

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

|   |                            |
|---|----------------------------|
| In the Matter of Instream Lease Application ) | CORRECTING ORDER ON        |
| IL-1081 and Preliminary and Final Award )     | INSTREAM LEASE IL-1081 and |
| of Mitigation Credits, Certificates 83857 )   | MITIGATION CREDIT PROJECT  |
| and 83732, Crook County )                     | MP-138                     |

**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.

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**

Grass Butte, LLC  
1111 Main Street, Suite 700  
Vancouver, WA 98660

**Lessee**

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

**Findings of Fact**

1. On June 8, 2010, the DRC Mitigation Bank and Grass Butte, LLC, filed an application to lease a portion of Certificates 83857 and 83651 and all of Certificate 83732 for instream use. The Department assigned the application number IL-1081.
2. On July 27, 2010, the Department issued an order approving instream lease IL-1081 and Mitigation Credit Project MP-138, as evidenced by Special Order Volume 81, Page 474. Following issuance of this order it was identified that there is a scrivener's error in the description of the number of acres on which the mitigation credit calculation was based. This order is being issued to correctly identify the number of acres for the mitigation credit calculation (see Finding of Fact #24 with the correction shown in bold and italic print) and supersedes Special Order Volume 81, Page 474.
3. Additional materials associated with the lease application were received on July 23, 2010.
4. On July 26, 2010, the Lessee and John Short, agent for the Lessor, requested to amend the lease application to remove 83651 from the lease application. The also requested to remove the following acres from the portion of Certificate 83857 proposed to be leased instream:

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.

| Twp  | Rng  | Mer | Sec | Q-Q   | POD | Priority Date | Acres |
|------|------|-----|-----|-------|-----|---------------|-------|
| 14 S | 14 E | WM  | 21  | SE SW | 2   | 1904/1910     | 2.5   |

- Peoples Irrigation Company is not an identified Lessor on the lease. Irrigation districts (and other water providers) are required by rule (OAR 690-077-0076) to be a co-lessor on an instream lease for water rights served by a district. However, it appears that the lands described in Finding of Fact #5 are no longer within this irrigation district. Therefore, Peoples Irrigation Company does not need to be included on the lease application.
- Interest in a portion of the water rights to be leased instream has been conveyed from the original land owners. The lease application identifies Grass Butte, LLC, as the Lessor. Individual conveyance agreements (recorded Statutory Bargain and Sale and Statutory Warranty Deeds), along with supporting documentation, identify that interest in a portion of the rights to be leased is held by The Daniels Group (now known as Grass Butte LLC) and another portion is held by Emmett Ranch. The Department has determined that Grass Butte is an interest holder in the rights and is authorized to lease the pertinent portions of the water rights instream.

For the portion of the right held by Emmett Ranch, Emmett Ranch provided notarized consent to the lease on July 26, 2010.

- The portion of the first right to be leased is as follows:

**Certificate:** 83857 in the name of Peoples Irrigation Company  
**Priority Date:** 1892 and 1898  
**Use:** Irrigation of 64.5 acres, being 13.4 acres from Point of Diversion (POD ) #1, 50.6 acres from POD #6, and 0.5 acres from POD #7  
**Quantity:** **Rate:** 0.81 Cubic Foot per Second (CFS), being 0.17 CFS from POD #1, 0.63 CFS from POD #6, and 0.01 CFS from POD #7  
**Duty:** 258.0 Acre-Feet (AF), being 53.6 AF from POD #1, 202.4 AF from POD #6, and 2.0 AF from POD #2  
**Limit:** One-eightieth CFS per acre, not to exceed 4.0 AF per acre per year  
**Source:** Crooked River, tributary of the Deschutes River

**Authorized Place of Use:**

| Twp  | Rng  | Mer | Sec | Q-Q   | POD | Priority Date | Acres |
|------|------|-----|-----|-------|-----|---------------|-------|
| 14 S | 14 E | WM  | 20  | SW SW | 6   | 1892          | 10.0  |
| 14 S | 14 E | WM  | 29  | NE NE | 7   | 1898          | 0.5   |
| 14 S | 14 E | WM  | 29  | NE NW | 6   | 1892          | 5.0   |
| 14 S | 14 E | WM  | 29  | NW NW | 1   | 1892          | 2.4   |
| 14 S | 14 E | WM  | 29  | NW NW | 6   | 1892          | 35.6  |
| 14 S | 14 E | WM  | 29  | SW NW | 1   | 1892          | 3.0   |
| 14 S | 14 E | WM  | 29  | SE NW | 1   | 1892          | 8.0   |

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

| Twp  | Rng  | Mer | Sec | Q-Q   | Measured Distances   |
|------|------|-----|-----|-------|--|
| 15 S | 16 E | WM  | 8   | NW SW | POD #1 - 1920 FEET NORTH & 340 FEET EAST FROM THE SW CORNER OF SECTION 8   |
| 14 S | 14 E | WM  | 29  | NE NW | POD #6 - 1085 FEET SOUTH & 970 FEET WEST FROM THE N ¼ CORNER OF SECTION 29 |
| 14 S | 14 E | WM  | 20  | SE SE | POD #7 - 325 FEET NORTH AND 120 FEET WEST FROM THE SE CORNER OF SECTION 20 |

8. The second right to be leased is as follows:

**Certificate:** 83732 in the name of Butler Ranch, Inc.  
**Priority Date:** 1892  
**Use:** Irrigation of 11.0 acres  
**Quantity:** **Rate:** 0.137 Cubic Foot per Second (CFS)  
**Duty:** 44.0 Acre-Feet (AF)  
**Limit:** Not to exceed 4.0 AF per acre per year  
**Source:** Crooked River, tributary of the Deschutes River

**Authorized Place of Use:**

| Twp  | Rng  | Mer | Sec | Q-Q   | Acres |
|------|------|-----|-----|-------|-------|
| 14 S | 14 E | WM  | 20  | SW SW | 11.0  |

**Authorized POD:**

| Twp  | Rng  | Mer | Sec | Q-Q   | Measured Distances  |
|------|------|-----|-----|-------|---|
| 14 S | 14 E | WM  | 20  | SE SW | 1896 FEET SOUTH AND 1717 FEET EAST FROM THE WEST ¼ CORNER OF SECTION 20 |

9. Certificates 83857 and 83732 do not specify the irrigation season. However, the irrigation season is defined by Decree as February 1 to December 1.

10. 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.

11. The Lessor and Lessee have requested to protect water instream from the PODs on the Crooked River to Lake Billy Chinook. A portion of the water diverted at each POD returns to the Crooked River below the POD 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 requires modification to account for return flows immediately below each POD. At this time, the Department estimates that return flows are 10% of the amount diverted.

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

Crooked River, tributary to the Deschutes River

**Instream Reach:** From each POD (as described in Finding of Fact #6 and 7) to Lake Billy Chinook

| Certificate   | Priority Date | POD # | At the POD          |                      | Below the POD       |                      | Period Protected Instream |
|---------------|---------------|-------|---------------------|----------------------|---------------------|----------------------|---------------------------|
|               |               |       | Instream Rate (cfs) | Instream Volume (AF) | Instream Rate (cfs) | Instream Volume (AF) |                           |
| 83857         | 1892          | 1     | 0.17                | 53.6                 | 0.15                | 48.24                | May 6 through October 15  |
|               | 1892          | 6     | 0.63                | 202.4                | 0.56                | 182.16               |                           |
|               | 1898          | 7     | 0.01                | 2.0                  | 0.006               | 1.8                  |                           |
| 83732         | 1892          |       | 0.137               | 44.0                 | 0.122               | 39.6                 |                           |
| <b>Totals</b> |               |       | <b>0.947</b>        | <b>302.0</b>         | <b>0.838</b>        | <b>271.8</b>         |                           |

13. Other conditions to prevent injury and enlargement are:

For the amount leased instream under Certificate 83732, the quantity of water leased from the point of diversion, together with the amount diverted at the old point of diversion, shall not exceed the quantity of water lawfully available at the original point of diversion.

14. There are supplemental water rights, Certificates 1327 and 83850, appurtenant to all or a portion of the lands described in Findings of Fact # 6 and 7. The Lessor and Lessee have requested that these water rights not be included as part of this lease application. During the term of the lease, water use under these rights will also be suspended.
15. 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.
16. 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.
17. 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.
18. The Lessor has requested that the lease terminate on November 30, 2013, or prior to approval of instream transfer T-10730. The lease will commence the date the final order is signed and on February 1 of each succeeding calendar year that the lease is in place.
19. The Lessor has requested the option of terminating the lease early with written notice to the Department.

**Preliminary Award of Deschutes Basin Mitigation Credits**

20. 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.
21. The Department assigned this mitigation credit project number MP-138.
22. 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). Comments were received from the Oregon Parks and

Recreation Department. These comments identified the additional instream flow will potentially benefit aquatic resources and improve the fishery resource.

23. No modifications were made to the lease based on the comments received.
24. As part of the public notice of the mitigation project, the Department identified that the project may result in 221.4 mitigation credits. However, on July 26, 2010, the applicants requested to amend the application to reduce the number of acres of irrigation leased to instream use from 123.0 to **75.5** acres. Therefore, the number of mitigation credits that may be awarded to this project have also been reduced. The Department finds that 135.9 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 Crooked River and General Zones of Impact.
25. The mitigation credits expire on December 31, 2014, or until the lease is terminated.
26. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.
27. 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.
28. 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.

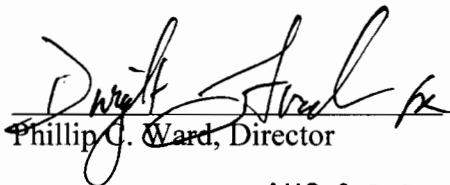
### **ORDER**

Therefore, it is ORDERED:

1. That the Lease as described herein is APPROVED.
2. This correcting order supersedes Special Order Volume 81, Page 474.
3. 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.

4. The lease will terminate on November 30, 2014. For multiyear leases, the Lessor 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 written notice to Salem office must include original signatures. The notice to the Watermaster office may be made by fax or e-mail. 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 period of allowed instream use (May 6 through October 15) or after the period of allowed use has begun for the water right(s) being leased, water may not be used under the right(s) leased until the following calendar year, unless the Director determines that enlargement would not occur.
5. **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 **135.9 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 **Crooked River and General Zones of Impact**.
6. 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.
7. The mitigation credits shall expire on December 31, 2014.
8. 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 30 day of July, 2010.

  
Phillip C. Ward, Director

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

Mailing date: AUG 02 2010