

**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
Certificate 74145, 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

Pooled Instream Lease for several water right holders (described in Findings of Fact #3)

Lessor #2

Swalley Irrigation District (SID)
64672 Cook Ave., Suite 1
Bend, OR 97701
kathy@swalley.com

Lessee

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

Findings of Fact

1. On June 30, 2008, the DRC and SID, on behalf of several water right holders, filed an application to lease a portion of Certificate 74145 to instream use. The Department assigned the application number SL-10.
2. On September 9 and 12, 2008, the Lessor and Lessee requested to amend the lease application to remove the following acres from the proposed lease application.

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres
17 S	12 E	WM	22	SE NE	102	33.95

3. The portion of the right to be leased has been clarified from the lease application and has been modified as described in Finding of Fact #2 and is as follows:

Certificate: 74145
Priority Date: September 1, 1899
Use: Irrigation of 40.68 acres, 15.22 equivalent acres of Nursery Use, and 0.5 equivalent acre of Pond Maintenance

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.

Season of Use: April 1 to November 1, further limited as follows:

April 1 to May 1 and Oct. 1 to Nov. 1 described herein as Season 1

May 1 to May 15 and Sept. 15 to Oct. 1 described herein as Season 2

May 15 to Sept. 15 described herein as Season 3

Quantity: Rate: Season 1 (limited to 1/83rd Cubic Foot per Second (CFS)/acre)
 Season 2 (limited to 1/62nd CFS/acre)
 Season 3 (limited to 1/33.45 CFS/acre)

Duty: limited to 9.58 acre-feet per acre

The quantities listed reflect allowance of a 43% transmission loss as determined by decree of the Circuit Court of Deschutes County, dated March 24, 1933

Source: Deschutes River, tributary to the Columbia River

Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Water Right Holder (Lessor #1)
Nursery Use							
17 S	12 E	WM	23	SW NW	1802	2.64	Bend Metro Parks & Rec.
17 S	12 E	WM	23	NW NW	1800	6.42	USDA Forest Service – Deschutes National Forest
17 S	12 E	WM	23	SW NW	1800	6.16	USDA Forest Service – Deschutes National Forest
Irrigation Use							
17 S	12 E	WM	17	SW SE	7400	1.5	Bend Metro Parks & Rec.
17 S	12 E	WM	9	NE NW	1100	0.5	Pat Murphy
17 S	12 E	WM	9	SE NW	1100	2.0	Pat Murphy
16 S	12 E	WM	27	SE SE	1100	29.95	RYMILKA, LLC & East Slope Investments, LLC
16 S	12 E	WM	27	SE SE	1300	6.73	RYMILKA, LLC & East Slope Investments, LLC
Pond Maintenance							
16 S	12 E	WM	27	SE SE	1100	0.5	RYMILKA, LLC & East Slope Investments, LLC

Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
17 S	12 E	WM	29	SE NE	Swalley Main Canal Diversion #3 – 985 feet North and 617 feet West from the East ¼ Corner of Section 29
15 S	12 E	WM	14	NW SE	Additional District Diversion #15 – 2170 feet North and 1350 feet West from SE Corner of Section 14

4. The Department has information that POD #15 is incorrectly described in Certificate 74145. Pursuant to the order issued approving Conserved Water Application CW-13, as evidenced by Special Order Volume 61, Page 630, the location coordinates should be:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
15 S	12 E	WM	14	NE SE	Additional District Diversion #15 – 2065.82 feet North and 1401.41 feet East from the S quarter Corner of Section 14

5. Certificate 74145 is a deficient water right. Since Certificate 74145 was issued, the amount of water that may be diverted under this certificate has been affected (reduced) by allocation of conserved water projects, instream transfers, and other transfer actions. If water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rates and duty allowed (described in Finding of Fact #3), the total rate and duty for

the water right would be exceeded. In the event water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rates and duty allowed at the PODs (described in Finding of Fact #3), the portion of the right involved in this instream lease would be limited as described in the table below.

Use	Season 1	Season 2	Season 3	Duty
Irrigation	0.143 CFS	0.197 CFS	0.360 CFS	122.56 AF
Nursery	0.461 CFS	0.635 CFS	1.164 CFS	395.93 AF
Pond Maint.	0.005 CFS	0.006 CFS	0.012 CFS	4.03 AF

- 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.
- The instream lease application, as proposed, is a split season lease. The application requests to use water for the existing use (out of stream) during the period September 15 through October 31 (a portion of Season 1 and Season 2). Water may be diverted for its existing use at the Swalley Main Canal POD as follows:

Season 1 for 31 days	Season 2 for 16 days	Duty
0.529 CFS	0.728 CFS	55.63 AF

- The Lessor and Lessee have requested to protect water instream during a portion of Season 3, being July 21 through September 14.
- The Lessor and Lessee have requested to protect water instream from the Swalley Main Canal POD described in Finding of Fact #3 to the mouth of the Deschutes River. A portion of the water diverted at the POD returns to the Deschutes River within the proposed reach and is available to downstream water right holders. Return flows from the existing use are back in the river system once river flows reach the Madras Gage. To prevent injury to downstream water right holders or enlargement, the quantity of water that may be protected instream requires modification and return flows should be accounted for at the Madras Gage.
- The instream use has been modified from the lease application to reflect Findings of Fact #2 and #9 and is as follows:

Deschutes River, tributary to the Columbia River

Instream Reach #1: From the Swalley Main Canal POD #3 (as described in Finding of Fact #3) to the Madras Gage

Certificate	Priority Date	Period Protected Instream	Instream Rate (cfs)	Instream Volume (AF)
74145	SEPT. 1, 1899	July 21 through Sept 14	0.961	106.74

Instream Reach #2: From the Madras Gage to the mouth of the Deschutes River

Certificate	Priority Date	Period Protected Instream	Instream Rate (cfs)	Instream Volume (AF)
74145	SEPT. 1, 1899	July 21 through Sept 14	0.317	35.22

11. Other conditions to prevent injury and enlargement are:

The amount of water to be leased instream under Certificate 74145 does not include a 43% transmission loss associated with this right when used for its originally authorized purpose. The transmission loss may not be leased and protected instream.

Within the specified stream reach, the amount of water to which this right is entitled shall not exceed the quantity of water legally available at the original point of diversion. Stream channel losses and gains calculated based on available data and the use of water by senior appropriators will determine the amount of water to which this right is entitled downstream from the original points of diversion within the specified stream reach.

The Lessor shall make daily measurements of use during the existing use period. The measuring device shall be a Parshal Flume, located at the Swalley Main Canal diversion, or another device acceptable to the Director. The daily measurements shall be submitted on a monthly basis to the District 11 Watermaster and be available upon request.

12. 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.

13. 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.

14. 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.

15. The Lessor and Lessee have requested that the lease terminate on October 31, 2008.

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 October 31, 2008.

Dated at Salem, Oregon this 12th day of September, 2008.


Phillip C. Ward, Director

Mailing date: SEP 17 2008