

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

In the Matter of Instream Lease Application ) DETERMINATION and  
IL-1411, Wasco County ) FINAL ORDER ON PROPOSED  
 ) INSTREAM LEASE

**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 No. 1**

Phil Kaser  
4965 Fifteenmile Rd.  
The Dalles, OR 97058

**Lessor No. 2**

Erin Smith  
320 Whitebirch Pl.  
Wenatchee, WA 98801

**Lessor No. 3**

Brook Remington  
6215 Kelly Cutoff Rd.  
The Dalles, OR 97038

**Lessee**

The Freshwater Trust (TFT)  
65 SW Yamhill St., Suite 200  
Portland, Oregon 97204

**Findings of Fact**

1. On May 14, 2014, Phil Kaser, Erin Smith, Brook Remington and TFT filed an application to lease a portion of Certificate 5603 for instream use. The Department assigned the application number IL-1411.
2. On July 7, 2014, the Department requested a revised application map from the Lessee. A revised application map was received on July 8, 2014. The revised map also clarified the portion of the right involved in the lease application within each quarter quarter.
3. The portion of the right to be leased has been modified from the lease application and is as follows:

**Certificate:** 5603 in the name of Charles Bernard (perfected under the Fifteenmile Creek Decree, of record at Salem, in the Order Record of the State Engineer, in Volume 7, at page 406)

**Use:** Irrigation of 9.6 acres

**Priority Date:** 1907

**Quantity:** **Volume:** 28.8 Acre-Feet (AF)

**Limit:** 3.0 AF per acre in any irrigation season

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:** Fifteenmile Creek, tributary to the Columbia River  
**Authorized Point of Diversion (POD):** Not specified on Certificate  
**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
2 N	14 E	WM	27	NE NW	3.0
2 N	14 E	WM	27	SE NW	5.0
2 N	14 E	WM	27	SW NE	1.6
Total Acres					9.6

4. Certificate 5603 does not provided a description of the location of the point of diversion. Based upon additional information provided by the Department’s Watermaster and the applicant, for purposes of this instream lease, the point of diversion is described as follows:

Twp	Rng	Mer	Sec	Q-Q	Latitude/Longitude and River Mile
2 N	14 E	WM	27	SW NE	Lat 45.629832, Long -121.052813; also approximately at River Mile 6.2

5. Certificate 5603 does not specify the irrigation season; nor is an irrigation season specified by Basin Program or Decree. For the purposes of instream leasing, an irrigation season of March 1 through October 31, consistent with OAR 690-250, shall be used to establish when water may be protected instream.
6. Certificate 5603 describes the annual duty of their respective rights as 3.0 acre-feet (AF) per acre; however the Fifteenmile Creek Decree further describes the duty in the following 30-day volumes: Prior to July 1, the diversion is restricted to 1.0 AF per acre in any 30-day period. From July 1<sup>st</sup>, the diversion is limited to ¾ AF per acre in any 30-day period.
7. Certificate 5603 does not describe the rate at which water can be applied. The Fifteenmile Creek Decree indicates that the rate applied during the irrigation season may be variable in order to achieve the appropriate head of water but also states that the irrigation rate shall not exceed 1/40<sup>th</sup> of CFS per acre after July 1<sup>st</sup>, except in case of rotation.

Certificate	Max Rate After July 1 <sup>st</sup>
5603	0.24 CFS

8. There appears to be two primary irrigation water rights, Certificates 49826 and 49825, appurtenant to all or a portion of the lands described in Finding of Fact No. 3. The Lessor and Lessee have requested that this water right not be included as part of this lease application. During the term of the lease, water use under these layered water rights will also be suspended.
9. 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.
10. At the full instream rate and volume requested, water may be protected instream over a 121 day period. The Lessor and Lessee requested an instream period of June 15 through September 30, which is 108 days. To maximize the instream use, the Department has expanded the instream period to June 2 through September 30, a 121 day period.

11. The instream use has been modified as specified in Finding of Fact No. 10 and is as follows:  
Fifteenmile Creek, tributary to the Columbia River

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

Certificate	Priority Date	Instream Rate (cfs)	Instream Volume (AF)	Period Protected Instream
5603	1907	0.12	28.8	June 2 through September 30

12. 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.

13. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right.
14. 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.
15. Instream water rights, with a senior priority date, created through an instream lease generally replace portions of other instream water rights, which carry junior priority dates, established through minimum flow conversion or the state agency application process to establish new instream water rights. The total monthly quantities of water to be protected under the existing and proposed instream rights in the reach will exceed the quantities identified as necessary for instream use for various fish life stages under Certificate 64744, which was created under ORS 537.341, the application process for state agencies to establish new instream water rights. However, the Department has identified that this instream lease will provide an additional beneficial purpose. The proposed instream lease has a priority date of 1907. Several of the existing instream water rights on Fifteenmile Creek have priority dates junior to 1909 and may only be 85 percent reliable depending upon the water year.

Based upon additional information from the Department's Watermaster, water rights with priority dates junior to 1909 are generally regulated off by August 1, if not sooner. Given the current water year, the Watermaster has identified that junior rights were already regulated off at the time this order was being prepared. The Oregon Department of Fish and Wildlife has identified that this portion of Fifteenmile Creek is a high priority for streamflow restoration and that additional streamflow is significant for the protection of aquatic habitat

and recovery of salmonids in the Fifteenmile Creek watershed.

16. The Department has identified that during the term of this lease, the quantities protected instream may be additive to other existing instream water rights established within the same reach under ORS 537.341, 537.346, 537.348 or 537.470.
17. 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.
18. 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.
19. 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.
20. 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.
21. If a right which has been leased is later proposed to be leased again, transferred and/or reviewed for 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.
22. The Lessor and Lessee have requested that the lease terminate on September 30, 2014. The last day in the term of a lease is generally the last day in the period of allowed use, irrigation season. An irrigation season for Fifteenmile Creek is not defined by certificate or decree. Consistent with Finding of Fact No. 5, the lease may terminate on October 31, 2014. 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 October 31, 2014.

Dated at Salem, Oregon this 11 day of July, 2014.

  
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Dwight French,  
Water Right Services Division Administrator, for  
Director, Oregon Water Resources Department

*This document was prepared by Laura  
Wilke and if you have any questions,  
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Mailing date: JUL 14 2014