

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

In the Matter of Instream Lease Application)	DETERMINATION and
IL-1426 and Preliminary and Final Award)	FINAL ORDER ON PROPOSED
of Mitigation Credits for Mitigation Project)	INSTREAM LEASE and MITIGATION
MP-190, Deschutes 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

Pooled Instream Lease for several water right holders (described in Findings of Fact No. 6)

Co-Lessor

Three Sisters Irrigation District (TSID)
PO Box 2230
Sisters, OR 97759
manager@tsidweb.org

Lessee

Deschutes River Conservancy (DRC) Mitigation Bank
700 NW Hill Street
Bend, Oregon 97701
gen@deschutesriver.org

Findings of Fact

1. On June 30, 2014, the DRC Mitigation Bank and TSID, on behalf of several water right holders filed an application to lease a portion of Certificate 74135 for instream use. The Department assigned the application number IL-1426.
2. On July 25, 2014, the Department requested additional information to support that 1.0 acre of irrigation use requested to be leased instream had been used within the five years prior to the lease being submitted to the Department. The Department requested an affidavit of use be completed and supporting documentation provided along with the affidavit. On July 28, 2014, additional information was provided to the Department. Based on evaluation of the information provided, it is not clear whether the information provided is sufficient to demonstrate that water was used within five years of the lease application being submitted.

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.

In addition, an affidavit attesting to the use of water was not provided to the Department. The Department has identified that this portion of the lease application is incomplete and may not be leased to instream use. The acre that may not be leased is as follows:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Priority Date	Acres	Lessor
14S	10E	WM	36	NE SE	200	1895	1.0	Carl Frank Johnson Trust

3. On August 11, 2014, the Department requested revised application maps for three of the properties involved in the lease application. Revised maps were received on August 12, 2014.
4. During the review of the lease application, the Department identified that the lease application identified more acres (30.6 acres) for the portion of the water right appurtenant to the property identified as being owned by James Enger than were available to be leased to instream use. The number of acres available has been clarified as 24.1 acres.
5. Certificate 74135 describes the authorized place of use by township, range, section, quarter quarter, and tax lots. Some tax lot configurations have changed and some tax lots have been partitioned or subdivided since this certificate was issued and no longer match those shown on the map of the water right of record. The portion of the water right to be leased as described in Finding of Fact No. 6 is consistent with the water right of record in so far as possible.
6. The portion of the right to be leased has been modified from the lease application and is as follows:

Certificate: 74135 Squaw Creek Irrigation District (now known as Three Sisters Irrigation District (perfected under the Squaw Creek Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 1, at Pages 121, 122, 123, 124, 435, 438, 445, 472, and 473)

Priority Date: 1887 and 1895

Use: 57.0 acres of Irrigation, being 12.8 acres under the 1887 priority date and 44.2 acres under the 1895 priority date
0.5 acre equivalent of Pond Maintenance under the 1895 priority date

Quantity: **Limit:** One-fiftieth of one cubic foot per second per acre, or its equivalent for each acre irrigated during the irrigation season of each year.

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

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Priority Date	Acres	Lessor
14S	12E	WM	17	SW NW	1401	1895	5.5	Marc and Pamela Thalacker
14S	12E	WM	18	NW NE	1401	1895	1.5	
15S	10E	WM	12	NW NE	302	1895	4.5	Wayne Cornick
15S	10E	WM	12	NW NE	303	1895	2.6	
14S	10E	WM	36	NE SE	200	1895	1.0	Carl Frank Johnson Trust et al
14S	10E	WM	36	NW SE	2400	1895	1.0	Phillip Krohn
14S	10E	WM	36	SW NE	2400	1895	2.0	
14S	10E	WM	36	NW SE	500	1895	2.0	Melissa Ward

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Priority Date	Acres	Lessor
15S	11E	WM	4	SW SW	401	1895	24.1	James Enger
15S	11E	WM	6	NE SW	1200	1887	12.8	Jeffrey Fackler

Authorized Point of Diversion (POD):

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

7. Certificate 74135 does not specify the irrigation season. 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.
8. Certificate 74135 describes the rate limit per acre as 1/50th cubic foot per second per (cfs) acre. However, the water right has been affected by several allocation of conserved water projects that have reduced the rate per acre for specific lands. The rate limit per acre for the portion of the right identified as being appurtenant to lands owned by Marc and Pamela Thalacker has been reduced to 1/61.61 cfs per acre. The rates described below are the rates by which the diversion at the POD shall be reduced under Certificate 74135 upon approval of this instream lease (diversion at POD may have been further reduced by other orders of the Department):

Priority Date	Season 1
1887	0.26 CFS
1895 Thalacker	0.11 CFS
1895 remaining properties	0.87 CFS
Total	1.24 CFS

9. There is no duty associated with the water right proposed to be leased instream. However, TSID (Co-Lessor) has requested to lease the equivalent of approximately 3.0 acre-feet per acre to instream use for irrigation use. This appears to be a reasonable amount of water considering beneficial use without waste.
10. 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.
11. 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 measurable into the Deschutes River and may be protected instream in the Deschutes River.

12. 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: From the POD (as described in Finding of Fact No. 6) to the mouth of Whychus Creek and into the Deschutes River to Lake Billy Chinook

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
74135	1887	0.205	38.18	July 1 through October 2
	1895	0.707	131.85	
Total Instream		0.912	170.03	

13. Other conditions to prevent injury and enlargement are:

The portion of water protected instream 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 the instream period of this lease, TSID shall report to the District 11 Watermaster's office the percentage diverted under the 1887 and 1895 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.

During the irrigation season, the amount of water diverted at the point of diversion under Certificate 74135 shall not exceed 151.78 CFS, and as further limited in a previous or subsequent orders affecting Certificate 74135.

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

15. 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.

16. 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 June, 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 73223, 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 Whychus Creek is a high priority for flow restoration. In addition, the original instream flows established under Certificate 73223 were based on flow needs for resident redband trout and did not account for flows necessary to support reintroduction of Mid-Columbia summer steelhead trout and spring Chinook salmon. 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.

17. 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.
18. 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.
19. 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.
20. 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.
21. 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.
22. The Lessor, Co-Lessor and Lessee have requested that the lease terminate on October 31, 2014. The lease may commence on the date this final order is signed.

Preliminary Award of Deschutes Basin Mitigation Credits

23. 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.
24. The Department assigned this mitigation credit project number MP-190.
25. 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). No comments were received.

26. As part of the public notice of the mitigation project, the Department identified that the project may result in 116.1 mitigation credits based upon the proposed lease of 64.5 acres of irrigation use to instream use. However, based upon additional evaluation, the Department identified several acres that were not available to be leased to instream use (as identified in Findings of Fact No. 2 and 4. The Department identified 57.0 acres of irrigation that may be leased to instream use. The lease of 57.0 acres of irrigation results in 102.6 AF of mitigation water. Therefore, the Department finds that 102.6 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 Whychus Creek and General Zones of Impact.
27. The mitigation credits expire on December 31, 2014.
28. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.
29. 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.
30. 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 each year 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, 2014.

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 102.6 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 Whychus Creek 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, 2014.
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 14 day of August, 2014.



Dwight French
Water Right Services Division Administrator, for
Director, Oregon Water Resources Department

This document was prepared by Laura Wilke and if you have any questions, please call 503-986-0884.

Mailing date: AUG 15 2014