

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

In the Matter of Instream Lease Application) DETERMINATION and
 IL-1204 and Preliminary and Final Award) FINAL ORDER ON PROPOSED
 of Mitigation Credits, Certificates 87331) INSTREAM LEASE and MITIGATION
 and 2734, Crook County) CREDIT PROJECT

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

Butler Ranch, Inc.
 5294 Lone Pine Rd.
 Terrebonne, OR 97760
johnshort@use.com

Lessee

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

Findings of Fact

1. On March 15, 2012, the DRC Mitigation Bank and Butler Ranch filed an application to lease a portion of Certificates 87331 and 2734 for instream use. The Department assigned the application number IL-1204.
2. On March 28, 2012, a revised lease application was received from the DRC Mitigation Bank.
3. The portion of the first right to be leased is as follows:

Certificate: 2734 in the name of E.D. Tirrill (perfected under Permit S-823)
Use: Irrigation of 14.3 acres
Priority Date: August 24, 1911
Quantity: **Rate:** 0.18 Cubic Foot per Second (CFS)
Source: Crooked River, tributary to the Deschutes River
Authorized Point of Diversion (POD): Not described in Certificate.

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
14S	14E	WM	22	NW NW	14.3

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. Certificate 2734 does not specify the irrigation season. However, the irrigation season consistent with the Crooked River Decree is February 1 to December 1.
5. Certificate 2734 also does not specify a duty limit. The duty limit for the area, consistent with the Crooked River Decree, is 4.0 acre-feet (AF) per acre. This would allow the use of up to 57.2 AF during the irrigation season.
6. Certificate 2734 does not identify a point of diversion. However, information provided with the lease application identifies that the point of diversion may be the same point as described in Finding of Fact #7 for Certificate 87331.
7. The portion of the second right to be leased is as follows:

Certificate: 87331 in the name of Claude Butler (perfected under Permit S-17167)
Use: Irrigation of 21.7 acres
Priority Date: July 23, 1946
Quantity: **Limit:** One-fortieth CFS per acre, not to exceed 4.0 AF per acre per year
Source: Crooked River, tributary to the Deschutes River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14S	14E	WM	22	NE NE	Not described on Certificate

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
14S	14E	WM	15	NE SE	2.2
14S	14E	WM	15	NW SE	0.8
14S	14E	WM	15	SE SE	16.6
14S	14E	WM	22	NW NW	2.1

8. Certificate 87331 does not specify the irrigation season. However, the irrigation season consistent with the Crooked River Decree is February 1 to December 1.
9. Certificate 87331 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 #7), the total rate and duty for the right would be exceeded. In the event water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rate and duty allowed at the POD (described in Finding of Fact #7), the portion of the right involved in this lease would be limited as described in the table below. This rate and duty are also the quantities by which Certificate 87331 shall be reduced, if this lease is approved.

Rate	Duty
0.41 CFS	86.8 AF

10. Certificate 87331 does not provide any measured distances for the location of the authorized point of diversion. However, based upon information provided with the lease application materials, the point of diversion is more accurately located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
14S	14E	WM	22	NE NE	1300 FEET SOUTH FROM THE NE CORNER OF SECTION 22

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. A portion of the water diverted at the POD returns to the Crooked River below the POD and is available to downstream water right holders. To prevent injury to downstream water right holders and enlargement, the quantity of water that may be protected instream requires modification to account for both surface and 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.

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 above for any subsurface return flows.

A portion of the water diverted to the place of use returns to the Crooked River through subsurface return flows. Immediately below the point of diversion, return flows begin to shoe back up in the river system. Approximately 10% return just below the point of diversion and all return flows are back in the river system by River Mile 30.

Because the return flows do not occur at a definite point, all return flows will be accounted for below the point of diversion consistent with OAR 690-077-0075(2)(b)(A). The instream flows just below the point of diversion have been reduced to the consumptive portion of the right to account for return flows and prevent injury and enlargement.

13. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:

Crooked River, tributary to the Deschutes River

Instream Reach #1: At the POD (as described in Finding of Fact #10)

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
2734	8/24/1911	0.18	57.2	May 5 through October 15
87331	7/23/1946	0.41	86.8	July 1 through October 15

Instream Reach #2: From immediately below the POD (as described in Finding of Fact #10) to Lake Billy Chinook

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
2734	8/24/1911	0.08	25.7	May 5 through October 15
87331	7/23/1946	0.18	39.1	July 1 through October 15

14. A portion of Certificate 87331 is supplemental to the portion of Certificate 2734 proposed to be leased instream as described in Finding of Fact #3. The Lessor and Lessee have requested that the supplemental portion of Certificate 87331 not be included as part of this lease application. During the term of the lease, water use under this right will also be suspended.
15. 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.
16. 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.
17. 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.
18. The Lessor has requested that the lease terminate on November 1, 2016. An instream lease generally terminates on the last day of the authorized period of allowed use. The irrigation season ends November 30. The lease may terminate on November 30, 2016. The lease will commence the date the final order is signed and on February 1 of each succeeding calendar year that the lease is in place.
19. The Lessor has requested the option of terminating the lease early with written notice to the Department.

Preliminary Award of Deschutes Basin Mitigation Credits

20. 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.
21. The Department assigned this mitigation credit project number MP-167.
22. 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 OPRD. These comments identified that additional streamflow may benefit aquatic resources and potentially improve recreational fishery resources in this area.

23. No modifications were made to the lease based on the comments received.
24. The lease of 36.0 acres of irrigation will generate 64.8 acre-feet of mitigation water. Therefore, the Department finds that 64.8 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 Crooked River and General Zones of Impact.
25. The mitigation credits expire on December 31, 2016.
26. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.
27. 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.
28. 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.

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 November 30, 2016. For multiyear leases, the Lessor shall have the option of terminating the lease with written notice to the Department provided to both the Salem office and Watermaster office. Written notice of termination of a lease must be

provided by all Lessors and the Lessee. The lease may be terminated at any time during a calendar year. However, if the termination request is received less than 30-days prior to the period of allowed instream use (May 5 through October 15) or after the period of allowed use has begun for the water rights being leased, water may not be used under the rights leased until the following calendar year, unless the Director determines that enlargement would not occur.

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 64.8 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 Crooked River 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, 2016.
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 28th day of June, 2012.

E. Timothy Wall 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.

Mailing date: 'JUL 02 2012