

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

In the Matter of Instream Lease Application    )    FINAL ORDER TO DENY  
IL-1260, Certificate 67252, Deschutes         )    PROPOSED INSTREAM LEASE  
County   )

**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**

Kathleen Miller  
66895 Gist Road  
Bend, OR 97701

**Lessee**

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

**Findings of Fact**

1. On October 23, 2012, Kathleen Miller and the DRC filed an application to lease a portion of Certificate 67252 for instream use. The Department assigned the application number IL-1260.
2. The Department provided notice of the lease application pursuant to OAR 690-077-0077(1) on October 30, 2012. No comments were received.
3. The application was submitted after the deadline for accepting leases for the 2012 calendar year. The deadline to submit an instream lease application for seasonal uses is July 1 consistent with OAR 690-077-0065(4). Lease applications received after this deadline are either returned or, at the request of the applicant (Lessor and Lessee), processed for the next calendar year.
4. The application was submitted with additional information to demonstrate that while the right may not have been used in the five years prior to the lease being submitted, the water right is not subject to forfeiture.
5. Consistent with OAR 690-077-0076(3)(h), the Lessor must verify as part of the lease application that the water right to be leased has been used under the terms and conditions of that right during the five years prior to submission of the lease or provide an explanation of why the right is not subject to forfeiture under ORS 540.610.

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.

6. The Lessor and Lessee provided information to demonstrate that the Lessor was prohibited by law from exercising the right and therefore not subject to forfeiture consistent with ORS 540.610 (2)(k). The Department requested additional information to support this claim and additional information was provided on February 18, 2013.
7. The Department reviewed the information provided by the Lessor and Lessee and identified that the information provided did not meet the criteria for rebutting forfeiture under ORS 540.510. However, the Lessor provided additional information on April 22, 2013, and attempted to demonstrate that the right is not subject to forfeiture under ORS 540.610 (2)(d) (unable to use the right due to economic hardship) and ORS 540.610 (2)(m) (the non use occurred during a time period under which the water right was included in a transfer application).
8. The Department further reviewed the information provided by the Lessor and identified that the information provided did not meet the definition for economic hardship, which is defined in OAR 690-017-0080(3). The Department also identified that the Lease Application is not a transfer application. A transfer application is a specific type of application filed under OAR Chapter 690, Division 380 and Division 385 and ORS 540.505 through 540.587. Instream lease applications are filed and processed consistent with ORS 537.348(2) and OAR Chapter 690, Division 77.
9. Therefore, the Department has determined that the lease application does not include all of the information required under OAR 690-077-0076(3), the minimum instream lease application requirements. Specifically, information showing that the right was used in the last five years or that the right is not subject to forfeiture.

### CONCLUSIONS OF LAW

The Department concludes that the instream lease application is incomplete and should be denied, OAR 690-077-0076(3).

### ORDER

Therefore, it is ORDERED:

1. That the Lease as described herein is DENIED.

Dated at Salem, Oregon this 26 day of April, 2013.

  
Dwight French, Water Right Services Administrator, for  
PHILLIP C. WARD, DIRECTOR

*This document was prepared by Laura Wilke and if you have any questions, please call 503-986-0884.*

**APR 29 2013**

Mailing date: \_\_\_\_\_