

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

In the Matter of Instream Lease Application) DETERMINATION and
IL-1618, Wallowa County) FINAL ORDER ON 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

Sweyn Wall and Beckijo Smergut-Wall
PO Box 283
Wallowa, OR 97885

Lessee

The Freshwater Trust (TFT)
700 SW Taylor St., Suite 200
Portland, Oregon 97205

Findings of Fact

1. On May 3, 2017, Sweyn Wall, Beckijo Smergut-Wall and TFT filed an application to lease a portion of Certificates 3052, 3167, and 46527. The Department assigned the application number IL-1618.
2. The watermaster identified that water from the original source cannot be prevented from reaching portions of the place of use proposed to be transferred instream. To avoid enlargement, the area where use cannot be suspended may not be leased instream.
3. The portion of the first right to be leased is as follows:

Certificate: 3052 in the name of G.W. HEARING (confirmed by Wallowa River Decree, of record at Salem, in the Order Record of the State Water Board of the State of Oregon, in Volume 5, at page 172)

Use: Irrigation of 0.8 acres of land, Domestic and Stock Use, from Tract 2

Priority date: 1887 for Tract 2 and 1900 for Tract 1

Quantity: **Limit:** shall not exceed 1.5 acre-feet per acre during any period of 30 days prior to July 31st of each year, and thereafter not exceed 1.0 acre-foot per acre during the entire remainder of the irrigation season; and said right shall be subject to all other conditions and limitations contained in said decree

Source: Bear Creek, tributary to the Wallowa River

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tract	Acres
1 N	42 E	WM	10	SE NE	2	0.8
Total						0.8

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.

4. Based upon additional information provided by the Lessor, Lessee, and the Department's Watermaster, and a review of Department records, for the purposes of this instream lease, the description of the Authorized Place of Use in Certificate 3052 contains a scrivener's error and should be:

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tract	Acres
1 N	42 E	WM	10	NE SE	2	0.8
Total						0.8

5. Certificate 3052 does not provide measured distances of the location of the point of diversion. Based upon additional information provided by the Lessor and Lessee, for the purposes of this instream lease, the point of diversion on Bear Creek, tributary to the Wallowa River, is described as follows:

Twp	Rng	Mer	Sec	Q-Q	Latitude & Longitude
1 N	42 E	WM	10	NE SE	McDonald Ditch POD – 45 34' 41.40" N, 117 32' 33.48" W

6. The portion of the second right to be leased is as follows:

Certificate: 3167 in the name of MAYMIE E VANPELT (confirmed by Wallowa River Decree, of record at Salem, in the Order Record of the State Water Board of the State of Oregon, in Volume 5, at page 198)

Use: Irrigation of 9.8 acres of land and Stock Use

Priority date: 1887

Quantity: **Limit:** shall not exceed 1.5 acre-feet per acre during any period of 30 days prior to July 31st of each year, and thereafter not exceed 1.0 acre-foot per acre during the entire remainder of the irrigation season; and said right shall be subject to all other conditions and limitations contained in said decree

Source: Bear Creek, tributary to the Wallowa River

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	42 E	WM	10	SE NE	7.8
1 N	42 E	WM	10	NE SE	2.0
Total					9.8

7. The following table lists the place of use as described in existing certificate 3167 and a proposed re-description based on the application map and the Watermaster findings:

Twp	Rng	Sec	Original Description of Place of Use		Proposed Re-Description of Place of Use	
			Q-Q	Acres	Q-Q	Acres
1 N	42 E	10	SE NE	7.8	SE NE	6.1
1 N	42 E	10	NE SE	2.0	NE SE	3.7

8. Certificate 3167 does not provide measured distances of the location of the point of diversion. Based upon additional information provided by the Lessor and Lessee, for the purposes of this instream lease, the point of diversion on Bear Creek, tributary to the Wallowa River, is described as follows:

Twp	Rng	Mer	Sec	Q-Q	Latitude & Longitude
1 N	42 E	WM	10	NE SE	McDonald Ditch POD – 45 34' 41.40" N, 117 32' 33.48" W

9. The portion of the third right to be leased is as follows:

Certificate: 46527 in the name of JOHN MCDONALD (confirmed by Wallowa River Decree, entered of record at Salem, in the Order Record of the Water Resources Director, in Volume 5, at page 183)

Use: Irrigation of 13.8 acres of land, Domestic and Stock Use, from Tract 2

Priority date: 1887 for Tract 2, 1893 for Tract 3, and 1907 for Tract 1

Quantity: **Limit:** shall not exceed 1.5 acre-feet per acre during any period of 30 days prior to July 31st of each year, and thereafter not exceed 1.0 acre-foot per acre during the entire remainder of the irrigation season; and said right shall be subject to all other conditions and limitations contained in said decree.

Source: Bear Creek, tributary to the Wallowa River

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Tract	Acres
1 N	42 E	WM	10	SE NE	2	12.8
1 N	42 E	WM	10	SW NE	2	1.0
Total						13.8

10. Certificate 46527 does not provide measured distances of the location of the point of diversion. Based upon additional information provided by the Lessor, Lessee, and the Department's Watermaster, and a review of Department records, for the purposes of this instream lease, the point of diversion is on Bear Creek, tributary to the Wallowa River, and is described as follows:

Twp	Rng	Mer	Sec	Q-Q	Latitude & Longitude
1 N	42 E	WM	15	SW NE	Davis Ditch POD – 45 34' 06.64" N, 117 32' 58.98" W

11. Certificates 3052, 3167, and 46527, do not specify the irrigation season. However, the Wallowa River Decree establishes the irrigation season for the area as May 1 to October 1.

12. There is a supplemental irrigation water right, Certificate 80877, appurtenant to all or a portion of the lands described in Findings of Fact Nos.3 through 10. The Lessor and Lessee have requested that this water right not be included as part of this lease application. During the term of the lease, water use under this right will also be suspended during the instream use period.

13. 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.

14. A portion of the water diverted at the PODs return to Bear Creek and is available to downstream water right holders. To prevent injury and enlargement, the quantity of water that may be protected instream requires modification to account for return flows immediately below each POD.

15. The Lessor and Lessee request to protect water instream under Certificates 3052, 3167, and 46527 from Bear Creek into the Wallowa River. The quantity that may be leased instream from Bear Creek is not measurable in to the Wallowa River. Water may only be protected instream under these water rights in Bear Creek.

The instream use has been modified from the lease application to prevent injury and enlargement and is as follows: Bear Creek, tributary to the Wallowa River
Instream Point No. 1: At the McDonald Ditch POD (as described in Finding of Fact Nos. 5 and 8)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
3052	1887 – Tract 2	0.02	3.60	May 1 through July 31
		0.01	0.80	August 1 through September 30
		Total:	4.40	
3167	1887	0.24	44.10	May 1 through July 31
		0.08	9.80	August 1 through September 30
		Total:	54.00	

Instream Reach No. 1: From immediately below the McDonald Ditch POD to the Mouth of Bear Creek (as described in Finding of Fact Nos. 5 and 8)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
3052	1887 – Tract 2	0.02	2.70	May 1 through July 31
		0.01	0.76	August 1 through September 30
		Total:	3.46	
3167	1887	0.18	33.16	May 1 through July 31
		0.08	9.31	August 1 through September 30
		Total:	42.47	

Instream Point No. 2: At the Davis Ditch POD (as Described in Finding of Fact No.10)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
46527	1887 – Tract 2	0.34	62.10	May 1 through July 31
		0.11	13.80	August 1 through September 30
		Total:	75.90	

Instream Reach No. 2: From immediately below the Davis Ditch POD to the Mouth of Bear Creek (as described in Finding of Fact no. 10+)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
46527	1887 – Tract 2	0.26	46.58	May 1 through July 31
		0.10	13.11	August 1 through September 30
		Total:	59.69	

16. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water rights.
17. The protection of flows within the proposed reach 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. Return flows resulting from the exercise of the existing water right would re-enter the river within the reach of the instream water right below each POD. The quantity of water to be protected in Instream Reach Nos. 1 and 2 has been reduced to account for return flows.
18. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach will provide for a beneficial purpose.
19. The total monthly quantities of water to be protected instream under existing and proposed instream rights in the reach do not exceed the estimated average natural flow.
20. 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.
21. 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.
22. 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.
23. The Lessor and Lessee have requested that the lease terminate on October 1, 2017. The lease may commence on the date this final order is signed.


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 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 October 1, 2017.

Dated at Salem, Oregon this 15 day of June, 2017.



Dwight French, Water Right Services Division Administrator, for
Thomas M. Byler, Director, Oregon Water Resources Department

Mailing date: 6-22-17

*This document was prepared by Arla
Heard and if you have any questions,
please call 503-986-0806.*