

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

In the Matter of Instream Lease Application ) DETERMINATION and  
IL -1703, Umatilla 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**

Jim Whitney  
PO Box 1614  
Pendleton, OR. 97801

**Co-Lessor**

The Freshwater Trust (TFT)  
700 SW Taylor St. Suite 200  
Portland, OR. 97205

**Findings of Fact**

1. On May 31, 2018, Jim Whitney and TFT filed an application to renew instream lease IL-1415, involving lease a portion of Certificate 75656 for instream use.
2. During review of the application the Department discovered scrivener's errors in the previous order as it did not account for the 3% losses. This order has been re-assigned a new lease number (IL-1703) to differentiate it from the previous order.
3. The portion of the right to be leased has been modified from the lease application and is as follows:

**Certificate:** 75656 in the name of Clear Creek Cattle Company (confirmed by the Umatilla River decree at Volume 3 at Page 127)

**Use:** Irrigation of 60.0 acres

**Priority Date:** 1880

**Quantity:** **Rate:** 0.59 Cubic Foot per Second (CFS)

**Volume:** 270.0 Acre-Feet (AF)

**Limit:** The amount of water to which this right is entitled is limited to an amount actually beneficially used and shall not exceed 1.06 Cubic feet per second, subject to the provisions 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 Point of Diversion (POD):** Not described on Certificate

**Authorized Place of Use:**

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.

| Twp         | Rng  | Mer | Sec | Q-Q   | Acres |
|-------------|------|-----|-----|-------|-------|
| 2 N         | 32 E | WM  | 19  | NE SW | 2.0   |
| 2 N         | 32 E | WM  | 19  | SE SW | 16.0  |
| 2 N         | 32 E | WM  | 19  | SW SE | 18.5  |
| 2 N         | 32 E | WM  | 30  | NE NE | 15.0  |
| 2 N         | 32 E | WM  | 30  | NW NE | 8.5   |
| Total Acres |      |     |     |       | 60.0  |

4. The Certificate does not describe the point of diversion; however, the Watermaster provided the following as the location of the point of diversion.

| Twp | Rng  | Mer | Sec | Q-Q   | Measured Distances                          |
|-----|------|-----|-----|-------|---|
| 2 N | 32 E | WM  | 30  | SE NE | PETERSON DAM, APPROXIMATELY RIVER MILE 2.46 |

5. Certificate 75656 does not specify the irrigation season; however the Decree identifies a season of “The 1<sup>st</sup> day of March to the 1<sup>st</sup> day of November”.
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 instream use is clarified from the lease application to prevent injury and enlargement and is as follows:

Birch Creek, tributary to the Umatilla River

**Instream Point:** At the POD (as described in Finding of Fact No. 4)

| Certificate | Priority Date | Instream Rate (CFS) | Instream Volume (AF) | Period Protected Instream   |
|-------------|---------------|---------------------|----------------------|-----------------------------|
| 75656       | 1880          | 0.59                | 270                  | March 16 through October 31 |

**Instream Reach:** From the Immediately below the POD (as described in Finding of Fact No.4) to the mouth of Birch Creek

| Certificate | Priority Date | Instream Rate (CFS) | Instream Volume (AF) | Period Protected Instream   |
|-------------|---------------|---------------------|----------------------|-----------------------------|
| 75656       | 1880          | 0.57                | 262                  | March 16 through October 31 |

8. 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 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 of the original point of diversion within the specified stream reach.

9. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
10. The protection of flows at the authorized point of diversion/within the proposed reach is appropriate, considering:
- 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 areas of natural loss of streamflow to the river bed downstream from the point of diversion a 3% reduction has been calculated to account for this loss; 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.
11. 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.
  12. 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.
  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, 2018. The lease 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**

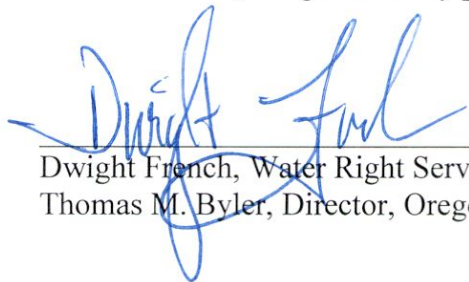
The Department concludes that the lease will not result in injury or enlargement, OAR 690-077-0077. The lease conforms to the applicable provisions of OAR 690-077-0015.

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

1. The Lease as described herein is APPROVED.
2. During 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, 2018; the lease may not be terminated by any party to the lease prior to the specified termination date.

Dated at Salem, Oregon this day JUL 09 2018.



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

*This document was prepared  
by Joan Smith if you have any  
questions, call 503-986-0892.*

Mailing date: JUL 10 2018