

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

In the Matter of Instream Lease Application) DETERMINATION and
IL-1338, Certificates 38374 and 51049,) FINAL ORDER ON PROPOSED
Sherman County) 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

Martin A. and Beverly LaVelle Underhill
PO Box 266
Dufur, OR 97021

Lessee

The Freshwater Trust (TFT)
65 SW Yamhill St., Suite 300
Portland, OR 97204
david@thefreshwaterturst.org

Findings of Fact

1. On April 18, 2013, TFT and Martin and Beverly Underhill filed an application to renew instream lease IL-2, involving all of Certificates 38374, 51048, and 51049 for instream use.
2. During the review process, the Department identified that the Final Order approving the lease, as evidenced by Special Order Volume 74, Pages 407 - 410, did not break the instream use down between Buck Hollow Creek and Kerr Creek in the description of the instream use. Therefore, the Department has assigned the application a new lease number, IL-1338, to differentiate it from the original lease.
3. On August 9, 2013, in response to a request from the Department, TFT clarified that the reach beginning on Kerr Creek should be protected into Buck Hollow Creek, if the quantity that may be leased instream is a measurable portion of Buck Hollow Creek.
4. During the review process, the Department also identified that the lease of water from Webb Reservoir would not result in any water that could be protected instream. The reservoir does not have a method for controlling release of water from the reservoir or a mechanism to bypass water around the reservoir. Therefore, since water may not be released from the reservoir for instream use or water not stored, no water may be leased instream. Certificate 51048, is no longer included as part of this lease. Furthermore, the secondary use of stored water from the reservoir under Certificate 51049 is also no longer included as a part of this lease.

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. This lease application includes all of Certificate 38374 and a portion of Certificate 51049.
6. The first right to be leased is as follows:

Certificate: 38374 in the name of Ernest O. Webb and Agnes M. Webb (perfected under permit S-28518)
Use: IRRIGATION of 37.3 acres
Priority Date: December 10, 1962
Quantity: **Rate:** 0.93 Cubic Foot per Second (CFS)
Volume: 149.2 AF
Limit: shall be limited to 1/40th cfs per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 4.0 AF per acre for each acre irrigated during the irrigation season of each year
Source: BUCK HOLLOW CREEK, tributary to the DESCHUTES RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	14 E	WM	2	NE NW	POD #1 – 180 FEET SOUTH AND 2660 FEET WEST FROM THE NE CORNER OF SECTION 2
4 S	14 E	WM	2	SE NW	POD #2 – 1940 FEET SOUTH AND 2790 FEET WEST FROM THE NW CORNER OF SECTION 2

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Gov't Lot	Acres
3 S	14 E	WM	35	NE SW		0.1
3 S	14 E	WM	35	NW SE		9.4
3 S	14 E	WM	35	SW SE		14.7
4 S	14 E	WM	2	NW NE	2	7.4
4 S	14 E	WM	2	SW NE		5.7

7. The portion of the second right to be leased has been modified from the lease application to exclude stored water based on Finding of Fact #3 and is as follows:

Certificate: 51049 in the name of Agnes M. Webb (perfected under permit S-38057)
Use: Irrigation of 11.9 acres and Supplemental Irrigation of 7.4 acres
Priority Date: March 10, 1975
Quantity: **Rate:** 0.16 CFS from Buck Hollow Creek and 0.32 CFS from Kerr Creek, being 0.13 CFS for primary irrigation and 0.19 CFS for supplemental irrigation
Volume: 26.0 AF form Buck Hollow Creek and 39.37 from Kerr Creek, being 16.63 AF for primary irrigation and 22.74 AF for supplemental irrigation
Limit: shall be limited to 1/40th cfs per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 4.0 AF per acre for each acre irrigated during the irrigation season of each year
Source: KERR CREEK and BUCK HOLLOW CREEK, tributary to the DESCHUTES RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	14 E	WM	2	NE NW	BUCK HOLLOW CR POD – 180 FEET SOUTH AND 2660 FEET WEST FROM THE NE CORNER OF SECTION 2
4 S	14 E	WM	2	SW NE	KERR CR POD – 1850 FEET SOUTH AND 2520 FEET WEST FROM THE NW CORNER OF SECTION 2

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	Gov't Lot	Acres
3 S	14 E	WM	35	NE SW		0.1
3 S	14 E	WM	35	NW SE		9.4
3 S	14 E	WM	35	SW SE		14.7
4 S	14 E	WM	2	NW NE	2	7.4
4 S	14 E	WM	2	SW NE		5.7

8. Certificate 51049 also includes the use of stored water from Webb Reservoir. Webb reservoir stores up to 11.83 AF under Certificate 51048. Based on Finding of Fact #4, the Department has identified that stored water may not be included as part of the lease. Based on conversation with the local Watermaster, when water is diverted from the point of Diversion on Kerr Creek, which is located on the reservoir, both live flow and stored water are diverted for primary and supplemental irrigation. Therefore the volume of water available to be leased under Certificate 51049 is being reduced proportionally based on what may be diverted from storage and is as follows:

Primary Irrigation	Supplemental Irrigation
4.97 AF	6.86 AF

9. Certificates 38374 and 51049 do not specify the irrigation season. However, the Deschutes River Decree identifies the irrigation season for the area as April 1 to November 1.
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. Based on Finding of Fact #3, the Lessee requests that the lease include protection of water from Kerr Creek into Buck Hollow Creek. An instream reach is generally from the point of diversion to the mouth of the source stream (Kerr Creek) but may be protected further if measurable in the receiving stream (Buck Hollow Creek) (OAR 690-077-0015 (8)). The quantity that may be leased instream from Kerr Creek is measurable into Buck Hollow Creek and may be protected instream in Buck Hollow Creek.
12. The instream use has been modified from the lease application to prevent injury and enlargement and exclude stored water and is as follows:

Primary Instream Use

Kerr Creek, tributary to Buck Hollow Creek

Instream Reach: From the Kerr Creek POD (as described in Finding of Fact #7) to the mouth of Kerr Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
51049	3/10/1975	0.1	16.63	July 1 through September 19

Buck Hollow Creek, tributary to the Deschutes River

Instream Reach#1: From the confluence of Buck Hollow with Kerr Creek to POD #2 for Certificate 38374 (as described in Finding of Fact #6) at approximately River Mile 0.8

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
51049	3/10/1975	0.10	16.63	July 1 - September 19

Instream Reach#2: From POD #2 for Certificate 38374 to the Buck Hollow Creek POD for Certificate 51049 (as described in Finding of Fact #7)

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
51049	3/10/1975	0.10	16.63	July 1 - September 19
38374	12/10/1962	0.93	149.20	
Total		1.03	165.83	

Instream Reach#3: From Buck Hollow Creek POD for Certificate 51049 to the mouth of Buck Hollow Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
51049	3/10/1975	0.26	42.63	July 1 - September 19
38374	12/10/1962	0.93	149.20	
Total		1.03	165.83	

Supplemental Instream Use

Kerr Creek, tributary to Buck Hollow Creek

Instream Reach: From the Kerr Creek POD (as described in Finding of Fact #7) to the mouth of Kerr Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
51049	3/10/1975	0.14	22.74	July 1 -September 19

Buck Hollow Creek, tributary to the Deschutes River

Instream Reach: From the confluence of Buck Hollow with Kerr Creek to the mouth of Buck Hollow Creek

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
51049	3/10/1975	0.14	22.74	July 1 - September 19

13. 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.

14. A portion of Certificate 51049 is supplemental to Certificate 38374. The portion of Certificate 51049 being leased instream shall only be protected instream if the full rate and duty under Certificate 38374 are not available during the period for which water is being leased instream.
15. 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.
16. Based upon review of the application, comments received, 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.
17. 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.
18. The Lessor has requested that the lease terminate on October 31, 2017. The lease may commence on the date this final order is signed.
19. 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.

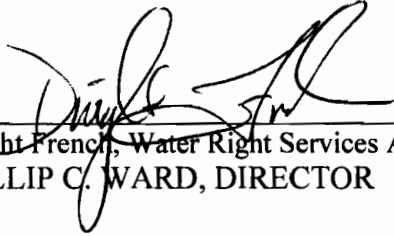
ORDER

Therefore, it is ORDERED:

1. That 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 water rights for irrigation use, including ground water registrations.
3. The term of the lease will commence upon approval of the instream lease and terminate on October 31, 2017. For multiyear leases, the lessor *shall* have the option of terminating the lease each year with written notice to the Department. The lease may be terminated at any time during the calendar year. However, if the termination request is received less than 30-

days prior to the period of allowed instream use (July 1 through September 19) or after the period of allowed use has begun for the water rights being leased, water shall not be used under the rights leased until the following calendar year, unless the Director determines that enlargement would not occur.

Dated at Salem, Oregon this 29 day of August, 2013.



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

This document was prepared by Laura Wilke and if you have any questions, please call 503-986-0884.

Mailing date: SEP 05 2013