

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

In the Matter of Instream Lease Application) DETERMINATION and FINAL ORDER ON
IL-1970 and Preliminary and Final Award of) PROPOSED INSTREAM LEASE and
Mitigation Credits for Mitigation Project) MITIGATION CREDIT PROJECT
MP-305, Deschutes County)

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

Pooled Instream Lease for several water right holders (described in Finding of Fact No. 2)

Co-Lessor

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

Lessee

Deschutes River Conservancy Mitigation Bank (DRCMB)
700 NW Hill Street, Suite 1
Bend, Oregon 97703
gen@deschutesriver.org

Findings of Fact

1. On May 11, 2023, DRCMB and SID, and on behalf of several water right holders, filed an application to lease a portion of Certificate 74145 for instream use. The Department assigned the application number IL-1970.
2. During the evaluation of the instream lease application, the Department worked with SID to adjust a few acres that were identified incorrectly in the application.
3. The portion of the right to be leased is as follows:

Certificate: 74145 (perfected under the Deschutes River Decree)

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: September 1, 1899

Use: Irrigation of 52.81 acres, Nursery of 18.35 acres

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, which is not allowed for direct diversions.

Source: Deschutes River, tributary to the Columbia River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
17 S	12 E	WM	29	SE NE	SWALLEY MAIN CANAL POD NO. 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 POD NO. 15 – 2170 FEET NORTH AND 1350 FEET WEST FROM SE CORNER OF SECTION 14

Authorized Place of Use:

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Water Right Holder
16 S	12 E	WM	14	NE NW	703	6.00	Frank & Carol Brian
16 S	12 E	WM	27	SE SE	1300	5.00	Shane Sweeney
16 S	12 E	WM	29	NW NE	306	2.69	Akar Willard Family Trust
16 S	12 E	WM	29	SW NE	300	1.26	Swalley Irrigation District
16 S	12 E	WM	29	SW NE	303	0.53	Swalley Irrigation District
17 S	12 E	WM	7	SW SE	106	0.33	Swalley Irrigation District
17 S	12 E	WM	8	NW SE	2100	1.00	Swalley Irrigation District
17 S	12 E	WM	8	SW SE	900	0.50	Swalley Irrigation District
17 S	12 E	WM	22	NE NE	104	22.39	Bend Park & Recreation
17 S	12 E	WM	22	SE NE	104	12.39	Bend Park & Recreation
17 S	12 E	WM	23	NW NW	1800	0.72	US Forest Service
TOTAL						52.81	

NURSERY							
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Water Right Holder
16 S	12 E	WM	29	NW NE	306	1.31	Akar Willard Family Trust
17 s	12 e	WM	22	NW NE	103	7.66	Swalley Irrigation District
17 S	12 E	WM	23	NW NW	1800	6.60	US Forest Service
17 S	12 E	WM	23	SW NW	1800	2.78	US Forest Service
TOTAL						18.35	

4. The description of POD No. 15 in Certificate 74145 contains scrivener's errors. 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	Measured Distances
15 S	12 E	WM	14	NE SE	ADDITIONAL DISTRICT DIVERSION NO. 15 – 2065.82 FEET NORTH AND 1401.41 FEET EAST FROM THE SOUTH 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 volume (based on the duty) allowed (described in Finding of Fact No. 3), the total rate and volume 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 volume allowed at the PODs (described in Finding of Fact No. 3), the portion of the right involved in this instream lease would be limited as described in the table below. These rates and volume are also the quantities by which the diversion at POD No. 3 under Certificate 74145 shall be reduced over the full irrigation season, if this instream lease is approved.

Use	Season 1 (cfs)	Season 2 (cfs)	Season 3 (cfs)	Volume (af)
Irrigation	0.397	0.531	0.998	349.05
Nursery	0.138	0.185	0.347	121.28
Totals	0.535	0.716	1.345	470.33

6. 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.
7. The instream use is as follows:
Deschutes River, tributary to Columbia River

Instream Reach: From the Swalley Main Canal POD No. 3 (as described in Finding of Fact No. 2) to Lake Billy Chinook

Certificate	Priority Date	Use	Instream Rate (CFS)			Instream Volume (AF)	Period Protected Instream
			Season 1	Season 2	Season 3		
74145	SEPT. 1, 1899	IR	0.363	0.486	0.900	288.09	April 1 – October 25
		NU	0.126	0.169	0.313	100.17	
		Totals	0.489	0.655	1.213	388.26	

8. Other conditions to prevent injury and enlargement are:

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

9. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.

10. The protection of flows within the proposed reach is appropriate, considering:

- a. The instream water use begins at the recorded point of diversion;
- b. The location of confluences with other streams downstream of the point of diversion.
- c. There are no known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
- d. Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the reach of the instream water right.

11. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach will provide for a beneficial purpose.

12. The total monthly quantities of water to be protected instream under existing and proposed instream rights in the reach do not exceed the estimated average natural flow.

13. 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.

14. Based upon review of the application, information provided by the Department's Watermaster, and other available information, the Department finds that the lease will not result in injury or enlargement. The order approving this instream 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.

15. If a right which has been leased is later proposed to be leased again, transferred and/or reviewed under an allocation of conserved water, a new injury review shall be required. For example, instream 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 any future transactions.

16. The Lessor has requested that the lease terminate on October 31, 2023. The lease may commence on the date this final order is signed.

Preliminary Award of Deschutes Basin Mitigation Credits

17. 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.
18. The Department assigned this mitigation credit project number MP-305.
19. 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 Department of Environmental Quality in favor of the application.
20. The Department finds that 128.1 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 Middle Deschutes and General Zones of Impact.
21. The mitigation credits expire on December 31, 2023.
22. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.
23. 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.
24. 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

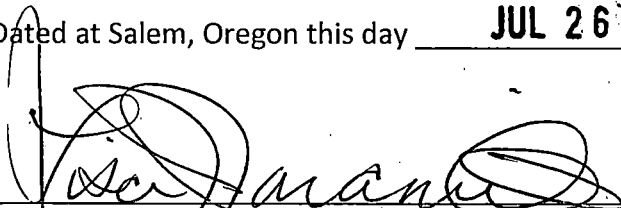
The Department concludes that the lease will not result in injury or enlargement, OAR 690-077-0077. The lease conforms to the applicable provisions of OAR 690-077-0015.

This mitigation project results in mitigation credits pursuant to ORS 537.746 and OAR 690-521-0300 and 690-521-0400.

Now, therefore it is ORDERED:

1. The Lease as described herein is APPROVED.
2. During the term of the lease, the former place of use will no longer receive water as part of these rights, any supplemental rights, or any other layered irrigation water rights, including ground water registrations and permits.
3. The term of the lease will commence upon approval of the instream lease and terminate on October 31, 2023.
4. **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 **128.1** 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 **Middle Deschutes and General Zones of Impact**.
5. 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.
6. The mitigation credits shall expire on December 31, 2023.
7. 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 day **JUL 26 2023**



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
Douglas E. Woodcock, Acting Director
Oregon Water Resources Department

Mailing date: **JUL 27 2023**

This document was prepared by Sarah Henderson. If you have any questions, please call 503-979-9872.