

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

In the Matter of Instream Lease Application )     DETERMINATION and  
IL-1486, Wasco 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**

T & C Rentals LLC  
Todd Davis  
1137 Enstad Lane  
Silverton, OR 97381

**Lessee**

The Freshwater Trust (TFT)  
65 SW Yamhill St., Suite 200  
Portland, Oregon 97204

**Findings of Fact**

1. On May 27, 2015, T & C Rentals and TFT filed an application to lease a portion of certificate 76978 and the entirety of Certificates 4859 and 76979 for instream use. The Department assigned the application number IL-1486.
2. On July 9, 2015, the Department requested information to clarify the portion of Certificate 76978 to be leased to instream use, including a lease application map. Additional and revised application materials were received on July 14 and 15, 2015.
3. The portion of the first right to be leased has been clarified from the lease application and is as follows:

**Certificate:** 76978 in the name of Henry J. Yager and Jacob C. Yager (confirmed by the Fifteenmile Creek Decree, of record at Salem, in the Order Record of the Water Resources Director, in Volume 7, at Page 406)

**Use:** Irrigation of 14.03 acres, being 8.83 acres from Tract 1, 1.5 acres from Tract 2, and 3.7 acres from Tract 3

**Priority Date:** 1892 for Tract 1, 1895 for Tract 2, and 1901 for Tract 3

**Quantity:** **Volume:** 42.09 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, is limited to a diversion of not to exceed 3.0 acre-feet for each acre irrigated during the irrigation season of each year.

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.

**Source:** Eightmile Creek, tributary to Fifteenmile Creek

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	13 E	WM	19	SW SE	290 FEET NORTH AND 2200 FEET WEST FROM THE SE CORNER OF SECTION 19

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Tract	Q-Q	Acres
1 S	13 E	WM	19	1	SW SE	8.10
1 S	13 E	WM	19	3	SW SE	0.50
1 S	13 E	WM	19	1	SE SE	0.73
1 S	13 E	WM	19	3	SE SE	3.20
1 S	13 E	WM	20	2	NE SW	0.30
1 S	13 E	WM	20	2	SW SW	1.20
Total Acres						14.03

- Certificate 76978 describes the annual duty of the right as 3.0 acre-feet (AF) per acre; however, the Fifteenmile Creek Decree further describes the duty in the following 30-day volumes: Prior to July 1, the diversion is restricted to 1.0 AF per acre in any 30-day period. From July 1<sup>st</sup>, the diversion is limited to ¾ AF per acre in any 30-day period.
- Certificate 76978 does not describe the rate at which water can be applied. The Fifteenmile Creek Decree indicates that the rate applied during the irrigation season may be variable in order to achieve the appropriate head of water but also states that the irrigation rate shall not exceed 1/40<sup>th</sup> of Cubic Foot per Second (CFS) per acre after July 1<sup>st</sup>, except in case of rotation.

Certificate	Tract No.	Max Rate After July 1 <sup>st</sup>
76978	1	0.22 Cubic Foot per Second (CFS)
	2	0.038 CFS
	3	0.093 CFS

- The second right to be leased is as follows:

**Certificate:** 4859 in the name of J. C. Yager (perfected under Permit S-4319)

**Use:** Irrigation of 10.2 acres

**Priority Date:** November 25, 1919

**Quantity:** **Rate:** 0.125 CFS

**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, or its equivalent in case of rotation.

**Source:** Eightmile Creek, tributary to Fifteenmile Creek

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
1 S	13 E	WM	19	SE SW	9.1
1 S	13 E	WM	19	SW SE	0.6
1 S	13 E	WM	30	NE NW	0.5
Total Acres					10.2

7. Certificate 4859 does not provided a description of the location of the point of diversion. Transfer application C-134, approved by the Department on June 5, 1961, as evidenced by Special Order Volume 11, Page 202, changed the point of diversion. For purposes of this instream lease only, the point of diversion is located as follows:

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

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	13 E	WM	19	SW SE	290 FEET NORTH AND 2200 FEET WEST FROM THE SE CORNER OF SECTION 19

8. The third right to be leased is as follows:

**Certificate:** 76979 in the name of J. C. Yager (perfected under Permit S-4320)

**Use:** Irrigation of 4.5 acres

**Priority Date:** November 25, 1919

**Quantity:** **Rate:** 0.056 CFS

**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, or its equivalent for each acre irrigated.

**Source:** Eightmile Creek, tributary to Fifteenmile Creek

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
1 S	13 E	WM	19	SE SE	4.5

9. Certificates 4859 and 76979 to not specify a duty limit per acre. The Fifteenmile Creek Decree identifies a duty limit for the area of 3.0 AF per acre. Up to 30.6 AF may be appropriated under Certificate 4859 and 13.5 AF may be appropriated under Certificate 76979 for beneficial use.
10. Certificates 76978, 4859, and 76979 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.
11. The channel of Eightmile Creek has migrated since these water rights were originally established. Based upon additional information provided by the Department's Watermaster, for purposes of this instream lease only, the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	13 E	WM	30	NW NE	2059 FEET WEST AND 45 FEET SOUTH FROM THE NE CORNER OF SECTION 30; GPS COORDINATES: LATITUDE 45.461262 AND LONGITUDE -121.222000

12. There appear to be supplemental and layered water rights (Certificates 76981 and 76980) appurtenant to all or a portion of the lands described in Findings of Fact No. 3, 6, and 8. The Lessor and Lessee have requested that these water rights not be included as part of this lease application. During the term of the lease, water use under these rights will also be suspended.
13. 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.
14. The requested instream rates associated with Certificate 4859 (0.03 CFS) and 76979 (0.06 CFS) are higher than the maximum rates allowed under each certificate. The instream rate must be reduced to prevent enlargement. For Certificate 4859, at 0.125 CFS, considering the volume limitation, water may be protected instream for an additional 2 days.
15. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:  
Eightmile Creek, tributary to Fifteenmile Creek

**Instream Reach:** From the POD (as described in Finding of Fact No. 11) to the mouth of Eightmile Creek

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
76978	1892	0.11	26.49	June 2 through September 30
	1895	0.20	4.50	
	1901	0.05	11.04	
4859	11/25/1919	0.125	30.60	May 31 through September 30
76979	11/25/1919	0.056	13.50	June 2 through September 30
<b>Total Instream</b>		<b>0.541</b>	<b>86.13</b>	

16. Other conditions to prevent injury and enlargement are:

Within the specified reach, the amount of water to which this right is entitled shall not exceed the quality 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 these rights are entitled downstream from the original point of diversion within the specified reach.

17. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
18. 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.
19. 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.
  20. 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.
  21. 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.
  22. 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.
  23. 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.
  24. The Lessor and Lessee have requested that the lease terminate on September 30, 2015. The last day in the term of a lease is generally the last day of the irrigation season. An irrigation season for Fifteenmile Creek is not defined by certificate or decree. Consistent with Finding of Fact No. 4, the lease may terminate on October 31, 2015. The lease may commence on the date this final order is signed

### **Conclusions of Law**

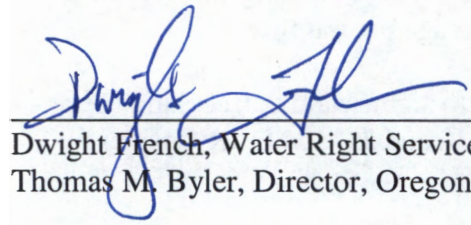
The Department concludes that the lease will not result in injury or enlargement, OAR 690-077-0077. The lease conforms to the applicable provisions of OAR 690-077-0015.

### **Now, therefore it is ORDERED:**

1. The Lease as described herein is APPROVED.
2. During 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, 2015.

Dated at Salem, Oregon this 21 day of July, 2015.



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

Mailing date: July 22 2015

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