

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

In the Matter of Instream Lease Application ) DETERMINATION and  
IL-1682, Union County ) FINAL ORDER ON 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**

Tony Malmberg  
1782 South Main Street  
Union, OR 97883

**Co-Lessor**

Andrea Malmberg  
1782 South Main Street  
Union, OR 97883

**Lessee**

The Freshwater Trust (TFT)  
700 SW Taylor, Suite 200  
Portland, Oregon 97205

**Findings of Fact**

1. On April 27, 2018, Tony and Andrea Malmberg and TFT filed an application to lease a portion of Certificates 45105 and 93003 for instream use. The Department assigned the application number IL-1682.
2. On May 29, 2018, the Department contacted the Lessee requesting submission of an application map for Instream Lease IL-1682. The Lessee submitted a map on the same day as requested.
3. On June 1, 2018, the Department requested clarification on the proposed instream reach from the Lessee. The Lessee on the same day specified that the proposed reach is from the point of diversion for both certificates to the mouth of Catherine Creek (confluence with the Grande Ronde).
4. The portion of the first right to be leased is as follows:

**Certificate:** 45105 in the name of Union Orchard Company (confirmed by decree of the Circuit Court of the State of Oregon for Union County; Volume 8, Page 1)

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.

**Use:** Irrigation of 21.62 acres  
**Priority Date:** 1874  
**Quantity:** **Rate:** 0.54 Cubic Foot per Second (CFS)  
**Volume:** 64.86 Acre-Feet (AF)  
**Limit:** One-Fortieth of one cubic foot per second (CFS) per acre, not to exceed 3.0 AF per acre per year  
**Source:** Catherine Creek, tributary to Grande Ronde River

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	40 E	WM	19	NE NE	850 FEET SOUTH AND 2870 FEET WEST FROM THE N1/4 CORNER OF SECTION 20

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	39 E	WM	24	SE SE	10.00
4 S	39 E	WM	25	NE NE	11.62
Total Acres					21.62

- Certificate 45105 does not specify the irrigation season. Nor is an irrigation season specified by Basin Program or Decree. Consistent with OAR 690-250, for the purposes of instream leasing, an irrigation season of March 1 through October 31 shall be used to establish when water may be protected instream.
- The decree identifies that the ditch through which water is diverted, under Certificate 45105, is the Prescott Ditch.
- The portion of the second right to be leased is as follows:

**Certificate:** 93003 in the name of Guild United Ditches, c/o Edgar Barton  
 (confirmed by decree of the Circuit Court of the State of Oregon for Union County; Volume 8, Page 1)  
**Use:** Irrigation of 18.58 acres  
**Priority Date:** 1874  
**Quantity:** **Rate:** 0.46 Cubic Foot per Second (CFS)  
**Volume:** 55.74 Acre-Feet (AF)  
**Limit:** One-Fortieth of one cubic foot per second (CFS) per acre, not to exceed 3.0 AF per acre per year  
**Source:** Catherine Creek, tributary to Grande Ronde River

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	40 E	WM	19	NE NE	150 FEET SOUTH AND 1730 FEET EAST FROM THE N1/4 CORNER OF SECTION 19

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	39 E	WM	24	SE SE	18.58

- The watermaster identified that the ditch through which water is diverted, under Certificate 93003, is the Guild United Ditch.

9. Certificate 93003 does not specify the irrigation season. Nor is an irrigation season specified by Basin Program or Decree. Consistent with OAR 690-250, for the purposes of instream leasing, an irrigation season of March 1 through October 31 shall be used to establish when water may be protected instream.
10. A portion of the water diverted at the POD returns to the system at approximately river mile (RM) 16.0 (SESE, Sec. 14, T4S, R39E, WM) 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 to account for surface return flows. The watermaster has identified a reduction of 25% for Certificate 45105 and 20% for Certificate 93003 below RM 16.0 to mitigate for any injury as a result of the loss of any return flows.
11. 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.
12. The instream use has been modified from the lease application. Return flows resulting from the exercise of the existing right would re-enter the river below RM 16.0 (SESE of Sec. 14, T4S, R39E, WM). To prevent injury and enlargement, the quantity of water to be protected instream has been reduced to ensure the annual volume limitation is not exceeded and to account for return flows below RM 16.0. The instream use is as follows:

Catherine Creek, tributary to Grande Ronde River

**Instream Reach 1:** At the authorized POD (as described in Finding of Fact No. 4)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
45105	1874	0.27	64.9	July 1 through October 29

To: Guild United Ditch

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
4 S	40 E	WM	19	NE NE	150 FEET SOUTH AND 1730 FEET EAST FROM THE N1/4 CORNER OF SECTION 19

**Instream Reach 2:** From Guild United Ditch to RM 16.0

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
45105	1874	0.27	64.9	July 1 through October 29
93003	1874	0.23	55.7	
Total		0.50	120.6	

**Instream Reach 3:** From immediately below RM 16.0 (located in the SESE of Sec. 14, T4S, R39E) to the mouth of Catherine Creek at RM 0.0 at the confluence with the Grande Ronde River

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
45105	1874	0.20	48.6	July 1 through October 29
93003	1874	0.19	44.5	
Total		0.39	93.1	

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

15. 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 and have been accounted for in Reach No. 3.

16. 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.

17. 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.

18. 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.

19. 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 shall be in addition to instream water rights established pursuant to ORS 537.348 or 537.470.

20. 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.
21. 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.
22. The Lessor, Co-Lessor, and Lessee have requested that the lease terminate on October, 2018. However, the last day of the irrigation season is October 31. The lease will terminate on October 31, 2018. The lease may commence on the date this final order is signed.
23. The Lessor, Co-Lessor, and Lessee have requested the option of terminating the lease early but only with consent of all parties to the lease.


**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, 2018.

Dated at Salem, Oregon this day JUN 11 2018.



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Dwight French, Water Right Services Division Administrator, for  
Thomas M. Byler, Director, Oregon Water Resources Department

Mailing date: JUN 11 2018

*This document was prepared by  
Jessica Joye and if you have any  
questions, please call 503-986-0814.*