

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

In the Matter of Instream Lease Application ) DETERMINATION and  
IL-1164, Certificate 36137 and 67284, ) FINAL ORDER ON PROPOSED  
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**

EEL, LLC  
Floyd Leithauser (signing partner)  
PO Box 157  
Sisters, OR 97759

**Lessee**

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

**Findings of Fact**

1. On April 28, 2011, the DRC and EEL, LLC, filed an application to lease all of Certificate 36137 and a portion of Certificate 67284 for instream use. The Department assigned the application number IL-1164.

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

**Certificate:** 36137 in the name of Pete F. Leithauser  
**Use:** Irrigation of 21.33 acres  
**Priority Date:** 1883  
**Quantity:** 0.43 Cubic Foot per Second (CFS)  
**Source:** Whychus Creek (formerly known as Squaw Creek), tributary to the Deschutes River

**Authorized Point of Diversion (POD):** Not described on certificate.

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
15 S	10 E	W.M.	4	NW SE	21.33

3. The portion of the second right to be leased is as follows:

**Certificate:** 67284 in the name of Frank L. Shaw  
**Use:** Irrigation of 12.0 acres

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.

**Priority Date:** 1883  
**Quantity:** 0.24 Cubic Foot per Second (CFS)  
**Source:** Whychus Creek (formerly known as Squaw Creek), tributary to the Deschutes River

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
15 S	10 E	W.M.	9	SE NW	BUCHANAN DITCH – 2050 FEET SOUTH AND 1250 FEET WEST FROM THE NORTH ¼ CORNER OF SECTION 9

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
15 S	10 E	W.M.	4	NW SE	12.0

4. Certificate 36137 does not identify the location of the authorized point of diversion. However, the lease application and the Squaw Creek Decree identify the diversion point as Buchanan Ditch, the same point of diversion as described in Certificate 67284.
5. Certificates 36137 and 67284 do not specify the irrigation season. Nor is the irrigation season specified by Decree. Nor is an irrigation season specified by Basin Program or Decree. For the purposes instream leasing, an irrigation season of March 1 through October 31, consistent with OAR 690-250, shall be used to establish when water may be protected instream.
6. Certificate 36137 and 67284 do not specify a duty limit per acre nor is one specified by Decree. The Lessor has requested to protect volumes equivalent to approximately 7.5 acre-feet per acre under each portion of the certificates proposed to be leased to instream use. Historically, the applicant has diverted the full quantity allowed by the water right.
7. 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.
8. The Lessor and Lessee have requested to protect water instream from the POD on Whychus Creek to Lake Billy Chinook. A portion of the water diverted at the POD returns to Whychus Creek below the POD. To prevent injury to any downstream water right holders and enlargement, the quantity of water that may be protected instream requires modification to account for return flows.

When evaluating for return flows, the Department generally considers the place of use as a whole and where the majority of return flows occur based upon the presence of surface return flows (overland flow) and the factors described below for any subsurface return flows.

The hydrogeologic evaluation of where subsurface return flows occur is generally based on the following information: 1) the local shallow and regional ground water elevations, 2) the shallow and regional head gradient (i.e. ground water flow direction), 3) elevation of nearby streams, 4) elevation of closest gaining stream reaches, 5) distance from nearby streams and gaining stream reaches, and 6) local geologic information.

The place of use under each right proposed for instream lease is located in close proximity to Whychus Creek. A portion of the water diverted to the place of use returns to the creek system around River Mile 16.5 as a result of sub-surface flow.

The instream flows at River Mile 16.5 have been reduced to the consumptive portion of the rights to account for subsurface return flows.

9. The lease application requests to protect water instream from Whychus Creek into the Deschutes River. An instream reach is generally from the point of diversion to the mouth of the source stream (Whychus 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 Whychus Creek is not measurable into the Deschutes River and, therefore, may not be protected instream into the Deschutes River.
10. The instream period requested by the Lessor and Lessee requires modification. At the rates and volumes requested for instream use water can be protected instream for 186 days under Certificate 36137 and 188 days under Certificate 67284. The instream period requested in the application, April 1 through October 31, is 214 days. On June 27, 2011, the Lessee requested that the instream period be shortened to prevent injury and enlargement.
11. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:

Whychus Creek, tributary to the Deschutes River

**Instream Reach #1:** From the Buchanan Ditch POD (as described in Finding of Fact #3) to River Mile 16.5

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
36137	1883	0.43	158.85	April 10 through October 12 (186 days)
67284	1883	0.24	79.50	April 10 through October 14 (188 days)

**Instream Reach #2:** From River Mile 16.5 to the mouth of Whychus Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
36137	1883	0.104	39.38	April 10 through October 12 (186 days)
67284	1883	0.058	21.60	April 10 through October 14 (188 days)

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. This review will include examination of the quantity of water available for transfer considering the limitations of the right and beneficial use without waste consistent with statute and rule. Approval of this lease does not establish a precedent for approval of future leases or transfers.

15. The Lessor has requested that the lease terminate on October 31, 2015. The lease will commence the date the final order is signed and on March 1 of each succeeding calendar year that the lease is in place.
16. 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 October 31, 2015. For multiyear leases, the lease shall commence on approval of the instream lease and on March 1 of each succeeding calendar year of the instream lease. The lessor *shall* have the option of terminating the lease each year with written notice to the Department. The lease may be terminated at any time during the calendar year. However, if the termination request is received less than 30-days prior to the period of allowed instream use (April 10 through October 14) or after the period of allowed use has begun for the water right(s) being leased, water shall 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 15 day of July, 2011.

  
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 18 2011

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