additional beneficial purpose. The Oregon Department of Fish and Wildlife has identified that Whychus Creek is a high priority for flow restoration. In addition, the original instream flows established under Certificate 73223 and 73224 were based on flow needs for resident redband trout and did not account for flows necessary to support reintroduction of Mid-Columbia summer steelhead trout and spring Chinook salmon. The Department has identified that during the term of this lease, the quantities protected instream may be additive to other existing instream water rights established within the same reach under ORS 537.341, 537.346, 537.348 or 537.470.

17. The total monthly quantities of water to be protected instream under existing and proposed instream rights in the reach do not exceed the estimated average natural flow.
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, 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.
20. If a right which has been leased is later proposed to be leased again, transferred and/or reviewed under 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.
21. The Lessor and Lessee have requested that the lease terminate July 2016. The term of an instream lease generally extends through the end of the period of allowed use or irrigation season. This instream lease may terminate on October 31, 2016, consistent with Finding of Fact No. 6. The lease may commence on the date this final order is signed.

Preliminary Award of Deschutes Basin Mitigation Credits

22. The Lessee, a mitigation bank chartered by the Water Resources Commission, has requested that the lease to instream use of 237.1 acres of irrigation use with a priority date of 1895 be used to generate mitigation credits.
23. The Department assigned this mitigation credit project number MP-210.
24. 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.
25. The Department has determined that the following quantities may be protected instream resulting from the conversion of 237.1 acres of irrigation under the 1895 priority date:

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
74135	1895	3.794	714.83	April 1 through July 4

26. The lease of 237.1 acres of irrigation use with a priority date of 1895 may generate 426.8 AF of mitigation water. Therefore, the Department finds that 426.8 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.

27. The mitigation credits expire on December 31, 2016.
28. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.
29. 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.
30. 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.

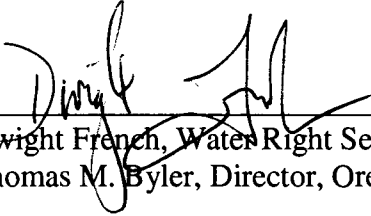
Now, therefore it is ORDERED:

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 October 31, 2016.
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 426.8 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 27 day of April, 2016.



Dwight French, Water Right Services Division Administrator, for
Thomas M. Byler, Director, Oregon Water Resources Department

Mailing date: APR 29 2016

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