

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

In the Matter of Instream Lease Application )	DETERMINATION and FINAL
IL-1405 and Preliminary and Final Award )	ORDER ON PROPOSED INSTREAM
of Mitigation Credits for Mitigation Project )	LEASE and MITIGATION CREDIT
MP-189, Deschutes and Crook County )	PROJECT

**Authority**

Oregon Revised Statutes (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**

Deschutes Land Trust (DLT)  
210 NW Irving Ave., Suite 102  
Bend, Oregon 97701  
[bsc@deschuteslandtrust.org](mailto:bsc@deschuteslandtrust.org)

**Lessee**

Deschutes River Conservancy (DRC) Mitigation Bank  
700 NW Hill Street  
Bend, Oregon 97701  
[gen@deschutesriver.org](mailto:gen@deschutesriver.org)

**Findings of Fact**

1. On May 22, 2015, DLT and the DRC Mitigation Bank filed an application to renew instream lease IL-1405, involving the entirety of Certificate 276 and a portion of Certificate 30561.
2. The first right to be leased is as follows:

**Certificate:** 276 in the name of Walter S. Fullerton (perfected under the Squaw Creek Decree of record at Salem, in the Order Record of the Board of Control of the State of Oregon, in Volume 1, at Page 120)

**Use:** Irrigation of 15.0 acres

**Priority Date:** August, 1901

**Quantity:** **Rate:** 0.3 Cubic Foot per Second (CFS)

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

**Authorized Point of Diversion (POD):** Not described on Certificate

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
14 S	11 E	WM	16	SW NW	8.0
14 S	11 E	WM	17	SE NE	5.0
14 S	11 E	WM	17	NE SE	2.0
<b>Total Acres</b>					<b>15.0</b>

3. Certificate 276 does not specify a rate and duty limit per acre. By Decree, the rate is limited to 1/50<sup>th</sup> of a CFS per acre. Every water right is subject to beneficial use without waste, which is the basis for the quantity of water available to be leased to instream use. Based upon consultation with the local Watermaster, the Department has identified that 4.5 acre-feet (AF) per acre appears to be a reasonable quantity of water considering beneficial use without waste. It is also consistent with the duty limit under certificate 30561. Therefore, up to 67.5 AF is available to be leased to instream use.
4. The portion of the second right to be leased is as follows:

**Certificate:** 30561 in the name of A. N. Voorhees and Sons (perfected under Permit S-25548)

**Use:** Irrigation of 6.8 acres

**Priority Date:** May 26, 1958

**Quantity:** **Rate:** 0.13 CFS

**Volume:** 30.6 AF

**Limit:** One-fiftieth of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 4.5 acre-feet for each acre irrigated during the irrigation season of each year

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

**Authorized Point of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14 S	11 E	WM	17	SW SE	Not provided on certificate

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	11 E	WM	16	SW NW	1.7
14 S	11 E	WM	17	NE SE	5.1
<b>Total Acres</b>					<b>6.8</b>

5. Certificates 276 and 30561 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.

6. Certificates 276 and 30561 do not provide a complete description of the location of the point of diversion. Based upon additional information provided by the Department's Watermaster, both certificates use the same point of diversion and, for purposes of this instream lease, the point of diversion appears to be located as follows:

Twp	Rng	Mer	Sec	Q-Q	Longitude/Latitude and River Mile
14 S	11 E	WM	17	SW SE	Longitude 44.351816 North Latitude -121.437742 West; approximately at River Mile 11.25

7. 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.
8. The Lessor and Lessee have requested to protect water instream from the POD described in Finding of Fact No. 6 to the mouth of the mouth of Whychus Creek. The place of use is in close proximity to Whychus Creek. A portion of the water diverted at the POD returns to the creek below the point of diversion and is available to downstream water right holders. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected instream was previously modified and return flows are accounted for immediately below the point of diversion.
9. The Department previously identified that the maximum rate and volume that may be leased instream is 0.13 CFS and 30.6 AF. At this rate and volume, water may be protected instream for up to 114 days. The lease application originally requested to protect water instream for 113 days (June 11 through October 1). The instream period may be increased by an additional day to June 11 through October 2.
10. For Certificate 276, the Lessor and Lessee requested to protect up to 127.43 AF instream. Water was also requested to be protected instream at a rate of 0.3 CFS over an instream period of April 1 through October 31 (214 days). The Department previously identified that the instream period requested may be modified to match that identified for Certificate 30561, June 11 through October 2 (114 days).
11. The instream use has been modified from the original lease application to prevent injury and enlargement and is as follows:

Whychus Creek, tributary to the Deschutes River

**Instream Point No. 1:** At the POD (as described in Finding of Fact No. 6)

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
276	August, 1901	0.30	67.5	June 11 through October 2
30561	5/26/1958	0.13	30.6	
<b>Total Instream</b>		<b>0.43</b>	<b>98.1</b>	

**Instream Reach No. 2:** From immediately below the POD to the mouth of Whychus Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
276	August, 1901	0.12	27.00	June 11 through October 2
30561	5/26/1958	0.05	12.24	
<b>Total Instream</b>		<b>0.17</b>	<b>39.24</b>	

12. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water rights.
13. 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. Return flows resulting from the exercise of the existing water right would re-enter the river within the reach of the instream water right below the POD. The quantity of water to be protected instream in Reach No. 2 has been reduced to account for return flows.
14. 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 month of June, 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 Certificate 73223, which was 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 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.
15. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach will provide for a beneficial purpose.
16. 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.
17. 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.
18. 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.

19. 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.
20. The Lessor and Lessee have requested that the lease terminate on October 31, 2019. The lease may commence on the date this final order is signed.
21. The Lessor and Lessee have requested the option of terminating the lease early with written notice to the Department.

**Preliminary Award of Deschutes Basin Mitigation Credits**

22. 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.
23. The Department assigned this mitigation credit project number MP-189.
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 lease of 21.8 acres of irrigation use to instream use results in 39.2 AF of mitigation water. Therefore, the Department finds that 39.2 mitigation credits may be awarded to this mitigation credit project and assigned to the DRC Mitigation Bank.
26. The instream right created as a result of this lease is located below the Whychus Creek Zone of Impact and will only provide protection of flows within the General Zone of Impact. Therefore, 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 General Zone of Impact.
27. The mitigation credits expire on December 31, 2019.
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.

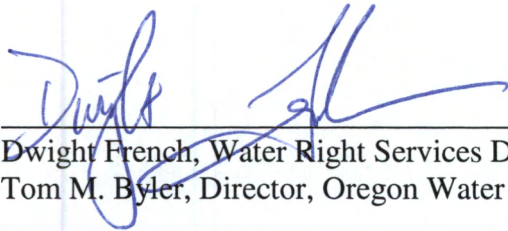
This mitigation project results in mitigation credits pursuant to ORS 537.746 and OAR 690-521-0300 and 690-521-0400.

### **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, 2019. For multiyear leases, the Lessor and Lessee 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 instream use period (June 11 through October 2) or after the water rights' original period of allowed use has begun, the Department may issue an order terminating the lease but use of water may allowed 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 **39.2 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 **General Zone 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, 2019.
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 24 day of June, 2015.



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

Mailing date: JUN 26 2015

*This document was prepared by Sarah Henderson and if you have any questions, please call 503-986-0890.*