

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

In the Matter of Instream Lease Application) **MODIFYING AND CORRECTING**
IL-1415, Umatilla County) **FINAL ORDER ON INSTREAM**
) **LEASE IL-1415**

Authority

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. OAR Chapter 690, Division 077 implements the statutes and provides the Department's procedures and criteria for evaluating instream lease applications.

Lessor

Clear Creek Cattle Co.
(Jim Whitney & Gary Jellum)
P.O. Box 1614
Pendleton, OR 97801

Lessee

The Freshwater Trust (TFT)
65 SW Yamhill St., Suite 200
Portland, Oregon 97204
natasha@thefreshwatertrust.org

Findings of Fact

1. On April 29, 2014, Clear Creek Cattle Co. and The Freshwater Trust filed an application to renew instream lease IL-1001, involving a portion of Certificate 75656.
2. During the review process, the Department identified that the duty of Certificate 75656 needed clarification; as a result, the quantity of water protected instream required modification. Therefore, the Department has assigned the lease a new number, IL-1415, to differentiate it from the original lease.
3. Following issuance of the Final Order approving IL-1415 on July 16, 2014, as evidenced by Special Order Volume 92, Page 1018, the Department identified that streamflow losses were not fully accounted for and that the lease, as approved, results in enlargement. The instream use below the point of diversion was reduced by a total of 3%. However, the reduction should have been 3% loss per mile over the 2.5 mile instream reach. Consistent with OAR 690-077-0077, the Department may modify an instream lease after a final order has been issued if the lease is found to result in injury or enlargement. This final order is being issued to modify the original lease to prevent enlargement of the right.
4. The Department has also identified that the duty per acre appears to have been incorrectly described in the original final order. The duty per acre based on the Umatilla River Decree appears to be 4.5 acre-feet per acre, consistent with the original lease application IL-1001. This correction is also incorporated into this modifying final order and results in the expansion of when water may be protected instream. The Watermaster has also identified at

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.

this higher duty per acre there would be return flows below the point of diversion. These return flows have also been accounted for in this modifying final order.

5. The right to be leased is as follows:

Certificate: 75656 in the name of CLEAR CREEK CATTLE COMPANY (Confirmed by Umatilla River Decree entered of record at Salem, in the Order Record of the Water Resources Director in, Volume 3, at page 127)

Use: Irrigation of 60 acres

Priority Date: 1880

Quantity: Rate: 0.75 Cubic Foot per Second (CFS)

Limit: limited to the amount actually beneficially used and shall not exceed 1.06 cubic feet per second, subject to the provision of paragraph 33 of said decree, and all other conditions and limitations contained in said decree.

Source: BIRCH CREEK, tributary to the UMATILLA RIVER

Authorized Point of Diversion (POD): Not described

Authorized Place of Use (POU):

Twp	Rng	Mer	Sec	Q-Q	Acres
2 N	32 E	WM	19	NE SW	2.0
2 N	32 E	WM	19	SE SW	16.0
2 N	32 E	WM	19	SW SE	18.5
2 N	32 E	WM	30	NE NE	15.0
2 N	32 E	WM	30	NW NE	8.5
Total:					60.0

6. Certificate 75656 does not provided the location of the point of diversion. The Watermaster identified that the POD description provided by the applicant was incorrect so, for the purpose of this instream lease, the point of diversion is located at approximately:

Twp	Rng	Mer	Sec	Q-Q	River Mile
2 N	32 E	WM	30	SE NE	Peterson Dam, approximately 2.46 RM from the mouth of Birch Creek

7. Certificate 75656 does not specify the irrigation season. The Umatilla Decree establishes an irrigation season of March 1 through October 31 of each year.

8. Certificate 75656 does not specify the rate and duty for the portion of lands described in Finding of Fact No. 3. The Umatilla River Decree, in Paragraphs 32 and 33, establishes that lands characterized as being the bottom lands along the tributaries of the Umatilla river will be limited to a rate of one-eightieth CFS per acre (up to 0.75 CFS) and duty of 4.5 acre feet (AF) per acre (up to 270.0 AF).

9. 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.

10. At the full instream rate approved under Special Order Volume 92, Page 1018, (0.59 CFS) and the modified instream volume (270.0 AF), water may only be protected instream over a 230 day period. The original lease application requested to protect water instream over a majority of the irrigation season (March 31 through October 1), a 185 day period. The Watermaster recommended the instream period be modified, as to not exceed the total duty

allowed (270.0 AF). For the purpose of this instream lease water shall be protected instream from March 16 through October 31, when instream flows are most needed.

11. The lease application requests the Department to protect water instream from Birch Creek into the Umatilla River. An instream reach is generally from the point of diversion to the mouth of the source stream (Birch Creek) but may be protected further if measurable in the receiving stream (the Umatilla River) (OAR 690-077-0015 (8)). The quantity that may be leased instream from Birch Creek is not measurable into the Umatilla River and cannot be protected instream in the Umatilla River.
12. Water may be protected instream from the POD to the mouth of Birch Creek. At the modified instream volume, a portion of the water diverted at the POD returns to Birch Creek within the reach 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 the POD.
13. Streamflows are lost within the proposed reach due to channel losses. Quantities protected instream have been reduced by 3% per mile at Instream Point No. 3 (Finding of Fact No. 14) to account for streamflow loss within the channel, as well as, prevent injury and enlargement. The instream reach is approximately 2.5 miles in length.
14. The instream use has been modified from the lease application to prevent injury and enlargement and is as follow:

BIRCH CREEK, tributary to the UMATILLA RIVER

Instream Reach: From the POD (Finding of Fact No. 6) to the mouth of Birch Creek

Instream Point No. 1: At the POD

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
75656	1880	0.59	270.0	March 16 through October 31

Instream Point No. 2: Immediately below the POD

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
75656	1880	0.42	192.0	March 16 through October 31

Instream Point No. 3: At the mouth of Birch Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
75656	1880	0.39	177.5	March 16 through October 31

15. Other conditions to prevent injury and enlargement are:

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 point 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.

Regulation upstream will not occur if the rate of the leased portion is available at either proposed POD or historical POD.

16. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
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 known areas of natural loss of streamflow to the river bed downstream from the point of diversion. The rate and volume of water protected instream has been reduced 3% per mile at Instream Point No. 3; and
 - d. Return flows resulting from the exercise of the existing water right would re-enter the river within the instream reach and have been accounted for at Instream Point No. 2.
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. This finding is made through an abbreviated review recognizing that the 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 or transferred to an instream use under ORS 537.348 and OAR 690-077-0070 or OAR 690-077-0075 a new injury review shall be required. 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 future leases or transfers.
23. The Lessor and Lessee have requested that the lease terminate on October 31, 2014. 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.

ORDER

Therefore, it is ORDERED:

1. That the Lease as described herein is APPROVED.
2. This modifying and correcting order supersedes Special Order Volume 92, at Page 1018.
3. 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.
4. The term of the lease will commence upon approval of the instream lease and terminate on October 31, 2014.

Dated at Salem, Oregon this 26 day, of August 2014.



Dwight French, Water Right Services Division Administrator, for
Director, Oregon Water Resources Department

Mailing date: AUG 27 2014

*This document was prepared by Laura
Wilke and if you have any questions,
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