

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

In the Matter of the Proposed Short-Term )	DETERMINATION and
Lease of Existing Water Rights for Instream )	FINAL ORDER ON PROPOSED
Use and Preliminary and Final Award of )	INSTREAM LEASE & MITIGATION
Mitigation Credits, Certificate 74135, )	CREDIT PROJECT
Deschutes County )	

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 short-term 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 #1**

Pooled Instream Lease for several landowners  
(described in Finding of Fact #3)

**Lessor #2**

Three Sisters Irrigation District (TSID)  
PO Box 2230  
Sisters, OR 97759  
[tsid@uci.net](mailto:tsid@uci.net)

**Lessee**

Deschutes Water Exchange (DWE) Mitigation Bank  
PO Box 1560  
Bend, OR 97709  
[ghubert@deschutesrc.org](mailto:ghubert@deschutesrc.org)

**Findings of Fact**

1. On July 17, 2006, TSID and the DWE Mitigation Bank filed an application to lease a portion of Certificate 74135 to instream use. The Department assigned the application number L-787.
2. On July 25, 2006, the application was amended by the Lessee to modify the portion of the water right to be leased instream.
3. The right to be leased has been modified from the application to clarify the portion of the right to be leased, to incorporate the amendment requested by the Lessee, and is as follows:

**Certificate:** 74135

**Season of Use:** unspecified by certificate or decree

**Priority Date:** 1895, 1899, and 1904

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.

**Quantity:** 7.22 Cubic Foot per Second (CFS), being 5.72 CFS under the 1895 priority date, 0.66 CFS under the 1899 priority date, and 0.84 CFS under the 1904 priority date

**Source:** Wychus Creek (formerly known as Squaw Creek), tributary to the Deschutes River

**Place of Use:**

IRRIGATION OF 286.0 ACRES UNDER THE 1895 PRIORITY DATE							
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Owner (Lessor #1)
14 S	11 E	WM	32	NE NE	100	29.0	Kerry Paulson
14 S	11 E	WM	32	NW NE	100	22.0	Kerry Paulson
14 S	11 E	WM	32	SW NE	100	7.0	Kerry Paulson
14 S	11 E	WM	32	SE NE	100	11.0	Kerry Paulson
14 S	11 E	WM	33	NW NW	400	20.0	Kerry Paulson
15 S	11 E	WM	17	NE NW	200	11.0	Bruce Resnick
15 S	11 E	WM	17	NW NW	200	36.0	Bruce Resnick
14 S	12 E	WM	7	SE SW	1102	2.5	Stephen Sparks
14 S	12 E	WM	7	SW SW	1102	6.0	Stephen Sparks
14 S	12 E	WM	18	NE SW	1102	23.0	Stephen Sparks
14 S	12 E	WM	18	SE NW	1102	38.0	Stephen Sparks
14 S	12 E	WM	18	NE NW	1102	27.5	Stephen Sparks
15 S	10 E	WM	24	SE SE	505	21.0	Mark Koos
15 S	10 E	WM	24	NE SE	505	2.0	Mark Koos
15 S	11 E	WM	3	NW NW	1101	30.0	Joseph Angel
IRRIGATION OF 33.0 ACRES UNDER THE 1899 PRIORITY DATE							
14 S	11 E	WM	30	NE SW	4701	33.0	Golfside Investment, LLC
IRRIGATION OF 42.0 ACRES UNDER THE 1904 PRIORITY DATE							
15 S	10 E	WM	24	SW SE	500	19.0	Janet Herring
15 S	10 E	WM	24	SW SE	501	7.0	Janet Herring
15 S	10 E	WM	24	SE SE	500	14.0	Janet Herring
15 S	10 E	WM	24	SE SE	501	2.0	Janet Herring

**Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
15 S	10 E	WM	21	SW SW	998 feet North & 1211 feet East from the SW Corner of Section 21

- The lease application includes the information required under OAR 690-077-0077(3). The Department provided notice of the lease application pursuant to OAR 690-077-0077(6). No comments were received.
- The instream use is clarified and modified from the lease application to prevent injury and enlargement, and to include an amendment to the application, and is as follows:  
Wychus Creek (formerly known as Squaw Creek), tributary to the Deschutes River

**Instream Reach:** From the POD (as described in Finding of Fact #2) to the mouth of Wychus Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (af)	Period Protected Instream
74135	1895	5.72	872.69	July 17 through October 1
	1899	0.66	100.69	July 17 through October 1
	1904	0.84	128.16	July 17 through October 1
Total		7.22	1101.54	

6. Other conditions to prevent injury and enlargement are:

The reach has been modified to extend only as far as the mouth of Wychus Creek. The applicant originally requested that the reach extend beyond Wychus Creek and into the Deschutes River down to Lake Billy Chinook. However, the quantity of water to be leased instream is not a measurable quantity in the Deschutes River. In order for water to be protected beyond the source stream, the quantity must be measurable in the receiving stream, in this case being the Deschutes River (OAR 690-077-0015 (7)).

The portion of water protected under this lease shall be based at the same percentage of diversion and delivery rate that Three Sisters Irrigation District (TSID) is diverting to rights of the same priority within the district. Each Monday morning during the period of this lease, TSID shall report to the District 11 Watermaster's office the percentage diverted under the 1895, 1899, and 1904 priority dates. This information only needs to be reported to the Watermaster's office once TSID is diverting water on a percentage basis. Subsequent reports only need to be made to the Watermaster's office when changes are made to the percentage of water being diverted. Once TSID begins diverting water on a percentage basis, the amount water leased instream shall be adjusted by that same percentage.

7. 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.
8. 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.
9. The lease will terminate on October 31, 2006.

**Preliminary Award of Deschutes Basin Mitigation Credits**

10. 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.
11. The Department assigned this mitigation credit project number MP-90.
12. 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 State 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 Parks and

Recreation Department. These comments identified a need for additional instream flow protections for recreation. Emphasis should be placed on protecting flows evenly during the late spring and summer period not otherwise affected by higher spring run-off.

13. The Lessor and Lessee have submitted two instream leases proposing to protect water in Whychus Creek. The proposed leases are structured to protect water over the spring and summer months, with one lease covering one part of the spring and summer and the second lease covering the last portion of the summer months. The first lease, L-701 (previously approved by the Department), was structured to protect water during the months of May through July at a rate of 5.509 CFS. The second proposed instream lease, L-787 and subject of this review, was proposed to protect water instream during the months of July through the first day of October. However, water may only be protected instream during the month of September and the first day of October given when the lease may be approved. L-787 proposes to protect water instream in Whychus Creek at a rate of 7.22 CFS. Both L-701 and L-787 are proposed as one year leases. The proposed lease structure will generally protect flows at an even rate through the remaining summer months. Therefore, no modifications have been made to this lease based upon comments received.
14. As part of the public notice of the mitigation project, the Department identified that the project may result in 640.8 mitigation credits. However, based upon additional evaluation, the Department has determined that the 1899 and 1904 priority date portions of the water right are not sufficiently available and may not be used for mitigation purposes. Therefore, the Department finds that **514.8** mitigation credits may be awarded to this mitigation credit project and assigned to the Deschutes Water Exchange 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 **General and Whychus Creek (formerly Squaw Creek)** zones of impact.
15. The mitigation credits expire on December 31, 2006.
16. The use and maintenance of the mitigation credits is subject to the terms and conditions of the Deschutes Water Exchange Mitigation Bank Charter.
17. 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.
18. 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 agreement 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.

**ORDER**

Therefore, it is ORDERED:

1. That the Short-Term Lease as described herein is APPROVED.
2. The former place of use shall no longer receive water as part of these rights during the term of the lease.
3. The lease shall terminate on October 31, 2006.
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 514.8 credits, as described herein, are awarded to this mitigation project and assigned to the Deschutes Water Exchange 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 General and Wychus Creek (formerly Squaw Creek) 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, 2006.
7. The use and maintenance of the mitigation credits shall be subject to the terms and conditions of the Deschutes Water Exchange Mitigation Bank Charter.

Dated at Salem, Oregon this 6<sup>th</sup> day of September 2006.

  
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 PSC Phillip C. Ward, Director

Mailing date: SEP 11 2006