

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

In the Matter of Instream Lease Application) DETERMINATION and
IL-1243, Certificates 65091, 65090, 13509,) FINAL ORDER ON PROPOSED
13501, 10028, and 3227, Deschutes County) INSTREAM LEASE

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 #1

City of Sisters
PO Box 39
Sisters, OR 97759

Lessee

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

Findings of Fact

1. On June 2, 2010, the City of Sisters and the DRC filed an application to lease all of Certificates 65091, 65090, 13509, 13501, 10028, and 3227 for instream use. The Department assigned the application number IL-1243.

2. The first right to be leased is as follows:

Certificate: 65091 in the name of City of Sisters

Use: Municipal Use

Priority Date: November 17, 1967

Quantity: 1.45 Cubic Foot per Second (CFS)

Source: Pole Creek and Sisters Reservoir constructed under permit R-5054, tributary to Whychus Creek (formerly Squaw Creek)

Authorized Point of Diversion (POD):

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|------|------|-----|-------|--|
| 15 S | 10 E | W.M. | 19 | SE NE | CREEK DIVERSION: 1810 FEET SOUTH AND 1100 FEET WEST FROM THE NE CORNER OF SECTION 19 |
| 15 S | 10 E | W.M. | 19 | NE NE | RESERVOIR OUTLET: 880 FEET SOUTH AND 750 FEET WEST FROM THE NE CORNER OF SECTION 19 |

Authorized Place of Use:

| Twp | Rng | Mer | Sec | Q-Q |
|------|------|------|-----|-------|
| 15 S | 10 E | W.M. | 4 | SW NE |
| 15 S | 10 E | W.M. | 4 | SE NW |
| 15 S | 10 E | W.M. | 4 | S ½ |

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 |
|------|------|------|-----|----------|
| 15 S | 10 E | W.M. | 5 | E ½ SW ¼ |
| 15 S | 10 E | W.M. | 5 | SE ¼ |
| 15 S | 10 E | W.M. | 8 | N ½ NE ¼ |
| 15 S | 10 E | W.M. | 8 | SE NE |
| 15 S | 10 E | W.M. | 9 | W ½ NE ¼ |
| 15 S | 10 E | W.M. | 9 | SE NE |
| 15 S | 10 E | W.M. | 9 | NW ¼ |
| 15 S | 10 E | W.M. | 9 | NW SW |

3. The third right to be leased is as follows:

Certificate: 65090 in the name of City of Sisters

Use: Storage of water for Municipal Use

Priority Date: August 10, 1967

Quantity: 6.3 Acre-Feet (AF)

Source: Pole Creek, tributary to Whychus Creek (formerly Squaw Creek)

Authorized Place of Use (Reservoir Location):

| Twp | Rng | Mer | Sec | Q-Q |
|------|------|------|-----|-------|
| 15 S | 10 E | W.M. | 19 | NE NE |

4. Certificates 65091 and 65090 all describe points of diversion and a reservoir that are located on Pole Creek Ditch. Pole Creek has historically been diverted from its natural channel and into Pole Creek Ditch. Recent restoration efforts have resulted in the installation of a headgate and modification of the stream channel to allow water in Pole Creek to flow past the ditch and continue downstream in the natural stream channel. Pole Creek Ditch is the actual diversion point for water out of Pole Creek and into the ditch. The Department has determined that, for purposes of instream leasing and restoration of streamflows, the ditch location on the creek may be used as the start point for the instream use created as a result of the lease of Certificates 65091 and 65090 to instream use. The head of Pole Creek Ditch is located as follows:

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|------|------|-----|-------|--|
| 15 S | 10 E | W.M. | 19 | SE NE | CREEK DIVERSION: 1810 FEET SOUTH AND 1100 FEET WEST FROM THE NE CORNER OF SECTION 19 |

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

Certificate: 13509 in the name of Sisters Domestic Water District

Use: Municipal Use

Priority Date: November 1, 1937

Quantity: 1.25 Cubic Foot per Second (CFS)

Source: 9 Springs, tributaries to Whychus Creek (formerly Squaw Creek)

Authorized Points of Diversion (POD):

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|-----|------|-----|-------|------------------------------|
| 16 S | 9 E | W.M. | 3 | SW SW | Not described in Certificate |
| 16 S | 9 E | W.M. | 10 | NW NW | Not described in Certificate |

Authorized Place of Use:

| Twp | Rng | Mer | Sec | Q-Q |
|------|------|------|-----|-------|
| 15 S | 10 E | W.M. | 4 | SW SW |
| 15 S | 10 E | W.M. | 4 | SE SW |
| 15 S | 10 E | W.M. | 4 | NW SW |
| 15 S | 10 E | W.M. | 8 | NE NE |
| 15 S | 10 E | W.M. | 9 | NW NW |
| 15 S | 10 E | W.M. | 9 | NE NW |

6. Water was originally diverted from the Springs under Certificate 13509 into a pick-up ditch along the ridge between Pole Creek and Whychus Creek. The pick-up ditch diverted water from the springs over the ridge and into a small channel tributary to Pole Creek. The pick-up ditch still carries water from several of the springs over the ridge and into a tributary to Pole Creek. The Watermaster has identified that at least one of the springs flows into Whychus Creek. Other springs either only flow a few feet or flow into the pick-up ditch. The Watermaster has estimated that there may be as much as 1.5 CFS flowing down the pick-up ditch and over the ridge into the unnamed tributary to Pole Creek. The amount of water flowing down the pick-up ditch appears to be more than the amount authorized (1.25 CFS) under Certificate 13509.

The Lessor and Lessee have requested that water from the springs be protected into Pole Creek. Certificate 13509 identifies that the springs are tributary to Whychus Creek (formerly Squaw Creek). However, the Department has determined that because there are sufficient flows in the pick-up ditch that, for purposes of the lease, the springs may be considered tributary to the unnamed tributary to Pole Creek.

7. The fifth right to be leased is as follows:

Certificate: 13501 in the name of Sisters Domestic Water District

Use: Domestic and Municipal Supply

Priority Date: April 7, 1937

Quantity: 1.25 Cubic Foot per Second (CFS)

Source: Pole Creek Swamp Springs, tributary to Whychus Creek (formerly Squaw Creek)

Authorized Points of Diversion (POD):

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|-----|------|-----|-------|------------------------------|
| 15 S | 9 E | W.M. | 35 | SW SE | Not described in Certificate |

Authorized Place of Use:

| Twp | Rng | Mer | Sec | Q-Q |
|------|------|------|-----|-----|
| 15 S | 10 E | W.M. | 4 | SW |
| 15 S | 10 E | W.M. | 9 | NW |

8. Water was originally diverted from the Pole Creek Swamp Springs under Certificate 13501 into a pick-up ditch which delivered water into Pole Creek Ditch. The pick-up ditch has been abandoned and over the years has been disrupted by hikers. Presently the springs no longer flow down the pick-up ditch. Instead they flow under natural conditions into the natural channel of Pole Creek, tributary to Whychus Creek.

9. The sixth right to be leased has been clarified from the lease application and is as follows:

Certificate: 10028 in the name of Sisters Water User Association

Use: Municipal Use

Priority Date: February 11, 1929

Quantity: 0.2 Cubic Foot per Second (CFS)

Source: Springs, tributary to Whychus Creek (formerly Squaw Creek)

Authorized Points of Diversion (POD):

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|------|------|------|-----|-------|------------------------------|
| 15 S | 10 E | W.M. | 8 | SE SE | Not described in Certificate |

Authorized Place of Use (within the town of Sisters):

| Twp | Rng | Mer | Sec |
|------|------|------|-----|
| 15 S | 10 E | W.M. | 4 |

10. The Department has additional information indicating that the source of water for Certificate 10028 may not actually be springs but rather an overflow channel, which flows into Whychus Creek, for Pole Creek Ditch. According to the Watermaster, the point of diversion for Certificate 10028 is located within this overflow ditch. When water is diverted into Pole Creek Ditch by City of Sisters and Patterson Ranch any water that is not used flows into this overflow ditch and then into Whychus Creek. Water is only present at this location when there are unused flows from Pole Creek Ditch.

11. The seventh right to be leased is as follows:

Certificate: 3227 in the name of Sisters Domestic Water User Association

Use: Municipal Use

Priority Date: May 18, 1917

Quantity: 1.5 Cubic Foot per Second (CFS)

Source: Branton Ditch out of Whychus Creek (formerly Squaw Creek), tributary to the Deschutes River

Authorized Point of Diversion (POD): Branton Ditch

Authorized Place of Use: The Town of Sisters

12. Certificate 3227 does not describe the location of the Branton Ditch POD. However, the map associated with the water right shows the location of the POD as being within:

| Twp | Rng | Mer | Sec | Q-Q |
|------|------|------|-----|-------|
| 15 S | 10 E | W.M. | 9 | SE NE |

The Watermaster has identified that this ditch and POD may no longer exist.

13. 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.

14. The lease application requests to protect 1.45 CFS instream year round under Certificate 65091 and 6.3 AF (0.11 CFS) instream from April 1 through April 29 under Certificate 65090. The water stored in a reservoir under Certificate 65090 may be appropriated under Certificate 65091 as part of the maximum of 1.45 CFS authorized under that right. To prevent injury and enlargement, the Department has determined that up to 1.45 CFS may be

protected instream with a portion of that being the 6.3 AF of stored water. 6.3 AF of stored water is equivalent to 0.009 CFS year round.

15. The lease application requests to protect water instream under Certificates 65091 and 65090 from Pole Creek into Whychus Creek. An instream reach is generally from the point of diversion to the mouth of the source stream (Pole Creek) but may be protected further if measurable in the receiving stream (Whychus Creek) (OAR 690-077-0015 (8)). The quantity that may be leased instream from Pole Creek is measurable into Whychus Creek and may be protected instream in Whychus Creek.

The lease application requests to protect water instream under Certificate 13509 from the Springs into Pole Creek and into Whychus Creek. Certificate 13509 identifies that these springs are tributary to Whychus Creek. However, as identified in Finding of Fact #5, flows from several of the springs are carried through a pick-up ditch and over the ridge into the Pole Creek subbasin. An instream reach is generally from the point of diversion to the mouth of the source stream (the springs and into the pick-up ditch) but may be protected further if measurable in the receiving stream (unnamed tributary to Pole Creek) (OAR 690-077-0015 (8)). The quantity that may be leased instream from the springs (1.25 CFS), which flow into the pick-up ditch, is measurable into the unnamed tributary to Pole Creek. The quantity to be leased is also measurable into Pole Creek and then into Whychus Creek and may be protected instream in down to the mouth of Whychus Creek.

The lease application requests to protect water instream under Certificate 13501 from the Pole Creek Swamp Springs into Pole Creek and then into Whychus Creek. The Pole Creek Swamp Springs, as described in Finding of Fact #8, are no longer physically diverted into Pole Creek Ditch but flow under natural conditions into Pole Creek Swamp, which is tributary to the natural channel of Pole Creek. An instream reach is generally from the point of diversion to the mouth of the source stream (Pole Creek Swamp Springs) but may be protected further if measurable in the receiving stream (Pole Creek) (OAR 690-077-0015 (8)). The quantity that may be leased instream from Pole Creek Swamp Springs is measurable into Pole Creek and may be protected instream in Pole Creek. The quantity proposed to be protected instream is also measurable into Whychus Creek.

The lease application requests to protect water instream under Certificate 10028 from the Springs into Pole Creek and then into Whychus Creek. However, the Springs (or overflow channel) do not flow under natural conditions into Pole Creek but rather flow (when water is present as described in Finding of Fact #10) into Whychus Creek. Water may not be protected instream in Pole Creek. For Whychus Creek, an instream reach is generally from the point of diversion to the mouth of the source stream (the Springs) but may be protected further if measurable in the receiving stream (Whychus Creek) (OAR 690-077-0015 (8)). The quantity that may be leased instream from the Springs (or overflow channel) is not measurable into Whychus Creek and may not be protected instream in Whychus Creek.

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

Springs, tributary to Whychus Creek (flow into a pick-up ditch, which then flows into an unnamed tributary to Pole Creek)

| Certificate | Priority Date | Instream Rate (cfs) | Instream Volume (AF) | Period Protected Instream |
|--|---------------|---------------------|----------------------|---------------------------|
| Instream Reach: From the Springs to the mouth of the pick-up ditch in the NW SW of Sec 3, T16S, R9E, W.M. | | | | |
| 13509 | 11/1/1937 | 1.25 | 904.96 | January 1 – December 31 |

Unnamed tributary to Pole Creek

| Certificate | Priority Date | Instream Rate (cfs) | Instream Volume (AF) | Period Protected Instream |
|--|---------------|---------------------|----------------------|---------------------------|
| Instream Reach: From the confluence of the pick-up ditch with the unnamed tributary to Pole Creek to the mouth of the unnamed tributary to Pole Creek | | | | |
| 13509 | 11/1/1937 | 1.25 | 904.96 | January 1 – December 31 |

Pole Creek Swamp Springs, tributary to Pole Creek

| Certificate | Priority Date | Instream Rate (cfs) | Instream Volume (AF) | Period Protected Instream |
|---|---------------|---------------------|----------------------|---------------------------|
| Instream Reach: From Pole Creek Swamp Springs (as described in Finding of Fact #7) to mouth of spring channel (confluence with Pole Creek) | | | | |
| 13501 | 4/7/1937 | 1.25 | 904.96 | January 1 – December 31 |

Pole Creek, tributary to Whychus Creek

| Certificate | Priority Date | Instream Rate (cfs) | Instream Volume (AF) | Period Protected Instream |
|---|---------------|---------------------|----------------------|---------------------------|
| Instream Reach: From the confluence of the unnamed tributary to Pole Creek and Pole Creek to Pole Creek Ditch POD (as described in Finding of Fact #4) | | | | |
| 13509 | 11/1/1937 | 1.25 | 904.96 | January 1 – December 31 |
| Instream Reach: From Pole Creek Ditch POD (as described in Finding of Fact #4) to confluence with Pole Creek Swamp | | | | |
| 13509 | 11/1/1937 | 1.25 | 904.96 | January 1 – December 31 |
| 65091 & 65090 | 11/17/1967 | 1.441 | 1043.24 | |
| | 8/10/1967 | 0.009 | 6.3 | |
| Totals | | 2.7 | 1954.5 | |
| Instream Reach: In Pole Creek, from confluence with Pole Creek Swamp to mouth of Pole Creek | | | | |
| 13501 | 4/7/1937 | 1.25 | 904.96 | January 1 – December 31 |
| 13509 | 11/1/1937 | 1.25 | 904.96 | |
| 65091 & 65090 | 11/17/1967 | 1.441 | 1043.24 | |
| | 8/10/1967 | 0.009 | 6.3 | |
| Totals | | 3.95 | 2859.46 | |

Springs, tributary to Whychus Creek

| Certificate | Priority Date | Instream Rate (cfs) | Instream Volume (AF) | Period Protected Instream |
|---|---------------|---------------------|----------------------|---------------------------|
| Instream Reach: From POD (as described in Finding of Fact #9) to mouth of overflow channel (confluence with Whychus Creek) | | | | |
| 10028 | 2/11/1929 | 0.2 | 144.79 | January 1 – December 31 |

Whychus Creek, tributary to the Deschutes River

| Certificate | Priority Date | Instream Rate (cfs) | Instream Volume (AF) | Period Protected Instream |
|--|---------------|---------------------|----------------------|---------------------------|
| Instream Reach: From confluence of Pole Creek and Whychus Cr to POD for Cert 3227 (as described in Finding of Fact #12) | | | | |
| 13501 | 4/7/1937 | 1.25 | 904.96 | January 1 – December 31 |
| 13509 | 11/1/1937 | 1.25 | 904.96 | |
| 65091 & 65090 | 11/17/1967 | 1.441 | 1043.24 | |
| | 8/10/1967 | 0.009 | 6.3 | |
| Totals | | 3.95 | 2859.46 | |
| Instream Reach: From POD for Cert 3227 to mouth of Whychus Creek | | | | |
| 13501 | 4/7/1937 | 1.25 | 904.96 | January 1 – December 31 |
| 13509 | 11/1/1937 | 1.25 | 904.96 | |
| 65091 & 65090 | 11/17/1967 | 1.441 | 1043.24 | |
| | 8/10/1967 | 0.009 | 6.3 | |
| 3227 | 5/18/1917 | 1.5 | 1085.95 | |
| Totals | | 5.45 | 3945.41 | |

17. 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.
18. 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.
19. 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.
20. The Lessor has requested that the lease terminate on December 31, 2016. The lease will commence the date the final order is signed and on January 1 of each succeeding calendar year that the lease is in place.
21. The Lessor has requested the option of terminating the lease early with written notice to the Department.

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. The lease will terminate on December 31, 2016. 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 (January 1 through December 31) 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.

Dated at Salem, Oregon this 16th day of July, 2012.

 for

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.*

Mailing date: JUL 17 2012