

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

In the Matter of Instream Lease Application) DETERMINATION and
IL-1714, Jackson 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

Carol M. Ross Trust
100 6th Street
Ashland, Oregon 97520
cory.artdreaming@gmail.com

Lessee

Trout Unlimited
P.O. Box 2809
White City, Oregon 97503
jay.doino@tu.org

Findings of Fact

1. On January 31, 2019, Carol M. Ross Trust and Trout Unlimited filed an application to lease a portion of Certificate 17204 for instream use. The Department assigned the application number IL-1714.
2. On March 26, 2019, the Department contacted the Lessee to let them know about the deficiencies in the application, namely the lands that were not able to be dried up would not be able to be leased instream. On April 2, 2019, the Lessee submitted a revised application and map, thus resolving the deficiencies in the application.
3. The lease application includes the information required under OAR 690-077-0076(3). The Department provided notice of the lease application on April 5, 2019, pursuant to OAR 690-077-0077(1). Five comments were received within the comment period. The Department has reviewed all comments and taken all the information into consideration.
4. The portion of the right to be leased is as follows:
 - Certificate:** 17204 in the name of R. P. Neil (confirmed by decree of the Circuit Court of Jackson County entered of record at Salem, in Volume 14, at page 498)
 - Use:** Irrigation of 149.2 acres
 - Season of Use:** April 1 to October 1
 - Priority Date:** 1858 for 74.8 acres and 1888 for 74.4 acres
 - Quantity:** 2.49 cfs, being 1.25 under 1858 priority and 1.24 under 1888 priority

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: Spencer Creek and Dead Indian Creek, tributary to South Fork Little Butte Creek

Authorized Point of Diversion (POD): None Described on Certificate

Authorized Place of Use:

Priority Date 1858					
Twp	Rng	Mer	Sec	Q-Q	Acres
38 S	3 E	WM	15	NE SW	11.0
38 S	3 E	WM	15	SE SW	2.0
38 S	3 E	WM	16	SE SE	5.0
38 S	3 E	WM	21	NE NE	0.8
38 S	3 E	WM	21	SE NE	9.0
38 S	3 E	WM	21	NE SE	7.5
38 S	3 E	WM	22	NW NW	30.5
38 S	3 E	WM	22	SW NW	8.0
38 S	3 E	WM	22	NW SW	1.0
Total Acres					74.8

Priority Date 1888					
Twp	Rng	Mer	Sec	Q-Q	Acres
38 S	3 E	WM	15	NW SW	38.0
38 S	3 E	WM	15	SW SW	36.4
Total Acres					74.4

5. Certificate 17204 does not provide a description of the location of the points of diversion. Based upon additional information provided to the Department and the original application map, for purposes of this instream lease, the point of diversion is described as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
38 S	3 E	WM	21	NE SE	Latitude: 42.2478885021 Longitude: -122.4639633164
38 S	3 E	WM	21	NE SE	Latitude: 42.2477649254 Longitude: -122.4685886248

6. While the Little Butte Decree and Certificate 17204 mention Spencer Creek as a source, based on the information provided by the Watermaster, Spencer Creek is not considered a source of water for the purposes of this lease.
7. Certificate 17204 does not specify a rate or duty per acre. However, the Little Butte Decree specifies the rate limit as 1/60 cubic foot per second per acre.
8. As defined by OAR 690-077-0077 (3) and (4), the proposed change could result in enlargement of the right if not conditioned to prevent use of more water than could have been beneficially used without waste for the existing authorized use. The best information currently available information indicates that the most consumptive crop in the area is apples with a net irrigation requirement of 3.06 acre feet per acre. (*Oregon Crop Water Use and Irrigation Requirements* (Cuenca, 1992)). Utilizing an evaporative loss quantification of 10%, the maximum duty of water that could be transferred without enlargement would be 3.4 acre feet (af) per acre. Therefore, to prevent enlargement of this right, the maximum diverted annual volume of water for the new use under this right is limited to 254.32 acre feet for

priority date 1858 (74.8 acre x 3.4 af = 254.32 af) and 252.96 acre feet for priority date 252.96 (74.4 acre x 3.4 af = 252.96 af).

9. The lease application requests to protect water instream from Dead Indian Creek (source stream) into South Fork Little Butte Creek (receiving stream) into Little Butte Creek to the confluence with the Rogue River. An instream reach is generally from the point of diversion to the mouth of the source stream (Dead Indian Creek) but may be protected further if measurable in the receiving stream (South Fork Little Butte Creek) (OAR 690-077-0015 (8)).
10. The quantity that may be leased instream from Dead Indian Creek is measurable into the South Fork Little Butte Creek; the quantity that may be leased instream from South Fork Little Butte Creek is not measurable into the Little Butte Creek. Therefore, the instream reach can be from the POD on Dead Indian Creek to the mouth of Dead Indian Creek and then into South Fork Little Butte Creek to the mouth of South Fork Little Butte Creek.
11. The instream flows just below the point of diversion will be reduced to the consumptive portion of the right to account for return flows and to prevent injury and enlargement of the right.
12. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:

Dead Indian Creek, tributary to South Fork Little Butte

Instream Point: At the PODs (as described in Finding of Fact No. 5)

Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
1858	1.39	336.6	June 1 to September 30
1888	1.38	334.8	

Instream Reach: Immediately below the PODs to the mouth of South Fork Little Butte Creek

Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
1858	1.05	254.32	June 1 to September 30
1888	1.05	252.96	

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 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.

14. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
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. 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. The quantity of water to be protected instream has been reduced to account for return flows.
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 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, unless otherwise specified by a subsequent order establishing a new instream water right.
18. 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 in the month of October.

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

19. The Department has determined that the estimated average natural flows may be exceeded due to the following:
- a) There are two existing state agency established instream water right certificates (Certificate 72736 and Certificate 72737) that cover 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 applications (IS-72857 and IS-72858) 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 flow restoration priority watershed. In addition, the lower reaches of Dead Indian Creek and South Fork Little Butte Creek have been identified as having the highest need for flow restoration in previous prioritization efforts according to ODFW.
20. 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.
21. 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, as conditioned, 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.

22. 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.
23. The Lessor and Lessee have requested that the lease terminate on September 30, 2019. 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 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 September 30, 2019.

Dated at Salem, Oregon this day MAY 07 2019



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
Thomas M. Byler, Director, Oregon Water Resources Department

Mailing date: MAY 08 2019

This document was prepared by Sarah Henderson. If you have any questions, please call 503-986-0884.