

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

In the Matter of Instream Lease Application )	DETERMINATION and
IL-1237 and Preliminary and Final Award )	FINAL ORDER ON PROPOSED
of Mitigation Credits, Certificate 86855, )	INSTREAM LEASE and MITIGATION
Klamath 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**

Jim Lynes  
5936 Shawn Dr.  
Helena, MT 59602  
[jlynes@mt.net](mailto:jlynes@mt.net)

**Lessee**

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

**Findings of Fact**

1. On April 8, 2012, the DRC Mitigation Bank and Jim Lynes filed an application to lease a portion of Certificate 86855 for instream use. The Department assigned the application number IL-1237.
2. On June 14, 2012, the DRC Mitigation Bank submitted revised application materials, which removed 1.0 acre of irrigation use from the proposed lease.
3. The portion of the right to be leased has been modified from the original lease application and is as follows:

**Certificate:** 86855 in the name of ESTATE OF H. P. HOEY (confirmed by Deschutes River (F) Decree

**Use:** IRRIGATION of 7.35 ACRES

**Priority Date:** SEPTEMBER 1, 1898

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:****Rate:**

April 1 to May 23 and August 20 to November 1  
 Limited to 1/80<sup>th</sup> cubic foot per second (CFS) per acre

May 23 to August 20  
 Limited to 1/40<sup>th</sup> CFS per acre

**Duty:** Limited to 4.0 acre-feet (AF) per acre

April 1 to May 23 and August 20 to November 1	May 23 to August 20	Volume Limit (based on duty)
0.092 CFS	0.184 CFS	29.4 AF

**Limit/Duty:**

The amount of water to which this right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purpose and shall not exceed 4 acre-feet per acre, measured at the point of diversion from the stream, which may be diverted at a rate not to exceed One-Fortieth of one cubic foot per second per acre from May 23 to August 20 and One-Eightieth of one cubic foot per second per acre from April 1 to May 23 and August 20 to November 1.

**Source:**

Big Marsh Creek, tributary to Crescent Creek

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
24 S	7 E	WM	20	SW NE	7.35

4. The location of the point of diversion is not specified in the certificate. The Deschutes River Decree identifies that water is diverted by dams and ditches but does not specify a specific point of diversion. However, the application identifies that the diversion is located approximately at:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
24 S	7 E	WM	20	SW SW	975 FEET NORTH AND 260 FEET EAST FROM THE SW CORNER OF SECTION 20

5. 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.
6. The quantities of water proposed to be protected instream, beginning at the point of diversion, require modification. At the full rate and volume requested, the Department cannot protect the water over the entire instream period requested (July 1 through October 23, a 115 day period) without enlargement of the water right and injury to other surface water rights. Therefore, the proposed instream use requires modification to prevent enlargement of the water right and injury to other surface water rights. The Department has reduced the instream period by 2 days to prevent injury and enlargement.
7. The proposed instream use requires modification to take into account return flows and stream flow losses. Return flows, approximately 10% of the diversion, from the existing use return to Big Marsh Creek immediately below the place of use.

The stretch of Crescent Creek between the confluence with Big Marsh Creek and the mouth is a losing stream reach and loses approximately 2% of its flows.

8. The reach for an instream water right is typically from the point of diversion on the source stream to the mouth of that source stream. However, water may be protected further downstream if the quantity of water is measurable in the receiving stream, in this case Crescent Creek and the Little Deschutes River. The quantity of water that may be protected instream in Big Marsh Creek is measurable in Crescent Creek and the quantity that may be protected instream in Crescent Creek is measurable in the Little Deschutes River, consistent with OAR 690-077-0015(8), and therefore, the reach may extend into Crescent Creek and into the Little Deschutes River to the mouth.

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

Big Marsh Creek, tributary to Crescent Creek

**Instream Reach 1:** From the POD (as described in Finding of Fact #4) to the lower end of the place of use, located approximately where the creek crosses the east boundary of the SE NW of Section 20, T24S, R7E, W.M.

Priority Date	Instream Period	Rate Instream	Volume Instream
9/1/1898	July 1 through August 19	0.184 CFS	29.2 AF
	August 20 through October 21	0.088 CFS	

**Instream Reach 2:** From just below the lower end of the place of use, located approximately where the creek crosses the east boundary of the SE NW of Section 20, T24S, R7E, W.M., to the mouth of Big Marsh Creek

Priority Date	Instream Period	Rate Instream	Volume Instream
9/1/1898	July 1 through August 19	0.166 CFS	26.3 AF
	August 20 through October 21	0.079 CFS	

Crescent Creek, tributary to the Little Deschutes River

**Instream Reach 3:** In Crescent Creek, from the confluence with Big Marsh Creek to the mouth of Crescent Creek

Priority Dates	Instream Period	Rate Instream	Volume Instream
9/1/1898	July 1 through August 19	0.162 CFS	25.8 AF
	August 20 through October 21	0.078 CFS	

Little Deschutes River, tributary to the Deschutes River

**Instream Reach 4:** In the Little Deschutes River, from the confluence with Crescent Creek to the mouth of the Little Deschutes River

Priority Dates	Instream Period	Rate Instream	Volume Instream
9/1/1898	July 1 through August 19	0.162 CFS	25.8 AF
	August 20 through October 21	0.078 CFS	

10. 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.

11. 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.
12. 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.
13. The Lessor has requested that the lease terminate on October 31, 2016. The lease may commence the date the final order is signed and on April 1 of each succeeding calendar year that the lease is in place.
14. The Lessor has requested the option of terminating the lease early with written notice to the Department.

**Preliminary Award of Deschutes Basin Mitigation Credits**

15. 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.
16. The Department assigned this mitigation credit project number MP-173.
17. 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.
18. No modifications were made to the lease based on the comments received.
19. As part of the public notice of the mitigation project, the Department identified that the project may result in 15.0 mitigation credits. However, since the application was originally submitted to the Department the number of acres of irrigation proposed for transfer has been reduced to 7.35 acres. Irrigation of 7.35 acres has an average consumptive use of 13.2 AF. Therefore, the Department finds that 13.2 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 Little Deschutes Zone of Impact.

20. The mitigation credits expire on December 31, 2016.
21. The use and maintenance of the mitigation credits is subject to the terms and conditions of the DRC Mitigation Bank Charter.
22. 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.
23. 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 October 31, 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 (July 1 through October 21) or after the period of allowed use has begun for the water right being leased, water may not be used under the right 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 13.2 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 Little Deschutes Zone 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 16<sup>th</sup> day of July, 2012.

  
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 17 2012** \_\_\_\_\_