

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

In the Matter of Instream Lease Application) DETERMINATION and
SL-52, Wallowa County) FINAL ORDER ON PROPOSED INSTREAM
) LEASE WITH MODIFICATIONS

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.

Lessors

Perry Johnston
81703 Hwy 82
Wallowa, OR 97885

Ken and Bobbie Baker
81705 Hwy 82
Wallowa, OR 97885

Lessee

The Freshwater Trust (TFT)
Attn: Jessica Humphreys
401 NE 1st Street Box #6
Enterprise, OR 97828

Findings of Fact

1. On April 17, 2020, Perry Johnston, Ken and Bobbie Baker, and TFT filed an application to lease a portion of Certificates 94782, 94348, 94778, and the entirety of Certificates 94163, 94781, 94780, and 94779, as a split season instream use. Certificate 94163 was superseded by confirming Certificate 95217. The Department assigned the Split Season Lease Application number SL-52.
2. On June 10, 2020, the Lessors through TFT modified the application to clarify the lands to be leased.
3. The rates listed in the application were slightly different than the rates calculated by the Department. This difference is due to rounding issues.
4. The portion of the first right to be leased is as follows:
Certificate: 94782 in the name of S.W. Miles (confirmed under the Wallowa River Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 5, at Page 184-185)

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.

Use: Irrigation of 6.2 Acres in Tract 1
Priority Date: 1882 for Tract 1
Quantity: **Limit:** shall not exceed 1.5 acre-feet per acre during any period of 30 days prior to July 31 of each year, and thereafter not to exceed 1.0 acre-foot per acre during the entire remainder of the irrigation season
Source: LOSTINE RIVER (aka South Fork Wallowa River), tributary to the Wallowa River

Authorized Points of Diversion (POD):

| Twp | Rng | Mer | Sec | Q-Q | Tract No. | Ditch Name |
|-----|------|-----|-----|-------|-----------|-------------|
| 1 S | 43 E | WM | 9 | SE NE | 1 | MILES DITCH |

Authorized Place of Use:

| IRRIGATION | | | | | | |
|--------------------|------|-----|-----|-------|-------|------------|
| Twp | Rng | Mer | Sec | Q-Q | Tract | Acres |
| 1 N | 43 E | WM | 32 | NW SE | 1 | 1.4 |
| 1 N | 43 E | WM | 32 | SW SE | 1 | 4.8 |
| Total Acres | | | | | | 6.2 |

5. Certificate 94782 does not provide a full description of the point of diversion of the Miles Ditch. However, based upon additional information provided by the Lessee, a review of the Department's records, and the Department's Watermaster, the Lessors have been utilizing the downstream Foster Ditch for a point of diversion. Therefore, for purposes of this instream lease, the point of diversion from the Lostine River, is described and located approximately as follows:

| Twp | Rng | Mer | Sec | Q-Q | Latitude / Longitude |
|-----|------|-----|-----|-------|---|
| 1 S | 43 E | WM | 4 | NE SW | FOSTER DITCH: 320 FEET SOUTH AND 625 FEET WEST OF THE CENTER OF SECTION 4; LATITUDE: 45.50716, LONGITUDE: -117.45096 |

6. Certificate 94782 does not include a rate limitation. The on-farm rate of 0.15 CFS (rounded) identified by the Lessors and Lessee as part of the split season lease is equivalent to approximately 1/40 CFS per acre.
7. The entirety of the second right to be leased is as follows:

Certificate: 95217 in the names of Ken and Bobbie Baker and Perry Johnston (confirmed under the Wallowa River Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 5 at Pages 184-185)
Use: IRRIGATION of 70.8 ACRES, DOMESTIC AND STOCK
Priority Date: 1882 (Tract 1)
Rate: 1.16 CUBIC FOOT PER SECOND
Limit/Duty: The amount of water to which this right is entitled for irrigation shall not exceed 1.0 acre-foot per acre during any period of 30 days prior to July 31 of each year, and thereafter not to 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: Lostine River (aka South Fork Wallowa River), tributary to the Wallowa River

Authorized Point of Diversion:

| Twp | Rng | Mer | Sec | Q-Q | Measured Distances |
|-----|------|-----|-----|-------|--|
| 1 S | 43 E | WM | 9 | SE NE | MILES DITCH: (Latitude: 45.494134; Longitude: -117.438922) |
| 1 S | 43 E | WM | 4 | NE SW | FOSTER DITCH: 320 FEET SOUTH AND 625 FEET WEST OF THE CENTER OF SECTION 4; LATITUDE: 45.50716, LONGITUDE: -117.45096 |

Authorized Place of Use:

| Twp | Rng | Mer | Sec | Q-Q | Tax Lot | Acres |
|-----|------|-----|-----|-------|---------|-------|
| 1 N | 43 E | WM | 32 | NW SE | 8600 | 36.0 |
| 1 N | 43 E | WM | 32 | SW SE | 8600 | 34.8 |
| | | | | | Total | 70.8 |

8. Certificate 95217 lists two points of diversion. for purposes of this instream lease, the point of diversion from the Lostine River is the Foster Ditch POD.
9. Certificate 95217 does not include a rate limitation. The on-farm rate of 1.16 CFS (rounded) identified by the Lessors and Lessee as part of the split season lease is equivalent to approximately 1/60 CFS per acre.
10. The portion of the third right to be leased is as follows:

Certificate: 94348 in the name S.L. Magill (confirmed under the Wallowa River Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 5 at Page 181)

Use: Irrigation of 3.9 Acres

Priority Date: 1889 (Tract 3)

Quantity: **Limit:** shall not exceed 1.5 acre-feet per acre during any period of 30 days prior to July 31 of each year, and thereafter not to exceed 1.0 acre-foot per acre during the entire remainder of the irrigation season

Source: SOUTH FORK OF WALLOWA RIVER (Lostine River), tributary to the Wallowa River

Authorized Point of Diversion (POD): None listed on Certificate

Authorized Place of Use:

| IRRIGATION (Tract 3) | | | | | |
|----------------------|------|-----|-----|-------|-------|
| Twp | Rng | Mer | Sec | Q-Q | Acres |
| 1 N | 43 E | WM | 32 | SE NW | 3.9 |

11. Certificate 94348 does not provide a description of the point of diversion. However, based upon additional information provided by the Lessee, a review of the Department's records, and the Department's Watermaster, the point of diversion is located at the Foster Ditch. Therefore, for purposes of this instream lease, the point of diversion from the Lostine River, is described and located approximately as follows:

| Twsp | Rng | Mer | Sec | Q-Q | Latitude / Longitude |
|------|------|-----|-----|-------|---|
| 1 S | 43 E | WM | 4 | NE SW | FOSTER DITCH: 320 FEET SOUTH AND 625 FEET WEST OF THE CENTER OF SECTION 4; LATITUDE: 45.50716, LONGITUDE: -117.45096 |

12. Certificate 94348 does not include a rate limitation. The on-farm rate of 0.10 CFS (rounded) identified by the Lessors and Lessee as part of the split season lease is equivalent to approximately 1/40 CFS per acre.

13. The entirety of the fourth right to be leased is as follows:

Certificate: 94781 in the names of Kenneth M. and Bobbie Lou Baker, and Perry M. Johnston (confirmed under the Wallowa River Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 5 at Page 177)

Use: Irrigation of 82.5 Acres and Stock

Priority Date: 1883

Quantity: **Limit:** shall not exceed 1.0 acre-foot per acre during any period of 30 days prior to July 31 of each year, and thereafter not to exceed 1.0 acre-foot per acre during the entire remainder of the irrigation season

Source: LOSTINE RIVER, tributary to the Wallowa River

Authorized Point of Diversion (POD):

| Twsp | Rng | Mer | Sec | Q-Q | Measured Distance |
|------|------|-----|-----|-------|---|
| 1 S | 43 E | WM | 4 | NE SW | FOSTER DITCH: 320 FEET SOUTH AND 625 FEET WEST OF THE CENTER OF SECTION 4; LATITUDE: 45.50716, LONGITUDE: -117.45096 |

Authorized Place of Use:

| IRRIGATION | | | | | |
|------------|------|-----|-----|-------|-------|
| Twsp | Rng | Mer | Sec | Q-Q | Acres |
| 1 N | 43 E | WM | 32 | SW NE | 37.4 |
| 1 N | 43 E | WM | 32 | SE NE | 16.0 |
| 1 N | 43 E | WM | 32 | NE SE | 29.1 |
| Total | | | | | 82.5 |

14. Certificate 94327 does not include a rate limitation. The on-farm rate of 1.35 CFS (rounded) identified by the Lessors and Lessee as part of the split season lease is equivalent to approximately 1/60 CFS per acre.

15. The entirety of the of the fifth right to be leased is as follows:

Certificate: 94780 in the names of Kenneth M. and Bobbie Lou Baker, and Perry M. Johnston (confirmed under the Wallowa River Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 5 at Page 177)

Use: Irrigation of 0.3 Acre and Stock

Priority Date: 1883

Quantity: Limit: shall not exceed 1.5 acre-foot per acre during any period of 30 days prior to July 31 of each year, and thereafter not to exceed 1.0 acre-foot per acre during the entire remainder of the irrigation season
Source: LOSTINE RIVER, tributary to the Wallowa River

Authorized Point of Diversion (POD):

| Twp | Rng | Mer | Sec | Q-Q | Measured Distance |
|-----|------|-----|-----|-------|---|
| 1 S | 43 E | WM | 4 | NE SW | FOSTER DITCH: 320 FEET SOUTH AND 625 FEET WEST OF THE CENTER OF SECTION 4; LATITUDE: 45.50716, LONGITUDE: -117.45096 |

Authorized Place of Use:

| IRRIGATION | | | | | |
|------------|------|-----|-----|-------|-------|
| Twp | Rng | Mer | Sec | Q-Q | Acres |
| 1 N | 43 E | WM | 32 | SW NE | 0.3 |

16. Certificate 94780 does not include a rate limitation. The on-farm rate of 0.008 CFS (rounded) identified by the Lessors and Lessee as part of the split season lease is equivalent to approximately 1/40 CFS per acre.

17. The entirety of the sixth right to be leased is as follows:

Certificate: 94779 in the name of William Sherod (confirmed under the Wallowa River Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 5 at Page 193)

Use: Irrigation of 71.8 Acres, Domestic and Stock Use

Priority Date: 1883 for Tract 3

Quantity: Rate: 1.17 Cubic Feet Per Second (CFS)

Limit: shall not exceed 1.5 acre-feet per acre during any period of 30 days prior to July 31 of each year, and thereafter not to exceed 1.0 acre-foot per acre during the entire remainder of the irrigation season

Source: LOSTINE RIVER (aka South Fork Wallowa River), tributary to the Wallowa River

Authorized Point of Diversion (POD): Not Listed on Certificate

Authorized Place of Use:

| Twp | Rng | Mer | Sec | Q-Q | Acres |
|-------|------|-----|-----|-------|-------|
| 1 N | 43 E | WM | 29 | SE SW | 2.2 |
| 1 N | 43 E | WM | 29 | SW SW | 13.4 |
| 1 N | 43 E | WM | 32 | NW NE | 0.4 |
| 1 N | 43 E | WM | 32 | NE NW | 34.4 |
| 1 N | 43 E | WM | 32 | NW NW | 21.4 |
| Total | | | | | 71.8 |

18. Certificate 94779 does not provide the location of the point of diversion. Based upon additional information provided by the Lessor, Lessee, a review of the Department's records, and the Department's Watermaster, for purposes of this instream lease, the point of diversion on the Lostine River is described and located approximately as follows:

| Twp | Rng | Mer | Sec | Q-Q | Latitude / Longitude |
|-----|------|-----|-----|-------|---|
| 1 N | 43 E | WM | 33 | SW SW | CLEARWATER DITCH: 1283 FEET NORTH AND 313 FEET EAST OF THE SW CORNER OF SECTION 33; Latitude: 45.518688; Longitude: -117.469878 |

19. Certificate 97749 does not include a rate limitation. The on-farm rate of 1.17 CFS identified by the Lessors and Lessee as part of the split season lease is equivalent to approximately 1/60 CFS per acre.

20. The portion of the seventh right to be leased is as follows:

Certificate: 94778 in the name of William Sherod (confirmed under the Wallowa River Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 5 at Page 193)
Use: Irrigation of 8.0 Acres, Domestic and Stock Use
Priority Date: 1883
Quantity: **Limit:** shall not exceed 1.5 acre-feet per acre during any period of 30 days prior to July 31 of each year, and thereafter not to exceed 1.0 acre-foot per acre during the entire remainder of the irrigation season
Source: LOSTINE RIVER (aka South Fork Wallowa River), tributary to the Wallowa River

Authorized Point of Diversion (POD): Not Listed on Certificate

Authorized Place of Use:

| Twp | Rng | Mer | Sec | Q-Q | Acres |
|-------|------|-----|-----|-------|-------|
| 1 N | 43 E | WM | 32 | NW NE | 5.5 |
| 1 N | 43 E | WM | 32 | NW NW | 2.5 |
| Total | | | | | 8.0 |

21. Certificate 94778 does not provide the location of the point of diversion. Based upon additional information provided by the Lessor, Lessee, a review of the Department's records, and the Department's Watermaster, for purposes of this instream lease, the point of diversion on the Lostine River is described and located approximately as follows:

| Twp | Rng | Mer | Sec | Q-Q | Latitude / Longitude |
|-----|------|-----|-----|-------|---|
| 1 N | 43 E | WM | 33 | SW SW | CLEARWATER DITCH: 1283 FEET NORTH AND 313 FEET EAST OF THE SW CORNER OF SECTION 33; Latitude: 45.518688; Longitude: -117.469878 |

22. Certificate 97749 does not include a rate limitation. The on-farm rate of 0.20 CFS (rounded) identified by the Lessors and Lessee as part of the split season lease is equivalent to approximately 1/40 CFS per acre.

23. Certificates 94782, 95217, 94348, 94781, 94780, 94779, and 94778 do not specify the irrigation season. However, the Wallowa River Decree establishes the irrigation season for the area as May 1 through September 30.

24. There are supplemental irrigation water rights, Certificates 94160 and 94161, appurtenant to all or a portion of the lands described in Findings of Fact Nos. 4, 7, 10, 13, 15, 17, and 20. The Lessors and Lessee have requested that these water rights not be included as part

of this lease application. During the term of the lease, water use for the lands covered under this lease for these rights will also be suspended during the instream use period.

25. 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.
26. The instream lease application, as proposed, is a split season lease.

Use of water under the water rights included in this lease may continue for the existing use up to the rates and volumes specified in the below table consistent with the water right limitations identified in Findings of Fact Nos. 4 through 23. The rates have been modified from the lease application due to rounding issues.

Foster Ditch:

| Certificate | Priority | Acres | On-Farm Rate (CFS) | On-Farm Volume (AF) | On-Farm Use Period |
|-------------|----------|-------|--------------------|---------------------|-----------------------|
| 94782 | 1882 | 6.2 | 0.160 | 28.52 | May 1 through July 31 |
| 95217 | 1882 | 70.8 | 1.160 | 211.68 | |
| 94348 | 1889 | 3.9 | 0.100 | 17.94 | |
| 94781 | 1883 | 82.5 | 1.350 | 246.35 | |
| 94780 | 1883 | 0.3 | 0.008 | 1.38 | |
| Total | | 163.7 | 2.808 | 505.87 | |

Clearwater Ditch:

| Certificate | Priority | Acres | On-Farm Rate (CFS) | On-Farm Volume (AF) | On-Farm Use Period |
|-------------|----------|-------|--------------------|---------------------|-----------------------|
| 94779 | 1883 | 71.8 | 1.17 | 213.50 | May 1 through July 31 |
| 94778 | 1883 | 8.0 | 0.20 | 36.80 | |
| Total | | 92.9 | 1.37 | 250.30 | |

27. Use of water under the water rights included in this lease may be utilized for instream use during the period of August 1 through September 30, up to the rates and volumes specified in the table below consistent with the water right limitations identified in Findings of Fact Nos. 4 through 23. Due to rounding issues, the rates have been modified from the lease application.

| Certificate | Priority | Instream Rate | Instream Volume |
|-------------|----------|---------------|-----------------|
| 94782 | 1882 | 0.05 | 6.2 |
| 95217 | 1882 | 0.59 | 70.8 |
| 94348 | 1889 | 0.03 | 3.9 |
| 94781 | 1883 | 0.68 | 82.5 |
| 94780 | 1883 | 0.002 | 0.3 |
| 94779 | 1883 | 0.59 | 71.8 |
| 94778 | 1883 | 0.07 | 8.0 |
| Total | | 2.012 | 243.5 |

28. A portion of the water diverted at the points of diversion returns to the Lostine River within the proposed reaches and is available to downstream water right holders. To prevent injury to downstream water right holders and enlargement, the quantity of water

that may be protected instream requires modification and return flows should be accounted for immediately below each point of diversion. The reduction in the instream water rights from the original quantities identified in Finding of Fact No. 27 is as follows:

| Reach | Percent |
|---|---------|
| From immediately below the Foster Ditch points of diversion at Latitude: 45.50716, Longitude: -117.45096 to the Clearwater Ditch at Latitude: 45.51866, Longitude -117.469878 | 5% |
| From the Clearwater Ditch points of Diversion at Latitude: 45.51866, Longitude -117.469878 to the Mouth of the Lostine River at the confluence with the Wallowa River | 10% |

OAR 690-077-0015(8).

29. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:

Instream Point No. 1: At the Foster Ditch POD (as described in Findings of Fact Nos. 5, 7, 11, 13, and 15)

| Certificate | Priority | Instream Rate (CFS) | Instream Volume (AF) | Period Protected Instream |
|-----------------------|----------|---------------------|----------------------|-------------------------------|
| 94782 | 1882 | 0.050 | 6.2 | August 1 through September 30 |
| 95217 | 1882 | 0.585 | 70.8 | |
| 94348 | 1889 | 0.030 | 3.9 | |
| 94781 | 1883 | 0.680 | 82.5 | |
| 94780 | 1883 | 0.002 | 0.3 | |
| Total Instream | | 1.347 | 163.7 | |

Instream Reach No. 1: From immediately below the Foster Ditch POD to the Clearwater Ditch POD (as described in Finding of Fact Nos. 18 and 21.)

| Certificate | Priority | Instream Rate (CFS) | Instream Volume (AF) | Period Protected Instream |
|-----------------------|----------|---------------------|----------------------|-------------------------------|
| 94782 | 1882 | 0.05 | 5.9 | August 1 through September 30 |
| 95217 | 1882 | 0.56 | 67.3 | |
| 94348 | 1889 | 0.03 | 3.7 | |
| 94781 | 1883 | 0.65 | 78.4 | |
| 94780 | 1883 | 0.00 | 0.3 | |
| Total Instream | | 1.290 | 155.6 | |

Instream Point No. 2: At the Clearwater Ditch POD

| Certificate | Priority | Instream Rate (CFS) | Instream Volume (AF) | Period Protected Instream |
|-----------------------|----------|---------------------|----------------------|-------------------------------|
| 94782 | 1882 | 0.05 | 5.9 | August 1 through September 30 |
| 95217 | 1882 | 0.56 | 67.3 | |
| 94348 | 1889 | 0.03 | 3.7 | |
| 94781 | 1883 | 0.65 | 78.4 | |
| 94780 | 1883 | 0.00 | 0.3 | |
| 94779 | 1883 | 0.59 | 71.8 | |
| 94778 | 1883 | 0.07 | 8.0 | |
| Total Instream | | 1.95 | 235.4 | |

Instream Reach No. 2: From the Clearwater Ditch POD to the mouth of the Lostine River (RM 0.0) at the confluence with the Wallowa River

| Certificate | Priority | Instream Rate (CFS) | Instream Volume (AF) | Period Protected Instream |
|-----------------------|----------|---------------------|----------------------|-------------------------------|
| 94782 | 1882 | 0.05 | 5.3 | August 1 through September 30 |
| 95217 | 1882 | 0.53 | 60.5 | |
| 94348 | 1889 | 0.03 | 3.3 | |
| 94781 | 1883 | 0.61 | 70.5 | |
| 94780 | 1883 | 0.00 | 0.3 | |
| 94779 | 1883 | 0.53 | 64.6 | |
| 94778 | 1883 | 0.06 | 7.2 | |
| Total Instream | | 1.81 | 211.7 | |

30. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
31. 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 instream has been reduced below each affected POD to account for return flows.
32. 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.
33. 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.
34. 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.
35. 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.
36. 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.

37. The Lessors and Lessee have requested that the lease terminate on October 1, 2020. 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 and modified herein is APPROVED.
2. During the term of this lease, the places of use will continue to receive water as identified in Finding of Fact No. 26 during the period May 1 through July 31 for irrigation. For the remainder of the irrigation season, during the term of this lease, the former place of use will not receive water as part of these rights, any supplemental rights (including Certificates 94160 and 94161), or any other layered water rights for irrigation use, including groundwater registrations
3. The term of the lease will commence upon approval of this instream lease, and terminate on October 1, 2020.

Dated at Salem, Oregon this AUG 04 2020



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
THOMAS M. BYLER, Director
Oregon Water Resources Department

*This document was prepared by Teri Hranac.
If you have any questions, please call
503-986-0881.*

Mailing date: AUG 05 2020