

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

In the Matter of Instream Lease Application    )    PARTIAL REINSTATEMENT OF  
IL-1566, Benton County                            )    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**

Clifford and Gay Hall  
PO Box 490  
Philomath, OR 97370

**Findings of Fact**

1. On March 10, 2014, Eric Schwartz, on behalf of Thomas Paine Farms, filed an application to renew instream lease IL-989, involving a portion of Certificates 28041 and 54648. The Department assigned the lease a new application number, IL-1398.
2. A Final Order approving instream lease IL-1398 was issued by the Department on April 24, 2014, as evidenced by Special Order Volume 92, Pages 194-198. The term of the lease commenced on April 24, 2015 and was to extend through September 30, 2018.
3. On March 1, 2015, the Department received a request from Luckiamute River Farm, LLC, to terminate the lease prior to the 2015 instream use period. The lease was exercised during the 2014 water use period ending on September 30, 2014.
4. On March 10, 2015, the Department issued an order terminating Instream Lease IL-1398, as evidenced by Special Order Volume 95, Pages 230-231.
5. On August 12, 2016, Eric Schwartz informed the Department that it had erroneously terminated Instream Lease IL-1398 based upon the request received from Luckiamute River Farm. Mr. Schwartz indicated that Luckiamute River Farm only owns a portion of the acreage involved in the lease application. The remaining acreage is owned by Clifford and Gay Hall, with interest in the water rights retained by Mr. Schwartz. Mr. Schwartz indicated that neither he nor the Hall's had consented to the termination of Instream Lease IL-1398 and were not informed of its termination.

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.

6. Mr. Schwartz requested that the Department reinstate the portion of the lease involving Certificates 28041 and 54648 that are appurtenant to the lands owned by Clifford and Gay Hall. Mr. Schwartz provided the Department with documents showing that Clifford and Gay Hall own a portion of the acreage associated with instream lease IL-1398.
7. Based upon review of information provided by Eric Schwartz and Benton County ownership records, the Department has determined that Luckiamute River Farm, LLC is not the sole owner of the lands associated with water right Certificate 28041 and 54648. The Department determined that Clifford and Gay Hall are also recorded owners, as established by Benton County deed records, of lands to which a portion of the water right evidenced by Certificate 28041 and 54648 are appurtenant.
8. The Department has determined that the termination order requested by Luckiamute River Farms, LLC was issued in error. The portion of Instream Lease IL-1398 that is associated with the lands owned by Clifford and Gay Hall may be reinstated.
9. The Department assigned the instream lease a new number, IL-1566, to differentiate it from the original lease.
10. The portion of the first right to be leased is as follows:

**Certificate:** 28041 in the name of Rachel C. Bergman (perfected under Permit S-21121)  
**Use:** Irrigation of 63.7 acres  
**Priority Date:** July 23, 1951  
**Quantity:** **Rate:** 0.13 Cubic Foot per Second (CFS) (proportioned rate)  
**Duty:** 159.25 Acre-Feet (AF)  
**Limit:** One-Eighthieth of one CFS per acre, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 2.5 AF per acre for each acre irrigated during the irrigation season of each year

**Source:** LUCKIAMUTE RIVER, tributary of the WILLAMETTE RIVER

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

Twp	Rng	Mer	Sec	Q-Q	DLC
10S	6W	WM	20	NE NE SW NE NW SE	Norton DLC 43

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
10S	6W	WM	16	SW SW	43	2.6
10S	6W	WM	17	SE SE	43	0.8
10S	6W	WM	20	NE NE	43	21.6
10S	6W	WM	20	SW NE	43	8.5
10S	6W	WM	20	SE NE	43	4.8
10S	6W	WM	20	NE SE	43	0.6
10S	6W	WM	20	NW SE	43	1.5
10S	6W	WM	21	NW NW	43	21.3
10S	6W	WM	21	SW NW	43	2.0
<b>TOTAL:</b>						<b>63.7</b>

11. Certificate 28041 is a deficient water right. If water were diverted simultaneously to all authorized lands and uses described in the right at the maximum rate and duty allowed, the total rate and duty for the water right would be exceeded. In the event water was diverted simultaneously to all authorized lands and uses described in the right at the maximum rate and duty allowed at the POD, the portion of the right involved in this instream lease would be limited as described in the above Finding of Fact No. 10.

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

**Certificate:** 54648 in the name of Jack Mahana  
**Use:** Supplemental Irrigation of 12.7 acres  
**Priority Date:** October 18, 1974  
**Quantity:** **Rate:** 0.16 Cubic Foot per Second (CFS)  
**Duty:** 31.75 Acre-Feet (AF)  
**Limit:** One-eightieth of one CFS per acre, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 2.5 AF per acre for each acre irrigated during the irrigation season of each year, provided the available supply for any prior right existing for the same land and shall not exceed the limitation allowed herein

**Source:** LUCKIAMUTE RIVER, tributary of the WILLAMETTE RIVER

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

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
10S	6W	WM	20	NW SE	Norton DLC 43	2310 FEET NORTH AND 1650 FEET WEST FROM THE SE CORNER OF SECTION 20

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
10S	6W	WM	20	SW NE	8.5
10S	6W	WM	20	SE NE	2.3
10S	6W	WM	20	NE SE	0.6
10S	6W	WM	20	NW SE	1.3
<b>TOTAL:</b>					<b>12.7</b>

13. Certificates 28041 and 54648 do not specify the irrigation season. However, the Luckiamute River Decree establishes the irrigation season for the area as April 1 through September 30.

14. Certificate 28041 does not identify a specific location for the point of diversion in the NWSE of Section 20. However, it appears from the final proof maps that Certificates 28041 and 54648 have the same point of diversion in the NWSE. Therefore, the instream reach will begin at the location of the point of diversion identified in Finding of Fact No. 12 above.

15. The Department provided notice of the lease application on March 18, 2014, pursuant to OAR 690-077-0077(1). No comments were received. Notice of this lease was provided under application IL-989.

16. The instream use has been modified from the lease application and is as follows:  
LUCKIAMUTE RIVER, tributary to WILLAMETTE RIVER

**Primary Instream:**

**Instream Reach:** From the POD (as described in Finding of Fact No. 12) to the mouth of Luckiamute River.

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
28041	July 23, 1951	0.13	47.55	April 1 through September 30
54648	Oct. 18, 1974	0.06	22.29	
Total		0.22	191.1	

**Supplemental Instream:**

**Instream Reach:** From the POD to the mouth of Luckiamute River.

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
54648	Oct. 18, 1974	0.03	9.46	April 1 through September 30

17. Other conditions to prevent injury and enlargement are:

Certificate 54648 is supplemental to a portion of Certificate 28041. The portion of Certificate 54648 leased instream as supplemental shall only be protected instream if the full rate and duty under Certificate 28041 are not available during the period in which water is leased instream. Certificate 28041 is a deficient water right. A portion of Certificate 54648 may also be protected instream as primary to bring the rate and duty allowed under the primary right, Certificate 28041, for 12.7 acres up to the full rate and duty allowed, being 1/80 cfs per acre and 2.5 AF per acre.

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

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.
24. 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.
25. The lease may commence on the date this final order is signed and terminate on September 30, 2018.
26. 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 REINSTATED.
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 September 30, 2018. 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, April 1 through September 30, 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 17 day of September 2016.

  
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Dwight French, Water Right Services Division Administrator, for  
Thomas M. Byler, Director, Oregon Water Resources Department  
Mailing date: OCT 18 2016

This document was prepared by Kate Fitzgerald. If you have any questions, please call 503-986-0898.