

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

In the Matter of Proposed Instream Lease)	DENIAL OF PROPOSED INSTREAM
Renewal IL-2, Certificates 38374, 51048)	LEASE
and 51049, Sherman and Wasco Counties)	
)	

Authority

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. OAR Chapter 690, Division 077 implements the statutes and provides the Department's procedures and criteria for evaluating instream lease applications.

Lessor

Wayne L. Webb
P.O. Box 1550
The Dalles, Oregon 97058

Lessee

David Pilz
The Freshwater Trust
65 SW Yamhill Street, Suite 200
Portland, Oregon 97204

Findings of Fact

1. On May 25, 2010 Wayne L. Webb and the Freshwater Trust filed an application to renew IL-2, involving all of Certificates 38374, 51048 and 51049 for instream use.

2. The first right to be leased is as follows:

Certificate: 38374 in the name of ERNEST O. WEBB and AGNES M. WEBB (perfected under Permit S-28518)

Use: IRRIGATION of 37.3 ACRES

Priority Date: DECEMBER 10, 1962

Rate: 0.93 CUBIC FEET PER SECOND

Limit/Duty: ONE-FORTIETH cfs per acre, not to exceed 4.0 acre-feet per acre per year

Source: BUCK HOLLOW CREEK, tributary to DESCHUTES RIVER

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 Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
4 S	14 E	WM	2	NE NW	2660 FEET WEST AND 180 FEET SOUTH FROM NE CORNER OF SECTION 2
4 S	14 E	WM	2	SE NW	2790 FEET WEST AND 1940 FEET SOUTH FROM NE CORNER OF SECTION 2

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
3 S	14 E	WM	35	NE SW		0.1
3 S	14 E	WM	35	NW SE		9.4
3 S	14 E	WM	35	SW SE		14.7
4 S	14 E	WM	2	NW NE	2	7.4
4 S	14 E	WM	2	SW NE		5.7
Total:						37.3

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

Certificate: 51048 in the name of AGNES M. WEBB (perfected under Permit R-6150)

Use: IRRIGATION and SUPPLEMENTAL IRRIGATION

Priority Date: MARCH 10, 1975

Rate: 11.83 ACRE FEET

Source: KERR CREEK, tributary to BUCK HOLLOW CREEK

Authorized Place of Use:

STORAGE				
Twp	Rng	Mer	Sec	Q-Q
4 S	14 E	WM	2	SW NE

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

Certificate: 51049 in the name of AGNES M. WEBB (perfected under Permit S-38057)

Use: IRRIGATION of 11.9 ACRES and SUPPLEMENTAL IRRIGATION of 7.4 ACRES

Priority Date: MARCH 10, 1975

Rate: 0.48 CUBIC FEET PER SECOND (CFS), being 0.16 CFS from BUCK HOLLOW CREEK and 0.32 CFS from KERR CREEK AND RESERVOIR

Limit/Duty: ONE-FORTIETH CFS per acre, not to exceed 4.0 acre-feet per acre for IRRIGATION and 4.0 acre-feet per acre for SUPPLEMENTAL IRRIGATION

Source: BUCK HOLLOW CREEK, tributary to DESCHUTES RIVER, and KERR CREEK AND WEBB RESERVOIR, tributaries to BUCK HOLLOW CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
4 S	14 E	WM	2	SW NE	KERR CR: 1850 FEET SOUTH AND 2520 FEET WEST FROM NE CORNER OF SECTION 2
4 S	14 E	WM	2	NE NW	BUCK HOLLOW CR: 180 FEET SOUTH AND 2660 FEET WEST FROM NE CORNER OF SECTION 2

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
3 S	14 E	WM	35	NW SE	1.6
3 S	14 E	WM	35	SW SE	4.4
4 S	14 E	WM	2	NW NE	0.5
4 S	14 E	WM	2	NW NE	4.4
4 S	14 E	WM	2	SW NE	1.0
Total:					11.9

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
4 S	14 E	WM	2	NW NE	4.4
4 S	14 E	WM	2	SW NE	3.0
Total:					7.4

5. On November 18, 1968 Ernest and Agnes Webb, husband and wife, (Owners) granted Wayne L. Webb (Renter) a 20-year lease of the real property commonly known as the Buck Hollow Ranch. The Owners granted Wayne L. Webb the exclusive right to use and manage all aspects of Buck Hollow Ranch except certain specific rights reserved by the Owners, including rights to a residence and barn located on the property and certain hunting rights which the Owners leased to other people.
6. The November 18, 1968 land lease agreement also granted Wayne Webb the right to renew the lease for one additional 20-year term, upon expiration of the initial 20-year term.
7. Earnest Webb, owner of the Buck Hollow Ranch, died in 1972. His will devises all of his property to his wife Agnes for life, or until she remarries, with the remainder of the property to be divided equally among four of Earnest's six children upon Agnes' death or remarriage. Two of the four children named in Earnest's will are Wayne Webb and La Velle Underhill.
8. Sometime after the death of Earnest Webb, one of the children named in Earnest's will filed an action to partition Buck Hollow Ranch. The Circuit Court of Sherman County determined that the rights of Earnest's children could not vest during the life of Agnes Webb, unless she remarried. The Court further held that, as provided by Earnest's will, when the rights of Wayne Webb and La Velle Underhill become vested, the rights of Wayne Webb and La Velle Underhill will be as tenants in common. *See Oregon Court of Appeals, Aff'd (91-4954-C; CA A77449) April, 29 1994.*
9. On November 18, 1988 Wayne Webb exercised his right to renew the land lease agreement for one additional 20-year period. The land lease agreement was signed by Agnes Webb, the widow of Earnest Webb.
10. Instream Lease L-2 was initially approved by the Department on July 7, 1995. Between July 7, 1995 and November 30, 2006 the Department renewed Instream Lease L-2 approximately seven times.
11. On March 25, 2008 the Department re-designated Instream Lease L-2 as Instream Lease IL-2, and renewed the Instream Lease for the 2008 irrigation season.

12. The lease record contains evidence that at the time the lease was first approved, Wayne Webb was not the deeded landowner to which the water right is appurtenant. However, at the time Mr. Webb filed Instream Lease application L-2, and at each time he renewed Instream Lease IL-2 (or its predecessor L-2), Mr. Webb established that he was authorized to lease the rights as identified in the Instream Lease Application or Instream Lease Renewal form by submitting copies of the land lease agreement as established in Findings of Fact #5, 6 and 7.
13. On June 1, 2010 the Department published notice of the proposed renewal of Instream Lease IL-2, in the Department's weekly public notice pursuant to OAR 690-077-0077(1).
14. On June 21, 2010 Victor VanKoten, Attorney for La Velle (Webb) Underhill, filed comments sufficient to establish, more likely than not, his client is a 25% tenant in common with the Applicant, Wayne L. Webb, regarding the lands subject to this proposed instream lease renewal. The comments referred to the will of Earnest Webb, and notified the Department that a second action to partition the Buck Hollow Ranch. *See Wasco County Partition Case No. CC97-17.*
15. Also on June 21, 2010, Mr. VanKoten mailed copies of the comments filed on behalf of La Velle Underhill to the Freshwater Trust, and Mark Wombel, Attorney for the Lessor, Wayne Webb.
16. Neither the Lessor nor the Lessee disputed the comments filed by Victor VanKoten nor did they provide any additional documentation or other evidence to establish that Mr. Webb is currently authorized to pursue the renewal of Instream Lease IL-2 on behalf of all landowners.
17. The Lessor, Wayne L. Webb, is not currently the deeded landowner to a 100% undivided interest in all lands to which the water rights the Applicant has proposed to protect instream under Instream Lease Renewal IL-2.
18. The lease application does not include the all of information required under OAR 690-077-0076(3). Specifically, the Lessor has not provided sufficient documentation to demonstrate that the Lessor is authorized to pursue the instream lease on behalf of all owners, as required by OAR 690-077-0076(3)(i) which requires:
 - (i) If the lessor(s), as identified in Subsection (2)(a) of this rule, is not the deeded landowner to which the water right is appurtenant, sufficient documentation to demonstrate that the lessor(s) is authorized to pursue the instream lease. Such documentation shall include:
 - (A) A notarized statement from the landowner consenting to the lease and a copy of the recorded deed;
 - (B) A water right conveyance agreement(s) as defined in OAR chapter 690, division 380 and a copy of the recorded deed for the landowner at the time the water right was conveyed; or
 - (C) Other documentation that demonstrates to the Department's satisfaction that the lessor(s) is authorized to pursue the lease in the absence of the consent of the landowner.

CONCLUSIONS OF LAW

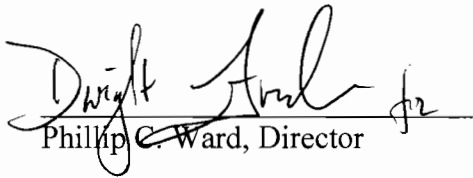
The Department concludes that the Applicant has not provided documentation sufficient to demonstrate he is authorized to pursue the instream lease as required by 690-077-0076(3)(i).

ORDER

Therefore, it is ORDERED:

1. That the Lease as described herein is DENIED.

Dated at Salem, Oregon this 4th day of October, 2010.


Phillip C. Ward, Director

Mailing date: OCT 05 2010

This order was prepared by Kody Thurgood. If you have any questions about the information in this document, you may reach me at 503-986-0892 or Kody.J.Thurgood@wrд.state.or.us