



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Dwight French, Water Right Services Division Administrator

SUBJECT: Agenda Item N, April 20, 2012
Water Resources Commission Meeting

Instream Lease Program Update

I. Issue Statement

This report provides an update on the instream leasing program (OAR Chapter 690, Division 77). *This is an information report only; no Commission action is required.*

II. Background

The instream leasing program provides a voluntary means to aid the restoration and protection of streamflows. This arrangement provides benefits both to water right holders and to instream values by providing water users with options that protect their water rights while leasing water for instream benefits. The ability to convert an existing water right to instream use temporarily under an instream lease is part of the Instream Water Right Act adopted in 1987.

The first instream leases were submitted to the Department in 1994. Over the years, the instream leasing program has grown and evolved. In 1994, there were 6 instream leases approved by the Department. In the last five years, the Department has averaged 335 active leases per year. Table 1 in Attachment 1 shows the number of active leases by calendar year since the program began.

In November 2001, the Commission adopted rules under OAR 690-077-0079, extending the maximum term for an instream lease from two to five years. The rules also implemented the legislatively created split season use instream leasing program (2001 Oregon Laws Chapter 205). A split season lease allows an existing water use to occur for a part of the year and an instream use for a different period. The original split season leasing program was to sunset on January 2, 2008, and the term for the split season lease was limited to a single year lease.

To lease any water right to instream use, the lease must not result in injury to other water rights or enlargement of the existing right. For a split season instream lease, applicants must meet additional requirements, including measurement and reporting to provide assurance against injury and enlargement. Applicants must consult with the Department's Watermaster prior to

submitting the application to determine appropriate measuring and reporting conditions. In addition, the split season use application must be submitted at least two weeks before any water is used for any existing or instream purpose. The instream use and existing use may not occur at the same time. Applicants may generally have one existing use period and one instream use period.

In August, 2006, the Commission adopted revised rules under OAR Chapter 690, Division 77 that eliminated the one year limitation on split season use instream leases. The term for all instream leases is now up to five years with a renewal option available. In addition, the required review date for the split season program was updated to be no later than the year 2014 (extending the sunset date on the program). The sunset date on the split season use leasing program was also legislatively extended in 2007 (2007 Oregon Laws Chapter 355) to January 2, 2014.¹ In addition to other housekeeping changes, the revised rules also clarified the instream leasing process to include an application (instead of a lease agreement) and recognized the updated practice of issuing Final Orders approving an instream lease (instead of signing the lease agreement). To date, the Department has received and approved 14 split season lease applications.

III. Preventing Injury and Enlargement

To lease any water right to instream use, the lease must not result in injury to other water rights or enlargement of the existing right. If a proposed lease would result in injury or enlargement, the Department may condition the lease in the Final Order approving the lease to prevent the injury or enlargement or deny the lease application.

The Department may also adjust the conditions on an instream lease once the Final Order has been issued approving an instream lease, if the Department receives information indicating that a lease results in injury or enlargement. The final order may either be reissued with additional conditions to eliminate the injury or enlargement or terminated if the injury or enlargement cannot be prevented.

The Department has only two documented cases of injury: In the Deschutes Basin, Department staff identified that use of water for irrigation purposes had not been suspended on the lands involved for two instream leases. After a site visit and attempts to resolve the issue with the landowners, the Department terminated both leases to prevent further injury to other water rights and enlargement of the use.

The Department has one instance involving enlargement: This instance involved several leases on Fifteenmile Creek, tributary to the Columbia River in the Hood Basin. The Department identified that the creek actually loses surface water to groundwater within a portion of the protected instream reach. Department staff worked with the Freshwater Trust who was a

¹ Staff are in the process of scheduling a meeting of split-season participants and other interested stakeholders with the intent of developing a consensus-based legislative concept to remove or extend the sunset date. This activity will be the subject of a report to the Commission in late 2012, and will fulfill the program review required in rule.

primary partner in leases on Fifteenmile Creek to collect data. Based on the data collected, subsequent leases incorporated a 50% loss factor to the quantity of water that could be protected instream within the losing portion of the instream reach.

Two tables showing past leasing activity are provided in Attachment 1.

IV. Summary

The leasing program is an integral part of the Department's streamflow restoration efforts and interest in the program continues to grow. In 2011, a total 443.8 CFS were leased instream. The Department has identified only two instances where actual injury occurred after a lease had been approved and in both of these cases the leases were recinded. Staff has acted to prevent enlargement from occurring in the first place. Staff are conducting a review of the split-season leasing program and will be developing a legislative concept to remove or extend the sunset date.

Attachment 1: Instream Leasing Activity (Tables 1 and 2)

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