

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

In the Matter of Instream Lease Application ) DETERMINATION and  
IL-1635 and Preliminary and Final Award ) FINAL ORDER ON PROPOSED  
of Mitigation Credits for Mitigation Project ) INSTREAM LEASE and MITIGATION  
MP-226, 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. 3)

**Co-Lessor**

Three Sisters Irrigation District (TSID)  
PO Box 2230  
Sisters, OR 97759

**Lessee**

Deschutes River Conservancy (DRCMB) Mitigation Bank  
700 NW Hill Street, Suite 1  
Bend, Oregon 97703  
[gen@deschutesriver.org](mailto:gen@deschutesriver.org)

**Findings of Fact**

1. On June 29, 2017, the DRCMB 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-1616.
2. 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 may 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. 3 is consistent with the water right of record in so far as possible.

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. 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:** Irrigation of 51.65 acres, being 21.75 acres under the 1895 priority date; 29.9 under the 1899 priority.

**Quantity:** **Limit:** One-fiftieth of one cubic foot per second (CFS) 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
13 S	12 E	WM	31	NW NE	2000	1895	6.00*	Don Kidson
13 S	12 E	WM	31	NE NE	2000		9.00*	
13 S	12 E	WM	31	SW NE	2000		5.50*	
13 S	12 E	WM	31	SE NE	2000		1.25*	
<i>Sub Total:</i>							21.75	
14 S	11 E	WM	30	SE SW	900	1899	17.80**	Laura Ann McCallum Trust
14 S	11 E	WM	30	SW SE	900		8.60**	
14 S	11 E	WM	33	SE SW	1300		3.50**	William Brandon
<i>Sub Total:</i>							29.90	
<b>Total:</b>							51.65	

\*Instream for Mitigation Purposes  
 \*\*Instream for Restoration Purposes

**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

4. 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.
5. Certificate 74135 describes the rate limit per acre as 1/50<sup>th</sup> cubic foot per second per (cfs) acre. 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. In addition, the rate per acre for certain specific lands has been reduced further, specifically for lands identified as owned by Thalacker. Based upon review of known transactions, the rate available at the POD for the water use described in Finding of Fact No. 3 is as follows:



Priority Dates	Diversion Rate in CFS
<b>Irrigation Use</b>	
1895	0.435
1899	0.598
<b>Total</b>	<b>1.033</b>

6. 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.
7. There may be supplemental irrigation water rights appurtenant to all or a portion of the lands described in Finding of Fact No. 3. During the term of the lease, water use under any supplemental or layered irrigation water right will also be suspended.
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 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.
10. The instream use will be conditioned to allow less water to be protected instream below TSID's point of diversion based upon instream measurements conducted by Department staff or others approved by the Department, which may show lower or higher levels of loss and allow the instream flows to be adjusted accordingly. The instream quantity may not exceed the instream quantity identified at the point of diversion.
11. The applicant has requested the instream use begin at the authorized point of diversion. The point of diversion is located within a known losing reach on Whychus Creek. The losing reach extends from the point of diversion located at approximately River Mile (RM) 24.5 to the OWRD gaging station 14076050 located in Sisters, at approximately RM 20.7. The Department's study on seepage loss monitoring water would be problematic. Therefore, to prevent enlargement of the water right, the instream use will be conditioned as set forth in Finding of Fact #10.



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

**Whychus Creek, tributary to the Deschutes River**

**Instream Reach No. 1:** At the POD (as described in Finding of Fact No. 3), located approximately at RM 24.5 to the confluence of Whychus Creek with the Deschutes River (RM 0.0)

Certificate	Priority Dates	Use	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
74135	1895*	Irrigation	0.348	65.3	July 5 through October 8
	1899**	Irrigation	0.478	89.7	
	<b>Totals:</b>		<b>0.826</b>	<b>155.0</b>	

\*Instream flows for mitigation purposes

\*\*Instream flows for restoration purposes

**Instream Reach No. 2:** From the confluence of Whychus Creek with the Deschutes River to Lake Billy Chinook

Certificate	Priority Dates	Use	Instream Rate (CFS)	Instream Volume (AF)	Instream Period
74135	1895*	Irrigation	0.348	65.3	July 5 through October 8
	1899**	Irrigation	0.478	89.7	
	<b>Totals:</b>		<b>0.826</b>	<b>155.0</b>	

13. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
14. The protection of flows within the proposed reach is appropriate, considering:
- The instream water use begins at the recorded point of diversion;
  - The location of confluences with other streams downstream of the point of diversion.
  - The known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
  - 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.
15. Instream water rights, with a senior priority date, created through an instream lease (ORS 537.348) generally replace portions of other instream water rights, which carry junior priority dates, established through minimum flow conversion (ORS 537.346) or the state agency application process (ORS 537.341) to establish new instream water rights.
16. Within the proposed instream reach on Whychus Creek above the confluence with Indian Ford Creek (at approximately RM 19.5), during the months of July through September, the total quantities of water to be protected within the proposed reach under the existing instream rights, established under ORS 537.348 (instream lease and instream transfer) and ORS 537.470 (allocation of conserved water), and the proposed instream right will exceed the quantities identified as necessary for instream use for various fish life stages under Certificate 73224, which was created under ORS 537.341, the state agency instream water right application process.



17. Within the proposed instream reach on Whychus Creek below the confluence with Indian Ford Creek (at approximately RM 19.5), during the months of July through October, the total quantities of water to be protected within the proposed reach under the existing instream rights, established under ORS 537.348 (instream lease and instream transfer) and ORS 537.470 (allocation of conserved water), and the proposed instream right 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, the state agency instream water right application process.
18. The original instream flows established under Certificates 73224 and 73223 were based on flow needs for resident red band trout and did not account for flows necessary to support reintroduction of Mid-Columbia summer steelhead trout and spring Chinook salmon.
19. The current instream flows on Whychus Creek under Certificates 73224 and 73223 are insufficient for the reintroduction of anadromous runs of Mid-Columbia summer steelhead trout and spring Chinook salmon. Summer steelhead trout are listed as threatened under the federal Endangered Species Act. The additional flows beyond the established state agency instream water rights are necessary and will provide a public benefit as follows
  - a. Adult upstream migration. For steelhead (September-January) and for Chinook (May-August) flows need to be higher than the instream water rights for: 1) physical passage of large fish upstream over riffles and shallow bars, and 2) migration cues – relatively high flows to stimulate upstream movement to spawning grounds.
  - b. Spawning. Habitat Suitability Criteria for steelhead trout and Chinook salmon spawning indicate that the anadromous fish prefer water about 0.5 ft. deeper and 0.8 ft./sec. faster than resident rainbow trout. This equates to a much higher recommended flow for anadromous vs. resident spawning.
  - c. Outmigration. Out-migrating juvenile steelhead trout (March-June) and Chinook salmon (February-March) will benefit greatly from higher flows to facilitate emigration of juveniles downstream to the main stem Deschutes.
  - d. The proposed instream right is located in an ODFW flow restoration priority watershed.
20. Within the proposed reach on Whychus Creek above the confluence with Indian Ford Creek, during the months of July through September, by adding to other instream water rights established pursuant to ORS 537.341 (state agency application process), ORS 537.348 (instream transfer process and instream lease) and ORS 537.470 (allocation of conserved water process), any new instream water right established by this instream lease would provide protection for additional flows identified as necessary for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values. In addition, during the month of October above the confluence with Indian Ford Creek, the proposed instream use may add to other instream water right established by ORS 537.348 and ORS 537.470, and replace a portion of Certificate 73224, established under ORS 537.341, with an earlier priority date.
21. Within the proposed reach on Whychus Creek during the months of July through October below the confluence with Indian Ford Creek, the proposed instream use may add to other instream water rights established by ORS 537.348, ORS 537.470, and ORS 537.341.



22. 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.
23. 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.
24. 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.
25. 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.
26. The Lessor and Lessee have requested that the lease terminate on October 31, 2017. The lease may commence on the date this final order is signed.

**Preliminary Award of Deschutes Basin Mitigation Credits**

27. The Lessee, a mitigation bank chartered by the Water Resources Commission, has requested that a portion of the right to be protected instream be used to generate mitigation credits.
28. The Department assigned this mitigation credit project number MP-226.
29. 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.
30. The, the Department finds that **39.2** 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.
31. The mitigation credits expire on December 31, 2017.
32. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.



33. 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.
34. 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.

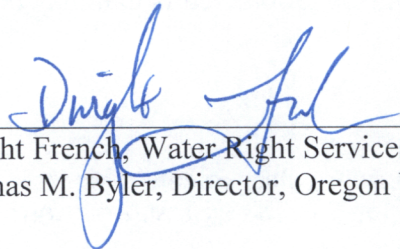
### **Now, therefore it is ORDERED:**

1. The Lease as described herein is APPROVED.
2. During 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, 2017.
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 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, 2017.



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 4 day of August, 2017.



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

Mailing date: AUG 07 2017

*This document was prepared by Sarah Henderson if you have questions; call 503-986-0890.*