

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

In the Matter of Transfer Application	)	FINAL ORDER APPROVING AN
T-9687 (Mitigation Credit Project MP-25),	)	INSTREAM TRANSFER
Crook County, Oregon	)	APPLICATION & PRELIMINARY AND FINAL AWARD OF MITIGATION CREDITS

ORS 540.505 to 540.580 establishes the process in which a water right holder may submit a request to transfer the point of diversion, place of use, or character of use authorized under an existing water right. OAR Chapter 690, Division 380 implements the statutes and provides the Department's procedures and criteria for evaluating transfer applications.

OAR 690-521-0100 to 690-521-0600 establishes the process in which anyone may submit a ground water mitigation project to the Department for the purpose of establishing mitigation credits in the Deschutes Ground Water Study Area.

Pursuant to OAR 690-521-0400 (2), any mitigation credits awarded to a mitigation project are valid until used to fulfill a mitigation obligation of a ground water use in the Deschutes Ground Water Study Area. Valid mitigation credits may be assigned by any person or recognized mitigation bank to any person or other mitigation bank. Mitigation credits are used when a person submits to the Department documentary evidence that valid credits have been obtained and assigned to satisfy a mitigation obligation.

**Applicant**

EMMETT RANCH LLC  
PO BOX 1830  
BEND OR 97709

**Findings of Fact**

**Instream Transfer**

1. On March 29, 2004, EMMETT RANCH LLC filed a transfer application to change the place of use and character of use under Certificate 75556. The Department assigned the application number T-9687.
2. Notice of the application for transfer was published pursuant to ORS 540.520 and OAR 690-380-4000 on April 20, 2004. No comments were filed in response to the notice.

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.

3. An amended application modifying the number of acres of irrigation to be transferred instream was received on October 27, 2004.
4. On December 6, 2004, Emmett Ranch LLC identified Tammy Sailors, Creative Water Solutions LLC, as the agent authorized to act on behalf of the applicant.
5. Following issuance of the draft Preliminary Determination on February 9, 2005, the applicant submitted an additional request on March 22, 2005, to further reduce the portion of the right to be transferred instream from 104.1 acres to 30.0 acres. Additional information describing the shape of the instream use proposed in transfer application T-9687 was received from the applicant on March 30, 2005.
6. A Preliminary Determination was issued by the Department on April 7, 2005, incorporating previously requested amendments to the application.
7. Original notice of the application for transfer was published pursuant to ORS 540.520 and OAR 690-380-4020 on April 12, 2005. Notice was also filed in a newspaper for three consecutive weeks on April 13, 20 and 27, 2005. No comments or protests were filed in response to the notice.
8. On August 29, 2005, the Department received a written request from the applicant to withdraw the Preliminary Determination issued by the Department on April 7, 2005. The applicant also requested to amend the application back to its configuration as of October 27, 2004, to transfer 104.1 acres of irrigation to instream use under certificate 75556.
9. A superseding Preliminary Determination was issued by the Department on September 27, 2005.
10. Notice of the superseding Preliminary Determination of the application for transfer was published pursuant to ORS 540.520 and OAR 690-380-4020 on October 4, 2005. Notice was also filed in a newspaper for three consecutive weeks on October 3, 10, and 17, 2005. No comments or protests were filed in response to the notice.
11. The portion of the right to be transferred is as follows:

**Certificate:** 75556 in the name of Peoples Irrigation Company  
**Use:** Irrigation, livestock and domestic  
**Acres:** 104.1 acres, being 69.5 acres under the 1898 priority date and 34.6 under the 1904/1910 priority date  
**Priority Date:** 1898 and 1904/1910  
**Season:** February 1 to December 1 (Crooked River Decree)  
**Quantity:** 1.301 cubic feet per second (cfs), being 0.869 cfs under the 1898 priority date and 0.432 cfs under the 1904/1910 priority date  
**Rate/Duty:** 1/80<sup>th</sup> cfs per acre, not to exceed 4.0 acre-feet (AF) per acre per year  
**Source:** Crooked River, tributary to the Deschutes River

**Authorized Point of Diversion:**

Township		Range		Meridian	Sec	¼ ¼	Location
15	S	16	E	W.M.	8	NW SW	POD #1 - 1920 feet North & 340 feet East from SW Corner of Section 8
14	S	14	E	W.M.	20	SE SE	POD #2- 325 feet North & 120 feet West from SE Corner of Section 20

**Authorized Place of Use:**

Township	Range	Meridian	Sec	¼ ¼	Tax Lot	Acres
14	S	14	E	W.M.	21	SW SW 200 34.6
14	S	14	E	W.M.	29	NE NE 100 39.5
14	S	14	E	W.M.	29	NW NE 100 30.0

12. A total of 416.4 AF of water may be used beneficially annually under the existing right.
13. Application T-9687 proposes to change the character of use to instream use for fish and wildlife habitat, recreation and pollution abatement. The applicant has also requested that this instream transfer be used to establish mitigation credits under the Deschutes Mitigation Bank and Mitigation Credit Rules, OAR Chapter 690, Division 521.
14. Application T-9687 proposes to change the place of use of the right to create an instream reach from each POD to Lake Billy Chinook.
15. The applicant proposes that water be transferred instream and protected follows:

Period	Priority Date	Rate (cfs)	Volume (acre-feet)
Reach #1 - POD #1 (as described in Finding of Fact #11) to POD #2 (as described in Finding of Fact #11)			<b>416.4</b>
May 23 <sup>rd</sup> through October 31 <sup>st</sup>	1904/1910	0.431	
Reach #2 – POD #2 (as described in Finding of Fact #11) to Lake Billy Chinook			
May 23 <sup>rd</sup> through October 31 <sup>st</sup>	1898	0.865	
	1904/1910	0.431	
	<b>Total</b>	<b>1.296</b>	

16. There is an existing instream water right, Certificate 80966, with a priority date of September 18, 1968, within the same reach as that proposed for the new instream water right. This instream water right was established under the allocation of conserved water process pursuant to OSR 537.470. There is also a pending instream water right application, Application IS-70354, filed by the Oregon Department of Fish and Wildlife under ORS 537.314, within the same reach as that proposed by this instream transfer for a new instream

water right. This instream water right application proposes to protect water for anadromous and resident fish rearing, and will have a priority date of May 11, 1990 if approved.

17. The applicant has identified that this instream transfer application is intended to replace a portion of the pending instream water right application, if approved, for the same reach. This application will also add to the existing instream water right, Certificate 80966.
18. There is an instream lease, L-614, which leased instream a portion of the water right to be transferred instream. This instream lease terminated on November 30, 2005.
19. Water has been used within the last five years according to the terms and conditions of the rights, and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.
20. A diversion structure and delivery system sufficient to use the full amount of water allowed under the existing right are present.
21. The proposed change would not result in enlargement of the right.
22. The proposed change would not result in injury to other water rights.
23. The amount and timing of the proposed instream flow are allowable within the limits and use of the original water right.
24. The protection of flows within the proposed reach is appropriate, considering:
  - a. The instream water right 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. There are no known return flows resulting from the exercise of the existing water right within the reach of the proposed instream water right. Any return flows resulting from the exercise of the existing water right likely re-enter the river downstream of the reach of the instream water right.
25. The total monthly quantities of water to be protected under the proposed instream right in the proposed reach will provide for a beneficial purpose, and do not exceed the estimated average natural flow.
26. Within the reach proposed by the applicant, as noted in Finding of Fact 14, the Oregon Department of Fish and Wildlife (ODFW) has applied for an instream water right for anadromous and resident fish rearing, which will have a priority date of May 11, 1990 if approved, through a portion of the instream reach proposed by this instream transfer.

Proposed necessary flows for the pending instream water right application are at times not met during the requested period for instream protection.

27. Within the reach proposed by the applicant, this segment of the Crooked River is on the Department of Environmental Quality's 303d list of water quality limited streams for pH, fecal coliform, total dissolved gas, and temperature.
28. The Department of Parks and Recreation has identified that protection of additional instream flows through the proposed reach of the Crooked River would be beneficial for the scenic and aesthetic qualities of the river and any visitor-related river use activities in Smith Rock State Park.
29. By adding to the existing instream water right within the same reach, the instream right established as a result of this transfer will provide protection for additional streamflows necessary for fish and wildlife habitat, pollution abatement and recreation.

**Preliminary Award of Deschutes Basin Mitigation Credits**

30. Emmett Ranch LLC (the Applicant) has requested this instream transfer application be used to establish mitigation credits in the Deschutes Ground Water Study Area. The Applicant has requested that any mitigation credits generated from this project be assigned to Emmett Ranch LLC.
31. The Department assigned this mitigation credit project number MP-25.
32. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on June 22, 2004. No comments were received.
33. The Department consulted with representatives from Oregon Department of Fish and Wildlife (ODFW), Oregon Department of Environmental Quality, Oregon State Parks and Recreation Department, Oregon Division of State Lands, the Oregon Department of Agriculture, and the Department's Watermaster pursuant to OAR 690-521-0300 (7) and OAR 690-505-0630 (2) on November 17, 2004. Comments were received from State Parks and Recreation on March 7, 2005. Comments submitted by State Parks and Recreation recommend that water be protected during the late spring and summer months (June 1 to mid September) to provide the most instream benefit to recreation.
34. The applicant has requested to protect water evenly over the period May 23 through October 31 at close to the maximum rates allowed by the originating water right. The instream transfer, as proposed, appears to meet the recommendations made by State Parks and Recreation. Therefore, no changes were made to the instream transfer based on comments received.
35. As part of the notification process for mitigation credit projects, the Department originally determined that this mitigation project may result in 190.1 mitigation credits. On April 7, 2004, the Department issued a preliminary award of 54.0 mitigation credits as part of the Preliminary Determination, consistent with an amendment to the application to transfer 30.0

acres of irrigation of instream use. On August, 29, 2005, the applicant requested withdrawal of the Preliminary Determination and amended the application to transfer 104.1 acres of irrigation to instream use. Based upon this amendment, the Department finds that **187.4** mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to Emmett Ranch, LLC. The mitigation credits may be used to mitigate for ground water permit applications and existing conditioned ground water permits and certificates, providing mitigation pursuant to the Deschutes Ground Water Mitigation Rules, OAR Chapter 690, Division 505, within the **Crooked River Zone of Impact and/or the General Zone of Impact**.

36. No water will be protected instream under this transfer during the 2005 calendar year. Water is to be protected instream from May 23 through October 31. Water shall begin being protected instream in the 2006 calendar year. In addition, a portion of the water to be protected instream under this transfer has been protected instream under instream lease L-614 from June 23 through November 30 of the 2005 calendar year. This instream lease is also mitigation credit project MP-32. Mitigation credits awarded to MP-32 are valid through December 31, 2005. The Department has determined that mitigation credits awarded to this instream transfer and mitigation credit project will be valid beginning January 1, 2006.
37. A total of 416.4 AF is proposed to be transferred to instream use and 187.4 AF of that, as identified above, may be used for mitigation purposes. The amount of water transferred instream and not used for mitigation purposes will benefit instream flow.
38. The Department shall award final mitigation credits upon completion of the approved project by the applicant and verification by the Department that the project is complete. The issuance of a certificate(s) for the proposed instream water right shall result in completion of the project and verification that the project is complete.

### **Conclusions of Law**

The proposed changes in place of use and character of use in application T-9687 are consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075.

This mitigation project results in mitigation credits pursuant to ORS 537.746 and OAR 690-521-0300 and 690-521-0400.

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

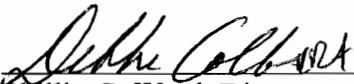
1. The proposed changes in place of use and character of use in application T-9687 are approved.
2. Certificate 75556 is cancelled and a new instream water right for the portion of the right transferred to instream use shall be issued. A new certificate for the remaining portion of the right not modified by this transfer shall also be issued.
3. The instream water right shall provide for the protection of streamflows from each point of diversion, as described in Determination #4 below, to Lake Billy Chinook.
4. The quantities of water to be protected under the instream water right are:

Period	Priority Date	Rate (cfs)	Volume (acre-feet)
Reach #1 - POD #1 (as described in Finding of Fact #11) to POD #2 (as described in Finding of Fact #11)			<b>416.4</b>
May 23 <sup>rd</sup> through October 31 <sup>st</sup>	1904/1910	0.431	
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	1904/1910	0.431	
	<b>Total</b>	<b>1.296</b>	

5. The instream right established by this transfer shall replace a portion of any instream water rights established pursuant to ORS 537.341 or 537.346, and be in addition to any instream water rights established pursuant to ORS 537.348 or 537.470, unless otherwise specified by a subsequent order establishing a new instream water right under those statutes.
6. The former place of use shall no longer be irrigated, nor will water be used for domestic and stockwatering purposes, as part of this right.
7. **Final Award of Mitigation Credits:** Final Award of Mitigation Credits is made upon completion of the project and verification by the Department that the project has been completed as proposed. Issuance of the new instream water right certificate results in completion of the project and verification by the Department that the project is complete. Therefore, mitigation credits, in the amount of **187.4** credits, described herein, are awarded to this mitigation project and assigned to Emmett Ranch LLC. Awarded mitigation credits may be used beginning **January 1, 2006**, to satisfy a mitigation obligation of a ground water permit applicant and/or ground water permit/certificate holder in the **Crooked River Zone of Impact and/or General Zone of Impact**. The awarded mitigation credits are valid beginning January 1, 2006, the first year that water will be protected instream under the new instream water right.

- Mitigation credits are valid until used to satisfy a mitigation obligation of a ground water permit applicant and/or ground water permit/certificate holder within the Deschutes Ground Water Study Area pursuant to the Deschutes Ground Water Mitigation Rules. Mitigation credits are used when a person submits to the Department documentary evidence that valid credits have been obtained and assigned to satisfy a mitigation obligation.

Dated at Salem, Oregon this 5<sup>th</sup> day of December 2005.

*FOR*   
Phillip C. Ward, Director

Mailing date: DEC 13 2005