

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

In the Matter of Instream Transfer	)	PRELIMINARY DETERMINATION
Application T-9835 and Mitigation Credit	)	PROPOSING APPROVAL OF A
Project MP-29, Deschutes County	)	CHANGE IN PLACE OF USE AND
	)	CHARACTER OF USE &
	)	PRELIMINARY 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 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**

JOHN A. SHORT  
EMMETT RANCH, LLC  
PO BOX 1830  
BEND, OR 97709

**Findings of Fact**

**Instream Transfer**

1. On December 16, 2004, John A. Short, Emmett Ranch LLC, filed a transfer application to change the character of use and place of use under a portion of Certificate 72196 to instream use. The Department assigned the application number T-9835.
2. Notice of the application for transfer was published on January 11, 2005, pursuant to ORS 540.520 and OAR 690-380-4000. No comments were filed in response to the notice.

Pursuant to OAR 690-380-4030, any person may file a protest or standing statement within 30 days after the last date of publication of notice of this preliminary determination.
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3. The portion of the right to be transferred is as follows:

**Certificate:** 72196 in the name of LaPine Cooperative Water Association

**Priority Date:** 1900

**Acres:** 21.1 acres

**Season of Use:** April 1 to November 1

**Quantity:** April 1 to May 23 & August 20 to November 1

Limited to 1/80<sup>th</sup> cubic foot per second (cfs) per acre: 0.26 CFS

May 23 to August 20

Limited to 1/40<sup>th</sup> cfs/acre: 0.53 CFS

Duty (limited to 4.0 acre-feet (af) per acre): 84.4 AF

**Source:** Little Deschutes River, tributary to the Deschutes River

**Point of Diversion:**

Township		Range		Meridian	Sec	¼ ¼		Location
23	S	9	E	W.M.	34	SW	SW	550 feet North & 1150 feet East from the SW Corner of Section 34

**Authorized Place of Use:**

Township		Range		Meridian	Sec	¼ ¼		Tax Lot	Acres
22	S	10	E	W.M.	34	SW	SW	4100	10.1
22	S	10	E	W.M.	34	SE	SW	4100	11.0

4. Application T-9835 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; recreation; and to establish mitigation credits in the Deschutes Ground Water Study Area.

5. Application T-9835 proposes to change the place of use of the portion of the primary right, described in Finding of Fact #3, to create an instream reach from the POD to the mouth of the Little Deschutes, into the Deschutes River and down to Lake Billy Chinook.

6. The applicant proposed the quantities of water to be transferred and protected instream be as follows:

Certificate	Priority Date	Rate Instream	Volume Instream	Instream Period
72196	1900	0.26375 CFS	84.0782 AF	April 1 through September 8

7. Based upon information provided with the application, water has been used within the last five years according to the terms and conditions of the portion of existing water right Certificate 72196 proposed for transfer, and no evidence is available in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.

8. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right are present.

9. The lands on which this water right is appurtenant are sub-irrigated from Long Prairie Slough during portions of each year. Use of water under the existing right is subject to beneficial use without waste in accordance with ORS 536.310. The right proposed for transfer cannot be beneficially used during those periods in which the sub-irrigation is sufficient to satisfy the crop needs. Additional information was requested from the applicant to demonstrate the extent to which the existing right may be beneficially used without waste.
10. Based upon Finding of Fact #9, on January 18, 2006, the applicant provided additional information, including aerial photographs from June 2000, and August 2002, to demonstrate that water may be used beneficially without waste. On February 22, 2007, the applicant provided an additional aerial photograph from 2003. Sub-irrigation to varying degrees appears to be evident on each of the aerial photographs. However, the 2003 aerial photograph appears to show the subject property under drier conditions. Based upon review of the aerial photographs, it appears that a total of 75.0 AF of water may be used beneficially without waste annually for primary irrigation of 21.1 acres under the portion of Certificate 72196 proposed for transfer.
11. During the review process, comments were received from Oregon Parks and Recreation Department (OPRD) and from the Oregon Department of Fish and Wildlife (ODFW) (mitigation project comments). ODFW identified that instream flows are needed for various life stages of spring and fall Chinook, steelhead and redband trout during the months of the irrigation season, and also identified that instream flow protection is needed during the months outside of the irrigation season during the early spring (March) and late fall (November). OPRD has identified that additional flows are necessary for recreation, specifically during the later part of the spring and the later fall months. OPRD recommended protection of flows between May 22<sup>nd</sup> and October 31<sup>st</sup>. This would also provide additional flows in the mainstem Deschutes River in a section that is dewatered after irrigation water is cut off in October.
12. The proposed instream use requires modification to take into account return flows and stream flow losses. Return flows from the existing use return to the Little Deschutes River in the vicinity of the Little Deschutes gage near LaPine, located approximately at river mile 27. Also, the segment of the reach on the mainstem Deschutes River between the confluence with the Little Deschutes River and Bend is a losing reach and loses approximately 7% of its flows.

13. Based upon Findings of Fact #9 through #12, the applicant has agreed to modify the quantities to be transferred and protected instream as follows:

**Instream Reach 1:** From POD (as described in Finding of Fact #3) to the Little Deschutes gage near LaPine (approximately River Mile 27)

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
72196	1900	0.231	75.0	May 23 through October 31

**Instream Reach 2:** From the Little Deschutes gage near LaPine (approximately River Mile 27) to the mouth of the Little Deschutes River

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
72196	1900	0.104	33.8	May 23 through October 31

**Instream Reach 3:** From the confluence of Little Deschutes River and the Deschutes River to Lake Billy Chinook

Certificate	Priority Date	Instream Rate (CFS)	Instream Volume (AF)	Period Protected Instream
72196	1900	0.1	31.4	May 23 through October 31

14. As modified, the proposed changes would not result in injury.
15. As modified, the proposed changes would not result in enlargement.
16. The amount and timing of the proposed instream flow described in Finding of Fact #13 is allowable within the limits and beneficial use of the original water right.
17. The protection of flows as described in Finding of Fact #13 within the proposed reach is appropriate, considering:
- The instream water right begins at the recorded point of diversion;
  - The location of confluences with other streams downstream of the point of diversion. The reach for an instream water right is typically from the point of diversion on the source stream to the mouth of that source stream. However, water may be protected further downstream if the quantity of water is measurable in the receiving stream, in this case the Deschutes River. The quantity of water proposed to be protected instream in Reach #3 is measurable in the mainstem Deschutes River, consistent with OAR 690-077-0015 (8), and, therefore, the reach may extend into the Deschutes River and down to Lake Billy Chinook.
  - There are known areas of natural loss of streamflow to the river bed downstream from the point of diversion that have been accounted for in Reach #3 of the proposed instream use; and
  - The quantity of water to be protected instream in Reach #2 has been reduced to account for return flows. Return flows resulting from the exercise of the existing water right would re-enter the river downstream from the point of diversion approximately at River Mile 27 (Little Deschutes gage near LaPine) on the Little Deschutes River.

18. There is an instream lease, L-739, 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 June 22, 2006, as evidenced by Special Order Volume 68, Page 640. The order approving this instream lease is scheduled to terminate on October 31, 2010, 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.
19. Within the proposed instream reach on the Little Deschutes River, there is an existing instream water right, Certificate 73226, established under ORS 537.341 (state agency application process), for the purpose of fish migration, spawning, egg incubation, fry emergence, and juvenile rearing.

The Little Deschutes River is also on the Oregon Department of Environmental Quality's (DEQ) 303d list of water quality limited streams for a variety of water quality concerns.

20. Within the proposed instream reach on the mainstem Deschutes River, there are several existing instream water rights. There is one instream water right, Certificate 59777, established under ORS 537.346 (minimum streamflow conversion) for the purpose of supporting aquatic life and minimizing pollution, from the confluence of the Little Deschutes to the confluence with Spring River. There is another instream water right, Certificate 59778, also established under ORS 537.346 for the purpose of supporting aquatic life and minimizing pollution, from the confluence with Spring River to the Central Oregon Irrigation District (COID) North Canal Dam. There is also a pending instream water right application, IS-70695, filed by the ODFW pursuant to ORS 537.341, with the Department to establish an instream water right from the COID North Canal Dam to Lake Billy Chinook. The remaining instream water rights were established under ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) and are generally located between the Central Oregon Canal and Lake Billy Chinook.

This portion of the Deschutes River is a designated State Scenic Waterway. The State Scenic Waterway designation provides for protection of flows necessary to maintain the free flowing character of the Deschutes River for fish and wildlife habitat, and recreation, which is a matter of statutory policy. In addition to flows for the designated Scenic Waterway, which are not always met during requested period for instream protection, this segment of the Deschutes River is on DEQ's 303d list of water quality limited streams for temperature and pH.

21. The applicant proposes to replace a portion of the existing instream water rights established under and ORS 537.346 and ORS 537.341 on the Little Deschutes River and mainstem Deschutes River evidenced by Certificates 73226, 59777, and 59778. The applicant also 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).

22. The existing instream water rights, established under ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency application process), within the proposed reach on the Little Deschutes River and the mainstem Deschutes River are sufficient to protect the monthly quantities of water necessary for various fishlife stages, supporting aquatic life, and minimizing pollution, but are not always met. By replacing a portion of these instream water rights, any instream water right created as a result of this transfer will provide for protection of streamflows identified as necessary for various fishlife stages, supporting aquatic life, and minimizing pollution, under an earlier priority date.
23. By adding to other instream water rights, established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process), located within the portion of the proposed reach located on the mainstem Deschutes River, a new instream water right established by this transfer would provide protection for additional streamflows necessary for fish and aquatic habitat enhancement, pollution abatement and recreation.
24. The total monthly quantities of water to be protected under the existing and proposed instream right (as described in Finding of Fact #13) in the proposed reach will provide for a beneficial purpose and do not exceed the estimated average natural flow.
25. Based upon Findings of Fact #19 through #24, any instream water right established by this transfer application may 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, during the period May 23 through October 31, unless otherwise specified by an order approving a new instream water right under these statutes.

**Preliminary Award of Deschutes Basin Mitigation Credits**

26. Emmett Ranch (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.
27. The Department assigned this mitigation credit project number MP-29.
28. The Department provided notice of the mitigation credit project pursuant to OAR 690-521-0300 (6) on January 25, 2005. No comments were received in response to this notice.
29. The Department consulted with representatives from ODFW, DEQ, OPRD, 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 March 14, 2005. Comments were received from ODFW. ODFW identified that instream flows are needed for various life stages of spring and fall Chinook, steelhead and redband trout during the months of the irrigation season, and also identified that instream flow protection is needed during the months outside of the irrigation season during the early spring (March) and late fall (November).

30. The Department is unable to expand the period during which instream flows may be protected outside of the irrigation season, as recommended by ODFW, without causing injury. However, the shape of the instream use has been modified to protect water instream later in the irrigation season, being May 23 through October 31. This is also consistent with comments submitted by OPRD, as described in Finding of Fact #11.
31. When this mitigation project was originally public noticed, the Department had made a preliminary determination that the mitigation project may result in 38.0 mitigation credits for use in the Little Deschutes, Upper Deschutes, Middle Deschutes and General Zones of Impact. However, a portion of the property is sub-irrigated and will likely continue to be sub-irrigated. Therefore, the use is less consumptive than originally estimated. Based upon evaluation of aerial photographs, it appears that, on average, 28.8 AF of consumptive use will be retired as a result of the transfer to instream use.
32. Based upon Finding of Fact #31, **28.8** mitigation credits (1.0 mitigation credit = 1.0 AF of mitigation water) may be awarded to this mitigation credit project and may be assigned to Emmett Ranch. These 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 **Little Deschutes, Upper Deschutes, Middle Deschutes, and and/or General Zones of Impact**.
33. As noted in Finding of Fact #18, there is presently an instream lease, L-739, 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-84. Mitigation credits awarded to MP-84 are valid through December 31, 2010, unless the lease and mitigation project are terminated earlier. Prior to any mitigation credits being awarded to mitigation credit project MP-29, 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-29) may be valid the first year that water is protected instream under any new instream water right issued as a result of this transfer.
34. A total of 75.0 AF may be transferred to instream use and 28.8 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.
35. 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.

**Determination and Proposed Action**

The proposed changes in character of character of use and place of use to instream use in application T-9835 appear to be consistent with the requirements of ORS 540.505 to 540.580, OAR 690-380-5000, and OAR 690-077-0075, and will be approved provided that protests are not filed pursuant to OAR 690-380-4030.

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

If approved, the change and subsequent use of water shall be subject to the following conditions:

1. The proposed changes shall be effective upon issuance of a Final Order.
2. Certificate 72196 shall be 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 the authorized point of diversion on the Little Deschutes River to Lake Billy Chinook on the mainstem Deschutes River. The quantities of water to be protected under the instream water right are as follows:

**Instream Reach 1:** From POD (as described in Finding of Fact #13) to the Little Deschutes gage near LaPine (approximately River Mile 27)

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4. 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 identified in a subsequent order establishing a new instream water right under these statutes.
5. The former place of use of the transferred water shall no longer receive water as part of this right.



6. 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 72196 and any related decree.
7. **Preliminary 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, will result in completion of the project and verification by the Department that the project is complete. If completed as proposed, mitigation credits, in the amount of **28.8** credits, as described herein, may be awarded to this mitigation project and assigned to Emmett Ranch. 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 **Little Deschutes, Upper Deschutes, Middle Deschutes, and and/or General Zones of Impact**. Any mitigation credits awarded will begin being valid the first year that water is to be protected instream under a new instream water right resulting from this mitigation project.
8. 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 31<sup>ST</sup> day of May 2007.

  
Phillip C. Ward, Director

This Preliminary Determination was prepared by Laura Snedaker. If you have questions about the information in this document, you may reach me at 503-986-0884 or [Laura.K.Snedaker@wrdd.state.or.us](mailto:Laura.K.Snedaker@wrdd.state.or.us).

Protests should be addressed to the attention of Field Services Division, Water Resources Department, 725 Summer St. NE, Salem, OR 97301-1266.