

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

In the Matter of Instream Lease Application)
IL-1607, Deschutes County)
)

DETERMINATION and
FINAL ORDER ON PROPOSED
INSTREAM LEASE

Authority

Oregon Revised Statute (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. Oregon Administrative Rule (OAR) Chapter 690, Division 077 implements the statutes and provides the Department's procedures and criteria for evaluating instream lease applications.

Lessor

Pooled Instream Lease on behalf of several water right holders

Co-Lessor

Tumalo Irrigation District (TID)
64697 Cook Ave.
Bend, OR 97703

Co-Lessor

Central Oregon Irrigation District (COID)
1055 SW Lake Court
Redmond, OR 97756

Lessee

Deschutes River Conservancy (DRC)
P.O. Box 1560
Bend, Oregon 97709

Findings of Fact

1. On March 27, 2017, DRC, COID and TID, on behalf of several water right holders, filed an application to lease a portion of Certificates 74146, 74147, and 83571 for instream use. The Department assigned the application number IL-1607.
2. A portion of the lands involved in this lease originated from Certificate 76106. Allocation of Conserved Water project CW-9 cancelled Certificate 76106 and incorporated acreage under the 9/1900 priority date in Certificate 74146 (as described in Special Order Volume 54, Page 826, and Volume 64, Page 157). Lands involved in this transaction, included in this lease, are as follows:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Lessor
16 S	11 E	WM	1	SW SE	600	14.46	Brian Puziss
16 S	11 E	WM	1	SW SE	500	1.60	Brian Puziss
16 S	11 E	WM	22	NW SE	1500	0.60	Robert Bugas Karen Kay Rauch Bugas Becky Jo Bucari
16 S	12 E	WM	16	SW NW	700	5.10	Craig Morton
16 S	11 E	WM	22	NW SE	1501	4.70	Kenneth L. & Kathy O. Kowalski
Total Acres						26.46	

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.

Authorized POD:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	11 E	WM	23	SW NE	TUMALO CREEK POD No. 1 (TUMALO FEED CANAL) – NORTH 70 DEGREES 21' WEST; 1550 FEET FROM THE EAST ¼ CORNER OF SECTION 23

3. Certificate 74146 (76106, CW-9) 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 No.2), 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 No.2), 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 the POD under Certificate 74146 shall be reduced, if this instream lease is approved.

Priority Date	Rate (CFS)	Volume (AF)
September, 1900	0.249	47.63

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

Certificate: 74146 in the name of Tumalo Irrigation District (confirmed by Tumalo Creek Decree of record at Salem, in the order Record of the Water Resources Director, in volume 1, at Page 135 and in volume 16, at Page 188)

Use: Irrigation of 71.95 acres, being 3.0 acres under the August 5, 1900 priority date, 30.85 acres under the September 1900 priority date, 3.4 acres under the May 27, 1907 priority date, and 34.7 acres under the June 1, 1907 priority date

Priority Date: August 5, 1900, September 1900, May 27, 1907 and June 1, 1907

Quantity: **Limit:** one-seventieth of one cubic foot per second (or its equivalent) and 1.8 acre-feet (af), measured at or within one-half mile of the land to be irrigated, for each acre irrigated during the irrigation season of each year

Source: Tumalo Creek, tributary to the Deschutes River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	11 E	WM	23	SW NE	POD NO. 1 (TUMALO FEED CANAL) – NORTH 70 DEGREES 21' WEST; 1550 FEET FROM THE EAST ¼ CORNER OF SECTION 23

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Priority Date	Tax Lot	Acres	Water Right Holder (Lessor)
16 S	11 E	WM	22	NW SE	09/01/00	1501	0.02	Kenneth L & Kathy O. Kowalski
16 S	11 E	WM	22	NW SE	09/01/00	1500	0.03	Robert Bugas Karen Kay Rauch Bugas Becky Jo Bucari
16 S	11 E	WM	26	SE SE	06/01/07	700	17.0	Charles J. & Linda B. Frick
16 S	11 E	WM	26	SE NE	09/01/00	603	4.0	Anthony Amadio
16 S	11 E	WM	27	SE NW	09/01/00	207	2.0	Nicholas Hunter Pechin Revocable Trust c/o Nicholas Hunter Pechin

Twp	Rng	Mer	Sec	Q-Q	Priority Date	Tax Lot	Acres	Water Right Holder (Lessor)
16 S	12 E	WM	30	NW SE	05/27/07	2100	3.4	Jerry Curl
16 S	11 E	WM	35	SE NE	09/01/00	600	4.1	Louis B. Dvorak
16 S	11 E	WM	35	SE NE	06/01/07	204	2.7	Louis B. Dvorak
16 S	11 E	WM	35	SE NE	09/01/00	204	4.8	Louis B. Dvorak
16 S	11 E	WM	35	SE NE	09/01/00	700	4.0	Louis B. Dvorak
16 S	12 E	WM	9	SW SW	06/01/07	900	1.4	Deschutes River Ranch Group, LLC Craig Morton, President
16 S	12 E	WM	16	NW NW	06/01/07	600	1.6	Deschutes River Ranch Group, LLC Craig Morton, President
16 S	12 E	WM	17	NE SE	06/01/07	2500	12.0	Deschutes River Ranch Group, LLC Craig Morton, President
16 S	12 E	WM	17	NE SE	08/05/00	2500	3.0	Deschutes River Ranch Group, LLC Craig Morton, President
16 S	12 E	WM	17	NE SE	09/01/00	2500	4.5	Deschutes River Ranch Group, LLC Craig Morton, President
16 S	12 E	WM	16	SW NW	09/01/00	700	0.8	Deschutes River Ranch Group, LLC Craig Morton, President
16 S	12 E	WM	16	SW NW	09/01/00	700	0.6	Deschutes River Ranch Group, LLC Craig Morton, President
17 S	11 E	WM	4	NW NE	09/01/00	500	6.0	Ann Wright Cobb
Total Acres							71.95	

5. Certificate 74146 does not specify the irrigation season. However, the Tumalo Creek Decree establishes the irrigation season for the area as April 15 to October 15.
6. Certificate 74146 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 No. 4), 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 No. 4), 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 the POD under Certificate 74146 shall be reduced, if this instream lease is approved.

Priority Date	Rate (CFS)	Volume (AF)
August 5, 1900	0.040	5.40
September, 1900	0.291	55.53
May 27, 1907	0.045	6.12
June 1, 1907	0.465	62.46
Totals	0.841	129.51

7. The portion of the third right to be leased is as follows:

Certificate: 74147 in the name of Tumalo Irrigation District (perfected under Permit S-19628)

Priority Date: October 29, 1913

Use: Irrigation of 61.1 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: 0.764 CFS (limited to 1/80th CFS/acre)

Season 2: 1.018 CFS (limited to 1/60th CFS/acre)
 Season 3: 1.886 CFS (limited to 1/32.4th CFS/acre)

Duty: 595.59 AF (limited to 9.91 AF per acre)

Source: Tumalo Creek, tributary to the Deschutes River

Authorized POD:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
18 S	10 E	WM	2	NW SW	POD NO. 2 – NORTH 14 DEGREES 02' WEST; 1713 FEET FROM THE SOUTH ¼ CORNER OF SECTION 2

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Water Right Holder (Lessor #1)
16 S	11 E	WM	26	SE NE	603	19.0	Anthony Amadio
16 S	12 E	WM	30	NE SE	100	16.0	Jerry Curl
16 S	12 E	WM	30	NE SE	2000	5.0	Jerry Curl
16 S	12 E	WM	30	NE SE	2100	1.9	Jerry Curl
16 S	12 E	WM	30	NW SE	2100	0.7	Jerry Curl
16 S	12 E	WM	30	SE NE	100	13.2	Jerry Curl
16 S	11 E	WM	35	SE NE	600	0.4	Louis B. Dvorak
16 S	11 E	WM	24	SW NW	502	1.0	Marla O' Donnell
16 S	11 E	WM	27	SE NW	207	1.5	Nicholas Hunter Pechin Revocable Trust Nicholas Hunter Pechin
16 S	11 E	WM	35	SE NW	1500	2.4	Robert L. & Gretchen B. Pederson
Total Acres						61.1	

8. Certificates 74146 and 74147 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 No. 2, 4 and 7 are consistent with the water rights of record in so far as possible.
9. The quantity of water that may be protected instream under Certificate 74147 requires modification. Use of water under every water right is subject to beneficial use without waste in accordance with ORS 536.310. Beneficial use is the measure and limit of all water rights (ORS 540.610). Certificate 74147 allows the diversion of up to 9.91 Acre-Feet (AF) per acre. As stated on the original permit (S-19628), the purpose of this water right is to secure the same duty for the District as fixed in the Deschutes River Decree, being 9.91 AF per acre. The Deschutes River Decree also identifies that the duty at the point of diversion includes transmission losses of 45 percent. Based upon review of the water right record and consultation with the Watermaster, the Department has determined that the full rates and seasonal volume allowed at the point of diversion must be reduced by 45% considering beneficial use without waste.
10. The portion of the fourth right to be leased is as follows:

Certificate: 83571 in the name of Central Oregon Irrigation District
Use: Central Oregon Canal POD #9: Irrigation of 2.0 acre
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 No. 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 Points of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	11 E	WM	32	NW NE	POD NO. 9 (T.I.D BEND FEED CANAL): 2050 FEET WEST FROM THE NE CORNER OF SECTION 32

Authorized Places of Use:

Twp	Rng	Mer	Sec	Q-Q	POD	Acres	Tax Lot	Water Right Holder (Lessor)
17 S	11 E	WM	24	NW NE	9	2.0	200	Brooks Resource Corp. Kirk Schueler
Total						39.28		

11. 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 to November 1, further limited as follows:
 April 1 to May 1 and October 1 to November 1 described herein as Season 1
 May 1 to May 15 and September 15 to October 1 described herein as Season 2
 May 15 to September 15 described herein as Season 3

12. 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 No. 10), the total rate and duty for the water right would be exceeded. In the event water was 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 No. 10), 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 No. 9 under Certificate 83571 shall be reduced, if this instream lease is approved.

POD #9

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	

13. There are supplemental irrigation water rights appurtenant to all or a portion of the lands described in Finding of Fact No. 2, 4, 7 and 10. The Lessor and Lessee have requested that these water rights not be included as part of this lease application. During the term of the lease, water use under these rights will also be suspended.
14. 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.
15. 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 (Deschutes River) (OAR 690-077-0015 (8)). The quantity that may be leased instream from Tumalo Creek is measurable into the receiving stream, and may be protected into the Deschutes River.
16. The Lessors and Lessee have requested to protect water instream from the POD on Tumalo Creek (described in Findings of Fact No. 2, 4, 7 and 10) 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 within the proposed reach. Return flows from the existing use generally back in the river system once river flows reach the Madras Gage. To prevent injury or enlargement of the rights, the quantity of water that may be protected instream requires modification to account for return flows at the Madras Gage.
17. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:

Tumalo Creek, tributary to Deschutes River

Instream Reach #1: From the Tumalo Feed Canal POD (as described in Finding of Fact No. 2 and 4) on Tumalo Creek and then into the Deschutes River to the Madras Gage

Priority Date	Instream Rate (CFS)								Instream Volume (AF)
Certificate 74146									
	4/1 - 4/15	4/15 - 4/30	5/1 - 5/14	5/15 - 9/14	9/15 - 9/30	10/1 - 10/15	10/16 - 10/26	10/27 - 10/31	
8/5/1900		0.015	0.015	0.015	0.015	0.015			5.40
9/1900		0.152	0.152	0.152	0.152	0.152			55.53
5/27/1907		0.017	0.017	0.017	0.017	0.017			6.12
6/1/1907		0.171	0.171	0.171	0.171	0.171			62.46
Certificate 76106 – CW-9									
9/1900		0.131	0.131	0.131	0.131	0.131			47.63
Certificate 74147									
10/29/1913	0.764	0.764	1.018	1.886	1.018	0.764	0.764		605.50
Certificate 83571									
10/31/1900	0.014	0.014	0.018	0.034	0.018	0.014	0.014		10.90
12/2/1907									
Totals	0.778	1.264	1.522	2.40	1.522	1.264	0.778		793.54

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

Priority Date	Instream Rate (CFS)								Instream Volume (AF)
Certificate 74146									
	4/1 - 4/15	4/15 - 4/30	5/1 - 5/14	5/15 - 9/14	9/15 - 9/30	10/1 - 10/15	10/16 - 10/26	10/27 - 10/31	
8/5/1900		0.015	0.015	0.015	0.015	0.015			5.40
9/1900		0.152	0.152	0.152	0.152	0.152			55.53
5/27/1907		0.017	0.017	0.017	0.017	0.017			6.12
6/1/1907		0.171	0.171	0.171	0.171	0.171			62.46
Certificate 76106 – CW-9									
12/8/1961		0.131	0.131	0.131	0.131	0.131			47.63
Certificate 74147									
10/29/1913	0.265	0.265	0.265	0.265	0.265	0.265	0.265		109.98
Certificate 83571									
10/31/1900	0.009	0.009	0.009	0.009	0.009	0.009	0.009		3.60
12/2/1907									
Totals	0.0355	0.76	0.76	0.76	0.76	0.76	0.0355	0.00	290.72

18. Other conditions to prevent injury and enlargement are:

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

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

20. 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 within the proposed reach and have been accounted for in the reach from the Madras Gage to the mouth of the Deschutes River (Reach #2).

21. 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.

22. The instream use created by this instream lease will be additive to other instream rights (created as a result of instream lease, instream transfer, and/or allocation of conserved water) within the proposed reach. By adding to this existing instream water right within the same reach, the total monthly quantities of water to be protected instream will exceed the estimated average natural flow during the months of April and October.

The estimated average natural flow may not be exceeded unless criteria for exceeding are met.

23. The Department has determined that the estimated average natural flows may be exceeded due to the following:
 - a) There is an existing state agency established instream water right certificate (Certificate 73222) that covers the same reach or portion of the reach to be established by the proposed instream lease. In addition, the quantities to be protected instream will not exceed the amounts requested in the original instream water right application (IS-70752) filed by the Oregon Department of Fish and Wildlife (ODFW) and;
 - b) The water right proposed to be leased is in an Oregon Department of Fish and Wildlife (ODFW) flow restoration priority watershed.
24. Instream water rights, with a senior priority date, created through an instream lease generally replace portions of other instream water rights, which carry junior priority dates, established through minimum flow conversion or the state agency application process to establish new instream water rights. During the month of April and October, the total quantities of water to be protected under the existing and proposed instream rights in the reach will exceed the quantities identified as necessary for instream use for various fish life stages under Certificate 73222, which was created under ORS 537.341, an application process for state agencies to establish new instream water rights. However, the Department has identified that this instream lease will provide an additional beneficial purpose. The Oregon Department of Fish and Wildlife has identified that Tumalo Creek is a high priority for flow restoration. The Department has identified that during the term of this lease, the quantities protected instream may be additive to other existing instream water rights established within the same reach under ORS 537.341, 537.346, 537.348 or 537.470.
25. 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.
26. 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.
27. 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.
28. The Lessors, Co-Lessor, and Lessee have requested that the lease terminate on October 31, 2017. The lease may commence on the date this final order is signed.

Conclusions of Law

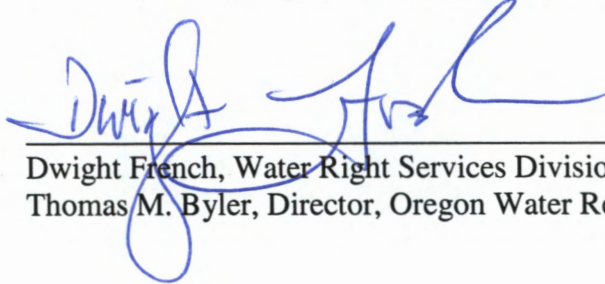
The Department concludes that the lease will not result in injury or enlargement, OAR 690-077-0077. The lease conforms to the applicable provisions of OAR 690-077-0015.

Now, therefore it is ORDERED:

1. The Lease as described herein is APPROVED.
2. During of 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, 2017.

Dated at Salem, Oregon this 11 day of May, 2017.

This document was prepared by Arla Heard and if you have any questions, please call 503-986-0806.



Dwight French, Water Right Services Division Administrator, for
Thomas M. Byler, Director, Oregon Water Resources Department

Mailing date: MAY 13 2017