

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

In the Matter of Instream Lease Application    )     DETERMINATION and FINAL ORDER ON  
IL-1479, Umatilla County                        )     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**

Cunningham Sheep Company  
Robert Levy  
PO Box 1186  
Pendleton, OR 97801  
[csheepco@gmail.com](mailto:csheepco@gmail.com)

**Findings of Fact**

1. On March 25, 2020, Robert Levy of Cunningham Sheep Company filed an application to lease the entirety of Certificates 1928 and 1655 and a portion of Certificates 2647 and 9779.
2. The portion of the first right to be leased is as follows:

**Certificate:**        1928 in the name of The Cunningham Sheep and Land Company  
                         (perfected under Permit S-36)

**Use:**                Irrigation of 165.4 acres

**Priority Date:**    September 17, 1909

**Quantity:**        **Rate:** 2.07 Cubic Foot per Second (CFS)  
**Limit:** limited to an amount actually beneficially used for said purposes,  
and shall not exceed 2.07 CFS, or its equivalent in case of rotation. The  
use hereunder shall conform to any reasonable rotation system ordered  
by the proper State Officer.

**Source:**            West Birch Creek, tributary to Birch Creek

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 S	31 E	WM	25	NE SE	4.0
1 S	31 E	WM	25	SE SE	29.0
1 S	31 E	WM	36	NE NE	6.0
1 S	31 E	WM	36	NW NE	6.0
1 S	32 E	WM	30	SW NW	4.0
1 S	32 E	WM	30	SE NW	6.0
1 S	32 E	WM	30	NE SW	34.0
1 S	32 E	WM	30	NW SW	22.1
1 S	32 E	WM	30	SW SW	29.0
1 S	32 E	WM	30	SE SW	22.0
1 S	32 E	WM	31	NW NW	3.3
<b>Total Acres</b>					<b>165.4</b>

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

**Certificate:** 1655 in the name of George F. Campbell (perfected under Permit S-1361)

**Use:** Irrigation of 23.7 acres

**Priority Date:** April 17, 1912

**Quantity:** **Rate:** 0.3 CFS

**Limit:** limited to an amount actually beneficially used for said purposes, and shall not exceed 0.3 CFS, or its equivalent in case of rotation. The use hereunder shall conform to any reasonable rotation system ordered by the proper State Officer.

**Source:** Birch Creek or extension of the Smith-Cunningham irrigation ditch

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
1 S	32 E	WM	30	NW SE	9.6
1 S	32 E	WM	30	SW SE	14.1
<b>Total Acres</b>					<b>23.7</b>

4. Certificate 1655 identifies the source of water as Birch Creek or extension of the Smith-Cunningham irrigation ditch. However, based upon review of the water right record, the source of water for this right appears to be West Birch Creek, tributary to Birch Creek.
5. Certificates 1928 and 1655 do not specify a rate and duty limit per acre. However, based upon review of the water right records and additional information provided by the Watermaster, a rate limit is 1/80<sup>th</sup> CFS per acre and an appropriate duty limit per acre, for purposes of this instream lease, is 4.5 Acre-Feet (AF) per acre considering the quantity of water that could be used beneficially and without waste.

6. Certificates 1928 and 1655 do not provided a description of the location of the point of diversion. Based upon review of water right records and additional information provided by the Department’s Watermaster and the Lessor, for purposes of this instream lease, the point of diversion (POD) is described as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 S	31 E	WM	1	NW SW	CUNNINGHAM DITCH POD: 250 FEET SOUTH AND 1200 FEET EAST OF THE QUARTER CORNER BETWEEN SECTIONS 1 AND 2, T2S, R31E, WM.

7. The portion of the third right to be leased is as follows:

**Certificate:** 2647 in the name of Anette Willson (confirmed by decree of the Circuit Court of the State of Oregon for Umatilla County and the said decree entered of record at Salem in the order Record of the State Water Board of the State of Oregon, in volume 3, at page 127)

**Use:** Irrigation of 43.0 acres, being 10.0 acres under the March, 1874 priority date and 33.0 acres under the 1890 priority date

**Priority Date:** March, 1874 and 1890

**Quantity:** **Rate:** 0.54 CFS, being 0.13 CFS under the March, 1874 priority date and 0.41 CFS under the 1890 priority date

**Limit:** limited to an amount actually beneficially used for said purposes, and shall not exceed 0.54 CFS, subject to the provision of paragraph 33 of said decree and all other conditions and limitations contained in said decree.

**Source:** Birch Creek, tributary to the Umatilla River

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
1 S	31 E	WM	25	NE SE	23.0
1 S	31 E	WM	25	SW SE	10.0
1 S	31 E	WM	36	NW NE	10.0
<b>Total Acres</b>					<b>43.0</b>

8. Certificate 2647 identifies the source of water as Birch Creek, tributary to the Umatilla River. However, based upon review of the water right record, the source of water for this right appears to be West Birch Creek, tributary to Birch Creek.
9. Certificate 2647 does not provide a description of the location of the point of diversion. Based upon review of water right records, including Transfer F1, which changed the point of diversion for a portion of the acreage involved in this lease, as evidenced by Special Order Volume 3, Page 223, and additional information provided by the Department’s Watermaster and the Lessor, for purposes of this instream lease, the points of diversion are described as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 S	31 E	WM	36	SW NW	WILSON DITCH POD: 70 FEET NORTH AND 1720 FEET WEST FROM THE CENTER OF SECTION 36
2 S	31 E	WM	1	NW SW	CUNNINGHAM DITCH POD: 250 FEET SOUTH AND 1200 FEET EAST OF THE QUARTER CORNER BETWEEN SECTIONS 1 AND 2, T2S, R31E, WM.

10. Based upon review of Transfer F1 and the water right, the place of use under Certificate 2647 associated with each point of diversion is more accurately described as follows:

Twp	Rng	Mer	Sec	Q-Q	Priority Date	POD	Acres
1 S	31 E	WM	25	NE SE	1890	CUNNINGHAM DITCH	23.0
1 S	31 E	WM	25	SW SE	March, 1874	CUNNINGHAM DITCH	10.0
1 S	31 E	WM	36	NW NE	1890	WILSON DITCH	10.0
<b>Total Acres</b>							<b>43.0</b>

11. Certificate 2647 does not specify a rate and duty limit per acre. However, the Umatilla River Decree specifies the rate limit as 1/80<sup>th</sup> CFS per acre and the duty limit as 4.5 AF per acre consistent with paragraph 33 of the Umatilla Decree and all other conditions and limitations contained in the decree.

12. The portion of the fourth right to be leased has been modified and clarified from the original lease application and is as follows:

**Certificate:** 9779 in the name of Fred W. Falconer (perfected under Permit S-8842)

**Use:** Irrigation of 77.1 acres

**Priority Date:** December 15, 1928

**Quantity:** **Rate:** 0.97 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:** West Birch Creek, tributary to Birch Creek

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

Twp	Rng	Mer	Sec	Q-Q
2 S	31 E	WM	1	NW SW

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
1 S	31 E	WM	25	SE SW	5.0
1 S	31 E	WM	25	NE SE	2.0
1 S	31 E	WM	25	SW SE	20.0
1 S	31 E	WM	25	SE SE	3.0
1 S	31 E	WM	36	NE NW	22.2
1 S	31 E	WM	36	SE NW	24.9
<b>Total Acres</b>					<b>77.1</b>

13. Certificate 9779 does not provide measured distances of the location of the point of diversion. Based upon review of water right records and additional information provided by the Department's Watermaster and the Lessor, for purposes of this instream lease, the point of diversion (POD) is described as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 S	31 E	WM	1	NW SW	CUNNINGHAM DITCH POD: 250 FEET SOUTH AND 1200 FEET EAST OF THE QUARTER CORNER BETWEEN SECTIONS 1 AND 2, T2S, R31E, WM.

14. Certificate 9779 does not specify a duty limit per acre. However, based upon additional information provided by the Watermaster, an appropriate duty limit per acre, for purposes of this instream lease, is 4.5 Acre-Feet (AF) per acre considering the quantity of water that could be used beneficially and without waste.
15. Certificates 1928, 1655, 2647, and 9779 do not specify the irrigation season. However, the Umatilla River Decree establishes the irrigation season for the area as March 1 to November 1.
16. 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.
17. The Lessor requested assistance from the Department in determining the appropriate reach for the proposed instream use. The Watermaster recommended a reach from the PODs to the mouth of West Birch Creek.
18. A portion of the water diverted at each POD returns to West Birch Creek within the proposed reach 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 and return flows should be accounted for immediately below each POD.
19. Streamflows are lost within the proposed reach due to evaporation. Reductions of 3% per mile in the quantities that may be protected instream are necessary to prevent injury to downstream water users and enlargement of the right(s).
20. An instream period was not clearly identified on the instream lease application. The Watermaster recommended that water be protected instream during May through October.

21. The instream use has been modified from the lease application to prevent injury and enlargement and is as follows:

West Birch Creek, tributary to Birch Creek

**Instream Point No. 1:** At Cunningham Ditch POD (as described in Findings of Fact No. 6, 9, and 13)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
2647	March, 1874	0.13	45.00	May 4 through October 31
2647	1890	0.29	103.50	May 4 through October 31
1928	9/17/1909	2.07	744.30	May 4 through October 31
1655	4/17/1912	0.30	106.65	May 6 through October 31
9779	12/15/1928	0.97	346.95	May 5 through October 31
<b>Total Instream</b>		<b>3.76</b>	<b>1346.40</b>	

**Instream Reach No. 2:** From immediately below Cunningham Ditch POD to Wilson Ditch POD (as described in Finding of Fact No. 9)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
2647	March, 1874	0.09	32.00	May 4 through October 31
2647	1890	0.21	73.60	May 4 through October 31
1928	9/17/1909	1.47	529.28	May 4 through October 31
1655	4/17/1912	0.21	75.84	May 6 through October 31
9779	12/15/1928	0.69	246.72	May 5 through October 31
<b>Total Instream</b>		<b>2.67</b>	<b>957.44</b>	

**Instream Point No. 3:** At Wilson Ditch POD

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
2647	March, 1874	0.09	32.00	May 4 through October 31
2647	1890	0.33	118.60	May 4 through October 31
1928	9/17/1909	1.47	529.28	May 4 through October 31
1655	4/17/1912	0.21	75.84	May 6 through October 31
9779	12/15/1928	0.69	246.72	May 5 through October 31
<b>Total Instream</b>		<b>2.79</b>	<b>1002.44</b>	

**Instream Point No. 4:** Immediately below Wilson Ditch POD

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
2647	March, 1874	0.09	32.00	May 4 through October 31
2647	1890	0.30	105.60	May 4 through October 31
1928	9/17/1909	1.47	529.28	May 4 through October 31
1655	4/17/1912	0.21	75.84	May 6 through October 31
9779	12/15/1928	0.69	246.72	May 5 through October 31
<b>Total Instream</b>		<b>2.76</b>	<b>989.44</b>	

**Instream Reach No. 5:** From immediately below Wilson Ditch to mouth of West Birch Creek (identified quantities account for 3% loss per mile and are approximate amounts at mouth of West Birch Creek)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
2647	March, 1874	0.08	27.75	May 4 through October 31
2647	1890	0.26	92.49	May 4 through October 31
1928	9/17/1909	1.26	453.19	May 4 through October 31
1655	4/17/1912	0.18	64.03	May 6 through October 31
9779	12/15/1928	0.59	211.55	May 5 through October 31
<b>Total Instream</b>		<b>2.37</b>	<b>849.01</b>	

22. 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.

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

24. The protection of flows within the proposed reach is appropriate, considering:

- a. The instream water use begins at the recorded points 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 points of diversion. However, there are streamflow losses due to evaporation. Evaporative losses of 3% per mile have been accounted for in Finding of Fact No. 21; and
- d. Return flows resulting from the exercise of the existing water right would re-enter the river within the reach of the instream water rights. The quantity of water to be protected instream below each POD has been reduced to account for return flows.

25. 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.

26. The total monthly quantities of water to be protected instream under the proposed instream rights in the reach will exceed the estimated average natural flow. The estimated average natural flows may not be exceeded unless criteria for exceeding those flows are met.

27. 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 72653) 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-70687) filed by the Oregon Department of Fish and Wildlife (ODFW); and
- b) The water right proposed to be leased is located within an Oregon Department of Fish and Wildlife (ODFW) flow restoration priority watershed.

28. 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.

29. 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.

30. 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.

31. The Lessor has requested that the lease terminate on October 31, 2024. The lease may commence on the date this final order is signed.

32. The Lessor has requested 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.

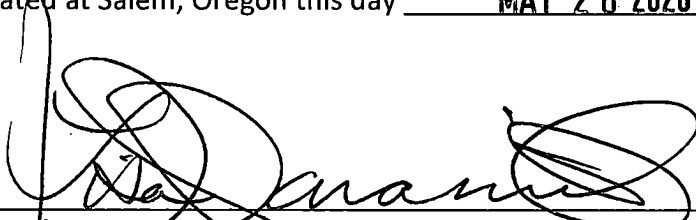
### **Now, therefore it is ORDERED:**

1. The Lease as described herein is APPROVED.
2. During each year 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, 2024. For multiyear leases, the lessor *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 4 through October 31) 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 day MAY 20 2020.



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

Mailing date: MAY 21 2020

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