

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

In the Matter of Instream Lease Application ) DETERMINATION and  
IL-1585 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**

Gary Smith  
PO Box 715  
Elgin, OR 97827

**Lessee**

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

**Findings of Fact**

1. On March 9, 2017 Gary Smith and TFT filed an application to lease the entirety of Certificates 36696 and 36706 for instream use. The Department assigned the application number IL-1585.
2. The first right to be leased is as follows:

**Certificate:** 36696 in the name of Peter Westenskow (perfected under S-31186)  
**Use:** Irrigation of 40.0 acres  
**Priority Date:** January 13, 1966  
**Quantity:** **Rate:** 0.50 Cubic Foot per Second (CFS)  
**Volume:** 100.0 Acre-Feet (AF)  
**Limit:** The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to one-fortieth of one cubic foot per second per acre or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 2.50 acre feet per acre for each acre irrigated during the irrigation season of each year.  
**Source:** Clark's Creek, tributary to the Grande Ronde River

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 N	39 E	WM	24	SE SW	2110 FEET NORTH AND 1780 FEET WEST FROM THE SOUTHEAST CORNER NWNE OF SECTION 25

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:**

Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	39 E	WM	24	SE SW	12.6
1 N	39 E	WM	25	NW NE	18.0
1 N	39 E	WM	25	NE NW	9.4
Total Acres					40.0

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

**Certificate:** 36706 in the name of Peter C. Westenskow (perfected under S-132)  
**Use:** Irrigation of 97.2 acres  
**Priority Date:** August 4, 1909  
**Quantity:** **Rate:** 1.22 Cubic Foot per Second (CFS)  
**Volume:** 243.0 Acre-Feet (AF)  
**Limit:** The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to one-eightieth of one cubic foot per second per acre.  
**Source:** Clark's Creek, tributary to the Grande Ronde River

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 N	39 E	WM	24	SE SW	2110 FEET NORTH AND 1780 FEET WEST FROM THE SOUTHEAST CORNER NWNE OF SECTION 25

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	39 E	WM	23	NE SE	15.6
1 N	39 E	WM	23	SE SE	30.0
1 N	39 E	WM	24	NW SW	3.6
1 N	39 E	WM	24	SW SW	40.0
1 N	39 E	WM	24	SE SW	5.0
1 N	39 E	WM	25	NW NW	3.0
Total Acres					97.2

- Certificates 36696 and 36706 do not specify the irrigation season; nor is an irrigation season specified by Basin Program or Decree. For the purposes of instream leasing, an irrigation season of March 1 through October 31, consistent with OAR 690-250, shall be used to establish when water may be protected instream.
- 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.
- The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:  
 Clark's Creek, tributary to Grande Ronde River  
**Instream Reach:** From POD (as described in Finding of Fact 2 & 3) to the Mouth of Clark's Creek

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
36696	January 13, 1966	0.36	100.0	May 15 through September 30
36706	August 4, 1909	0.80	243.0	May 1 through September 30

7. 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 points 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.

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

9. 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.

10. 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.

11. The instream use created by this instream lease will be additive to other instream rights (created as a result of instream lease, instream transfer, and/or allocation of conserved water) within the proposed reach. By adding to this existing instream water right within the same reach, the total monthly quantities of water to be protected instream will exceed the estimated average natural flow.

The estimated average natural flow may not be exceeded unless criteria for exceeding are met.

12. The Department has determined that the estimated average natural flows may be exceeded due to the following:

- a) There is an existing state agency established instream water right certificate (Certificate 73018) that covers the same reach or portion of the reach to be established by the proposed instream lease. In addition, the quantities to be protected instream will not exceed the amounts requested in the original instream water right application (IS-71662) filed by the Oregon Department of Fish and Wildlife (ODFW) and;
- b) The water right proposed to be leased is in an Oregon Department of Fish and Wildlife (ODFW) flow restoration priority watershed.

13. 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.

14. 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.
15. 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.
16. The Lessor and Lessee have requested that the lease terminate on October 31, 2021. The lease has been submitted prior to the 2017 irrigation season, and may commence on the date this final order is signed.
17. The Lessor and Lessee have requested that there not be an option to terminate 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 each year of 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 October 31, 2021. For multiyear leases, the lessor and lessee *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 (May 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 18 day of April, 2017.

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

*This document was prepared by Arla Heard and if you have any questions, please call 503-986-0806.*

Mailing date: APR 25 2017