

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

In the Matter of Instream Lease Application) DETERMINATION and FINAL ORDER ON
IL-1797, Union 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

Buffalo Peak Land & Livestock, LLC
Andrea M. Malmberg
1782 South Main Street
Union, Oregon 97883

Lessee

The Freshwater Trust (TFT)
401 NE 1st Street
Enterprise, Oregon 97828

Findings of Fact

1. On April 6, 2020, Buffalo Peak Land & Livestock, LLC and TFT filed an application involving the entirety of Certificate 82530 and portions of Certificates 3485 and 6264 for instream use. The Department assigned the application number IL-1797.
2. On June 8, 2020, the Department notified the Lessee of acreage that could not be leased instream due to road, buildings and sub-irrigated ground. On June 10, 2020, the Lessee submitted revised application pages with those acres removed from the application.

3. The first right to be leased is as follows:

Certificate: 82530 in the name of Don E. Robinson (perfected under Permit S-43399)
Use: Irrigation of 23.2 acres
Priority Date: June 28, 1978
Quantity: **Rate:** 0.58 Cubic Foot per Second (CFS)
Volume: 69.6 Acre-Feet (AF)
Limit: The amount of water used for irrigation together with the amount secured under any other right existing for the same lands, is limited to a diversion of one-fortieth of one cubic foot per second (or its equivalent) and 3.0 acre-feet for each acre irrigated during the irrigation season of each year.
Source: Catherine Creek, tributary to Grande Ronde River

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.

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	40 E	WM	29	NE NE	840 FEET SOUTH AND 1170 FEET WEST FROM THE NE CORNER OF SECTION 29

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	40 E	WM	20	SW NE	23.2

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

Certificate: 3485 in the name of State Ditch Company, a corporation (perfected under Permit S-765)
Use: Irrigation of 15.0 acres,
Priority Date: April 26, 1911
Quantity: **Rate:** 0.189 Cubic Foot per Second (CFS)
Volume: 45.0 Acre-Feet (AF)
Source: Catherine Creek, tributary to Grande Ronde River
Authorized Point of Diversion (POD): None described

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	40 E	WM	20	NW SE	10.0
4 S	40 E	WM	20	SW NE	5.0
Total Acres					15.0

5. Certificate 3485 does not provide a description of the location of the point of diversion. Based upon additional information provided by the Lessor and Lessee, for purposes of this instream lease, the point of diversion for both Certificates 3485 and 82530 is described as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
4 S	40 E	WM	29	NE NE	LATITUDE: 45.193 LONGITUDE: -117.834

6. Certificate 3485 does not specify a rate and duty limit per acre. However, the Grande Ronde River Decree specifies the rate limit as one-fortieth cfs per acre and the duty limit as 3.0 acre-feet for each acre irrigated.

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

Certificate: 6264 in the name of JACK FICKLE (confirmed by decree of the Circuit Court of the State of Oregon for Union County, and of record at Salem, in the Volume 8, at Page 1)
Use: IRRIGATION of 128.9 ACRES; BEING 79.1 ACRES FROM TRACT 1 AND 49.8 ACRES FROM TRACT 2
Priority Date: 1864
Rate: 3.25 CUBIC FEET PER SECOND; BEING 1.99 CFS FROM TRACT 1 AND 1.26 CFS FROM TRACT 2

Limit/Duty: The amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed 3.0 acre-feet per acre in any irrigation season, diverted at a rate of not to exceed ONE-FORTIETH of a cubic foot per second per acre.

Source: LITTLE CREEK, tributary to CATHERINE CREEK
 CATHERINE CREEK, tributary to GRANDE RONDE RIVER

Authorized Points of Appropriation: None described

Authorized Place of Use:

Tract 1 – Little Creek					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	40 E	WM	17	NW SW	16.5
4 S	40 E	WM	17	SW SW	31.5
4 S	40 E	WM	18	NE SE	26.6
4 S	40 E	WM	18	SE SE	4.5
Total					79.1

Tract 2 – Catherine Creek					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	40 E	WM	19	NE NE	2.2
4 S	40 E	WM	20	NW NW	13.0
4 S	40 E	WM	20	SW NW	11.5
4 S	40 E	WM	20	SE NW	14.6
4 S	40 E	WM	20	NE SW	8.5
Total					49.8

8. Certificate 6264 does not provide a description of the location of the points of diversion. Based upon additional information provided by the Lessor and Lessee, for the purpose of this instream lease, the points of diversion are located as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
4 S	40 E	WM	20	NW NW	LITTLE CREEK: LATITUDE 45.209; LONGITUDE -117.845
4 S	40 E	WM	19	NE NE	CATHERINE CREEK: LATITUDE 45.193; LONGITUDE -117.834

9. Certificates 3485, 6264 and 82530 do not specify the irrigation season; nor is an irrigation season specified by Basin Program or Decree. For the purposes of instream leasing, an irrigation season of March 1 through October 31, consistent with OAR 690-250-0070, shall be used to establish when water may be protected instream.
10. 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.
11. As defined by OAR 690-077-0077 (3) and (4), the proposed change could result in enlargement of the right if not conditioned to prevent use of more water than could have been beneficially used without waste for the existing authorized use. The best currently

available information indicates that the most consumptive crop in the area is pasture with a net irrigation requirement of 2.44 acre feet per acre. (*Oregon Crop Water Use and Irrigation Requirements* (Cuenca, 1992)). The maximum duty of water that could be transferred without enlargement would be 2.44 acre feet (af) per acre.

Therefore, to prevent enlargement of these rights, the maximum diverted annual volume of water will be reduced immediately below the PODs as described in the instream reaches below. The new use under Certificate 82530 is limited to annual diversion of 56.6 acre feet (23.2 acres x 2.44 af = 56.6 af). The cubic feet per second (CFS) was calculated by taking the volume / the number of days in the season / 1.983471. $((56.6 \text{ af} / 121) / 1.983471 = 0.23 \text{ CFS})$.

The new use under Certificate 3485 is limited to an annual diversion of 36.6 acre feet (15.0 acre x 2.44 af = 36.6 af). The cubic feet per second (CFS) was calculated by taking the volume / the number of days in the season / 1.983471. $((36.6 \text{ af} / 121) / 1.983471 = 0.15 \text{ CFS})$.

The new use under Certificate 6264 for Little Creek is limited to an annual diversion of 193.01 acre feet (79.1 acre x 2.44 af = 193.01 af). The cubic feet per second (CFS) was calculated by taking the volume / the number of days in the season / 1.983471. $((193.01 \text{ af} / 60) / 1.983471 = 1.62 \text{ CFS})$.

The new use under Certificate 6264 for Catherine Creek is limited to an annual diversion of 121.51 acre feet (49.8 acre x 2.44 af = 121.51 af). The cubic feet per second (CFS) was calculated by taking the volume / the number of days in the season / 1.983471. $((121.51 \text{ af} / 60) / 1.983471 = 1.02 \text{ CFS})$.

12. A portion of the water diverted at the POD returns to Catherine Creek within the proposed reach and is available to downstream water right holders. Approximately 20% of return flows from the existing use return to the creek system below the POD near stream gage 13320300 (approximately RM 17). 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.
13. A portion of the water diverted at the POD for Certificate 6264 returns to Little Creek within the proposed reach and is available to downstream water right holders. Approximately 20% of return flows from the existing use return to the creek system below the POD by approximately RM 3.5 at Bryan St. Bridge. 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.
14. In addition, the full quantity requested to be protected instream from the point of diversion to the mouth of Catherine Creek may not be made without enlargement. There are known areas of natural streamflow loss to the river bed downstream from the point of diversion. The Watermaster has identified that below the point of diversion at approximately river mile 12.0 on Catherine Creek, there is a losing reach and a loss of 1% per mile. The

quantities that may be protected instream below river mile 12.0 will be adjusted to prevent injury to downstream users and enlargement of the right.

15. In addition, the full quantity requested to be protected instream from the point of diversion to the mouth of Little Creek may not be made without enlargement. There are known areas of natural streamflow loss to the river bed downstream from the point of diversion. The Watermaster has identified that below the point of diversion at approximately river mile 3.0 on Little Creek, there is a losing reach and a loss of 1% per mile. The quantities that may be protected instream below river mile 3.0 will be adjusted to prevent injury to downstream users and enlargement of the right.
16. The lease application requests to protect water instream from Little Creek into Catherine Creek. An instream reach is generally from the point of diversion to the mouth of the source stream (Little Creek) but may be protected further if measurable in the receiving stream (Catherine Creek) (OAR 690-077-0015 (8)). The quantity that may be leased instream from Little Creek is not measurable into Catherine Creek and may not be protected instream in Catherine Creek.
17. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:

Little Creek, tributary to Catherine Creek

Instream Point: At the POD (as described in Finding of Fact No. 8) at approximately RM 4.6

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
6264	1864	1.99	237.30	July 15 through September 12

Instream Reach No. 1: Immediately below the POD to River Mile 3.5

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
6264	1864	1.62	193.01	July 15 through September 12

Instream Reach No. 2: From River Mile 3.5 to River Mile 3.0

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
6264	1864	1.30	154.41	July 15 through September 12

Instream Point No. 2: At mouth of Little Creek

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
6264	1864	1.26	150.47	July 15 through September 12

Catherine Creek, tributary to the Grande Ronde River

Instream Point No. 1: At the POD (as described in Finding of Fact No. 5)

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
82530	6/28/1978	0.290	69.60	July 1 through October 29
3485	4/26/1911	0.188	45.00	
6264	1864	1.260	149.40	July 15 through September 12
Totals		1.738	264.00	

Instream Reach No. 1: Immediately below the POD to River Mile 17.0

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
82530	6/28/1978	0.23	56.61	July 1 through October 29
3485	4/26/1911	0.15	36.60	
6264	1864	1.02	121.51	July 15 through September 12
Totals		1.40	214.72	

Instream Reach No. 2: From River Mile 17.0 to River Mile 12.0

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
82530	6/28/1978	0.19	45.29	July 1 through October 29
3485	4/26/1911	0.12	29.28	
6264	1864	0.82	97.21	July 15 through September 12
Totals		1.13	171.78	

Instream Point No. 2: At the mouth of Catherine Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
82530	6/28/1978	0.17	40.42	July 1 through October 29
3485	4/26/1911	0.11	25.53	
6264	1864	0.73	87.30	July 15 through September 12
Totals		1.01	153.25	

18. Other conditions to prevent injury and enlargement are:

The amount of water to which this instream use is entitled is limited to the quantities available at the original point of diversion.

Within the specified stream reach, the amount of water to which this right is entitled shall not exceed the quantity of water legally available at the original points of diversion. Stream channel losses and gains calculated based on available data and the use of water by senior appropriators will determine the amount of water to which this right is entitled downstream from the original points of diversion within the specified stream reach.

19. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water rights.

20. 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 known areas of natural loss of streamflow to the river bed downstream from the points of diversion and the quantities protected instream have been reduced to account for loss; 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 the POD. The quantity of water to be protected instream has been reduced to account for return flows.
21. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reaches will provide for a beneficial purpose.
22. The total monthly quantities of water to be protected instream under existing and proposed instream rights in the reach do exceed the estimated average natural flow during the month of September. The estimated average natural flow may not be exceeded unless criteria for exceeding are met.
23. The Department has determined that the estimated average natural flows in Little Creek may be exceeded due to the following:
- a) There is an existing state agency established instream water right certificate (Certificate 73314) that covers the same reach or portion of the reach to be established by the proposed instream lease. In addition, the quantities to be protected instream will not exceed the amounts requested in the original instream water right application (IS-71680) filed by the Oregon Department of Fish and Wildlife (ODFW) and;
 - b) The water right on Little Creek proposed to be leased is in an Oregon Department of Fish and Wildlife (ODFW) flow restoration priority watershed.
24. The instream right established by this instream lease shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or 537.470 unless otherwise specified by an order approving a new instream water right under these statutes.
25. 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.
26. Based upon review of the application, information provided by the Department's Watermaster, and other available information, the Department finds that the lease, as conditioned, 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.

27. 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.

28. The Lessor and Lessee have requested that the lease terminate on October 31, 2020. The lease may commence on the date this final order is signed.

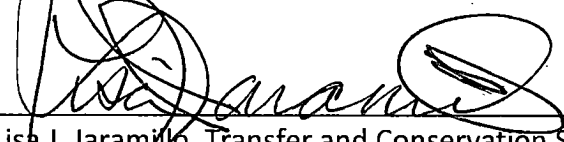
Conclusions of Law

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 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 31, 2020.

Dated at Salem, Oregon this day JUL 08 2020



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

Mailing date: JUL 09 2020

This document was prepared by Sarah Henderson. If you have any questions, please call 503-986-0884.