

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

In the Matter of Instream Lease Application ) DETERMINATION and  
IL-1077, Certificates 82246 and 82248, ) FINAL ORDER ON PROPOSED  
Crook County ) INSTREAM LEASE

**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.

**Lessor #1**

Pooled Instream Lease for several water right holders (described in Findings of Fact #5 and #6)

**Lessor #2**

Ochoco Irrigation District (OID)  
1001 NW Deer Street  
Prineville, OR 97754  
[ochocoid@crestviewcable.com](mailto:ochocoid@crestviewcable.com)

**Lessee**

Deschutes River Conservancy (DRC)  
P.O. Box 1560  
Bend, Oregon 97709  
[gen@deschutesriver.org](mailto:gen@deschutesriver.org)

**Findings of Fact**

1. On May 25, 2010, the DRC and OID, on behalf of several water right holders, filed an application to lease a portion of Certificates 82246 and 82248 for instream use. The Department assigned the application number IL-1077.
2. On June 3, 2010, the DRC submitted a revised lease form to clarify the portion of Certificate 82246 proposed to be leased instream.
3. On June 28, 2010, the DRC requested to amend the application to remove 13.5 acres from what was proposed to be leased instream under Certificate 82246. It appears that these acres are covered with water for most, if not all, of the irrigation season, and use may not be suspended. The acres removed from the lease are the following:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Water Right Holder (Lessor #1)
14 S	16 E	WM	32	NE NE	1600	1.0	IronHorse Development, LLC
14 S	16 E	WM	32	NW NE	1600	12.5	IronHorse Development, LLC

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.

4. Also, on June 28, 2010, the DRC submitted additional information further clarifying the portion of Certificate 82246 to be leased instream.
5. The portion of the first right to be leased has been clarified and modified from the lease application and is as follows:

**Water Right:** Certificate 82246

**Use:** Irrigation of 417.2 acres and 21.2 acres equivalent of Industrial Use

**Priority Date:** August 10, 1917

**Quantity:** Rate – limited to 1/80<sup>th</sup> Cubic Foot per Second (CFS)/acre  
Duty – limited to 4.0 Acre-Feet (AF)/acre

Use	Rate	Duty
Irrigation	5.215 CFS	1668.8 AF
Industrial	0.265 CFS	84.8 AF
Totals	5.48 CFS	1753.6 AF

**Source:** Ochoco Creek, McKay Creek Dry Creek, Lytle Creek, Johnson Creek, all waste and return water flowing in all Unnamed Waterways, and Ochoco Reservoir, constructed under Permit R-528, tributary to the Crooked River

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres	Supplemental Place of Use Information – Tax Lot	Water Right Holder (Lessor #1)
<b>Irrigation Use</b>							
14 S	15 E	WM	25	SW NW	7.9	2104	Groves Holdings
14 S	15 E	WM	25	SE NW	1.6	2104	Groves Holdings
14 S	15 E	WM	25	NE SW	2.0	1700	Jerry Robertson
14 S	15 E	WM	25	SE SW	11.1	1700	Jerry Robertson
14 S	15 E	WM	25	NW SE	7.8	800 – 2.8 acres	Twinstar Enterprises
						1200 – 5.0 acres	
14 S	15 E	WM	25	SW SE	5.9	*900 - 1.0 acre	Twinstar Enterprises
						1000 – 1.5 acres	
						1200 – 3.4 acres	
14 S	15 E	WM	25	SE SE	0.2	800	SMAF Construction
14 S	16 E	WM	28	NW SW	16.3	1600	IronHorse Development, LLC
14 S	16 E	WM	28	SW SW	31.2	1600	IronHorse Development, LLC
14 S	16 E	WM	29	SE NW	4.7	113	Jerry and Sandra Halter
14 S	16 E	WM	29	NE SE	9.0	1600	IronHorse Development, LLC
14 S	16 E	WM	29	SE SE	12.8	1600	IronHorse Development, LLC
14 S	16 E	WM	30	SW SW	14.9	800	SMAF Construction
14 S	16 E	WM	30	SE SW	0.1	800	SMAF Construction
14 S	16 E	WM	31	NE NW	0.8	1300	SMAF Construction
14 S	16 E	WM	31	NW NW	7.0	1300	SMAF Construction
14 S	16 E	WM	32	NE NE	19.2	1600	IronHorse Development, LLC
14 S	16 E	WM	32	SE NE	22.0	1600	IronHorse Development, LLC
14 S	16 E	WM	32	NE SE	8.5	1600	IronHorse Development, LLC
14 S	16 E	WM	32	SE SE	1.9	1600	IronHorse Development, LLC
14 S	16 E	WM	33	NE NW	12.7	1600	IronHorse Development, LLC
14 S	16 E	WM	33	NW NW	23.4	1600	IronHorse Development, LLC
14 S	16 E	WM	33	SW NW	19.7	1600	IronHorse Development, LLC
14 S	16 E	WM	33	SE NW	18.5	1600	IronHorse Development, LLC
14 S	16 E	WM	33	NW NE	3.6	1600	IronHorse Development, LLC
14 S	16 E	WM	33	SW NE	5.2	1600	IronHorse Development, LLC
14 S	16 E	WM	33	NE SW	26.7	1600	IronHorse Development, LLC
14 S	16 E	WM	33	NW SW	33.3	1600	IronHorse Development, LLC

Twp	Rng	Mer	Sec	Q-Q	Acres	Supplemental Place of Use Information – Tax Lot	Water Right Holder (Lessor #1)
14 S	16 E	WM	33	SW SW	22.3	1600	IronHorse Development, LLC
14 S	16 E	WM	33	SE SW	2.7	1600	IronHorse Development, LLC
14 S	16 E	WM	33	NW SE	15.9	1600	IronHorse Development, LLC
14 S	16 E	WM	33	SW SE	4.3	1600	IronHorse Development, LLC
15 S	16 E	WM	4	SW NE	9.6	2500	Stearns Land Co.
15 S	16 E	WM	4	SE NE	5.1	2500	Stearns Land Co.
15 S	16 E	WM	4	NE SE	9.4	2500	Stearns Land Co.
15 S	16 E	WM	4	NW SE	19.9	2500	Stearns Land Co.
<b>Industrial Use</b>							
14 S	15 E	WM	23	SW NE	21.2	*500	Hooker Creek Sand & Gravel
14 S	15 E	WM	23	NW SE			Hooker Creek Sand & Gravel
14 S	15 E	WM	23	SW SE			Hooker Creek Sand & Gravel

**NOTE:** Tax lot numbers preceded by an asterick (\*) in the supplemental information column on the certificate for the place of use listing denotes that the tax lot extends over more than one quarter quarter section of land.

**INDUSTRIAL:** The irrigation equivalent acres for the industrial water rights are listed and located by quarter quarter sections of land within which the tax lot listed in the supplemental information column is located. The place of use for the irrigation equivalent acres of industrial water right is authorized for use anywhere within the tax lot and is not apportioned between the quarter quarter sections of land. Where “w/in service area” appears in the tax lot column the legal description identified the quarter quarter section of land adjacent to the Ochoco Feed Canal where water is diverted from the source, and the place of use for the irrigation equivalent acres industrial water right is authorized for use anywhere within the service area of the district.

**IRRIGATION:** Because irrigation water rights on tracts of land less than 5.0 acres in size need not be mapped under ORS 541.329(2) (d) and need only be identified by tax lot number, the irrigation water right by acres is listed and located according to the quarter quarter in which the largest portion of the tax lot is located.

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
15 S	17 E	WM	5	SW NW	OCHOCO FEED CANAL – 500 FEET NORTH AND 250 FEET EAST FROM THE W ¼ CORNER OF SECTION 5

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

**Water Right:** Certificate 82248

**Use:** 86.5 equivalent acres of Industrial Use

**Season of Use:** Year Round

**Priority Date:** August 10, 1917

**Quantity:** Rate: 1.189 CFS

Duty (4.0 Acre-Feet (AF)/acre): 346.0 AF

**Source:** Ochoco Creek and Ochoco Reservoir, constructed under Permit R-528, tributary to the Crooked River

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres	Supplemental Place of Use Information – Tax Lot	Water Right Holder (Lessor #1)
15 S	16 E	WM	4	NE NW	86.5	7200	Ochoco Lumber Company
15 S	16 E	WM	4	NW NW		7200	
15 S	16 E	WM	4	SW NW		7200	
15 S	16 E	WM	4	SE NW		7200	
15 S	16 E	WM	4	NE SW		2900	
15 S	16 E	WM	4	NW SW		2900	

For the purposes of the legal description of the place of use, the acres equivalent industrial water is listed and arrayed by the quarter-quarter section(s) of land within which the tax lot listed in the supplemental

information column is located. However, the acres equivalent water right is not apportioned between the quarter-quarter section(s) of land, and the place of use for the acres equivalent industrial water right is authorized anywhere within the listed tax lots.

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
15 S	17 E	WM	5	SW NW	OCHOCO FEED CANAL – 500 FEET NORTH AND 250 FEET EAST FROM THE W ¼ CORNER OF SECTION 5

7. The irrigation season is not specified in Certificate 82246 but is specified by the Crooked River Decree as February 1 to December 1.
8. A scrivener’s error has been identified in Certificate 82248. This certificate lists a portion of the industrial use as being located in the SE SW of Section 4 in Township 15 South, Range 16 East. The final proof map for Certificate 82248 does not show any industrial use in this quarter quarter. The final proof map does show industrial use in the NE SW, which is not listed on the Certificate. The final proof map has been identified by the District as showing the correct place of use for this portion of the industrial use. For the purposes of this lease, the description of the portion of Certificate 82248 to be leased instream, as described in Finding of Fact #6, is consistent with the final proof map for Certificate 82248.
9. The place of use described in Finding of Fact #6 will continue to receive a portion of water during the term of the lease. The portion of Certificate 82248 for Ochoco Lumber Company allows the diversion of up to 1.238 CFS (proportioned) for 90.0 equivalent acres. The applicant has requested to lease 86.5 equivalent acres and leave some water at the place of use for dust control. The quantity of water diverted at the POD, upon approval of this instream lease, will be limited to 0.048 CFS (maximum of 14.0 AF) for dust control.
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). Notice of the lease was first provided on June 1, 2010. A second notice of the application was provided on June 8, 2010, following clarification of the lease by the DRC on June 3, 2010 (see Finding of Fact #2). No comments were received in response to either notice.
11. The quantities proposed to be leased instream (up to 6.561 CFS) exceed the estimated average natural flows during the months of August (6.27 CFS) and September (6.5 CFS). Under OAR 690-077-0015(4) and (5), the estimated average natural flows may be exceed if the use is significant for the public use requested or if the presumption for exceeding the average flows is met. The Department has determined the presumption under OAR 690-077-0015(5) has been met and that the estimated average natural flows may be exceeded due to the following:
  - a. The quantities to be protected instream during September and October will not exceed the amounts requested in the original instream water right application (IS-70611) filed by the Oregon Department of Fish and Wildlife (ODFW), which was issued an instream certificate (73214) on October 21, 1996. In addition, the public use requested for the instream lease (fish and wildlife habitat, pollution abatement, and recreation) includes the same public use protected under Certificate 73214 (migration, spawning, egg incubation, fry emergence, and juvenile rearing).
  - b. The instream use proposed under this instream lease application is located within an ODFW flow restoration priority watershed for the months of September and October.

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

Ochoco Creek and Ochoco Reservoir, tributary to the Crooked River

**Reach #1:** From the Ochoco Feed Canal POD (as described in Finding of Fact #5 and #6) to the mouth of Ochoco Creek

Water Right	Priority Date	Instream Rate	Instream Volume	Period Protected Instream
82246	August 10, 1917	5.48 CFS	1315.2 AF	June 17 – October 15
82248	September 2, 1986	1.081 CFS	259.5 AF	
Totals		6.561 CFS	1574.7 AF	

**Reach #2:** In the Crooked River from the confluence of Ochoco Creek and the Crooked River to Lake Billy Chinook

Water Right	Priority Date	Instream Rate	Instream Volume	Period Protected Instream
82246	August 10, 1917	4.93 CFS	1183.68 AF	June 17 – October 15
82248	September 2, 1986	0.97 CFS	233.50 AF	
Totals		5.90 CFS	1417.18 AF	

13. Other conditions to prevent injury and enlargement are:

The portion of water protected under this lease shall be based upon the same percentage of diversion and delivery rate that OID is diverting to water users within the District. In times of short supply, where general allocation in the District has been reduced, the instream use created by this lease will be reduced by the same amount. At the time this instream lease application was submitted, the District had limited delivery to 3.0 acre-feet per acre (out of the 4.0 acre-feet per acre that may be diverted), which is reflected in the maximum volume of water that may be protected instream. If OID further reduces the amount of water diverted to water users, the Watermaster shall be notified and the quantity of water protected instream shall reduced by the same percentage.

To account for return flows and prevent injury, the quantity of water that may be protected instream in Reach #2 has been reduced by 10 percent.

14. The lease application requests to protect water instream from Ochoco Creek into the Crooked River. An instream reach is generally from the point of diversion to the mouth of the source stream (Ochoco Creek) but may be protected further if measurable in the receiving stream (the Crooked River) (OAR 690-077-0015 (8)). The quantity that may be leased instream from Ochoco Creek is measurable into the Crooked River and may be protected instream in the Crooked River.
15. 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.
16. 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.

17. 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.
18. The Lessor has requested that the lease terminate on November 1, 2010. However, the last day in the irrigation season is November 30, 2010. An instream lease generally terminates on the last day in the legal season of use. Therefore, this lease may terminate on November 30, 2010.

### CONCLUSIONS OF LAW

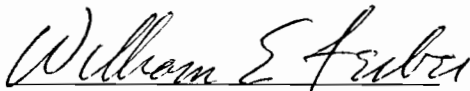
The Department concludes that the lease will not result in injury or enlargement, OAR 690-077-0077. The lease conforms to the applicable provisions of OAR 690-077-0015.

### 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 place of use for Certificate 82248 will continue to receive water (0.048 CFS, not to exceed 14.0 AF) as part of this right during the duration of the lease for dust control only.
4. The lease will terminate on November 30, 2010.

Dated at Salem, Oregon this 29<sup>th</sup> day of June, 2010.

  
P- 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 30 2010