

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

In the Matter of Instream Lease Application) DETERMINATION and FINAL ORDER ON
IL-1943, Umatilla County) PROPOSED INSTREAM LEASE

Authority

Oregon Revised Statute (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. Oregon Administrative Rule (OAR) Chapter 690, Division 077 implements the statutes and provides the Department's procedures and criteria for evaluating instream lease applications.

Lessor

Port of Umatilla
Kim Puzey, Manger
P.O. Box 879
Umatilla, OR 97882
kimpuzey@uci.net
lolly.anderson@andersonschultz.com

Findings of Fact

1. On February 6, 2023, the Port of Umatilla filed an application to lease a portion of Certificate 96360 for instream use. The Department assigned the application number IL-1943.
2. The portion of the right to be leased is as follows:

Certificate: 96360 in the name of Port of Umatilla (perfected under S-49497)
Use: Municipal Use
Priority Date: January 19, 1979
Quantity: **Rate:** 36.6 Cubic Foot per Second (CFS)
Source: Columbia River, a tributary of Pacific Ocean

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 N	28 E	WM	10	NE SE	1970 FEET NORTH AND 280 FEET WEST FROM THE SE CORNER OF SECTION 10

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Twp	Rng	Mer	Sec	Q-Q
4 N	28 E	WM	2	NW NE	4 N	28 E	WM	2	SW NE

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.

Twp	Rng	Mer	Sec	Q-Q
4 N	28 E	WM	2	NW NW
4 N	28 E	WM	2	SW NW
4 N	28 E	WM	2	SE NW
4 N	28 E	WM	2	NE SW
4 N	28 E	WM	2	NW SW
4 N	28 E	WM	2	SW SW
4 N	28 E	WM	2	SE SW
4 N	28 E	WM	2	NW SE
4 N	28 E	WM	2	SW SE
4 N	28 E	WM	3	NE NE
4 N	28 E	WM	3	NW NE
4 N	28 E	WM	3	SW NE
4 N	28 E	WM	3	SE NE
4 N	28 E	WM	3	NW SW
4 N	28 E	WM	3	SW SW
4 N	28 E	WM	3	SE SW
4 N	28 E	WM	3	NE SE
4 N	28 E	WM	3	NW SE
4 N	28 E	WM	3	SW SE
4 N	28 E	WM	3	SE SE
4 N	28 E	WM	4	NE NE
4 N	28 E	WM	4	SE NE
4 N	28 E	WM	4	NE SE
4 N	28 E	WM	4	SE SE
4 N	28 E	WM	8	NE NE
4 N	28 E	WM	9	NE NE
4 N	28 E	WM	9	SW NE
4 N	28 E	WM	9	SE NE
4 N	28 E	WM	9	NE SE
4 N	28 E	WM	9	NW SE
4 N	28 E	WM	9	SW SE
4 N	28 E	WM	9	SE SE
4 N	28 E	WM	10	ALL
4 N	28 E	WM	11	NW NE
4 N	28 E	WM	11	SW NE
4 N	28 E	WM	11	SE NE
4 N	28 E	WM	11	NE NW
4 N	28 E	WM	11	NW NW
4 N	28 E	WM	11	SW NW
4 N	28 E	WM	11	SE NW
4 N	28 E	WM	11	NE SW
4 N	28 E	WM	11	NW SW
4 N	28 E	WM	11	SW SW
4 N	28 E	WM	11	SE SW
4 N	28 E	WM	11	NE SE
4 N	28 E	WM	11	NW SE
4 N	28 E	WM	11	SW SE
4 N	28 E	WM	11	SE SE
4 N	28 E	WM	11	SE SE
4 N	28 E	WM	12	SW NW
4 N	28 E	WM	12	SE NW
4 N	28 E	WM	12	NE SW

Twp	Rng	Mer	Sec	Q-Q
4 N	28 E	WM	12	NW SW
4 N	28 E	WM	13	NW NE
4 N	28 E	WM	13	SW NE
4 N	28 E	WM	13	SE NE
4 N	28 E	WM	13	NE NW
4 N	28 E	WM	13	SW NW
4 N	28 E	WM	13	SE NW
4 N	28 E	WM	13	NE SW
4 N	28 E	WM	13	NW SW
4 N	28 E	WM	13	SW SW
4 N	28 E	WM	13	SE SW
4 N	28 E	WM	13	NE SE
4 N	28 E	WM	13	NW SE
4 N	28 E	WM	13	SW SE
4 N	28 E	WM	13	SE SE
4 N	28 E	WM	14	NE NE
4 N	28 E	WM	14	NW NE
4 N	28 E	WM	14	SW NE
4 N	28 E	WM	14	SE NE
4 N	28 E	WM	14	NE NW
4 N	28 E	WM	14	NW NW
4 N	28 E	WM	14	SW NW
4 N	28 E	WM	14	SE NW
4 N	28 E	WM	14	NE SE
4 N	28 E	WM	14	SE SE
4 N	28 E	WM	15	NE NE
4 N	28 E	WM	15	NW NE
4 N	28 E	WM	15	SW NE
4 N	28 E	WM	15	SE NE
4 N	28 E	WM	15	NE NW
4 N	28 E	WM	15	NW NW
4 N	28 E	WM	15	SW NW
4 N	28 E	WM	15	SE NW
4 N	28 E	WM	15	NE SW
4 N	28 E	WM	15	NW SW
4 N	28 E	WM	16	NE NE
4 N	28 E	WM	16	NW NE
4 N	28 E	WM	16	SW NE
4 N	28 E	WM	16	SE NE
4 N	28 E	WM	16	NE NW
4 N	28 E	WM	16	NW NW
4 N	28 E	WM	16	SE NW
4 N	28 E	WM	21	SW SE
4 N	28 E	WM	22	NE NE
4 N	28 E	WM	22	NW NE
4 N	28 E	WM	22	SW NE
4 N	28 E	WM	22	SE NE
4 N	28 E	WM	23	NW NE
4 N	28 E	WM	23	SW NE
4 N	28 E	WM	23	NE NW
4 N	28 E	WM	23	SE NW
4 N	28 E	WM	24	NE NW

Twp	Rng	Mer	Sec	Q-Q
4 N	28 E	WM	24	NW NW
4 N	28 E	WM	24	SW NW
4 N	28 E	WM	24	SE NW
4 N	28 E	WM	24	NE SW
4 N	28 E	WM	24	NW SW
4 N	28 E	WM	24	SW SW
4 N	28 E	WM	24	SE SW
4 N	28 E	WM	27	NE SW
4 N	28 E	WM	27	NW SW
4 N	28 E	WM	27	SW SW

Twp	Rng	Mer	Sec	Q-Q
4 N	28 E	WM	27	SE SW
4 N	28 E	WM	27	NW SE
4 N	28 E	WM	27	SW SE
4 N	28 E	WM	28	SW NE
4 N	28 E	WM	28	NE SE
4 N	28 E	WM	28	SE SE
4 N	28 E	WM	30	NE NW
4 N	28 E	WM	30	NW NW
4 N	28 E	WM	30	SW NW
4 N	28 E	WM	30	SE NW

3. Certificate 96360 does not specify the period of allowed use. However, use of water for municipal use is assumed to be year round use unless otherwise specified in the certificate.
4. 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.
5. The instream use is as follows:

Columbia River, a tributary of Pacific Ocean

Instream Point: From the POD (as described in Finding of Fact No. 2)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
96360	January 19, 1979	36.6	26497.19	January 1 through December 31

6. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
7. The protection of flows at the authorized point of diversion 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 point of the instream water right.
8. The total monthly quantities of water to be protected under the existing and proposed instream rights at the point will provide for a beneficial purpose.
9. The total monthly quantities of water to be protected instream under existing and proposed instream rights at the point do not exceed the estimated average natural flow.

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, 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.
12. 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.
13. The Lessor has requested that the lease begin in February 2023 and terminate in January 2028. An instream lease may be active for a period of five years and ends at the end of the season of use, therefore the lease will terminate on December 31, 2027. The lease may commence on the date this final order is signed.
14. Water under this lease is being used to serve as temporary mitigation for water use authorized under the Mid-Columbia Water Commission's Mitigation Use Rights (being Permits S-55061, S-55114, S-55190, S-55192, S-54633, S-55262, S-55263, and/or S-55167). Because a 27.29 cfs portion of Certificate 96360 is subject to curtailment under conditions set forth in Certificate 96360 to maintain the persistence of listed fish species, the Mid-Columbia Water Commission has executed and agreed to abide by the 2023 Fish Persistence Response and Curtailment Plan and is attached herein and incorporated as part of this final order approving IL-1943.
15. The curtailment plan incorporated herein as Attachment 1 may be revised, provided it is submitted to the Department prior to February 14 of each year.
16. The Lessor has requested the option of terminating the lease early with written notice to the Department.

Conclusions of Law

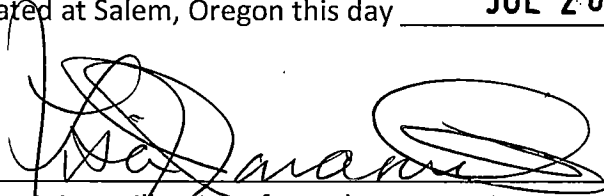
The Department concludes that the lease will not result in injury or enlargement, OAR 690-077-0077. The lease conforms to the applicable provisions of OAR 690-077-0015.

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 December 31, 2027. For multiyear leases, the lessor *shall* have the option of terminating the lease any time each year with written notice to the Department. The Lessor may only terminate the lease early with the consent of all parties to the lease. However, if the termination request is received less than 30-days prior to the instream use period (January 1) or after the water rights' original period of allowed use has begun, the Department may issue an order terminating the lease, but use of water may not be allowed until the following calendar year, unless the Director determines that enlargement would not occur.
4. In the event that target flows consistent with conditions to maintain the persistence of listed fish species set forth in Certificate 96360 are not met, the Mid-Columbia Water Commission will curtail Columbia River pumping and dry up lands authorized to receive water under a Mitigation Use Right (being Permits S-55061, S-55114, S-55190, S-55192, S-54633, S-55262, S-55263, and/or S-55167) in accordance with the 2023 Fish Persistence Response and Curtailment Plan executed and agreed to by Mid-Columbia Water Commission and incorporated herein as Attachment 1.

Dated at Salem, Oregon this day JUL 26 2023



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
Douglas E. Woodcock, Acting Director
Oregon Water Resources Department

Mailing date: JUL 27 2023

This document was prepared by Sarah Henderson. If you have any questions, please call 503-979-9872.

2023 FISH PERSISTENCE RESPONSE AND CURTAILMENT PLAN

This 2023 FISH PERSISTENCE RESPONSE AND CURTAILMENT PLAN (this “Curtilment Plan”) was adopted on the 6th day of July, 2023 (the “Effective Date”), by the Mid-Columbia Water Commission (“MCWC”).

RECITALS

1. The MCWC submitted a planned mitigation use map and table for 2023 mitigation use water rights (Mitigation Use Rights) to the Oregon Water Resources Department (OWRD) on February 14, 2023.
2. The Mitigation Use Rights can be pumped, unmitigated, from March 1 to April 14 and from October 1 to October 31 each year subject to Mitigation Use Right conditions.
3. Use of the Mitigation Use Rights between April 15 and September 30 require bucket-for-bucket mitigation (Mitigation Period).
4. The MCWC Mitigation Use Right Mitigation Plan and Mitigation Use table for 2023 includes 159.912 cfs of mitigation source water to provide bucket-for-bucket mitigation of 159.912 cfs of the 180 cfs of Mitigation Use Rights administered by the MCWC.
5. The proposed mitigation source water for 2023 includes 118.4 cfs of certificated water rights of the Port of Umatilla leased in-stream, which the Port of Umatilla has offered to the MCWC for lease as mitigation source water for Mitigation Use Rights.
6. OWRD has confirmed that up to 27.29 cfs of the Port of Umatilla water right Certificate 96360 may be subject to daily curtailment/diminishment due to Persistence of Fish conditions established by the Final Order issued on August 24, 2012, approving an Extension of Time for the Port of Umatilla's Permit S-49497 and subsequently incorporated into Certificate 96360 (perfected under the terms of Permit S-49497).
7. The conditions incorporated into the Port of Umatilla's Certificate 96360 to maintain the persistence of listed fish species include two recommended minimum flow targets at McNary Dam.
8. The conditions incorporated into Certificate 96360 to maintain the persistence of listed fish species cannot be triggered, nor are they required, from March 1 to April 9 or from September 1 to October 31 of any year.
9. From April 10 to June 30 the recommended minimum target flow of the Columbia River at McNary Dam that may trigger curtailment/diminishment under Certificate 96360 is 260,000 cubic-feet-per-second (cfs):

Attachment 1

10. From July 1 to August 31 the recommended minimum target flow of the Columbia River at McNary Dam that may trigger curtailment/diminishment under Certificate 96360 is 200,000 cfs.
11. Daily curtailment conditions set forth in Certificate 96360 are based upon diverted flow at the authorized points of diversion in Certificate 96360 and are based on a mathematical equation found in Certificate 96360.
12. The Port of Umatilla and the MCWC have agreed that mitigation source water provided by the Port of Umatilla will be subject to curtailment based on the conditions incorporated into Certificate 96360 to maintain the persistence of listed fish species.
13. The Port of Umatilla has applied for an instream lease of Certificate 96360 (IL-1943) that includes water supplies that if used through the Port of Umatilla diversion would be subject to curtailment due to conditions incorporated into Certificate 96360 to maintain the persistence of listed fish species.
14. On April 12, 2023, OWRD confirmed that in order for the MCWC to rely on IL--1943 for mitigation, the MCWC must reduce rate at the authorized points of diversion for the MCWC's Mitigation Use Rights consistent with the conditions incorporated into Certificate 96360 to maintain the persistence of listed fish species. The MCWC must also identify specific lands that will be precluded from receiving Columbia River water under any other water right during periods when all or some of the Certificate 96360 rate subject to conditions to maintain the persistence of listed fish species is curtailed.
15. The MCWC met on April 13, 2023, to discuss OWRD requirements of the 2023 Mitigation Use Rights and proposed restrictions on both rate and acreage of the MCWC pursuant to a proposed use map for the 2023 irrigation season.
16. The MCWC agreed to develop a temporary Persistence of Fish Response and Curtailment Plan to address the period from April 10 to August 31, during which conditions incorporated into Certificate 96360 to maintain the persistence of listed fish species may result in a curtailment of mitigation supply for up to 27.29 cfs of the 159.912 cfs of mitigation source water administered by the MCWC.
17. The MCWC will utilize a temporary Persistence of Fish Response and Curtailment Plan in 2023 as long as water supplies subject to conditions in Certificate 96360 to maintain the persistence of listed fish species are needed to meet temporary mitigation program needs of the MCWC.

AGREEMENT

2023 Fish Persistence Response and Curtailment Plan:

The MCWC hereby adopts the following as the 2023 Fish Persistence Response and Curtailment Plan:

1. On July 13, 2023, the MCWC provided a map that includes 1,633 acres of land, including the name of the landowner and identifying information for each field, which are authorized to receive water under a Mitigation Use Right (and are further authorized to be accredited corresponding mitigation water under Certificate 96930 leased instream under IL-1943) throughout the irrigation season, and for which the landowner is willing to curtail Columbia River pumping should target flows consistent with conditions to maintain the persistence of listed fish species set forth in Certificate 96930 not be met (Curtailment Map). The map shall be color coded based upon curtailment levels by cfs and prioritized by field for curtailment from 1.0 cfs to 27.29 cfs.
2. For all lands utilizing mitigation use rights identifying IL-1943 as mitigation source water that are subject to curtailment pursuant to Paragraph 1 of this Agreement section, except during those instances during the period April 10 through April 14 when target flows consistent with conditions to maintain the persistence of listed fish species set forth in Certificate 96360 are not met, those lands can pump to the maximum permitted rate of the Mitigation Use Right for the period of March 1 to April 14 and September 1 through October 31 subject to the conditions of the applicable Mitigation Use Right.
3. During the period of April 15 to August 31, for all lands utilizing mitigation rights identifying IL-1943 as mitigation source water that are subject to curtailment pursuant to Paragraph 1 of this Agreement section, those lands can pump to the maximum permitted rate as long as Columbia River flows at McNary Dam meet the target flow requirements contained in the conditions set forth in Certificate 96930 to maintain the persistence of listed fish species.
4. The MCWC shall inform Curtailment Map landowners via email to the landowner and diversion owner if the fish flow target at McNary Dam is about to drop below target flow requirements of the conditions set forth in Certificate 96930 to maintain the persistence of listed fish species. The MCWC shall inform the landowners that the 2023 Fish Persistence Response Plan is about to be triggered and shall begin providing daily reports on target flow levels and which specific lands shall be required to cease receiving Columbia River water based on priority established in the adopted Curtailment Map.
5. The MCWC shall provide a report to OWRD identifying the same lands identified in Paragraph 4 of this Agreement section and confirm that those lands are no longer receiving Columbia River water.

Attachment 1

6. Those lands shall cease pumping Columbia River from the date of notice of curtailment until date of notice that flows in the Columbia River have returned to the point where the conditions set forth in Certificate 96360 to maintain the persistence of listed fish species are no longer applicable to the mitigation source for the cut-off lands or August 31, whichever comes first.
7. Should a curtailed landowner have alternative sources of water (e.g., groundwater wells, Umatilla River water, re-use water, or stored water), the landowner shall inform the MCWC of its intention to switch to the alternative source(s) and document the measuring point where that source(s) can be confirmed as the source(s) of irrigation in lieu of mitigated Columbia River water.
8. This temporary 2023 Fish Persistence Response and Curtailment Plan shall terminate on September 1, 2023.

Instream Lease IL-1943:

Source: Columbia River, a tributary of the Pacific Ocean:

Certificate	Priority Date	Period of Use	Rate (CFS)	Volume (AF)
96360	January 19, 1979	January 1 through December 31	36.6	26497.19

Purpose: Conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, and other ecological values; recreation; pollution abatement; and navigation.

OWRD Consideration and Approval of Lease Applications.

OWRD will process and review the lease application and any renewal applications described in Paragraphs 1 and 2 of this Agreement section consistent with the statutes and rules governing such applications and renewal applications. If approved, OWRD agrees that the applications and any renewal applications shall satisfy the requirements set forth above.