

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

In the Matter of Instream Transfer	)	FINAL ORDER APPROVING A
Application T-9829 and Mitigation Credit	)	CHANGE IN PLACE OF USE AND
Project MP-28, Crook County	)	CHARACTER OF USE AND
	)	PRELIMINARY & FINAL AWARD OF
	)	MITIGATION CREDITS

**Authority**

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 Chapter 690, Division 077 provides additional criteria for evaluating transfers to instream water rights.

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**

THE DANIELS GROUP, LLC  
1111 MAIN ST, SUITE 700  
VANCOUVER, WA 98660

This is an order in other than a 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.

## Findings of Fact

### Background

1. On December 3, 2004, John Short for Emmett Ranch, LLC, filed an application to change the place of use and character of use under Certificate 43547 to instream use. The Department assigned the application number T-9829.
2. On April 6, 2005, Tammy Harty (agent for Emmett Ranch, LLC) requested to amend the rate at which water is proposed to be protected instream.
3. On June 4, 2007, a request was submitted to the Department to assign the application to The Daniels Group, LLC. The Daniels Group, LLC, has requested that John Short for Deschutes Irrigation, LLC, act as agent for the application.
4. The portion of the right to be transferred is as follows:

**Certificate:** 43547 in the name of LOW LINE DITCH CO. (confirmed by Crooked River decree)

**Use:** IRRIGATION of 16.71 ACRES, DOMESTIC AND LIVESTOCK

**Priority Date:** 1903

**Rate:** 0.21 CUBIC FOOT PER SECOND (CFS) for Irrigation and a reasonable amount for domestic and stock use

**Limit/Duty:** 4.0 Acre-Feet (AF) per acre per year

**Source:** CROOKED RIVER, tributary to DESCHUTES RIVER

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

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
14 S	14 E	WM	24	SE SW	Unspecified by Certificate

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
14 S	14 E	WM	28	NW NW	16.71

5. The rate per acre of irrigation, by the Crooked River Decree, is limited to no more than 1/80<sup>th</sup> CFS per acre and further limited to no more than 1.0 AF per acre in each 30 day period. The irrigation season is set by the Decree as February 1 to December 1.
6. The authorized POD is incorrectly described in the transfer application. The correct POD is reflected in Finding of Fact #4. The Crooked River Decree further describes the POD as the Low Line Ditch.
7. On January 19, 2005, staff visited the site and identified that the POD is more accurately located approximately at Latitude 44.33859 degrees north and Longitude 121.01154 degrees west.
8. A total of 66.84 AF of water may be beneficially used annually under the existing right.

9. Application T-9829 proposes to change the character of use to instream use for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and any other ecological values; pollution abatement; and recreation. The applicant has also requested to use this instream transfer as a mitigation project to establish mitigation credits in the Deschutes Ground Water Study Area.
10. Application T-9829 proposes to change the place of use of the right to create an instream reach from the POD to Lake Billy Chinook. The POD is described in Finding of Fact #4 and further defined in Findings of Fact #6 and #7.
11. The applicant proposes the quantities of water to be transferred instream to be protected as follows:

Instream Period	Rate (CFS)	Volume (AF)
May 21 through October 31	0.22	71.6

12. There are at least two existing instream water rights, Certificate 81584 (established by instream transfer) and Certificate 80966 (established by allocation of conserved water), within the same reach as that proposed for the new instream water right. There is also one pending instream water right application filed under ORS 537.341 (state agency application process).
13. The applicant proposes that any instream water right established as a result of this instream transfer be additive to the existing instream water rights on the mainstem Deschutes River established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process).
14. Notice of the application for transfer was published on December 21, 2004, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
15. On August 29, 2007, the Department mailed the applicant a copy of the Preliminary Determination proposing to approve Transfer Application T-9829, with modifications to the rate at which water may be protected instream, to the applicant. On August 29, 2007, the applicant requested that the Department proceed with issuance of a Preliminary Determination and on September 17, 2007, the applicant provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
16. On September 26, 2007, the Department issued a preliminary determination proposing to approve Transfer Application T-9829 and mailed a copy to the applicant. Additionally, notice of the preliminary determination for the transfer application was published in the Department's weekly notice on October 2, 2007, and in The Bulletin on September 30, 2007, and October 7 and 14, 2007, pursuant to ORS 540.520 and OAR 690-380-4020. No comments or protests were filed in response to the Department's weekly notice or to the newspaper notice.

***Instream Transfer Review Criteria (OAR 690-77-0075 and 690-380-4010)***

17. Water has been used within the last five years according to the terms and conditions of the right, and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
18. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Application T-9829.
19. The requested instream rate and volume, described in Finding of Fact #11, is higher than the rate and duty allowed for the portion of the right to be transferred. During the instream period (a period of 164 days) requested by the applicant, water may be transferred instream up to a rate of 0.206 CFS.
20. The proposed instream use also requires modification to take into account return flows. Return flows from the existing use return to the Crooked River below the point of diversion.
21. Based upon Findings of Fact #19 and #20, on August 29, 2007, the applicant agreed to modify the quantities to be transferred and protected instream as follows:

<b>Instream Reach</b>	<b>Rate (CFS)</b>	<b>Volume (AF)</b>	<b>Period Protected Instream</b>
At the POD (Low Line Ditch)	0.206	66.84	May 21 through October 31
Below POD to Lake Billy Chinook	0.093	30.1	

22. The instream rate within the reach below the POD will be protected as described in Finding of Fact #21. However, the quantity of water protected instream within this reach may be adjusted in the future. Stream channel losses and gains calculated based on available data and the use of water by senior appropriators will be used to determine the amount of water that any instream water right created as a result of this transfer may be entitled to downstream from the original point of diversion.
23. Based upon Finding of Fact #7, the POD is located approximately at Latitude 44.33859 degrees north and Longitude 121.01154 degrees west.
24. There is an instream lease, L-579, presently in effect for the same portion of the water right proposed for transfer to instream use. This instream lease was approved by the Department on August 2, 2004, as evidenced by Special Order Volume 61, Page 2. The order approving this instream lease is scheduled to terminate on November 30, 2008, and includes a condition allowing for early termination of the lease order. Prior to this instream transfer becoming effective, the existing instream lease must be terminated. Also, the date on which this instream transfer may be approved may be affected by the date on which the existing instream lease is terminated to prevent any injury and/or enlargement.
25. A request to terminate instream lease L-579 was received on November 9, 2007, after the close of the irrigation season. This instream lease is being terminated under a separate

order. No water will be protected instream under this transfer during the 2007 calendar year. Water will begin to be protected instream in the 2008 calendar year.

26. The proposed change, as modified, would not result in enlargement of the right.
27. The proposed change, as modified, would not result in injury to other water rights.
28. The amount of the proposed instream flow and the timing of the proposed instream flow is allowable within the limits and use of the original water right.
29. 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 known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
  - d) Return flows resulting from the exercise of the existing water right have been accounted for in the reach below the POD.
30. Within the reach proposed by the applicant, as noted in Finding of Fact #12, 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.
31. 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.
32. 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.
33. By adding to other instream water rights for the same location, the instream right will provide protection for additional streamflows necessary for fish and wildlife habitat, pollution abatement and recreation.

34. The total monthly quantities of water to be protected under the existing and proposed instream rights in the proposed reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.

***Preliminary Award of Deschutes Basin Mitigation Credits***

35. The Daniels Group, 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 The Daniels Group, LLC.
36. The Department assigned this mitigation credit project number MP-28.
37. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on January 4, 2005. No comments were received in response to this notice.
38. The Department consulted with representatives from ODFW, DEQ, Oregon Parks and Recreation Department, Oregon Department 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 January 19, 2005. No comments were received in response to this notice.
39. The proposed transfer of 16.71 acres of irrigation use to instream use will provide 30.1 acre-feet of mitigation water. Therefore, 30.1 mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and assigned to The Daniels Group, 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 and/or General Zones of Impact.
40. A total of 66.84 AF is proposed to be transferred to instream use and 30.1 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.
41. As noted in Finding of Fact #24, there is presently an instream lease, L-579, in place for the same portion of the water right proposed for transfer to instream use. This instream lease is also mitigation credit project MP-26. Mitigation credits awarded to MP-26 are valid through December 31, 2008, unless the lease and mitigation project are terminated earlier. Prior to any mitigation credits being awarded to mitigation credit project MP-28, the existing instream lease and mitigation credit project must be terminated. Also, the date on which this instream transfer/mitigation project may be approved may be affected by the date on which the existing instream lease/mitigation credit project is terminated to prevent any injury and/or enlargement. Mitigation credits awarded to this mitigation credit project (MP-28) may be valid the first year that water is protected instream under any new instream water right issued as a result of this transfer.

42. A request to terminate instream lease L-579 and Mitigation Project MP-26 was received on November 9, 2007, after the close of the irrigation season. This instream lease is being terminated under a separate order. No water will be protected instream under this transfer during the 2007 calendar year. Water will begin to be protected instream in the 2008 calendar year. Mitigation credits awarded to this mitigation credit project (MP-28) will be valid beginning January 1, 2008.
43. 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 for the proposed instream water right shall result in completion of the project and verification that the project is complete.

**Determination and Proposed Action**

The changes in character of use and place of use to instream use proposed in application T-9829 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:**

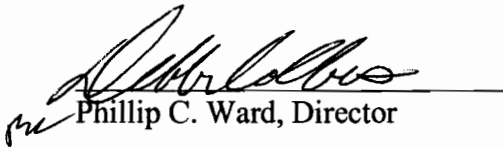
1. The changes proposed in instream transfer application T-9829 are approved and shall be effective upon issuance of this Final Order.
2. Water right certificate 43547 is cancelled. A new certificate confirming the instream water right shall be issued. A new certificate will also be issued describing that portion of the right not affected by this transfer.
3. The instream water right shall provide for the protection of streamflows from the POD, as described in Finding of Fact #4 (and further defined in Findings of Fact #6 and #7), to Lake Billy Chinook.
4. The quantities of water to be protected under the instream water right are:

Instream Reach	Rate (CFS)	Volume (AF)	Period Protected Instream
At the POD (Low Line Ditch)	0.206	66.84	May 21 through October 31
Below POD to Lake Billy Chinook	0.093	30.1	

5. Water rights upstream of the original point of diversion shall not be subject to regulation for flows in excess of the quantities to which this instream water right is entitled at the original point of diversion.
6. Stream channel losses and gains calculated based on available data and the use of senior appropriators will determine the amount of water to which this right is entitled downstream from the original point of diversion within the specified stream reach.

7. The instream right established by this transfer shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or 537.470, unless otherwise specified in a subsequent order establishing a new instream water right under those statutes.
8. The right to the use of the water is restricted to beneficial use at the place of use described, and is subject to all other conditions and limitations contained in Certificate 43547 and any related decree.
9. The former place of use of the transferred water shall no longer receive water as part of this right.
10. **Final Award of Mitigation Credits:** Final Award of Mitigation Credits may be made upon completion of the project and verification by the Department that the project has been completed as proposed. Issuance of a new instream water right certificate, as described herein, results in completion of the project and verification by the Department that the project is complete. Mitigation credits, in the amount of **30.1** credits, as described herein, will be awarded to this mitigation project and assigned to The Daniels Group, LLC. Mitigation credits awarded may be used to satisfy a mitigation obligation of a ground water permit applicant and/or ground water permit/certificate holder in the **Crooked River and/or General Zones of Impact**. The awarded mitigation credits are valid beginning January 1, 2008, the first year that water will be protected instream under the new instream water right.
11. 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 30 day of November, 2007.

  
Phillip C. Ward, Director

Mailing date: DEC 12 2007