

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

In the Matter of Instream Lease Application ) DETERMINATION and  
IL-1398, Benton County ) FINAL ORDER ON PROPOSED  
) INSTREAM LEASE

**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**

Thomas Paine Farms  
Attn: Eric Schwartz  
PO Box 1465  
Philomath, OR 97370  
[eric@chestnuts.org](mailto:eric@chestnuts.org)

**Findings of Fact**

1. On March 10, 2014, Thomas Paine Farms filed an application to renew instream lease IL-989, involving portions of Certificates 28041 and 54648.
2. The order issued June 16, 2009, approving IL-989, recorded at Special Order Volume 78, Pages 103-106, contains a scrivener's error in the number of acres to be leased under Certificate 28041. The number of acres to be leased should read 112.1 as depicted in the place of use table on page 2 of the order recorded at Special Order Volume 78, Page 104.
3. Due to clarification of the portions of the water rights leased instream as primary and supplemental, a Department assigned the application a new lease number, IL-1398.
4. The portion of the first right to be leased has been clarified from the original lease application and is as follows:

**Certificate:** 28041 in the name of Rachel C. Bergman (perfected under Permit S-21121)

**Use:** Irrigation of 112.1 acres

**Priority Date:** July 23, 1951

**Quantity:** **Rate:** 0.23 Cubic Foot per Second (CFS) (proportioned rate)

**Duty:** 280.25 Acre-Feet (AF)

**Limit:** One-Eighth of one CFS per acre, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to

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.

exceed 2.5 AF per acre for each acre irrigated during the irrigation season of each year

**Source:** LUCKIAMUTE RIVER, tributary of the WILLAMETTE RIVER

**Authorized Points of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
10S	6W	WM	20	NE NE SW NE NW SE	Norton DLC 43	None Specified.

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
10S	6W	WM	16	SW SW	43	2.6
10S	6W	WM	17	SE SE	43	0.8
10S	6W	WM	20	NE NE	43	21.6
10S	6W	WM	20	SW NE	43	9.4
10S	6W	WM	20	SE NE	43	32.5
10S	6W	WM	20	NE SE	43	4.2
10S	6W	WM	20	NW SE	43	1.5
10S	6W	WM	21	NW NW	43	21.3
10S	6W	WM	21	SW NW	43	18.2
<b>TOTAL:</b>						<b>112.1</b>

- Certificate 28041 is a deficient water right. If water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rate and duty allowed, the total rate and duty for the water right would be exceeded. In the event water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rate and duty allowed at the POD.
- The portion of the second right to be leased is as follows:

**Certificate:** 54648 in the name of Jack Mahana  
**Use:** Supplemental Irrigation of 23.4 acres  
**Priority Date:** October 18, 1974  
**Quantity:** **Rate:** 0.29 Cubic Foot per Second (CFS)  
**Duty:** 58.5 Acre-Feet (AF)  
**Limit:** One-eightieth of one CFS per acre, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 2.5 AF per acre for each acre irrigated during the irrigation season of each year, provided the available supply for any prior right existing for the same land and shall not exceed the limitation allowed herein

**Source:** LUCKIAMUTE RIVER, tributary of the WILLAMETTE RIVER

**Authorized Point of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
10S	6W	WM	20	NW SE	Norton DLC 43	2310 FEET NORTH AND 1650 FEET WEST FROM THE SE CORNER OF SECTION 20

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
10S	6W	WM	20	SW NE	9.4
10S	6W	WM	20	SE NE	8.5
10S	6W	WM	20	NE SE	4.2
10S	6W	WM	20	NW SE	1.3
<b>TOTAL:</b>					<b>23.4</b>

7. Certificates 28041 and 54648 do not specify the irrigation season. However, the Luckiamute River Decree establishes the irrigation season for the area as April 1 through September 30.
8. Certificate 28041 does not identify a specific location for the point of diversion in the NWSE of Section 20. However, it appears from the final proof maps, that Certificates 28041 and 54648 have the same point of diversion in the NWSE. Therefore, the instream reach will be from the location of the point of diversion as identified in Finding of Fact #6 above.
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. Notice of this lease was provided under application IL-989.
10. The instream use has been clarified from the original Final Order issued approving IL-989 and is as follows:

LUCKIAMUTE RIVER, tributary of the WILLAMETTE RIVER

**Primary Instream:**

**Instream Reach:** From the POD (as described in Finding of Fact No. 6) to the mouth of Luckiamute River.

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
28041	July 23, 1951	0.23	83.48	April 1 through September 30
54648	Oct. 18, 1974	0.11	41.03	
<b>Total</b>		<b>0.34</b>	<b>124.51</b>	

**Supplemental Instream:**

**Instream Reach:** From the POD (as described in Finding of Fact No. 5) to the mouth of Luckiamute River.

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
54648	Oct. 18, 1974	0.05	17.42	April 1 through September 30

11. Other conditions to prevent injury and enlargement are:

Certificate 54648 is supplemental to a portion of Certificate 28041. The portion of Certificate 54648 leased instream as supplemental shall only be protected instream if the full rate and duty under Certificate 28041 are not available during the period in which water is leased instream. Certificate 28041 is a deficient water right. A portion of Certificate 54648 may also be protected instream as primary to bring the rate and duty allowed under the primary right, Certificate 28041, for 23.4 acres up to the full rate and duty allowed, being 1/80 cfs per acre and 2.5 AF per acre.

12. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water rights.
13. 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. Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the reach of the instream water right.
14. 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.
15. 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.
16. 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.
17. 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.
18. If a right which has been leased is later proposed to be leased again, transferred and/or reviewed for 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.
19. The Lessor has requested that the lease commence in April, 2014 and terminate on September 30, 2019. The term of an instream lease may be for up to five years. The term requested by the Lessor is six years. The lease may terminate on September 30, 2018. The lease may commence on the date this final order is signed.
20. The Lessor has requested the option of terminating the lease early with written notice to the Department.

### **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 each year of 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 September 30, 2018. For multiyear leases, the lessor *shall* have the option of terminating the lease any time each year with written notice to the Department. However, if the termination request is received less than 30-days prior to the instream use period, April 1 through September 30, or after the water rights' original period of allowed use has begun, the Department may issue an order terminating the lease but use of water may not be allowed until the following calendar year, unless the Director determines that enlargement would not occur.

Dated at Salem, Oregon this 24 day of April, 2014.

  
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Dwight French, Water Right Services Administrator, for  
PHILLIP C. WARD, DIRECTOR

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

Mailing date: APR 25 2014