

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

In the Matter of the Proposed Lease of)	DETERMINATION and
Existing Water Rights for Instream Use,)	FINAL ORDER ON PROPOSED
Certificates 10900, 10901, 8679, and 42822,)	INSTREAM LEASE
Klamath County, Oregon)	

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

JaCox Ranch
PO Box 435
Fort Klamath, OR 97626

Lessee

Klamath Basin Rangeland Trust (KBRT)
700 Main Street, Suite 201A
Klamath Falls, OR 97601

Findings of Fact

1. On March 11, 2009, the KBRT and JaCox Ranch filed an application to renew instream lease L-479, involving a portion of certificates 10900 and 10901 and all of certificates 8679 and 42822. The Department assigned the application number IL-479.
2. On January 5, 2005, the Department issued final orders approving instream leases L-479 (Special Order Volume 63, Page 26) (Sevenmile Creek) and L-480 (Special Order Volume 63, Page 36) (Annie Creek) incorporating a Stipulated Agreement signed by JaCox Ranch, the Klamath Basin Rangeland Trust, Roger Nicholson and the Oregon Water Resources Department. The term of the order approving instream lease L-479 expired on September 30, 2008.
3. On December 6, 2005, JaCox Ranch and the KBRT filed an application to modify how water rights were leased instream under L-480. The new lease application was assigned number L-695. A final order superseding Special Order Volume 63, Page 36 for L-480 and approving L-695 was issued by the Department on June 5, 2006, as evidenced by Special Order Volume 68, Page 611. The term of this order expired on October 31, 2008.
4. Instream lease application IL-479 originally proposed to lease a portion of certificates 10900 and 10901 and all of certificates 8679 and 42822 for instream purposes. Under certificate 10900, the Lessor and Lessee (together "the Applicant") requested to lease 729.5 acres of irrigation to instream use. Under certificate 10901, the Applicant requested to lease 167.3 acres of irrigation, being 144.0 acres of primary irrigation and 23.3 acres of supplemental

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.

irrigation, to instream use. The Applicant also requested that a portion of water used under certificates 10900 and 10901 be left out of the lease for stockwatering purposes.

5. The terms of the Stipulated Agreement (See Finding of Fact #2), as referenced in the orders issued approving instream leases L-479 (Special Order Volume 63, Page 26) and L-480 (Special Order Volume 63, Page 36) remain in effect and are incorporated by reference herein. A copy of this Stipulated Agreement is located in the instream lease file IL-479. Pursuant to the stipulated agreement, the Applicant had revised the Application as it relates to certificate 10900 as follows:
 - a. The quantity diverted into the Upper Sevenmile Creek Ditch to remediate for subsurface irrigation and stockwater shall be modified to 1.0 CFS from April 1 to October 1. Fifty acres shall be excluded from the lease during the period April 1 to July 19 and 80.0 acres shall be excluded from the lease during the period July 20 to October 1.
 - b. An additional 12.0 acres of irrigation shall be excluded from the instream lease during the 2004 irrigation season. These 12.0 acres, located in the SE 1/4 SW 1/4, Section 13, Township 33 South, Range 6 East, W.M., shall be incorporated back into the instream lease beginning in the 2005 irrigation season and for the duration of the lease.
 - c. The combined total quantity of water leased instream; water diverted into Sevenmile Creek Ditch to remediate for subsurface irrigation on JaCox Ranch lands; and, any water diverted into Sevenmile Creek Ditch for direct irrigation (including stockwater) by JaCox Ranch shall not exceed $\frac{7}{17}$ of the streamflows in Sevenmile Creek at the Sevenmile Creek Ditch POD during the duration of the lease.
 - d. If flows are insufficient to provide full distribution of water as provided in subsections a. through c., the 1.0 CFS identified in subsection a. shall be delivered in full to the Upper Sevenmile Creek Ditch before remaining waters are distributed in favor of the quantity to be protected instream.
6. In addition, based upon evaluation of the Application, and as described in Special Order Volume 63, Page 26, the Department found the following:
 - a. The Applicant originally requested to leave a portion of water out of the lease under certificates 10900 (0.5 CFS) and 10901 (0.025 CFS) to supply stockwater. However, the Wood River decree, under which these certificates were issued, limits the diversion of water for stock or domestic purposes. The Decree states that during the irrigation season such appropriations shall not be entitled to any water for stock or domestic purposes in addition to the quantity that they are entitled to divert for irrigation. While water is being leased instream during the irrigation season, no water may be diverted solely for livestock use.
 - b. Use of water for irrigation purposes may not be suspended under all of the water rights to be leased, specifically under certificate 10900, which appropriates water through the Upper Sevenmile Ditch. The Department has identified a portion of the lands to which this water right is appurtenant that will continue to be irrigated as a result of subirrigation and, therefore, use of water on these lands cannot be suspended. These lands are located along four lateral ditches and are irrigated as a result of seepage from the ditch system. This is the same subirrigation referenced briefly in Finding 8(a) in association with the

terms of the stipulated agreement. This water, in the amount of 1.0 CFS, not leased is sufficient for sub irrigation and stock watering and shall not be leased instream.

7. The Applicant has also previously clarified that certificate 10901 is not supplemental to certificate 10900 and is entirely for the purpose of primary irrigation, domestic and stock. In addition, on August 13, 2004, the Lessor requested to amend the application to exclude 2.0 acres from the lease under certificates 10901 and 8679 because these two acres are not appurtenant to lands owned by the Lessor.
8. Special Order Volume 63, Page 26, originally described the portion of Certificate 10900 to be leased instream broken down by year, being a portion leased instream during the 2004 leasing season and during the 2005 through 2008 leasing seasons. The request to renew instream lease IL-479 is consistent with the description provided for the 2005 through 2008 leasing seasons.
9. Based upon the above Findings of Fact #5 through #8, the original lease application was modified to clarify the water rights to be leased. These rights are clarified as described in the following findings of fact.
10. The portion of the first right to be leased is as follows:

Certificate: 10900
Use: Primary irrigation, domestic and stock
Acres: 679.5 acres from April 1 to July 20 and 649.5 acres from July 20 to October 1
Priority Date: 1891
Season of Use: April 1 to October 1
Quantity: April 1 to July 20: 13.59 Cubic Feet per Second (CFS)
 July 20 to October 1: 8.12 CFS
 Duty (limited to 5.0 Acre-Feet (AF) per acre): 3397.5 AF
Source: Sevenmile Creek, tributary to Agency Lake
Authorized Point of Diversion (POD) - Upper Sevenmile Ditch POD:

Township		Range		Meridian	Sec	1/4	1/4	Location
33	S	6	E	W.M.	11	SE	SE	NA

Authorized Place of Use: The applicant originally requested to lease 729.5 acres of irrigated lands, as described in the Application, to instream use. However, the Department has identified that the number of acres of irrigation to be leased instream must be reduced by 50.0 acres from April 1 to July 20 and by 80.0 acres from July 20 to October 1. The exact location of these lands has not been delineated.

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

Certificate: 10901
Use: Irrigation, domestic and stock
Acres: 165.3 acres
Priority Date: 1898
Season of Use: April 1 to October 1
Quantity: April 1 to July 20 (limited to 1/50th Cubic Foot per Second (CFS) per acre): 3.31 CFS
 July 20 to October 1 (limited to 1/80th CFS per acre): 2.07 CFS

Duty (limited to 5.0 Acre-Feet (AF) per acre): 826.5 AF

Source: Sevenmile Creek, tributary to Agency Lake

Authorized Point of Diversion (POD) - Melhase Kingdon Ditch POD:

Township		Range		Meridian	Sec	1/4 1/4		Location
33	S	6	E	W.M.	24	SW	NW	NA

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	24	SW NW	17.30
33 S	6 E	WM	24	NE SW	20.00
33 S	6 E	WM	24	NW SW	20.00
33 S	6 E	WM	24	SW SW	15.00
33 S	6 E	WM	24	SE SW	40.00
33 S	6 E	WM	24	NW SE	5.00
33 S	6 E	WM	24	SW SE	35.00
33 S	6 E	WM	24	SE SE	13.00
Total:					165.3

12. The portion of the third right to be leased is as follows:

Certificate: 8679

Use: Supplemental irrigation, domestic and stock

Acres: 98.0 acres (supplemental to certificate 10901)

Priority Date: September 25, 1928

Season of Use: May 11 to October 1, unless special permission is granted by the Oregon State Game Commission to divert water earlier than May 11.

Quantity: Rate: 1.32 CFS

Duty: 490.0 AF

Source: Blue Springs, tributary to Sevenmile Creek

Authorized Point of Diversion (POD) - Blue Springs Ditch POD:

Township		Range		Meridian	Sec	1/4 1/4		Location
33	S	6	E	W.M.	24	NW	SW	NA

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	24	SW SW	15.00
33 S	6 E	WM	24	SE SW	40.00
33 S	6 E	WM	24	SW SE	30.00
33 S	6 E	WM	24	SE SE	13.00
Total:					98.00

13. The fourth right to be leased is as follows:

Certificate: 42822

Use: Irrigation

Acres: 56.6 acres

Priority Date: September 24, 1971

Season of Use: April 1 to October 1

Quantity: Rate: 1.0 CFS

Duty: 283.0 AF

Source: Drainage Ditch with any deficiency in flow to be made up from Sevenmile Creek, tributary to Agency Lake

Authorized Points of Diversion (POD):

Township		Range		Meridian	Sec	1/4 1/4		Location
33	S	6	E	W.M.	24	SE NE SE	NW SW SW	Drainage Ditch - drainage collected in ditch between points 3320 feet North & 20 feet North, both from SW corner, SE SW, Section 13
33	S	6	E	W.M.	11	SE	SE	Upper Sevenmile Ditch POD - 150 feet North & 960 feet West from SE Corner, Section 11

Authorized Place of Use: See Certificate 42822.

Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	6 E	WM	13	SE NW	13.60
33 S	6 E	WM	13	NE SW	10.00
33 S	6 E	WM	13	SE SW	11.20
33 S	6 E	WM	24	NE NW	8.80
33 S	6 E	WM	24	NW NW	13.00

14. Based upon review of the application, the above findings, and the stipulated agreement the Department has determined that the portion of Certificate 10900 being leased to instream use may be leased as described in the table below. This table describes how water will be allocated between the amount of water leased instream by JaCox Ranch and the amount diverted down the canal for Certificate 10900.

Reach: From Upper Sevenmile Ditch POD (SE 1/4 SE 1/4, Section 11, T33S, R6E, W.M.; 150 feet North & 960 feet West from SE Corner, Section 11) to Agency Lake.

Leased Instream	Volume Instream	Maximum possible - Diverted into Canal for Mr. Nicholson*	Diverted into Canal for JaCox Ranch for subirrigation and stockwatering	Maximum Possible - Canal Total	Period
13.00 CFS	773.55 AF	20.80 CFS	1.00 CFS	21.80CFS	April 1 - April 30
11.00 CFS	676.36 AF	20.80 CFS	1.00 CFS	21.80CFS	May 1 - May 31
10.00 CFS	595.04 AF	20.80 CFS	1.00 CFS	21.80CFS	June 1 - June 30
8.00 CFS	301.49 AF	20.80 CFS	1.00 CFS	21.80CFS	July 1 - July 19
7.00 CFS	305.45 AF	13.00 CFS	1.00 CFS	14.00 CFS	July 20 - Aug. 10
6.00 CFS	606.94 AF	13.00 CFS	1.00 CFS	14.00 CFS	Aug. 11 - Sept. 30

* Under certificates 10900, 10904, 10922, and 10926 for primary irrigation.

15. Other conditions on the instream lease are:

The combined total quantity of water to be protected instream; the amount of water diverted into the ditch to address subsurface irrigation; and, any amount diverted for direct irrigation and stockwatering by JaCox Ranch shall be as described in the relevant table in Finding of Fact #14 above and shall not exceed $\frac{7}{17}$ of streamflows in Sevenmile Creek during the period of the lease, and shall be subject to distribution as provided in Finding of Fact 5d above.

The Department has determined that a suitable regulatory device shall be installed by JaCox Ranch at the point of diversion for certificate 10900 to assure that appropriate portions of water are being diverted down the Upper Sevenmile Ditch and are being left instream past the point of diversion. Prior to this lease being exercised, an automatic splitting weir was

installed at the point of diversion and the weir satisfies this condition. The weir should be maintained in good working order. Any need to modify or replace the weir should be done in consultation with the Department. In addition, it may become necessary to measure the quantity of water being diverted into Upper Sevenmile Ditch and the quantity of water left instream past the point of diversion. If this is determined necessary, the Department may require the installation of a suitable measuring device, which would be paid for by, or on behalf of, JaCox Ranch.

The proposed distribution allows Mr. Nicholson to divert up to the full rate and duty allowed under the terms and conditions of certificates 10900, 10904, 10922, and 10926 as appurtenant to his lands at the Upper Sevenmile Ditch POD.

16. The period during which water was originally proposed to be protected instream under Certificate 6879 has been modified. With a rate and duty limitation of 1.32 CFS and 374.4 AF, water may be protected instream for a period of 143 days, being May 11 through September 30.
17. The instream use for Certificates 10901, 8679, and 42822 has been modified from the lease application and is consistent with Special Order Volume 63, Page 26. The instream use is as follows:

Certificate	Priority Date	Instream Reach	Primary Rate Instream	Supplemental Rate Instream	Period Protected Instream	Primary Vol. Instream	Supp. Volume Instream
10901	1898	Melhase Kingdon Ditch POD to Agency Lake	2.41 CFS 2.07 CFS		April 1 - July 19 July 20 - Sept. 30	826.5 AF	
8679	9/25/1928	Blue Springs Ditch to Agency Lake		1.32 CFS	May 11 - Sept. 30		374.4 AF
42822	9/24/1971	At the Drainage Ditch POD with any deficiency to be made up from the Upper Sevenmile Ditch POD to Agency Lake	1.0 CFS		May 11 - Sept. 30	283.0 AF	

18. Certificate 8679 is supplemental to the primary portion of certificate 10901 being leased instream. Certificate 8679 shall only be protected instream when necessary to make up a deficiency of the rate and duty of the primary supply under certificate 10901 during the period for which water is being leased instream.
19. 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.
20. 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.

21. 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.
22. The Lessor has requested that the lease terminate on September 30, 2013, unless terminated or modified in the manner provided under the Stipulated Agreement.
23. The Lessor has requested the option of terminating the lease early, with 30 day written notice to the Department, prior to water being leased instream.

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. Water is leased instream as follows for certificate 10900:

Reach: From Upper Sevenmile Ditch POD (SE 1/4 SE 1/4, Section 11, T33S, R6E, W.M.; 150 feet North & 960 feet West from SE Corner, Section 11) to Agency Lake.

Leased Instream	Volume Instream	Maximum possible - Diverted into Canal for Mr. Nicholson*	Diverted into Canal for JaCox Ranch for subirrigation and stockwatering	Maximum Possible - Canal Total	Period
13.00 CFS	773.55 AF	20.80 CFS	1.00 CFS	21.80CFS	April 1 - April 30
11.00 CFS	676.36 AF	20.80 CFS	1.00 CFS	21.80CFS	May 1 - May 31
10.00 CFS	595.04 AF	20.80 CFS	1.00 CFS	21.80CFS	June 1 - June 30
8.00 CFS	301.49 AF	20.80 CFS	1.00 CFS	21.80CFS	July 1 - July 19
7.00 CFS	305.45 AF	13.00 CFS	1.00 CFS	14.00 CFS	July 20 - Aug. 10
6.00 CFS	606.94 AF	13.00 CFS	1.00 CFS	14.00 CFS	Aug. 11 - Sept. 30

* Under certificates 10900, 10904, 10922, and 10926 for primary irrigation.

4. The combined total quantity of water to be protected instream; amount of water diverted into Upper Sevenmile Creek Ditch to address subsurface irrigation; and, any amount diverted for direct irrigation (including stockwatering) into Upper Sevenmile Creek Ditch by JaCox Ranch shall be as described in the relevant table in #3 above and shall not exceed $\frac{7}{17}$ of streamflows in Sevenmile Creek during the period of the lease.

If flows are insufficient to provide full distribution of water as provided in #3 above, the 1.0 CFS diverted into Upper Sevenmile Ditch to address subsurface irrigation, shall be delivered in full to the Upper Sevenmile Creek Ditch before remaining waters are distributed in favor of the quantity to be protected instream.

5. Water is leased instream as follows for certificates 10901, 8679 and 42822:

Certificate	Priority Date	Instream Reach	Primary Rate Instream	Supplemental Rate Instream	Period Protected Instream	Primary Vol. Instream	Supp. Volume Instream
10901	1898	Melhase Kingdon Ditch POD to Agency Lake	2.41 CFS 2.07 CFS		April 1 - July 19 July 20 - Sept. 30	826.5 AF	
8679	9/25/1928	Blue Springs Ditch to Agency Lake		1.32 CFS	May 11 - Sept. 30		374.4 AF
42822	9/24/1971	At the Drainage Ditch POD with any deficiency to be made up from the Upper Sevenmile Ditch POD to Agency Lake	1.0 CFS		May 11 - Sept. 30	283.0 AF	

6. A suitable regulatory device, as approved by the Department, shall be installed and maintained by JaCox Ranch at the point of diversion for certificate 10900 to assure that appropriate portions of water are being diverted down the Upper Sevenmile Ditch and are being left instream past the point of diversion. Prior to this lease being exercised an automatic splitting weir was installed at the point of diversion and the weir satisfies this condition. JaCox Ranch shall maintain the regulatory device in good working order and shall replace or modify the regulatory device, in consultation with the Department, if determined necessary by the Department. In addition, it may become necessary to measure the quantity of water being diverted into Upper Sevenmile Ditch and the quantity of water left instream past the point of diversion. If this is determined necessary, the Department may require the installation of a suitable measuring device, which would be paid for by, or on behalf of, JaCox Ranch.
7. If determined necessary by the Department, JaCox Ranch shall install a suitable device for measuring and recording the quantity of water flowing past and/or into the diversion point. The type and plans of the measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.
8. Certificate 8679 is supplemental to the primary portion of certificate 10901 being leased instream. Certificate 8679 shall only be protected instream when necessary to make up a deficiency of the rate and duty of the primary supply under certificate 10901 during the period for which water is being leased instream.
9. The lease will terminate on September 30, 2013. The lessor shall have the option of terminating the lease each year, prior to the lease being exercised (April 1), with 30 days written notice to the Department. In addition, the lease may be modified by the parties as provided in Paragraph VII. of the Stipulated Agreement, or the lease shall be terminated by

the Department, as provided therein, if the lease is determined by the Department to result in injury or enlargement that cannot be prevented by modifying the lease terms.

Dated at Salem, Oregon this 24th day of April, 2009.

Phillip C. Ward

Phillip C. Ward, Director

Mailing Date APR 29 2009