

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

In the Matter of Instream Lease Application ) DETERMINATION and  
IL-574, Certificates 42935, 42934, 42936, ) FINAL ORDER ON PROPOSED  
and 65386, Klamath 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 #1**

Kurt Thomas  
5800 Georgia Dr.  
Bakersfield, CA 93308

**Lessee**

Klamath Basin Rangeland Trust (KBRT)  
700 Main Street, Suite 201 A  
Klamath Falls, OR 97601  
[shannon.peterson@kbrt.org](mailto:shannon.peterson@kbrt.org)

**Findings of Fact**

1. On June 30, 2009, the KBRT and Kurt Thomas filed an application to renew instream lease L-574, involving all of Certificates 42935, 42934, 42936, and 65386 for instream use. The Department assigned the application number IL-574.

2. The first right to be leased is as follows:

**Certificate:** 42935 (leasing entire right instream)  
**Use:** Irrigation  
**Acres:** 316.2 acres  
**Priority Date:** September 20, 1960 for 6.03 CFS & October 20, 1960 for 0.3 CFS  
**Season of Use:** April 1 to October 1  
**Quantity:** Rate (limited to 1/50<sup>th</sup> Cubic foot per Second (CFS/acre): 6.33 CFS,  
being 5.06 CFS from Fort Creek and 1.27 CFS from Crooked Creek  
Duty (limited to 5.0 Acre-Feet (AF)/acre): 1581.0 AF  
**Source:** Fort Creek and Crooked Creek, tributary to the Wood River

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

Twtp	Rng	Mer	Sec	Q-Q	Measured Distances
33 S	7.5 E	WM	26	NW NE	FORT CREEK - 960 FEET SOUTH & 1050 FEET EAST FROM THE NW CORNER OF SECTION 26
33 S	7.5 E	WM	26	NW NW	CROOKED CR - #1 - 1260 FEET SOUTH & 270 FEET EAST FROM W1/4 CORNER OF SECTION 26
34 S	7.5 E	WM	13	NW SE	CROOKED CR - #2 - 1510 FEET NORTH & 2210 FEET WEST FROM SE CORNER OF SECTION 13

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.

**Authorized Place of Use:** See Certificate 42935

3. The second right to be leased is as follows:

**Certificate:** 42934 (leasing entire right instream)  
**Use:** Irrigation  
**Acres:** 1 148.9 acres  
**Priority Date:** September 20, 1960  
**Season of Use:** April 1 to October 1  
**Quantity:** Rate (limited to 1/50<sup>th</sup> CFS/acre): 22.98 CFS  
Duty (limited to 5.0 AF/acre): 5744.5 AF  
**Source:** Wood River, tributary to Agency Lake  
**Authorized Point of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
34 S	7.5 E	WM	14	NW NW	30 FEET SOUTH & 2450 FEET WEST FROM THE N1/4 CORNER OF SECTION 14

**Authorized Place of Use:** See Certificate 42934.

4. The third right to be leased has been clarified from the lease application and is as follows:

**Certificate:** 42936 (leasing entire right instream)  
**Use:** Supplemental Irrigation (supplemental to certificates 42934 and 42935)  
**Acres:** 720.1 acres  
**Priority Date:** April 13, 1965  
**Season of Use:** April 1 to October 1  
**Quantity:** Rate (limited to 1/50<sup>th</sup> CFS/acre): 14.4 CFS  
Duty (limited to 5.0 AF/acre): 3600.5 AF  
**Source:** Crooked Creek, tributary to the Wood River  
**Authorized Points of Diversion (POD):**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
33 S	7.5 E	WM	26	NW NE	1260 FEET SOUTH & 270 FEET EAST FROM N1/4 CORNER OF SECTION 26
34 S	7.5 E	WM	13	NW SE	1510 FEET NORTH & 2210 FEET WEST FROM SE CORNER OF SECTION 13

**Authorized Place of Use:** See Certificate 42936.

5. The forth right to be leased is as follows:

**Certificate:** 65386 (leasing entire right instream)  
**Use:** Irrigation  
**Acres:** 34.1 acres  
**Priority Date:** April 14, 1983  
**Season of Use:** April 1 to October 1  
**Quantity:** Rate (limited to 1/50<sup>th</sup> CFS/acre): 0.68 CFS  
Duty (limited to 5.0 AF/acre): 170.5 AF  
**Source:** Agency Spring, tributary to Crooked Creek and Wood River

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
34 S	7.5 E	WM	18	SW SW	870 FEET NORTH & 690 FEET EAST FROM THE SW CORNER OF SECTION 18

**Authorized Place of Use:** See Certificate 65386.

6. 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.
7. The application was previously amended by the applicant on August 9, 2004, to clarify that water should be protected instream under Certificate 42935 from May 28 through September 30.
8. The requested instream volumes identified in the lease application for certificates 42934 and 42936 are less than the maximum duty allowed under each right. At the requested rate and volume the instream period would be limited to 125 days, which is one day short of the full period requested in the application. The instream volumes may be increased up to maximum allowed under each right, which would also allow water to be protected instream over the full period requested.
9. Certificate 42936 shares the same points of diversion on Crooked Creek as certificate 42935.
10. The lease application requests to protect water under each of the certificates, except 65386, from their respective POD's to Agency Lake. The authorized source of water for certificate 42935 is Fort Creek and Crooked Creek. The authorized source for certificate 42936 is Crooked Creek. Each of these creeks is tributary to the Wood River, which is tributary to Agency Lake. Normally, instream water may be maintained downstream to the mouth of the source stream. However, instream water may be maintained further downstream if the quantity of water to be protected is a measurable portion of the flows in the receiving stream, in this case, the Wood River (OAR 690-077-0015 (7)). The quantity of water to be leased instream from Fort Creek (5.05 CFS) under certificate 42935 and the supplemental quantity (14.4 CFS) under certificate 42836 from Crooked Creek are measurable portions of the flows in the Wood River and may be protected to Agency Lake. However, the quantity of water to be leased instream from Crooked Creek under certificate 42935 (1.26 CFS) is not a measurable portion of the flows in the Wood River and may not be protected past the mouth of Crooked Creek.
11. The instream reach on Crooked Creek for certificates 42935 and 42936 may begin at the uppermost POD located in T33S, R7.5E, Section 13.
12. A scrivener's error has been identified in the original Final Order issued by the Department approving instream lease IL-574, as evidenced by Special Order Volume 61, Page 288. The instream rate under Certificate 42934 was incorrectly identified as 14.04 CFS. The correct rate should be 14.4 CFS.

13. Based on Findings of Fact #7 through #12 the instream use has been clarified and modified from the lease application to prevent injury and enlargement and is as follows:

Certificate	Priority Date	Instream Reach	Primary Rate Instream	Supplemental Rate Instream	Period Protected Instream	Primary Vol. Instream	Supp. Volume Instream
42935 Primary	9/20/1960	Uppermost Crooked Creek POD to the mouth of Crooked Creek Fort Creek POD to Agency Lake	1.21 CFS  4.81 CFS		May 28 - Sept 30	302.4 AF  1202.1 AF	
	10/20/1960	Uppermost Crooked Creek POD to the mouth of Crooked Creek Fort Creek POD to Agency Lake	0.06 CFS  0.24 CFS		May 28 - Sept 30	15.0 AF  59.98 AF	
42934 primary	9/20/1960	Wood River POD to Agency Lake	22.98 CFS		May 28 - Sept 30	5744.5 AF	
42936 supplemental	4/13/1965	Uppermost Crooked Creek POD to Agency Lake		14.4 CFS	May 28 - Sept 30		3600.5 AF
65386 primary	4/14/1983	At the Agency Spring POD	0.68 CFS		May 28 - Sept 30	170.5 AF	

14. Other conditions to prevent injury and enlargement are:

Certificate 42936 is supplemental to certificates 42934 and 42935. Certificate 42936 shall only be protected instream when necessary to make up a deficiency of the respective rates and duties of the primary supply under certificates 42934 and 42935 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. 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.

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, 2013.
19. On July 29, 2009, the Lessee requested that the Lessor have 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. 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 during the term of the lease.
3. The lease will terminate on October 31, 2013. 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 (May 28) or after the period of allowed use has begun for the water right(s) being leased, water shall not be used under the right(s) leased until the following calendar year, unless the Director determines that enlargement would not occur.

Dated at Salem, Oregon this 30<sup>th</sup> day of July, 2009.

  
Phillip C. Ward, Director *rw*

Mailing date: AUG 03 2009