

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

In the Matter of Instream Lease Application) DETERMINATION and FINAL ORDER ON
IL-1984, 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

WhitWhit, LLC
Jim Whitney
PO Box 1614
Pendleton, OR 97801

Lessee

Trout Unlimited (TU)
Attn: Chrysten Rivard
633 Iowa Street
Ashland, OR 97520

Findings of Fact

1. On June 5, 2023, Jim Whitney of WhitWhit, LLC and TU, filed an application involving the entirety of Certificates 80490, 80491, 80492, 89086, 89088, and 91874, and a portion of Certificate 91875 for instream use. The Department assigned the application number IL-1984.

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

- Certificate:** 80490 in the name of Geo C. Sloan (confirmed by decree for Umatilla County and recorded in Volume 3, Page 127)
- Use:** Irrigation of 9.5 acres, Domestic and Stock
- Priority Date:** 1892
- Quantity:** **Rate:** 0.12 Cubic Foot per Second (CFS)
Limit: The amount of water to which this right is entitled and hereby confirmed is limited to an amount actually beneficially used and shall not exceed 0.12 cubic foot 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, a tributary to Columbia River
Umatilla River, tributary to Columbia River
- Authorized Point of Diversion (POD):** Not described on certificate

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:

IRRIGATION, DOMESTIC, STOCK					
Twp	Rng	Mer	Sec	Q-Q	Acres
2 N	13 E	WM	13	SE NE	3.5
2 N	13 E	WM	13	SW SE	4.3
2 N	13 E	WM	13	SE SE	1.7
Total Acres					9.5

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

Certificate: 80491 in the name of State of Oregon, Eastern Oregon State Hospital (perfected under Permit S-12000)

Use: Irrigation of 3.9 acres

Priority Date: October 25, 1935

Quantity: **Rate:** 0.10 Cubic Foot per Second (CFS)

Limit: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to 1/40 of one cubic foot per second per acre or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 6.0 acre-feet for each acre irrigated during the irrigation season of each year.

Source: Birch Creek, a tributary to Columbia River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	32 E	WM	19	NE SW	NOT DESCRIBED ON CERTIFICATE

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
2 N	31 E	WM	13	NW SE	3.9
Total Acres					3.9

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

Certificate: 80492 in the name of State of Oregon, Eastern Oregon State Hospital (perfected under Permit S-24144)

Use: Irrigation of 0.47 acres

Priority Date: April 5, 1956

Quantity: **Rate:** 0.01 Cubic Foot per Second (CFS)

Limit: The amount of water to which this right is entitled is limited to an amount actually beneficially used and shall not exceed 0.01 cubic foot per second, water to be diverted from Birch Creek when available and any deficiency in the available supply in Birch Creek is to be made up by diversion from Umatilla River, providing that the total quantity diverted from both streams shall not exceed 1/40 of one cubic foot per second for each acre irrigated and not to exceed 4.5 acre-feet per acre, or its equivalent, measured at the point of diversion from the source.

Source: Birch Creek, a tributary to Columbia River
Umatilla River, tributary to Columbia River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	31 E	WM	13	SW NE	BIRCH CREEK – AS PROJECTED WITHIN WHITNEY DLC 37
2 N	32 E	WM	18	NW NW	UMATILLA RIVER

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
2 N	31 E	WM	13	SE NE	37	0.37
2 N	31 E	WM	13	NE SE	37	0.10
Total Acres						0.47

5. The fourth right to be leased is as follows:

Certificate: 89086 in the name of Warren & Vivian Taylor (confirmed by decree for Umatilla County and recorded in Volume 3, Page 127)
Use: Irrigation of 65.0 acres, Domestic and Stock
Priority Date: October 1902
Quantity: **Rate:** 0.81 Cubic Foot per Second (CFS)
Limit: The amount of water to which this right is entitled is limited to an amount actually beneficially used and shall not exceed 0.81 cubic foot per second, or its equivalent in case of rotation, measured at the point of diversion, subject to the provisions of paragraph 33 of said decree and all other conditions and limitations contained in said decree.
Source: Birch Creek, a tributary to Columbia River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
2 N	31 E	WM	13	SE NW	37	TAYLOR'S POD – 1750 FEET SOUTH AND 2730 FEET WEST FROM THE NE CORNER OF SECTION 13

Authorized Place of Use:

IRRIGATION, DOMESTIC, STOCK						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
2 N	31 E	WM	13	NW NW		19.0
2 N	31 E	WM	13	SW NW		25.0
2 N	31 E	WM	13	SE NW	4	11.0
2 N	31 E	WM	14	NE NE		7.0
2 N	31 E	WM	14	SE NE		3.0
Total Acres						65.0

6. The fifth right to be leased is as follows:

Certificate: 89088 in the name of Warren & Vivian Taylor (confirmed by decree for Umatilla County and recorded in Volume 3, Page 127)
Use: Irrigation of 2.0 acres, Domestic and Stock
Priority Date: May 1909
Quantity: **Rate:** 0.03 Cubic Foot per Second (CFS)

Limit: The amount of water to which this right is entitled is limited to an amount actually beneficially used and shall not exceed 0.03 cubic foot per second, or its equivalent in case of rotation, measured at the point of diversion, subject to the provisions of paragraph 33 of said decree and all other conditions and limitations contained in said decree.

Source: Birch Creek, a tributary to Columbia River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
2 N	31 E	WM	13	SE NW	37	TAYLOR'S POD – 1750 FEET SOUTH AND 2730 FEET WEST FROM THE NE CORNER OF SECTION 13

Authorized Place of Use:

IRRIGATION, DOMESTIC, STOCK						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
2 N	31 E	WM	13	NE SW	37	2.0
Total Acres						2.0

7. The sixth right to be leased is as follows:

Certificate: 91874 in the name of Warren & Vivian Taylor (perfected under Permit S-12000)

Use: Irrigation of 16.2 acres

Priority Date: October 25, 1935

Quantity: **Rate:** 0.40 Cubic Foot per Second (CFS)

Limit: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to 1/40 of one cubic foot per second per acre or its equivalent for each acre irrigated and shall further be limited to a diversion of not to exceed 6.0 acre-feet for each acre irrigated during the irrigation season of each year.

Source: Birch Creek, a tributary to Columbia River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
2 N	31 E	WM	13	SE NW	37	TAYLOR'S POD – 1750 FEET SOUTH AND 2730 FEET WEST FROM THE NE CORNER OF SECTION 13

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
2 N	31 E	WM	13	SW NE	37	0.4
2 N	31 E	WM	13	NE SE	37	7.4
2 N	31 E	WM	13	SW SE	37	4.2
2 N	31 E	WM	13	SE SE	37	4.2
Total Acres						16.2

8. The portion of the seventh right to be leased is as follows:

Certificate: 91875 in the name of Warren & Vivian Taylor (perfected under Permit S-12001)

Use: Primary Irrigation of 34.6 acres

Priority Date: October 25, 1935

Quantity: **Rate:** 0.865 Cubic Foot per Second (CFS)

Limit: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to 1/40 of one cubic foot per second per acre and shall further be limited to a diversion of not to exceed 6.0 acre-feet for each acre irrigated during the irrigation season of each year.

Source: Umatilla River, tributary to Columbia River

Authorized Point of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
2 N	31 E	WM	13	SE NW	37	TAYLOR'S POD – 1750 FEET SOUTH AND 2730 FEET WEST FROM THE NE CORNER OF SECTION 13

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	GLot	DLC	Acres
2 N	31 E	WM	13	SW NE		37	17.3
2 N	31 E	WM	13	NE NW	3		0.8
2 N	31 E	WM	13	SW NW			1.6
2 N	31 E	WM	13	SE NW			11.7
2 N	31 E	WM	14	NE NE			2.6
2 N	31 E	WM	14	SE NE			0.6
Total Acres							34.6

9. Certificates 80490, 80491, 80492, 89086, 89088, 91874, and 91875 do not specify an irrigation season or season of use. The Umatilla Decree does not limit the irrigation season stating, "the irrigators shall have the right to use the water at any time of the year it can be secured." However, for the purposes of this instream lease the irrigation season will be limited to what is ordinarily utilized in the region. Therefore, the irrigation season shall be between March 1 and November 1.

10. Certificate 80490 does not describe a point of diversion; Certificates 80491 and 80492 do not describe a measured distance location; the application and Watermaster have provided locations for the POD's, for the Birch Creek POD. Therefore, for this instream lease the location below provides the point of diversion to be used for these certificates during this instream lease per the Watermaster:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
2 N	31 E	WM	13	NWSE	BIRCH CREEK POD: LATITUDE 45.6518504106 LONGITUDE -118.8788407100

11. 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.

12. The full instream period requested by the Lessor and Lessee, March 1 through October 31, is 245 days. At the full instream rate and volume requested, water may only be protected instream for Certificate 80490 over a 179 day period; Certificate 80491 over a 121 day period; Certificate 80492 over a 106 day period; Certificate 89086 over a 182 day period; Certificate 89088 over a 151 day period; Certificate 91874 over a 122 day period; Certificate 91875 over a 121 day period. To prevent enlargement of the right, the requested instream use requires modification to the period being protected instream.

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

Birch Creek, tributary to Umatilla River

Instream Reach: From the POD's (as described in Finding of Fact No. 8 & 10) to the confluence with Umatilla River

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
80490	1892	0.12	42.75	May 6 – October 31
80491	10/25/1935	0.10	23.40	July 3 – October 31
80492	4/5/1956	0.01	2.12	July 18 – October 31
89086	10/1902	0.81	292.50	May 3 – October 31
89088	5/1909	0.03	9.00	June 3 – October 31
91874	10/25/1935	0.40	97.20	July 2 – October 31
91875	10/25/1935	0.87	207.60	July 3 – October 31
Totals		2.34	674.57	

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

15. 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.

16. 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.

17. The total monthly quantities of water to be protected instream under existing and proposed instream rights in the reach do exceed the estimated average natural flows in the months of September and October. The estimated average natural flow may not be exceeded unless criteria for exceeding are met.

18. The Department has determined that the estimated average natural flows may be exceeded due to the following:
 - a) There is an existing instream water right certificate (Certificate 59836) 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 established in the certificate under ORS 537.346 filed for the purpose of supporting aquatic life with a priority date of November 3, 1983, and;
 - b) The water right proposed to be leased is in an Oregon Department of Fish and Wildlife high flow restoration priority watershed.
19. During the month of September and October of this order the instream right established by this lease shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346, being Certificate 59836, with an earlier priority date, and be in addition to instream water rights established pursuant to ORS 537.348 or 537.470.
20. 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.
21. 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.
22. 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.
23. The Lessor and Lessee have requested that the lease terminate on October 31, 2023. The lease may commence on the date this final order is signed.

Conclusions of Law

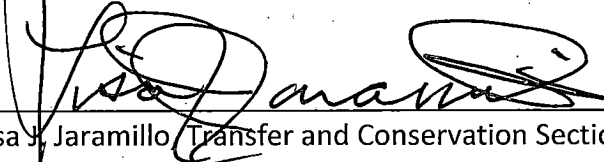
The Department concludes that the lease will not result in injury or enlargement, OAR 690-077-0077. The lease conforms to the applicable provisions of OAR 690-077-0015.

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, 2023.

Dated at Salem, Oregon this day AUG 29 2023



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
Douglas E. Woodcock, Acting Director
Oregon Water Resources Department

Mailing date: AUG 30 2023

This document was prepared by Sarah Henderson. If you have any questions, please call 503-979-9872.