

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

In the Matter of Instream Lease Application) DETERMINATION and
SL-45, 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
700 SW Taylor St., Suite 200
Portland, Oregon 97205

Findings of Fact

1. On April 15, 2019, Perry Johnston, Ken and Bobbie Baker, and The Freshwater Trust (TFT) filed an application to lease a portion of Certificates 3153, 3091, 3077, and 94163, as a split season instream use. The Department assigned the Split Season-Lease Application number SL-45.
2. On April 17, 2019, the Lessors through TFT modified the application to clarify the lands to be leased.
3. On April 18, 2019, as the result of an historic point of diversion transfer, Certificate 3077 was superseded by Certificate 94327.
4. The on-farm rates listed in the application were slightly different than the rates calculated by the Department. On April 22, 2019, TFT concurred with the on-farm rates prepared by the Department.

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.

5. The portion of the first right to be leased is as follows:

Certificate: 94163 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)

Use: Irrigation of 77.4 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 31st 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	37.4
1 N	43 E	WM	32	SW SE	1	40.0
Total Acres						77.4

6. Certificate 94163 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

7. Certificate 94163 does not include a rate limitation. The on-farm rate of 1.95 CFS (rounded) identified by the Lessors and Lessee as part of the split season lease is equivalent to approximately 1/40th CFS per acre.

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

Certificate: 94327 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 82.8 Acres

Priority Date: 1883

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 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	37.7
1 N	43 E	WM	32	SE NE	16.0
1 N	43 E	WM	32	NE SE	29.1
Total					82.8

9. Certificate 94327 does not include a rate limitation. The on-farm rate of 2.09 CFS (rounded) identified by the Lessors and Lessee as part of the split season lease is equivalent to approximately 1/40th CFS per acre.
10. The portion of the third right to be leased is as follows:

Certificate: 3153 in the name 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 79.4 Acres

Priority Date: 1883

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 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:

IRRIGATION					
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	5.5
1 N	43 E	WM	32	NE NW	34.4
1 N	43 E	WM	32	NW NW	23.9
Total					79.4

11. Certificate 3153 does not provide the specific 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	Measured Distance
1 N	43 E	WM	33	SW SW	CLEARWATER DITCH: 1283 FEET NORTH AND 313 FEET EAST OF THE SW CORNER OF SECTION 33

12. Certificate 3153 does not include a rate limitation. The on-farm rate of 2.00 CFS (rounded) identified by the Lessors and Lessee as part of the split season lease is equivalent to approximately 1/40th CFS per acre.

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

Certificate: 3091 in the name of 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 FOR Tract 3

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 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:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	43 E	WM	32	SE NW	3.9

14. Certificate 3091 does not provide the specific 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	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

15. Certificate 3091 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 1/40th CFS per acre.

16. Certificates 94163, 94327, 3153, and 3091 do not specify the irrigation season. However, the Wallowa River Decree establishes the irrigation season for the area as May 1 through September 30.

17. 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. 5, 8, 10, and 13. The

Lessors and Lessee have requested that these water right 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.

18. 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.

19. 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. 5 through 15. The rates have been modified from the lease application as identified in Finding of Fact No. 4.

Foster Ditch:

Certificate	On-Farm Rate (CFS)	On-Farm Volume (AF)	On-Farm Use Period
94163 – Tract 1	1.95	356.0	May 1 through July 31
94327	2.09	380.9	May 1 through July 31
3091	0.10	17.9	
Total	4.14	754.8	

Clearwater Ditch:

Certificate	On-Farm Rate (CFS)	On-Farm Volume (AF)	On-Farm Use Period
3153	2.00	365.2	May 1 through July 31

20. 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. 19 is as follows:

Reach	Percent
From immediately below the Foster Ditch points of diversion to the Clearwater Ditch Point of Diversion located in the SWSW Section 33, T1N, R43E, W.M.	2%
From the Clearwater Ditch Point of Diversion to the Mouth of the Lostine River at the confluence with the Wallowa River	10%

OAR 690-077-0015(8).

21. 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

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
94163	1882	0.64	77.4	August 1 through September 30
94327	1883	0.68	82.8	
3091	1889	0.03	3.9	
Total Instream		1.35	164.1	

Instream Reach No. 1: From immediately below the Foster Ditch POD to the Clearwater Ditch POD (as described in Finding of Fact No. 11)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
94163	1882	0.63	75.9	August 1 through September 30
94327	1883	0.67	81.1	
3091	1889	0.03	3.8	
Total Instream		1.33	160.8	

Instream Point No. 2: At the Clearwater Ditch POD

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
94163	1882	0.63	75.9	August 1 through September 30
94327	1883	0.67	81.1	
3091	1889	0.03	3.8	
3153	1883	0.66	79.4	
Total Instream		1.99	240.2	

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 Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
94163	1882	0.56	68.3	August 1 through September 30
94327	1883	0.60	73.0	
3091	1889	0.03	3.4	
3153	1883	0.59	71.5	
Total Instream		1.78	216.2	

22. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
23. The protection of flows within the proposed reach is appropriate, considering:
- The instream water use begins at the recorded point of diversion;
 - The location of confluences with other streams downstream of the point of diversion.
 - 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.
24. 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.
25. 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.
26. 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.
27. 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.
28. 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.
29. The Lessors and Lessee have requested that the lease terminate on October 1, 2019. 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 this lease, the place of use will continue to receive water as identified in Finding of Fact No. 19 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 this right, 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, 2019.

Dated at Salem, Oregon this MAY 23 2019.



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: MAY 24 2019