

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

In the Matter of Instream Lease Application    )    MODIFYING AND CORRECTING  
IL-1401, Umatilla County                        )    ORDER ON INSTREAM LEASE  
  )    IL-1401

**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**

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**Lessee**

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**Findings of Fact**

1. On April 28, 2014, Gabe Garton, Heather Garton, and The Freshwater Trust filed an application to lease a portion of Certificate 56170 for instream use. The Department assigned the application number IL-1401.
2. Upon review, the application was found incomplete. The Department requested additional regarding the validity of the right being leased on April 22, 2014. The applicant provided information indicating that the water right to be leased had been used under the terms and conditions of the right during the last five years, on April 28, 2014.
3. On May 28, 2014, the Department requested an amended map including the remaining acres not being leased. The applicant provided a sufficient map on May 28, 2014.
4. On May 29<sup>th</sup> the applicant amended the number of acres to be leased in the application to reflect the amended map.
5. Following issuance of the Final Order approving IL-1401 on June 2, 2014, as evidenced by Special Order Volume 92, Page 670, the Department identified that the rate and duty limits per acre appears to have been incorrectly described in the original final order as 1/40<sup>th</sup> cubic foot per second and 6.0 acre-feet per acre. The Department has identified that the rate and duty specified in the original final order is too high and results in enlargement of the right. Consistent with OAR 690-077-0077, the Department may modify an instream lease after a

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.

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.

6. The duty per acre based on the Umatilla River Decree appears to be 4.5 acre-feet per acre and the rate limit is 1/80<sup>th</sup> cubic foot per second per acre. This modification also results in the expansion of when water may be protected instream.
7. The portion of the right to be leased has been modified from the lease application and is as follows:

**Certificate:** 56170 in the name of GEO. W. BUSH (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 5.9 acres

**Priority Date:** 1889

**Quantity: Rate:** 0.07 Cubic Foot per Second (CFS)

**Limit:** 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 Umatilla River

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 N	32 E	WM	22	NW SE	Not described in Certificate

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	32 E	WM	22	SW NE	5.9
<b>Total Acres</b>					<b>5.9</b>

8. Certificate 56170 does not specify the irrigation season. However, the Umatilla River Decree establishes the irrigation season for the area as March 1 to November 1.
9. Certificate 56170 does not specify the rate and duty for the portion of lands described in Finding of Fact No. 7. 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 0.07 CFS) and duty of 4.5 acre feet (AF) per acre (up to 26.55 AF).
10. Certificate 56170 does not provided measured distances for the location of the point of diversion. Based upon additional information provided by the applicant, for purposes of this instream lease, the point of diversion is described as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 N	32 E	WM	22	NW SE	1850 feet West & 750 feet South from East ¼ Corner of Section 22

11. There is another primary irrigation water right, Certificate 28597, appurtenant to all or a portion of the lands described in Finding of Fact No. 7. The Lessor and Lessee have requested that this water right not be included as part of this lease application. During the term of the lease, water use under this right will also be suspended.

12. 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.
13. The lease application requests 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 (Umatilla River) (OAR 690-077-0015 (8)). The quantity that may be leased instream from the source stream is not measurable into the receiving stream, thus the instream reach has been reduced to the confluence of Birch Creek and the Umatilla River.
14. At a modified instream rate (0.07 CFS) and instream volume (26.55 AF), water may only be protected instream over a 191 day period. The original lease application requested to protect water instream over a portion of the irrigation season (May 1 through October 1), a 154 day period. The Watermaster recommended the instream period be modified, as to not exceed the total duty allowed (26.55 AF). For the purpose of this instream lease water shall be protected instream from April 24 through October 31, when instream flows are most needed.
15. Water may be protected instream from the POD described in Finding of Fact No. 10 to the confluence of Birch Creek and the Umatilla River. A portion of the water diverted at the POD returns to Birch Creek immediately below the POD and is available to downstream water right holders. To prevent injury to downstream water right holders and enlargement, the quantity of water protected instream requires modification to account for return flows.
16. Streamflows are lost within the proposed reach due to evaporation. Quantities protected instream have been reduced by 0.5% per mile beginning at Instream Point No. 2 to account for evaporative streamflow loss, as well as, prevent injury and enlargement.
17. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:  
Birch Creek, tributary to the Umatilla River

**Instream Point No. 1:** At the POD (as described in Finding of Fact No. 10)

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
56170	1889	0.07	26.55	April 24 – October 31

**Instream Point No. 2:** Immediately below the POD

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
56170	1889	0.05	18.88	April 24 – October 31

**Instream Point No. 3:** At the confluence of Birch Creek and the Umatilla River

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
56170	1889	0.048	18.02	April 24 – October 31

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

19. 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; however, there is streamflow loss due to evaporation. The rate and volume of water protected instream has been reduced 0.5% per river mile from Instream Point No. 2 to Instream Point No. 3 (Finding of Fact No. 17); and
  - d. Return flows resulting from the exercise of the existing water right would re-enter the river downstream from the POD within the reach of the instream water right. As such, the rate and volume of water protected instream at Instream Point No. 2 has been reduced to prevent injury and enlargement (Finding of Fact No. 17).
20. 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.
21. 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.
22. 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.
23. 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.
24. 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.
25. The Lessor and Lessee have requested that the lease terminate on October 31, 2014. The lease commenced on the date that the original final order was signed on June 2, 2014, approving instream lease IL-1401, as evidenced by Special Order Volume 92, at Page 670.

### **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. This correcting order supersedes Special Order Volume 92, at Page 670.
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 commenced upon the date that Special Order Volume 92, at Page 670, was signed on June 2, 2014, approving instream lease IL-1401, and will terminate on October 31, 2014.

Dated at Salem, Oregon this 12 day of September, 2014.

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

*This document was prepared by Laura  
Wilke and if you have any questions,  
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Mailing date: SEP 15 2014