



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1271
503-986-0900
FAX 503-986-0904

MEMORANDUM

TO: Water Resources Commission

FROM: Dwight French, Water Right Services Division Administrator

SUBJECT: Agenda Item A, November 15, 2012
Water Resources Commission Meeting

Review of Split-Season Leasing Program and Legislative Concept

I. Issue Statement

This report provides an update on the split season use instream leasing program (OAR Chapter 690, Division 77) and responds to the requirement that the Commission review the split season leasing program no later than the year 2014 to determine if any changes should be made in the program. *This is an informational 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.

In November 2001, the Commission adopted rules under OAR 690-077-0079 implementing 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 was limited to a single year lease.

In August, 2006, the Commission adopted revised rules under OAR Chapter 690, Division 77 extending the term of any lease, including split season, to five years and requiring review of the split season program 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.

To lease a water right instream under the split season use program, applicants must meet additional requirements, including measurement and reporting. 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 the use of water begins for any existing or instream purpose. The instream use and existing use may not occur at the same time.

III. Discussion

The first two split season instream leases were submitted to the Department in 2002. In the first five years of the program the Department received and processed 6 split season lease applications. To date, the Department has approved 17 individual split season instream leases, two of which have been renewed, with an annual average instream use of 3.7 cubic feet per second. Attachment A shows the number of new split season leases (not including renewals) submitted on an annual basis. The split season leasing program has generally averaged 2 new leases per year. However, 4 of the 17 split season leases received by the Department over the past 10 years were received in 2012.

The majority of the split season instream leases have been in the Deschutes Basin with the greatest quantity of water protected instream. Attachment B provides a breakdown of the quantity (cubic feet per second) and number of leases per River Basin.

To lease any water right to instream use, including under a split season instream lease, the lease must not result in injury to other water rights or enlargement of the existing right. The lease is reviewed by Department staff, including the local Watermaster, and is subject to a public comment period during which issues of injury and enlargement may be raised. If a proposed lease would result in injury or enlargement, the Department may reduce and/or condition the resulting instream use in the approving Final Order to prevent the injury or enlargement. If the injury or enlargement cannot be prevented, the Department will deny the lease application. No issues of injury have been identified associated with split season instream leases that were not addressed during the review process.

While the split season leasing program has not been as widely used as the regular leasing program, the Department anticipates that use and interest in this program will continue to grow. Our restoration partners, specifically The Deschutes River Conservancy and The Freshwater Trust, have identified that this program has been and will be a part of their restoration efforts. The Klamath Basin Rangeland Trust, another restoration partner, has not used the split season leasing program but has expressed interest in using the program. Each restoration partner has identified that one reason the program has not been used more frequently is the sunset date. The sunset date creates potential uncertainty in the future of this part of the leasing program and its use as a restoration and planning tool.

During the summer of 2012, the Department put together a Split Season Lease Work Group to assist in the review of the split season leasing program and the development of a legislative concept. This Work Group included representatives from the Klamath Basin Rangeland Trust, the Deschutes River Conservancy, The Freshwater Trust, the Oregon Farm Bureau, the Oregon Network of Watershed Councils, Water for Life, League of Oregon Cities, the Oregon Water

Resources Congress. Other members of the public, including one landowner, also participated in this work group by phone or e-mail. This group met on May 11, June 13, and August 27, 2012.

Several issues were highlighted during Work Group discussions, including:

- Whether the sunset date on the split season leasing program should be extended or eliminated. Some members were uncertain, given the light participation in the program, about the complete removal of the sunset date and supported extending the date. However, the restoration community expressed preference for removing the sunset date and identified the sunset date as a reason that the program has not been more widely used. Another suggested alternative to having a sunset date was a five-year reporting requirement to update the Commission on the status of the split season leasing program.
- One question was raised during the Work Group as to whether the more stringent provisions of the transfer statutes also applied to the general instream leasing program, including split season instream leases. Such provisions include a more robust evaluation of the application and a requirement of newspaper notice, which results in more time and expense for applicants.
- Concern was expressed that protections from injury reside only in program rules and not in statute. A suggestion was offered to add provisions into statute to clarify that all leases included a public notice opportunity, were approved by an order of the Department if the lease would not result in injury, and that a lease would be modified or revoked if found to result in injury following approval.

Based upon input from the Work Group, the Department has proposed making the following changes to ORS 537.348:

- Elimination of the sunset date for split season instream leases.
- Clarification that the transfer statutes only apply to Subsection 1 of ORS 537.348 for instream transfers.
- For instream leases and split season instream leases, adding text similar to that found in the existing Instream Leasing rules under OAR 690-077, confirm that:
 - Notice of a lease application will be provided upon receipt of the lease request.
 - Allegations of injury must be received within 21 days of that public notice.
 - Instream leases are approved by an order if the Department determines that the lease will not result in injury.
 - The Department may revoke or modify a lease if the lease is found to result in injury following its original approval.

The Department feels that the above modifications will clarify and strengthen the instream leasing program, including the split season leasing program.

IV. Summary

The instream leasing program is an integral part of the Department's streamflow restoration efforts. Split season instream leases are a part of that program. The split season leasing program has operated successfully for ten years. It has served as a useful tool for landowners and restoration groups, alike. The Department has received and processed 17 individual split season instream leases, and anticipates that with the removal of the sunset date, interest in the program will grow and broaden into other areas of the state. The Legislative Concept developed by the Department, with the assistance of the Split Season Lease Work Group, will help strengthen and build the split season lease program in particular, and the instream leasing program in general.

Attachments:

1. Attachment A – Annual Split Season Instream Leasing Activity
2. Attachment B – Split Season Instream Leasing Activity by Basin

Laura Wilke
503-986-0884



