

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

In the Matter of the Proposed Short-Term)	DETERMINATION and FINAL
Lease of Existing Water Rights for Instream)	ORDER ON PROPOSED INSTREAM
Use and Preliminary and Final Award of)	LEASE, WITHDRAW OF
Mitigation Credits, Certificate 72196,)	MITIGATION CREDIT PROJECT and
Deschutes County)	TERMINATION OF INSTREAM
		LEASE

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 short-term 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 #1

Pooled Instream Lease for several landowners
(described in Finding of Fact #2)

Lessor #2

LaPine Cooperative Water Association
PO Box 97
LaPine, OR 97739

Lessee

Deschutes Water Exchange (DWE) Mitigation Bank
PO Box 1560
Bend, OR 97709
danielle@deschutesrc.org

Findings of Fact

1. On April 26, 2005, Gordon Wanek, LaPine Cooperative Water Association and the DWE filed an application to lease a portion of Certificate 72196 to instream use. The Department assigned the application number L-644. A Final Order was issued approving this instream lease application on June 15, 2005, as evidenced by Special Order Volume 65, Page 82. This lease is to terminate on October 31, 2005.
2. On June 1, 2005, Albert and Patricia Havlik, Green Prairie Ranch and Stearns Land Company filed three individual instream lease applications along with LaPine Cooperative Water Association and the DWE to lease a portion of Certificate 72196 to instream use. The Department assigned the applications lease numbers L-661, L-662, and L-663 respectively.

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 lease applications include the information required under OAR 690-077-0077(3). The Department provided notice of the lease applications pursuant to OAR 690-077-0077(6). The lease applications were noticed as L-644, L-661, L-662 and L-663. No comments were received.
4. On June 24, 2005, the Department received a request for reconsideration of instream lease L-644 from the Deschutes River Conservancy (DRC), the parent organization of the DWE. The DRC requested that the Department reconsider the reach in which water was protected instream, being from the point of diversion to the mouth of the Little Deschutes River. The application originally requested a reach from the point of diversion to the mouth of the Little Deschutes River and thence into the Deschutes River to Lake Billy Chinook. The Department found that the quantity of water being leased instream under L-644, up to 2.55 Cubic Feet per Second (CFS), in the Little Deschutes River, was not measurable into the mainstem Deschutes River. Pursuant to OAR 690-077-0015 (7), in order for water to be protected beyond the source stream, the quantity must be measurable in the receiving stream.
5. On June 30, 2005, the Department indicated in a response to the DRC that it would reconsider the stream reach associated with instream lease L-644. The Department further identified, in an additional letter, that while the quantities of water being leased instream individually in the Little Deschutes River under L-644 and the three other proposed instream leases, L-661, L-662 and L-663, are not measurable in the Deschutes River, they would be measurable if all four leases were to be combined together into a pooled instream lease. If pooled, the Department could protect the quantity leased from the Little Deschutes River, into the Deschutes River and to Lake Billy Chinook.
6. On July 6, 2005, the DRC requested that the Department pool Instream Lease L-644 with the pending instream lease applications L-661, L-662 and L-663. The also requested to modify L-661 and L-663 to be for a term of one year.
7. The Department finds that instream leases L-664, L-661, L-662 and L-663 may be pooled and that the final order, Special Order Volume 65, Page 82, approving L-664 should be terminated.
8. The pooled instream lease application has been assigned application number L-663.
9. The right to be leased is as follows:

Certificate: 72196

Priority Date: 1897 and April 30, 1902

Acres: 189.6 acres under the 1897 priority date and 209.7 acres under the April 30, 1902 priority date

Season of Use: April 1 to November 1

Quantity: 1897:

Rate: 2.37 CFS April 1 to May 23 & August 20 to November 1
4.74 CFS May 23 to August 20

Duty: 758.4 AF

April 30, 1902:

Rate: 2.62 CFS April 1 to May 23 & August 20 to November 1
5.24 CFS May 23 to August 20

Duty: 838.8 AF

Source: Little Deschutes River, tributary to the Deschutes River

Authorized Place of Use:

IRRIGATION OF 399.3 ACRES							
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Landowner (Lessor #1)
1897 Priority Date							
22 S	10 E	WM	22	SE NE	101	15.0	Gordon Wanek
22 S	10 E	WM	22	NE SE	101	25.0	Gordon Wanek
22 S	10 E	WM	22	SW SE	101/102	5.1	Gordon Wanek
22 S	10 E	WM	22	SE SE	101	5.0	Gordon Wanek
22 S	10 E	WM	23	NW SW	2400	1.0	Gordon Wanek
22 S	10 E	WM	23	NW SW	2401	8.1	Gordon Wanek
22 S	10 E	WM	23	SW SW	2401	4.8	Gordon Wanek
22 S	10 E	WM	27	NE NE	102/103	10.0	Gordon Wanek
22 S	10 E	WM	27	NW NE	102/103	15.0	Gordon Wanek
22 S	10 E	WM	27	SW NE	103/104/108	21.0	Gordon Wanek
22 S	10 E	WM	27	SE NE	103/104/108	10.0	Gordon Wanek
22 S	10 E	WM	27	NE SE	108/105	5.7	Gordon Wanek
22 S	10 E	WM	27	NW SE	108/105	10.0	Gordon Wanek
22 S	10 E	WM	15	SE SE	2802	22.7	Stearns Land Company
22 S	10 E	WM	22	NE NE	100	31.2	Stearns Land Company
April 30, 1902 Priority Date							
22 S	10 E	WM	22	NW NE	101	37.4	Gordon Wanek
22 S	10 E	WM	22	SE NE	101	1.0	Gordon Wanek
22 S	10 E	WM	22	NW SE	101	33.0	Gordon Wanek
22 S	10 E	WM	22	SW SE	101	15.0	Gordon Wanek
22 S	10 E	WM	28	SW NW	3400	39.4	Green Prairie Ranch
22 S	10 E	WM	28	NW SW	3400	39.8	Green Prairie Ranch
23 S	10 E	WM	6	NE NE	700	32.7	Albert and Patricia Havlic
23 S	10 E	WM	6	NW NE	700	5.0	Albert and Patricia Havlic
23 S	10 E	WM	6	SE NE	700	6.4	Albert and Patricia Havlic

Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
23 S	9 E	WM	34	SW SW	550 feet North & 1150 feet East from the SW Corner, Section 34

10. On July 28, 2005, Lessor #2 and the Lessee requested to amend the quantities and timing of water to be protected instream. The instream use has also been modified to prevent injury and enlargement. The instream use is as follows:

Little Deschutes River

Tributary to the Deschutes River in the Deschutes Basin

Instream Reach 1: From POD (as described in Finding of Fact #10) to the mouth of the Little Deschutes River

Certificate	Priority Date	Instream Rate (cfs)	Period Protected Instream
72196	1897	4.74	August 3 – August 19
		2.37	August 20 – October 31
	April 30, 1902	5.24	August 3 – August 19
		2.62	August 20 – October 31

Instream Reach 2: From the confluence of Little Deschutes River and the Deschutes River to Lake Billy Chinook

Certificate	Priority Date	Instream Rate (cfs)	Period Protected Instream
72196	1897	4.41	August 3 – August 19
		2.2	August 20 – October 31
	April 30, 1902	4.87	August 3 – August 19
		2.44	August 20 – October 31

11. Other conditions to prevent injury and enlargement are:

A 7% loss factor has been applied to the portion of the reach extending from the confluence of the Little Deschutes River and Deschutes River to Lake Billy Chinook. The segment of the Deschutes River at the confluence to Bend is a losing reach.

12. 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.

13. 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.

14. The lease will terminate on October 31, 2005.

Preliminary Award of Deschutes Basin Mitigation Credits

15. Upon submission of the instream lease application (originally submitted as L-644-, L-661, L-662 and L-663), the Lessee, a mitigation bank chartered by the Water Resources Commission, requested that the portion of the right to be protected instream be used to generate mitigation credits.

16. The Department assigned these mitigation credit projects numbers MP-47, MP-52, MP-53 and MP-54. On July 6, 2005, the Lessee requested to pool the instream lease applications and the Department assigned the pooled instream lease mitigation project number MP-54.

17. On May 3, 2005, the Department provided notice of mitigation credit project MP-47 pursuant to OAR 690-521-0300 (6). The Department also provided notice, on May 3, 2005, of mitigation credit project MP-47 to the Oregon Department of Fish and Wildlife (ODFW), Oregon Department of Environmental Quality (DEQ), Oregon State Parks and Recreation Department (OPRD), Oregon Department of State Lands (DSL), the Oregon Department of Agriculture (DOA), and the Department's Watermaster pursuant to OAR 690-521-0300 (7) and OAR 690-505-0630 (2). Comments were received from the ODFW and OPRD.

Comments received from OPRD identified a need for additional instream flow protections from June 1 through mid September for water contact sports. These comments also identified that instream flows may be necessary during the early spring and later fall. However, in additional comments made to the Department, OPRD also identified that given when this lease may be approved during the irrigation season and current stream conditions that it would be beneficial to protect water instream at the maximum rates allowed.

ODFW identified that this project will provide effective instream protection of flows during the irrigation season and also identified, along with general comments on the mitigation program, that instream flow protection is needed during the months outside of the irrigation season.

18. Notice was not provided for mitigation credit projects MP-52, MP-53 and MP-54.
19. The Department is unable to expand the period during which instream flows may be protected outside of the irrigation season, as recommended by ODFW, without causing injury. The shaping proposed by the instream lease application, as amended by Lessor #2 and the Lessee, protects water instream at the maximum rates possible for the remainder of the irrigation season and meets the recommendations made by OPRD. Therefore, no modifications were made to the lease based upon comments received.
20. On June 9, 2005, the DWE Mitigation Bank requested that the mitigation project aspect of instream lease L-644 be withdrawn and that no mitigation credits be awarded. On June 22, 2005, the DWE Mitigation Bank requested that the mitigation project aspect of instream Lease L-662 be withdrawn and no mitigation credits be awarded. And on July 6, 2005, the DWE Mitigation Bank requested that the mitigation project aspect of instream lease L-661 and L-663 be withdrawn and that no mitigation credits be awarded.

CONCLUSIONS OF LAW

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

This mitigation projects have been withdrawn and, therefore, does not result in mitigation credits pursuant to ORS 537.746 and OAR 690-521-0300 and 690-521-0400.


ORDER

Therefore, it is ORDERED:

1. That the Short-Term Lease as described herein is APPROVED.
2. The former place of use shall no longer receive water as part of these rights during the term of the lease.
3. Instream Lease L-644, approved by Special Order Volume 65, Page 82 through 84, is terminated and its findings are incorporated into this order.
4. The lease shall terminate on October 31, 2005.

5. **Final Award of Deschutes Basin Mitigation Credits:** Mitigation Projects MP-47, MP-52, MP-53, and MP-54, together known as mitigation project MP-54, have been withdrawn. No mitigation credits have been awarded to these projects.

Dated at Salem, Oregon this 3rd day of August 2005.


Phillip C. Ward, Director
For

Mailing date: AUG 05 2005