

MEMORANDUM

TO: Water Resources Commission

FROM: Tom Paul, Field Services Division Administrator

SUBJECT: Agenda Item D, April 12, 2002
Water Resources Commission Meeting

Instream Leasing Program Update

I. Issue Statement

On November 29, 2001, the Commission adopted amendments to the Instream Water Right Rules (OAR 690-077). The amendments simplify the instream leasing process, reduce processing time, and describe the process for administering the 2001 Oregon Laws Chapter 205 (HB 2712) relating to split season use instream leasing.

This report provides an update on leasing activity, the development of new leasing forms based on stakeholder input, and revisions to the instream leasing manual. The report also provides an update on a new database to track the processing of lease applications. *This is an informational report only; no Commission action is required.*

II. Background

The instream leasing program has grown over 300 percent in the last three years, increasing from 39 active leases in 1998 to 151 in 2001. In 2001, 112 new leases were signed while 39 leases were multiyear leases originally signed in 2000. The 2002 leasing season begins with 38 active multiyear leases signed in 2001.

As the leasing program has grown, the Department has recognized the need to update and streamline its lease application process. In the fall of 2001, the Department met with stakeholders in Grants Pass, Pendleton, and Bend to discuss revisions to the leasing process. Two meetings involved the Oregon Water Trust and regional field staff; and the third meeting involved the Deschutes Resources Conservancy, irrigation districts, soil and water districts, and regional field staff. An additional discussion was held during the 2002 Field Conference and focused on implementation of split season instream use leasing.

In addition to a streamlined application process, the Department has developed a lease application tracking program in response to a Commission request at the November 29, 2001, Commission meeting. At that meeting, Commissioners expressed concern that leases were not being processed in a timely fashion. The new tracking program will document application processing time — information that will aid the Department as it continues to streamline and improve the leasing program.

III. Discussion

In reviewing the leasing program, Department staff identified four areas requiring further development: instream leasing forms, split season leasing, lease tracking, and revision of an internal leasing manual.

1) Instream Leasing Forms

The Department has revised all of the instream leasing forms for the 2002 season. There are four primary types of forms:

- Standard Leasing Form (Attachment 1);
- Pooled Leasing Form (Attachment 2a for Districts and 2b for Landowners);
- Renewal Form, (Attachment 3); and
- Split Season Use Instream Form (Attachment 4).

These forms are available on the Department’s website along with a description of which forms are required under various circumstances (<http://www.wrd.state.or.us/programs/stewardship/index.shtml>).

The table below illustrates how documentation requirements have been reduced for new leasing applications. In many instances, where the entire right is being leased, no attachments will be required this year, where five would have been required in 2001.

Instream Lease Documentation	2001 Requirement	2002 Requirement
Proof of property ownership/power of attorney documentation	Yes	No
Copies of certificates being leased	Yes	No (available on-line)
Identification of the public use to be served by the instream lease	Yes, with attachment	Yes, with check box on form
Tax lot map of lessor’s property	Yes	Include if water right is appurtenant to lands owned by others
Detailed map illustrating land being leased	Yes	Include if only a part of the right is being leased
Documentation of why a water right is valid and not subject to forfeiture, even if it has not been exercised for five or more consecutive years.	Yes, if non-use indicated	Yes, if non-use indicated

2) Split Season Instream Use Leasing

In an effort to ensure statewide consistency, staff are currently developing internal guidance for the 2002 season related to the accuracy level needed for split season use measurements,

measurement and reporting frequency, and documentation needed to enforce for split season use instream leases. Staff propose to review this guidance after the 2002 season and modify it as appropriate for the 2003 season.

3) Instream Lease Tracking

The Department has instituted a tracking program to determine the processing time for lease applications. At the November 29, 2001, meeting the Commission requested tracking of the following information: the date the lease application is received, the date the lease application is deemed complete, and the date the lease is signed. In addition to these three items, the following items will also be tracked: the date the watermaster review is received; the date notice is published; and, where applicable, the date the decision is made to deny the lease.

Staff will update the Commission on the processing time from receipt of complete application to final decision. As of March 1, 2002, the Department has received two lease applications. These applications took 29 and 40 days to process, respectively. These processing times include the time for the weekly public notice and the 21-day public notice period.

4) Revision of an Internal Leasing Manual

In September 1997 staff developed an instream leasing manual. At the November 29, 2001, Commission meeting staff committed to updating this internal manual. Three elements of this manual are near completion: the revised instream leasing forms; split season instream use leasing guidance; and the watermaster review form (Attachment 5) and instructions. Work continues on the guidance material for completing instream leasing forms and on revisions to the "Frequently Asked Questions" section.

IV. Director's Recommendation

This is an informational report only.

Attachments:

1. Standard Leasing Form
- 2a. Pooled District Form
- 2b. Pooled Landowner Form
3. Renewal Form
4. Split Season Instream Use Leasing Form
5. Watermaster Instream Lease Review Form

Bob Rice
(503) 378-8455 Ext. 238

Lease Agreement Number (assigned by WRD): _____

**STATE OF OREGON
WATER RESOURCES DEPARTMENT**

**Short-Term Water Right Lease Agreement
Pursuant to ORS 537.348(2) and OAR 690-077-0077
for
Leases of Existing Water Rights for Instream Use**

This Lease Agreement is between:

Lessor #1:

(Name)
(Mailing address)
(City, State, Zip Code)
(Telephone number)

Lessor#2, 3, etc.

The water right to be leased is located in _____ County

Lessee (if different than Oregon Water Resources Department):

(Name) Not Applicable
(Mailing address)
(City, State, Zip Code)
(Telephone number)

Trustee:

Oregon Water Resources Department
158 12th Street NE
Salem OR 97301
(503) 378-8455

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- 1.1** Lessor #1 is the owner, or authorized agent for owner of property located at: Township N, Range W, Section _____ and Tax Lot number _____. If the water right appurtenant to these lands is also appurtenant to lands owned by others, then Attachment 1, (tax lot map of lessor's property) needs to be included.

1.2 Lessor #2 is the (Check one):

- Not applicable
 Official representative of _____, the irrigation district which conveys water to the subject water rights.
 Another party with an interest in the subject water rights representing _____.

1.3 For the lands being leased, list all water rights appurtenant to the lessor's property. Indicate if there are any supplemental or overlying rights.

Certificate No.

1.4 **Subject Water Rights.** Lessor proposes to lease the water rights listed in 1.3.

The right(s) to be leased are further described as follows:

Certificate No.:

Priority date: _____ Type of use:

Legal Season of Use (if not listed on the certificate):

Is the entire water right certificate being leased?: Yes No

If no, list the acres to be leased by legal description of township, range, section, and $\frac{1}{4}$ $\frac{1}{4}$ which will be dried up as part of this lease, and include a map (Attachment 2) showing the lands which will not receive water.

Place of use: T _____, R _____, Section _____, $\frac{1}{4}$ $\frac{1}{4}$ - _____ acres to be leased
Enter additional places of use here, using format above:

Page ____ (Identify page number of certificate, if certificate is greater than 10 pages.)

Number of acres, if for irrigation:

Acre-feet of storage, if applicable:

Rate associated with leased rights (cfs): _____

(Use additional lines if there is more than one rate associated with the water right.)

Duty associated with leased rights (AF):

(Use additional lines if there is more than one duty associated with the water right.)

Conditions or other limitations, if any:

If you need to enter another leased right, please use the additional water rights form.

1.5 **Validity of Rights.** Lessor(s) attests (mark one) that:

- the water has been used over the past five years according to the terms and conditions of the owner's water right certificate or as an instream water right or

- the water has not been used over the past five years according to the terms and conditions of the owner's water right certificate, however the water right is not subject to forfeiture under ORS 540.610(2)()(include necessary supporting documentation as Attachment 3).

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2.1 Public Use. This lease will increase streamflows which will benefit:

- Conservation, maintenance and enhancement of aquatic and fish life, wildlife, and fish and wildlife habitat
- Pollution abatement
- Recreation and scenic attraction

2.2 Instream use created by lease. The instream use to be created is described as follows:

 River
Tributary to in the Basin.

Describe the point of diversion and any associated reach(es) of the instream use being created. If possible list the reach by river mile, if no reach is identified, the lease will be processed to be protected at the point of diversion):

Total volume in acre-feet:

Rate in cfs: Allowed period of use:

Conditions to prevent injury, if any:

- None
- The instream flow will be allocated on a daily average basis up to the described rate from through .
- Other (describe):

If you need to enter more instream uses, please use the additional water rights form.

2.3 Term of lease. This lease shall terminate on .

2.4 Compensation. The Lessor has agreed to lease subject water right for the sum of \$1.00, or other valuable considerations and for the benefit of the state of Oregon.

2.5 Flow protection. The Trustee will regulate use of water from the source, subject to prior appropriation and the agency enforcement guidance, to assure the water is delivered to the point of diversion, and through the reach past junior downstream users, so long as flow is sufficient to meet the demand under priority date of the new instream use (see section 2.2). No party is required to continuously measure the flow of the waterway described in Section 2.2.

2.6 Termination provision.

- For multiyear leases, lessor *shall* have the option of terminating the lease each year, prior to the lease being exercised, with 30 day written notice to the Department.
- For multiyear leases, lessor *shall not* have the option of terminating the lease each year, prior to the lease being exercised, with written notice to the Department.

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- 3.1 Accuracy.** The Undersigned Lessor/s, Lessee and Trustee declare that, to the best of their knowledge and belief, the information contained in this lease is true, correct and complete. If after the lease is signed, any information is determined to be false, the lease may be modified or terminated. This lease only exercises the water rights being leased; for the term of the lease; it shall not be construed to overcome any claim that the water right may otherwise be subject to forfeiture for nonuse pursuant to ORS 540.610 during the period of time prior to the execution of the lease.
- 3.2 Lease.** All Lessors agree to lease the water rights listed in 1.4 for instream use for the term of this Agreement through Lessee to Trustee, the Oregon Water Resources Department, pursuant to the provisions of ORS 537.348(2) and OAR 690-077-0077.
- 3.3 Precedent.** 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, and a prior short term lease shall not set a precedent for the amount of water to be leased or transferred instream.
- 3.4 Suspension of original use.** During the period of the lease, the owner agrees to suspend use of water allowed under the subject water rights and under any water right that is supplemental to the subject water rights. In the event that a supplemental water right is not part of this lease, it may be subject to forfeiture.

Lessor #1: _____ Date: _____

For additional Lessors, type in space for signature and date

Lessee: _____ Date: _____

- 3.5 Allocation of water to the instream use described in Section 2.2 during the term of this lease is not reasonably expected to cause injury to other rights to use water from the same source. If injury is found after this lease is signed, the lease may be modified or terminated to prevent injury.**

So ordered by Trustee: _____ Date: _____

Effective date is _____ (if later than the date of the Trustee's signature).

Other Attachments As Needed:

- Attachment 1: Tax Lot Map of Lessor's Property (required if landowner is not the sole landowner to lands for which the subject water rights are appurtenant)
- Attachment 2: Detailed map illustrating lands under subject rights to be leased (required if only part of a right is being leased instream).
- Attachment 3: Supporting documentation indicating why a right is valid and not subject to forfeiture even though the right has not been exercised for five or more consecutive years (required if the second box in Section 1.5 is checked)
- Attachment 4: Split Season Instream Use Form

Lease Agreement Number (assigned by WRD):

**STATE OF OREGON
WATER RESOURCES DEPARTMENT**

Pooled Lease Form

**Short-Term Water Right Lease Agreement
Pursuant to ORS 537.348(2) and OAR 690-077-0077
for
Leases of Existing Water Rights for Instream Use**

This Lease Agreement is between:

District:

(Name)

(Mailing address)

(City, State, Zip Code)

(Telephone number)

If more than one district, enter district information below:

The water right to be leased is located in _____ County

Indicate if Lessee is different than Oregon Water Resources Department

Different. If different, enter Lessee information below:

Trustee:

Oregon Water Resources Department

158 12th Street NE

Salem OR 97301

(503)378-8455

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1.1 District and landowner(s) propose to lease the water rights listed below (indicate if any are supplemental):

Certificate No.

1.2 Subject Water Rights. District and Landowners propose to lease the water rights listed in Attachment 5.

The right(s) to be leased are further described as follows:

Certificate No.:

Priority date: Type of use:

Legal Season of Use (if not listed on the certificate):

If an irrigation right, total number of acres to be leased:

Total acre feet of storage to be leased, if applicable:

Rate associated with leased rights (cfs):

(Use additional lines if there is more than one rate associated with the water right.)

Rate associated with leased rights (cfs):

Rate associated with leased rights (cfs):

Duty associated with leased rights (AF):

(Use additional lines if there is more than one duty associated with the water right.)

Duty associated with leased rights (AF):

Duty associated with leased rights (AF):

Conditions or other limitations, if any:

If you need to enter an additional leased right, please use the additional water rights form.

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2.1 Public Use. This lease will increase streamflows which will benefit:

- Conservation, maintenance and enhancement of aquatic and fish life, wildlife, and fish and wildlife habitat
- Pollution abatement
- Recreation and scenic attraction

2.2 Instream use created by lease. The instream use to be created is described as follows:

River
Tributary to in the Basin.

Describe the point of diversion and any associated reach(es) of the instream use being created. If possible list the reach by river mile, if no reach is identified, the lease will be processed to be protected at the point of diversion):

Total volume (AF):

(Use additional lines if there is more than one rate associated with the water right.)

Total volume (AF):

Total volume (AF):

Rate in cfs:

(Use additional lines if there is more than one rate associated with the water right.)

Rate in cfs:
Rate in cfs:

Conditions to prevent injury, if any:

- None
- The instream flow will be allocated on a daily average basis up to the described rate from _____ until _____.
- Other (describe): _____

To repeat the information in 2.2 for a different instream use, last page below.

- 2.3 Term of lease.** This lease shall terminate on _____.
- 2.4 Compensation.** The District has agreed to lease subject water right for the sum of \$1.00, or other valuable considerations and for the benefit of the state of Oregon.
- 2.5 Flow protection.** The Trustee will regulate use of water from the source, subject to prior appropriation and the agency enforcement guidance, to assure the water is delivered to the point of diversion, and through the reach past junior downstream users, so long as flow is sufficient to meet the demand under priority date of the new instream use (see section 2.2). No party is required to continuously measure the flow of the waterway described in Section 2.2.

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- 3.1 Accuracy.** The Undersigned District and Trustee declare that, to the best of their knowledge and belief, the information contained in this lease is true, correct and complete. If after the lease is signed, any information is determined to be false, the lease may be modified or terminated. This lease only exercises the water rights being leased; for the term of the lease; it shall not be construed to overcome any claim that the water right may otherwise be subject to forfeiture for nonuse pursuant to ORS 540.610 during the period of time prior to the execution of the lease.
- 3.2 Lease.** District agree to lease the water rights listed in 1.2 for instream use for the term of this Agreement through Lessee to Trustee, the Oregon Water Resources Department, pursuant to the provisions of ORS 537.348(2) and OAR 690-077-0077.
- 3.3 Precedent.** 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, and a prior short term lease shall not set a precedent for the amount of water to be leased or transferred instream.

District : _____ Date: _____

Lessee: _____ Date: _____

3.5 Allocation of water to the instream use described in Section 2.2 during the term of this lease is not reasonably expected to cause injury to other rights to use water from the same source. If injury is found after this lease is signed, the lease may be modified or terminated to prevent injury.

So ordered by Trustee: _____ Date: _____

Effective date is _____ (if different than the date of the Trustee's signature).

Attachment 5: Pooled Lease Landowner Form

Pooled Leasing Landowner Form

Landowner:

(Name)
(Mailing address)
(City, State, Zip Code)
(Telephone number)

If additional landowners, enter landowner information below

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1.1 Ownership. Landowner(s) owns or is authorized agent for the property shown on the map attached as Exhibit 5-A. (Outline or highlight property owned)

Subject Water Rights. Landowner proposes to lease the water rights shown on the map attached as Exhibit 5-B (this information may be included on Exhibit 5-A, or an additional map may be attached). (Cross hatch the area of water rights being leased).

Certificate No.: ; Page (Identify pertinent page number of certificate, if certificate is greater than 10 pages.)

[Attached map(s) must identify property owner, Township, Range, Section and ¼ ¼ , tax lot number, map orientation and scale.]

Number of acres, if for irrigation:

Acre feet of storage, if applicable:

Additional Subject Water Rights? (Please use Additional Landowner Information form.)

1.2 Validity of Rights. Landowner(s) attests (mark one) that:

- the water has been used over the past five years according to the terms and conditions of the owner's water right certificate or as an instream water right or
- the water has not been used over the past five years according to the terms and conditions of the owner's water right certificate, however the water right is not subject to forfeiture under ORS 540.610(2)() (include necessary supporting documentation as Attachment 5C).

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2.1 Accuracy. The Undersigned Landowner(s) declare that, to the best of their knowledge

and belief, the information contained in this lease is true, correct and complete. If after the lease is signed, any information is determined to be false, the lease may be modified or terminated. This lease only exercises the water rights being leased; for the term of the lease; it shall not be construed to overcome any claim that the water right may otherwise be subject to forfeiture for nonuse pursuant to ORS 540.610 during the period of time prior to the execution of the lease.

- 2.2 Lease.** All Landowners agree to lease the water rights listed in 1.1 for instream use for the term of this Agreement jointly with the District to Trustee, the Oregon Water Resources Department, pursuant to the provisions of ORS 537.348(2) and OAR 690-077-0077.
- 2.3 Suspension of original use.** During the period of the lease, the owner agrees to suspend use of water allowed under the subject water rights and under any water right that is supplemental to the subject water rights. In the event that a supplemental water right is not part of this lease, it may be subject to forfeiture.

Landowner: _____
Date: _____

If additional landowners, enter lines for landowner signature and date

Other Attachments As Needed:

- Exhibit 5-A: Tax Lot Map of Landowner's Property
Exhibit 5-B: Detailed map illustrating lands under subject rights to be leased [Exhibits 5-A and 5-B may be combined into a single map]
Exhibit 5-C: Supporting documentation indicating why a right is valid and not subject to forfeiture even though the right has not been exercised for five or more consecutive years (required if the second box in Section 1.3 of Attachment 5 [Pooled Lease Landowner Form] is checked)
Exhibit 5-D: Split Season Instream Use Form



Instream Lease Renewal
Oregon Water Resources Department

Attachment 3
Renewal Form

The undersigned entered into Instream Lease Number _____ involving Water Right Certificate(s) on (Trustee Signature Date), which expired on (Date).

The undersigned Lessor and Lessee, parties to the original lease, hereby request that Lease Number _____ be renewed. Lessor and Lessee warrant that, to the best of their knowledge, circumstances have not changed and all matters involved with or affected by the instream lease and the subject water right(s) remain as they were when the lease was first entered into, including but not limited to ownership of the lands to which the water right(s) is/are appurtenant, the acres from which the right is leased, and the public instream benefit provided as a result of this instream lease.

The terms and conditions of instream lease are hereby incorporated by reference in their entirety, with the following exception(s):

- The term of the lease, shall commence on (Date) (not before execution by the parties) and continue through (Date). (Tab and return for more exceptions)

This instream lease is part of a Conservation Reserve Enhancement Program (CREP).

Yes

No

Lessor: _____

Date: _____

Lessor #2, #3, etc (and date)

Lessee: _____

Date: _____

Trustee: _____

Date: _____

**Attachment 4 (Standard Leasing Form). Split Season Instream Use Form
 Attachment 5-D (Pooled Leasing Form)**

The standard instream water right form pursuant to ORS 537.348(2) and OAR 690-077-0077 must also be filled out before a Split Season Use Instream Lease Application can be processed.

Note: The terms of all split season use leases are limited to one year, with renewability. Split season use lease applications must be submitted to the Department two weeks prior to water being used either for the existing purpose or for the proposed instream purpose. (OAR 690-077-0079)

1. Existing and Instream Use Periods

For the water right being leased instream, as described in Section 1.4, include monthly or partial season rate or duty limitations, if appropriate. This section replaces the “Total volume, Rate in cfs, and Allowed period of use” portions of Section 2.2 on the standard instream leasing form.

The water right will be used for its existing purpose from _____ to _____.
 The water right will be used for instream use period is from _____ to _____.

	Rate (cfs)		Conversion Factor 1 cfs = 1.983471 ac-ft/day		Number of days		Duty (ac-ft)
Existing Use		*	1.983471	*		=	0.00
use if needed		*	1.983471	*		=	0.00
use if needed		*	1.983471	*		=	0.00
Instream Use		*	1.983471	*		=	0.00
use if needed		*	1.983471	*		=	0.00
use if needed		*	1.983471	*		=	0.00
Total	n/a		n/a		n/a		0.00

2. Measurement and Reporting

The water right lessor or lessee shall contact the watermaster to determine the necessary measurement and reporting requirements associated with leasing a water right. The holders of the water rights shall measure and report the use of the existing water right and instream water right to the satisfaction of the Director, or provide for third party measurement and reporting to the satisfaction of the Director. Pursuant to ORS 537.332(3), the Department holds instream water rights in trust for the benefit of the people of the State of Oregon.

- (a) Location(s) and type(s) of measuring device(s):
- (b) Frequency of measurement:
- (c) Parties responsible for the respective measurements:

Short-Term Water Right Lease Agreement Review Form

STATE OF OREGON
WATER RESOURCES DEPARTMENT
Pursuant to OAR 690-077-0077(3)(h)

Lease Agreement #:
Involving Certificate(s) #:

Watermaster/Field Staff Review. By signature below, staff verifies that:

1. Does the lease agreement meet the requirements of OAR 690-077-0077(3)(e) to suspend the original use?
 Yes
 No

Please explain:

2. Is the proposed instream use for:
 a point
 a reach.

Does the lease agreement meet the requirements of OAR 690-077-0077(7) to avoid injury to other water rights due to:

- Return flows
 Yes
 No

Please explain:

- Other losses
 Yes
 No

Please explain:

3. Does the lease agreement meet the requirements of OAR 690-077-0077(7) to avoid enlargement?
 Yes
 No

Please explain:

4. For split season use instream leasing, does the lease agreement meet the measuring and reporting requirements of OAR 690-077-0079(4)?
 n/a, not a split season use instream lease
 Yes
 No

Please explain:

5. Necessary conditions to the proposed instream use: (Describe, if any)

Field Staff _____ District
Title:
Date: