



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

North Mall Office Building
725 Summer St. NE, Suite A
Salem, OR 97301
Phone: 503-986-0900
FAX: 503-986-0904
www.oregon.gov/owrd

March 18, 2013

VIA E-MAIL

Applicant

ELLEN J. LOVETT TRUSTEE
7911 DEER CREEK ROAD
SELMA, OR 97538

SUBJECT: Water Right Transfer Application T-11369

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve application T-11369. This document is an intermediate step in the approval process; water may not be used legally as proposed in the transfer application until a Final Order has been issued by the Department. Please read this entire letter carefully to determine your responsibility for additional action.

A public notice is being published in the Department's weekly publication and in the Grants Pass Daily Courier newspaper, simultaneously with issuance of the Preliminary Determination. The notice initiates a period in which any person may file either a protest opposing the decision proposed by the Department in the Preliminary Determination or a standing statement supporting the Department's decision. The protest period will end 30 days after the Department's notice or 30 days after the last date of newspaper publication, whichever occurs later.

If no protest is filed, the Department will issue a Final Order consistent with the Preliminary Determination. You should receive a copy of the Final Order about 30 days after the close of the protest period.

If a protest is filed, the application may be referred to a contested case proceeding. A contested case provides an opportunity for the proponents and opponents of the decision proposed in the Preliminary Determination to present information and arguments supporting their position in a quasi-judicial proceeding.

Please do not hesitate to contact me at (503) 986-0890 or Dorothy.I.Pedersen@wrp.state.or.us if I may be of assistance.

Sincerely,

Dorothy Pedersen
Transfer Program Advisor

cc: T-11369
Kathy A. Smith, District 14 Watermaster (*via e-mail*)
Kevin O'Brien, Agent for the applicant (*via e-mail*)
Harold Center, CWRE #152 (*via e-mail*)

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

In the Matter of Transfer Application) PRELIMINARY DETERMINATION
T-11369, Josephine County) PROPOSING APPROVAL OF CHANGES
) IN PLACE OF USE AND POINT OF
) DIVERSION TO GROUNDWATER POINT
) OF APPROPRIATION, PARTIAL
) CANCELLATION AND PARTIAL
) DIMINUTION OF CERTAIN WATER
) RIGHTS

Authority

ORS 537.705 and 540.505 to 540.580 establish the process in which a water right holder may submit a request to transfer the point of appropriation, 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.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicant

ELLEN J. LOVETT TRUST
ELLEN J. LOVETT TRUSTEE
7911 UPPER DEER CREEK RD
SELMA, OR 97538

Findings of Fact

Background

1. On March 9, 2012, Ellen J. Lovett filed an application to change the places of use under Certificates 13890 and 66470 and to change the point of diversion to a groundwater point of appropriation under Certificate 13890. The Department assigned the application number T-11369.
2. Notice of the application for transfer was published on March 20, 2012, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On December 20, 2012, the Department sent out a draft of the Preliminary Determination to the applicant. The applicant's Certified Water Right Examiner (CWRE) recognized that some of the information for a portion of the supplemental irrigation was missing in the

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.

authorized place of use table for Certificate 66470. On December 27, 2012, the CWRE, acting on behalf of the applicant, submitted a new Table 2 to document the 18.8 acres of supplemental irrigation proposed to change place of use with the appurtenant primary water right Certificate 13890, described in Finding of Fact #5 below. In addition, the applicant has requested a completion date of 2015 by which to complete the transfer.

4. On December 27, 2012, the Department sent out a new superseding, revised draft of the Preliminary Determination to the applicant, to correctly describe the supplemental water right portion, and set forth a deadline of January 26, 2013, for the applicant to respond. On March 13, 2013, the agent for the applicant submitted correspondence by e-mail requesting the Department to proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant was authorized to pursue the transfer.

5. The portion of the FIRST primary right and its layered supplemental water right to be transferred are as follows:

Certificate: 13890 in the name of MARY MESSINGER (confirmed by decree of Circuit Court of State of Oregon for Josephine County)
Use: IRRIGATION of 157.5 ACRES
Priority Date: 1856
Rate: ONE-FIFTIETH of one cubic foot per second per acre irrigated during the irrigation season from April 1 to November 1 of each year.
Source: *NORTH FORK* of DEER CREEK, tributary to the ILLINOIS RIVER
Authorized Point of Diversion: See Finding of Fact #7

Certificate: 66470 in the name of JOHNNY EYGABROAD (perfected under Permit G-9518)
Use: SUPPLEMENTAL IRRIGATION of 18.8 ACRES
Priority Date: JANUARY 5, 1981
Rate: 0.23 cubic foot per second
Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.
Source: A SUMP within the ILLINOIS RIVER basin

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	DLC	Q - Q	Measured Distances
38 S	7 W	WM	14	37	NW NW	1070 FEET SOUTH AND 970 FEET EAST FROM THE NW CORNER OF SECTION 14

Authorized Places of Use:

IRRIGATION (IR) and SUPPLEMENTAL IRRIGATION (IS)								
Twp	Rng	Mer	Sec	Q - Q	GLot	DLC	Acres	
							Certificate 13890(IR)	Certificate 66470 (IS)
38 S	7 W	WM	13	SW NE	--	37	1.0	--
38 S	7 W	WM	13	NE NW	--	--	1.2	--
38 S	7 W	WM	13	NW NW	--	--	10.5	--
38 S	7 W	WM	13	NW NW	--	37	1.0	--
38 S	7 W	WM	13	SW NW	--	37	29.7	--
38 S	7 W	WM	13	SE NW	--	37	31.1	--
38 S	7 W	WM	14	NE NE	--	37	26.9	--
38 S	7 W	WM	14	NW NE	2	--	4.9 ¹	--
38 S	7 W	WM	14	NW NE	--	37	27.0	--
38 S	7 W	WM	14	SW NE	--	37	0.5	--
38 S	7 W	WM	14	SE NE	--	37	0.5	--
38 S	7 W	WM	14	NE NW	3	--	1.5 ¹	--
38 S	7 W	WM	14	NE NW	--	37	2.9	--
38 S	7 W	WM	14	NE NW	--	37	17.1 ²	17.1
38 S	7 W	WM	14	NW NW	--	37	1.7 ²	1.7

* Note: ¹ these lands have another primary irrigation right that will be diminished to supplemental irrigation as described below in Finding #21

² these lands are involved in a change in place of use as well as a change in point of diversion

6. Certificate 13890 describes North Fork Deer Creek as the source of water. The “North Fork” of Deer Creek meets up with South Fork Deer Creek just upstream from the current authorized (Messinger Ditch) point of diversion, thus creating the main-stem of Deer Creek. No previous maps or information are available which show the North Fork extending downstream to and beyond the Messinger Ditch. It is possible that the priority date of this water right pre-dates any surveys from the government or State Engineer’s office. It appears that the correct identification of the source of water for Certificate 13890 is “Deer Creek”.
7. Certificate 13890 does not describe the location of the point of diversion. However information is available from the Illinois River adjudication map, decree tabulation and from the current map prepared by the applicant’s Certified Water Rights Examiner (CWRE) based on a recent field visit and subsequent survey indicating that the point of diversion on Deer Creek is located as follows:

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
38 S	6 W	WM	18	NW SW	MESSINGER DITCH - (Lat.) 42 DEGREES 15 MINUTES 46.8 SECONDS and (Long.) -123 DEGREES 47 MINUTES 44.5 SECONDS

8. Transfer Application T-11369 proposes to change the point of diversion for this portion of Certificate 13890 downstream approximately 1.75 miles to three shallow, hydraulically connected wells placed in close proximity to the Deer Creek streambed located:

Proposed Points of Appropriation:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
38 S	7 W	WM	14	SE NW	1645 FEET SOUTH AND 1600 FEET EAST FROM THE NW CORNER OF SECTION 14

9. Transfer application T-11369 also proposes to change the place of use for the above described 18.8 acres of Certificates 13890 and 66470 to the following lands:

Proposed Place of Use:

IRRIGATION							
Twp	Rng	Mer	Sec	Q - Q	GLot	DLC	Acres
38 S	7 W	WM	13	SW NW	4	--	0.4
38 S	7 W	WM	13	SE NW	3	--	4.0
38 S	7 W	WM	13	SE NW	--	37	1.4
38 S	7 W	WM	13	NE SW	--	--	13.0

10. The portion of the SECOND right to be transferred is as follows:

Certificate: 66470 in the name of JOHNNY EYGABROAD (perfected under Permit G-9518)

Use: IRRIGATION of 18.8 ACRES

Priority Date: JANUARY 5, 1981

Rate: 0.23 cubic foot per second

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-EIGHTIETH of one cubic foot per second, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year.

Source: A SUMP within the ILLINOIS RIVER basin

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	DLC	Q - Q	Measured Distances
38 S	7 W	WM	14	37	NW NW	1070 FEET SOUTH AND 970 FEET EAST FROM THE NW CORNER OF SECTION 14

Authorized Place of Use:

IRRIGATION							
Twp	Rng	Mer	Sec	Q - Q	GLot	DLC	Acres
38 S	7 W	WM	13	SW NW	4	--	0.4
38 S	7 W	WM	13	SE NW	3	--	4.0
38 S	7 W	WM	13	SE NW	--	37	1.4
38 S	7 W	WM	13	NE SW	--	--	13.0

11. Certificate 66470 describes the source of water as a sump. However, the Department's Final Proof Survey map for Permit G-9518 describes a low lying swale/seepage area that appears to be a catch basin and naturally collects water. This area is purported to go dry every year in late April and additionally has never had power service or a water delivery system hooked up to it. The original application map and permit describes a sump (point of appropriation) as a small sump pond near the stream channel just to the southeast within the SE¹/₄ NW. This original sump described in the permit is stated by the applicant to be

the only source ever utilized and has had the overhead power service from Deer Creek Road to a point near the pump at the sump for many years. The current map prepared by the applicant's CWRE, based on a recent field visit and subsequent survey, indicates that the location of the existing point of appropriation (sump) is the original location, which should be re-described more appropriately as follows:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
38 S	7 W	WM	14	SE NW	1433 FEET SOUTH AND 1476 FEET EAST FROM THE NW CORNER OF SECTION 14

12. Transfer Application T-11369 proposes to change the place of use for the above described 18.8 acres to the following lands:

Proposed Place of Use:

IRRIGATION							
Twp	Rng	Mer	Sec	Q - Q	GLot	DLC	Acres
38 S	7 W	WM	14	NE NW	--	37	17.1
38 S	7 W	WM	14	NW NW	--	37	1.7

13. Accompanying the transfer application was a support letter from Jay Doino, Oregon Department of Fish and Wildlife (ODFW), stating that this transfer would restore surface flow to approximately 2 miles of Deer Creek. Deer Creek supports populations of coho salmon (federally listed as threatened), steelhead trout, and cutthroat trout. Flow restoration in the project reach will increase and enhance summertime fish habitat and also have water quality benefits.

Transfer Review Criteria (OAR 690-380-4010)

14. Water has been used within the last five years prior to the submittal of Transfer Application T-11369 according to the terms and conditions of the rights. There is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
15. A ditch, sump, pumps, pipeline, and sprinkler system sufficient to use the full amount of water allowed under the existing rights were present within the five-year period prior to submittal of Transfer Application T-11369.
16. The proposed changes would not result in enlargement of the rights.
17. The proposed changes would not result in injury to other water rights.
18. The Department's staff hydrogeologist concluded that the construction of the three proposed wells meets the requirements of ORS 540.531. It is estimated that pumping of the wells will result in a stream depletion of greater than 50 percent of the rate of appropriation in less than 10 days, thereby affecting the surface water source similarly to the authorized point of diversion, in accordance with OAR 690-380-2130(2)(c) and (11)(b).

Partial Cancellations of Certain Water Rights

19. On March 9, 2012, Ellen J. Lovett, Trustee of the Ellen J. Lovett Trust submitted a request for the Partial Cancellation of a water right certificate appurtenant to Tax Lot 300, within Section 14, Township 38 South, Range 7 West, W.M.

The portion of the right proposed to be cancelled is described as follows:

Certificate: 13890 in the name of MARY MESSINGER (decree of the circuit court of the State of Oregon for Josephine County)

Use: IRRIGATION of 2.90 ACRES

Priority Date: 1856

Quantity: 0.06 cfs

Source: (North Fork) Deer Creek, tributary to the Illinois River

Authorized Place of Use to be Cancelled:

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	GLot	DLC	Acres
38 S	7 W	WM	13	SW NE	--	37	2.6
38 S	7 W	WM	13	SW NE	2	--	0.3

20. On December 12, 2012, Ellen J. Lovett, Trustee of the Ellen J. Lovett Trust submitted request for the Partial Cancellation of a water right certificate appurtenant to Tax Lot 300, within Section 14, T 38 S, R 7 W, W.M.

The portion of the right proposed to be cancelled is described as follows:

Certificate: 66470 in the name of JOHNNY EYGABROAD (perfected under Permit G-9518)

Use: Irrigation of 35.5 ACRES and Supplemental Irrigation of 2.9 ACRES

Priority Date: January 5, 1981

Quantity: 0.47 cubic foot per second

Source: A Sump within the Illinois River basin

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q - Q	DLC	Survey Coordinates
38 S	7 W	WM	14	NW NW	37	1070 FEET SOUTH AND 970 FEET EAST FROM THE NW CORNER OF SECTION 14

Authorized Place of Use to be Cancelled:

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	GLot	DLC	Acres
38 S	7 W	WM	13	SW NE	2	--	1.3
38 S	7 W	WM	13	SW NE	--	37	1.7
38 S	7 W	WM	14	SW NE	--	37	0.5
38 S	7 W	WM	14	SW NW	--	37	12.0
38 S	7 W	WM	14	SE NW	--	37	20.0

SUPPLEMENTAL IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	GLot	DLC	Acres
38 S	7 W	WM	13	SW NE	--	37	2.6
38 S	7 W	WM	13	SW NE	2	--	0.3

Partial Diminution of a Certain Water Right

21. Certain lands in the authorized place of use table above in Finding of Fact #5 are noted to have two water rights for primary irrigation layered on the same lands. As per OAR 690-380-5120, on March 9, 2012, Ellen J. Lovett, Trustee of the Ellen J. Lovett Trust submitted a request for Diminution of the right under Certificate 12349 appurtenant to Tax Lot 300, within Section 14, T 38 S, R 7 W, W.M. to supplemental irrigation.

The portion of the right proposed to be diminished from primary irrigation to supplemental irrigation is described as follows:

Certificate: 12349, in the name of ERNEST WOODCOCK (perfected under Permit S-11696)

Use: IRRIGATION OF 6.4 ACRES

Priority Date: June 6, 1935

Rate: 0.08 cfs

Limit: The amount of water used for irrigation, is limited to a diversion of ONE-FIFTIETH of one cubic foot per second per acre irrigated during the irrigation season from April 1 to November 1 of each year.

Source: Cedar Creek, a tributary to Illinois River

Place of Use to be Diminished to Supplemental Irrigation:

SUPPLEMENTAL IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	GLot	DLC	Acres
38 S	7 W	WM	14	NW NE	2	--	4.9
38 S	7 W	WM	14	NE NW	3	--	1.5

Determination and Proposed Action

The changes in place of use and point of diversion proposed in Transfer Application T-11369 appear to be consistent with the requirements of ORS 537.705 and 540.505 to 540.580 and OAR 690-380-5000, and the abandoned water right portions should be cancelled. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be approved and the abandoned water right portions will be cancelled.

If Transfer Application T-11369 is approved, the final order will include the following:

- 1. The changes in place of use and point of diversion proposed in application T-11369 are approved. The portions of Certificates 13890 and 66470 described in Findings of Fact #19 and #20 that have been abandoned are cancelled. The use of water for a portion of Certificate 12349 described in Finding of Fact #21 is now diminished to supplemental irrigation.*
- 2. 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 Certificates 13890 and 66470 and any related decree.*
- 3. Water right certificates 13890, 66470 and 12349 are cancelled. New certificates will be issued describing those portions of the rights not affected by this transfer.*

4. *The quantity of water diverted at the new points of appropriation, shall not exceed the quantity of water lawfully available at the original point of diversion.*
5. *Water shall be acquired from the same water source as the original point of diversion. The proposed wells from which water is taken under the right shall be constructed so that the use of these wells will affect the surface water source similarly to the use of the original authorized point of diversion.*
6. *If, within five years after approval of the transfer, the Department finds that the transfer results in substantial or undue interference with an existing ground water right due to use of the new shallow wells, that would not have occurred in the absence of the transfer, the new points of appropriation shall be subordinate to the existing right injured by the transfer.*
7. *The original point of diversion of surface water shall not be retained as an additional or supplemental point of diversion under the transferred portion of the right. However, if within five years after approval of the transfer, the Department receives a transfer application to return to the last authorized surface water point of diversion, the application shall be approved.*
8. *Before water use may begin under this order, the water user shall install a totalizing flow meter on each of three wells proposed, or, with prior approval of the Director, another suitable measuring device, at each new point of diversion. The water user shall maintain the meters or measuring devices in good working order. The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.*
9. *The quantity of water diverted at the new points of appropriation (shallow wells) shall not exceed the quantity of water lawfully available at the original point of diversion.*
10. *The former places of use of the transferred rights shall no longer receive water under the rights.*
11. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2015**. A Claim of Beneficial Use prepared by a Certified Water Right Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the changes and full beneficial use of the water.*
12. *After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.*

Dated at Salem, Oregon this 18 day of March, 2013.


Dwight French, Water Right Services Administrator, for
PHILLIP C. WARD, DIRECTOR

This Preliminary Determination was prepared by Ken Dowden. If you have questions about the information in this document, you may reach me at 541-278-5456 or Ken.D.Dowden@wrđ.state.or.us.

Protests should be addressed to the attention of Transfer and Conservation Section, Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266.