

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

In the Matter of Instream Lease Application) DETERMINATION and
IL-1223, Certificates 74146, 74147, 76106,) FINAL ORDER ON PROPOSED
and 83571, 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 landowners
(described in Findings of Fact #4, 5, 6, and 7)

Lessor #2

Tumalo Irrigation District (TID)
64697 Cook Ave.
Bend, OR 97701
tid@tumalo.org

Lessee

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

Findings of Fact

1. On April 9, 2012, the DRC, Central Oregon Irrigation District, and TID, on behalf of various water right holders, filed an application to lease a portion of Certificates 74146, 74147, 76106, and 83571 for instream use. The Department assigned the application number IL-1223.
2. Certificates 74146, 74147, and 76106 describe the authorized place of use by township, range, section, quarter quarter, and tax lots. The tax lots on which a portion of the rights to be leased have changed since these certificates were issued. Some tax lot configurations no longer match those shown on the map of the water right and some of the original tax lots identified on the water right of record have been partitioned or subdivided. The portion of the water rights to be leased described in Findings of Fact #5, #6, #7, and #8 is consistent with the water right of record in so far as possible.
3. On June 20, 2012, the DRC requested to modify the proposed reach for the portion of the industrial use under Certificate 74147. The DRC requested that the reach for this use extend from the point of diversion down to the point of return flows.

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.

4. On June 21, 2012, the Department issued an order approving Instream Lease IL-1223, as evidenced by Special Order Volume 87, Page 849. Following issuance of the order, it was identified that the order incorrectly described the instream portions for Certificate 76106 and the instream rates and volumes for the reach extending below the Madras Gage. This order is being issued to correctly describe the instream quantities. Corrections are shown in bold and italic in Finding of Fact #16.
5. The portion of the first right to be leased has been clarified and modified from the lease application and is as follows:

Certificate: 74146 in the name of Tumalo Irrigation District
Use: Irrigation of 67.3 acres, being 16.9 acres under the September, 1900 priority date, 9.0 acres under the May 27, 1907 priority date, and 41.4 acres under the June 1, 1907 priority date
Season of Use: April 15 through October 15
Priority Date: September 1900, May 27, 1907, and June 1, 1907
Quantity: Rate: 0.961 Cubic Foot per Second (CFS) (limited to 1/70th CFS/acre), being

September, 1900	May 27, 1907	June 1, 1907
0.241 CFS	0.129 CFS	0.591 CFS

Duty: 121.14 Acre-Feet (AF) (limited to 1.8 AF/acre), being

September, 1900	May 27, 1907	June 1, 1907
30.42 AF	16.2 AF	74.52 AF

The quantities listed are as determined by decree of the Circuit Court of Deschutes County, in Volume 1, Page 135, and Volume 16, Page 188.

Source: Tumalo Creek, tributary to the Deschutes River

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Priority Date	Tax Lot	Acres	Water Right Holder (Lessor #1)	
16 S	11 E	WM	23	SW SE	6/1/1907	524	9.0	Bank of America	
16 S	11 E	WM	26	SE NE	9/1900	603	4.0	Anthony Amadio	
16 S	11E	WM	35	NW NW	6/1/1907	1000	19.7	Ellis Rev. Living Trust	
16 S	11E	WM	35	SE NE	6/1/1907	204	2.7	Louis B. Dvorak	
16 S	11E	WM	35	SE NE	9/1900	204	4.8	Louis B. Dvorak	
16 S	11E	WM	35	SE NE	9/1900	600	4.1	Louis B. Dvorak	
16 S	11E	WM	35	SE NE	9/1900	700	4.0	Louis B. Dvorak	
16 S	12 E	WM	7	NW NE	6/1/1907	400	10.0	Macmillan Family Trust	
16 S	12 E	WM	30	NW SE	5/27/1907	2100	3.4	C.L.R. Inc.	
17 S	11 E	WM	13	NW NW	5/27/1907	809	1.6	C.L.R. Inc.	
17 S	11 E	WM	13	NW NW	5/27/1907	817	4.0	C.L.R. Inc.	
Total							67.3		

Authorized Points of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	11 E	WM	23	SW NE	POD #1 (TUMALO FEED CANAL) – N 70 DEGREES 21' W; 1550 FEET FROM THE EAST ¼ CORNER OF SECTION 23
18 S	10 E	WM	2	NW SW	POD #2 – N 14 DEGREES 02' W; 1713 FEET FROM THE SOUTH ¼ CORNER OF SECTION 2

6. The portion of the second right to be leased has been clarified from the lease application and is as follows:

Certificate: 74147 in the name of Tumalo Irrigation District
Priority Date: October 29, 1913
Use: Irrigation of 95.46 acres and 2.0 acres equivalent of Industrial Use
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:

Irrigation

Rate: Season 1: 1.193 CFS (limited to 1/80th CFS/acre)
 Season 2: 1.591 CFS (limited to 1/60th CFS/acre)
 Season 3: 2.946 CFS (limited to 1/32.4th CFS/acre)
Duty: 946.01 AF (limited to 9.91 AF per acre)

Industrial

Rate: Season 1: 0.025 CFS (limited to 1/80th CFS/acre)
 Season 2: 0.033 CFS (limited to 1/60th CFS/acre)
 Season 3: 0.062 CFS (limited to 1/32.4th CFS/acre)
Duty: 19.82 AF (limited to 9.91 AF per acre)

Source: Tumalo Creek, tributary to the Deschutes River

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Water Right Holder (Lessor #1)
IRRIGATION							
16 S	11 E	WM	23	SE SE	524	6.4	Bank of America
16 S	11 E	WM	25	NE SE	908	2.6	Kristina Shockey
16 S	11 E	WM	25	NW SE	908	1.4	Kristina Shockey
16 S	11 E	WM	25	NW SW	905	8.0	RMB, LLC
16 S	11 E	WM	26	SE NE	603	19.0	Anthony Amadio
16 S	11 E	WM	34	NE SE	1100	13.0	Lane Qualified Personal Residence Trust
16 S	11 E	WM	35	SE NE	600	0.4	Louis B. Dvorak
16 S	12 E	WM	30	SE NE	100	13.2	C.L.R. Inc.
16 S	12 E	WM	30	NE SE	100	16.0	C.L.R. Inc.
16 S	12 E	WM	30	NE SE	2000	5.0	C.L.R. Inc.
16 S	12 E	WM	30	NE SE	2100	1.9	C.L.R. Inc.
16 S	12 E	WM	30	NW SE	2100	0.7	C.L.R. Inc.
17 S	11 E	WM	13	NW NW	809	3.0	C.L.R. Inc.
17 S	11 E	WM	13	NW NW	817	1.36	C.L.R. Inc.
17 S	11 E	WM	14	NE NE	11400	3.5	C.L.R. Inc.
Total						95.46	
2.0 EQUIVALENT ACRES OF INDUSTRIAL USE							
16 S	12 E	WM	30	NE SE	100	2.0	C.L.R., Inc.

Authorized POD:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	11 E	WM	23	SW NE	Tumalo Creek POD #1 (Tumalo Feed Canal) – N 70 degrees 21' W; 1550 feet from the East ¼ corner of Section 23

7. The portion of the third right to be leased has been clarified and modified from the lease application and is as follows:

Certificate: 76106 in the name of Tumalo Irrigation District
Priority Date: December 8, 1961

Use: Irrigation of 14.46 acres
Season of Use: April 15 through October 15 (as established by Tumalo Creek Decree)
Quantity: Rate (limited to 1/70th CFS/acre): 0.21 CFS
 Duty (limited to 2.5 AF/acre): 36.15 AF, further limited to a maximum of 20.12 AF from storage
Source: Tumalo Creek and Upper Tumalo Reservoir, constructed under Permit R-2743, tributaries of the Deschutes River

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Water Right Holder (Lessor #1)
16 S	11 E	WM	1	SW SE	600	14.46	Chris and Lisa Brehmer
Total						14.46	

Authorized POD:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	11 E	WM	23	SE NE	Tumalo Creek – 2080 feet South and 1310 feet West from the NE corner of Section 23
16 S	11 E	WM	33	SE SW	Upper Tumalo Reservoir

8. The portion of the fourth right to be leased is as follows:

Certificate: 83571 in the name of Central Oregon Irrigation District

Use: Irrigation of 2.0 acres

Priority Date: October 31, 1900 and December 2, 1907

Season of Use: April 1 through October 31, further limited as follows:
 April 1 through April 30 & October 1 through October 31
 May 1 through May 14 & September 16 through September 30
 May 15 through September 15

Maximum Quantity (Rate) that can be applied to an acre:

Season 1: limited to 1/80th cubic foot per second (CFS) per acre
 Season 2: limited to 1/60th CFS per acre
 Season 3: limited to 1/32.4th CFS per acre

Maximum Duty that can be applied to an acre:

Not to exceed 9.91 acre-feet (AF) per acre per year.

The above listed rates and duty reflect allowance of a 45% transmission loss on the main canals (POD #9) as determined by decree of the Circuit Court of Deschutes County, dated March 24, 1933. Those lands not served from the district main canal systems, but by direct pumping from the Deschutes River, are not allowed the 45% transmission loss.

Source: The Deschutes River, tributary to the Columbia River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17S	12E	W.M.	32	NW NE	TID BEND FEED CANAL POD #9: 2050 WEST FROM THE NE CORNER OF SECTION 32

Authorized Places of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres	Additional Place of Use Description Provided in Application - Tax Lot	Water Right Holder (Lessor #1)
17 S	11 E	WM	24	NW NE	2.0	200	Brooks Resources Corp.

9. The Department has information that the season of use described in Certificate 83571 contains scrivener errors. Consistent with the Decree for the Deschutes River (Volume 12, Page 282), the irrigation season should be:

Season of Use: April 1 through October 31, further limited as follows:
 April 1 through April 30 & October 1 through October 31 described herein as Season 1
 May 1 through May 14 & September 15 through September 30 described herein as Season 2
 May 15 through September 14 described herein as Season 3

10. Certificate 83571 is a deficient water right. 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 #8), 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 POD (described in Finding of Fact #8), the portion of the right involved in this instream lease would be limited as described in the table below. These rates and duty are also the quantities by which the diversion at POD #9 under Certificate 83571 shall be reduced, if this instream lease is approved.

Priority Date	Season 1	Season 2	Season 3	Duty
October 31, 1900	0.025 CFS	0.033 CFS	0.044 CFS	19.82 AF
December 2, 1907			0.018 CFS	

11. 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.
12. The lease application requests to protect water instream under Certificate 76106 beginning from Upper Tumalo Reservoir. However, Upper Tumalo Reservoir is an off channel reservoir. Water is diverted from Tumalo Creek, through a canal, and into the reservoir. There is no outlet from the Reservoir back to Tumalo Creek. Water protected instream under Certificate 76106 shall be from live flow only and begin at the point of diversion on Tumalo Creek.
13. It appears that the point of diversion for Certificate 76106 on Tumalo Creek is also the Tumalo Feed Canal point of diversion identified for Certificates 74146 and 74147 as described in Finding of Fact #5 and #6. For the purposes of this lease, water shall be protected instream from Tumalo Creek under Certificates 74146, 74147, and 76106 beginning at the Tumalo Feed Canal point of diversion, being:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	11 E	WM	23	SW NE	Tumalo Feed Canal – N 70 degrees 21' W; 1550 feet from the East ¼ corner of Section 23

14. The lease application requests to protect water instream from Tumalo Creek into the Deschutes River. An instream reach is generally from the point of diversion to the mouth of the source stream, Tumalo Creek, but may be protected further if measurable in the receiving stream, the Deschutes River (OAR 690-077-0015 (8)). The quantity that may be leased

instream from Tumalo Creek is measurable into the Deschutes River and may be protected instream in the Deschutes River.

15. The Lessor and Lessee have requested to protect water instream from the Tumalo Feed Canal POD on Tumalo Creek (as described in Finding of Fact #13) and from the Bend Feed Canal on the Deschutes River (as described in Finding of Fact #8) to the mouth of the Deschutes River. A portion of the water diverted at the POD returns to Tumalo Creek and to the Deschutes River along the proposed reach. All return flows from the existing use are back in the river system once river flows reach the Madras Gage. To prevent injury or enlargement of the right, the quantity of water that may be protected instream requires modification to account for return flows at the Madras Gage.
16. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows (corrections shown in bold and italic):

Tumalo Creek, tributary to the Deschutes River

Instream Reach: From the Tumalo Feed Canal POD (as described in Findings of Fact #13) to the confluence with the Deschutes River

Priority Date	Instream Rate (CFS)							Instream Volume (AF)
Certificate 74146								
	4/1 - 4/30	5/1 - 5/14	5/15 - 5/31	6/1 - 9/14	9/15 - 9/30	10/1 - 10/15	10/16 - 10/26	
9/1900				0.112	0.112	0.112		30.42
5/27/1907				0.060	0.060	0.060		16.20
6/1/1907				0.275	0.275	0.275		74.52
Certificate 74147								
10/29/1913	1.218	1.624	3.008	3.008	1.624	1.218	1.218	965.83
Certificate 76106								
12/8/1961				0.13	0.13	0.13		<i>36.15</i>
Totals	1.218	1.624	3.008	3.585	2.201	1.795	1.218	1123.12

Deschutes River, tributary to the Columbia River

Instream Reach #1: From the Bend Feed Canal POD (as described in Findings of Fact #8) to the confluence with Tumalo Creek

Priority Date	Instream Rate (CFS)							Instream Volume (AF)
Certificate 83571								
	4/1 - 4/30	5/1 - 5/14	5/15 - 5/31	6/1 - 9/14	9/15 - 9/30	10/1 - 10/15	10/16 - 10/26	
10/31/1900	0.014	0.018	0.034	0.034	0.018	0.014	0.014	10.9
Totals	0.014	0.018	0.034	0.034	0.018	0.014	0.014	10.9

Instream Reach #2: From the confluence with Tumalo Creek to the Madras Gage

Priority Date	Instream Rate (CFS)							Instream Volume (AF)
Certificate 74146								
	4/1 - 4/30	5/1 - 5/14	5/15 - 5/31	6/1 - 9/14	9/15 - 9/30	10/1 - 10/15	10/16 - 10/26	
9/1900				0.112	0.112	0.112		30.42
5/27/1907				0.060	0.060	0.060		16.20
6/1/1907				0.275	0.275	0.275		74.52
Certificate 83571								
10/31/1900	0.014	0.018	0.034	0.034	0.018	0.014	0.014	10.9

Certificate 74147								
10/29/1913	1.218	1.624	3.008	3.008	1.624	1.218	1.218	965.83
Certificate 76106								
12/8/1961				0.13	0.13	0.13		36.15
Totals	1.232	1.642	3.042	3.619	2.219	1.809	1.232	1134.02

Instream Reach #3: From the Madras Gage to the mouth of the Deschutes River

Priority Date	Instream Rate (CFS)							Instream Volume (AF)
Certificate 74146								
	4/1 - 4/30	5/1 - 5/14	5/15 - 5/31	6/1 - 9/14	9/15 - 9/30	10/1 - 10/15	10/16 - 10/26	
9/1900				0.112	0.112	0.112		30.42
5/27/1907				0.060	0.060	0.060		16.20
6/1/1907				0.275	0.275	0.275		74.52
Certificate 83571								
10/31/1900	0.009	0.009	0.009	0.009	0.009	0.009	0.009	3.6
Certificate 74147								
10/29/1913	0.414	0.414	0.414	0.414	0.414	0.414	0.414	171.83
Certificate 76106								
12/8/1961				0.096	0.096	0.096		26.03
Totals	0.423	0.423	0.423	0.966	0.966	0.966	0.423	322.60

17. Other conditions to prevent injury and enlargement are:

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.

18. There are supplemental water rights, Certificates 76714, 74147, 84148, 74149, and 76520, appurtenant to lands described in Findings of Fact #5, #6, #7, and #8. The Lessor and Lessee have not requested that these water rights be included as part of this lease application. During the term of the lease, water use under these supplemental water rights will also be suspended on the lands being leased instream.

19. 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.

20. 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.

21. 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.

22. The Lessor has requested that the lease terminate on October 31, 2012.

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. This correcting order supersedes Special Order Volume 87 page 849.
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 October 31, 2012.

Dated at Salem, Oregon this 5th 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.

JUL 09 2012

Mailing date: _____