



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

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February 19, 2015

HENRY AND MARIETTA NIGHTENGALE
694 ROAD SS
SUBLETTE, KS 67877

SUBJECT: Water Right Transfer Application T-11764

Please find enclosed the Preliminary Determination indicating that, based on the information available, the Department intends to approve Transfer Application T-11764. 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 Argus Observer 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 last date of newspaper publication.

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.

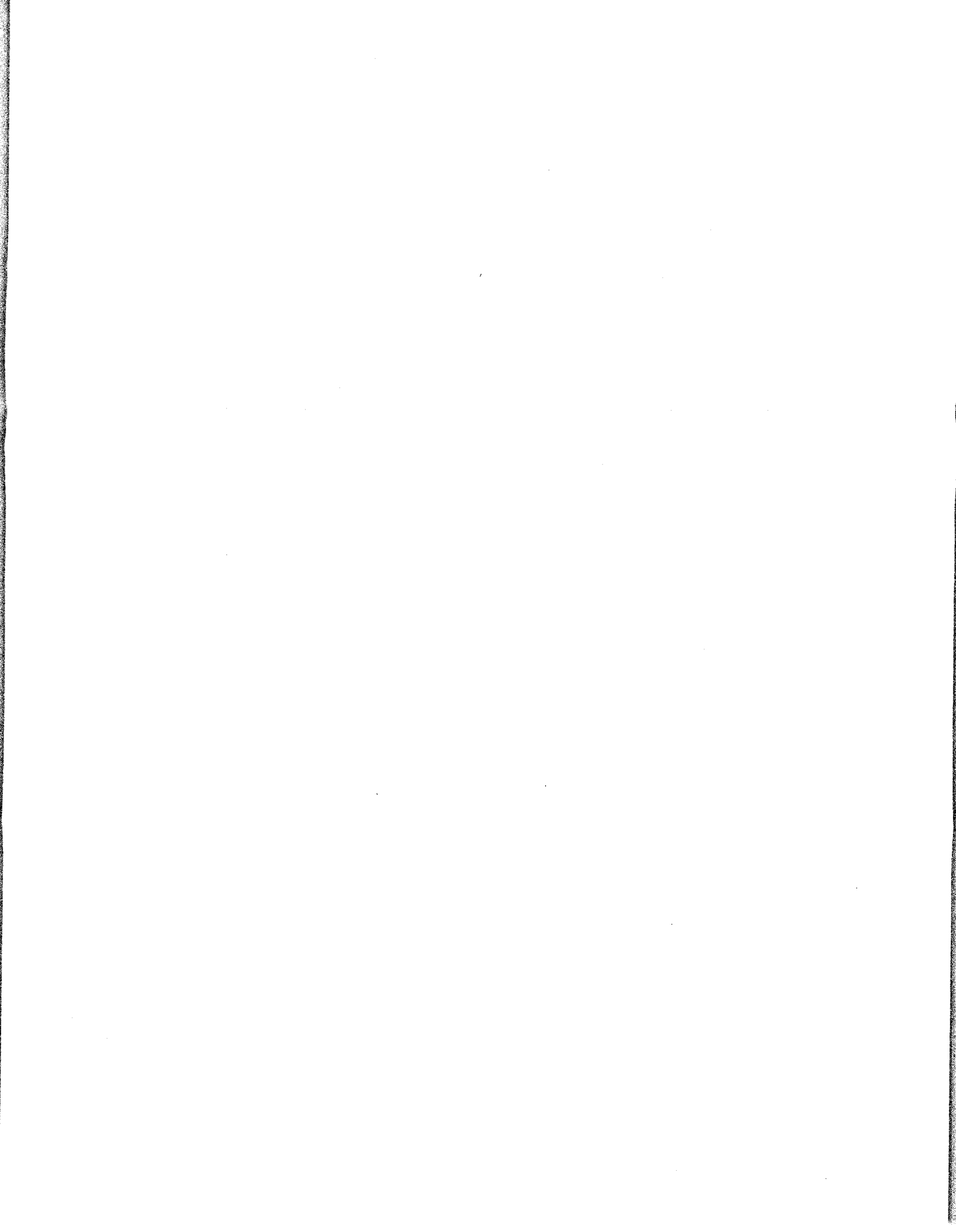
Please do not hesitate to contact me at Tracy.L.Fox@ wrd.state.or.us or 503 986-0827 if I may be of assistance.

Sincerely,

Ms. Tracy Fox
Transfer Specialist
Transfer and Conservation Section

cc: T-11764
Ronald K. Jacobs, District 9 Watermaster (*via e-mail*)
Marwyn Peaster, Agent for the applicant (*via e-mail*)
Michael Holladay, CWRE # 69 (*via e-mail*)

enclosures



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

In the Matter of Transfer Application) PRELIMINARY DETERMINATION
T-11764, Malheur County) PROPOSING APPROVAL OF A CHANGE IN
) POINT OF DIVERSION, A RE-DESCRIPTION
) OF THE AUTHORIZED PLACE OF USE
) UNDER CERTIFICATE 2334 AND PARTIAL
) CANCELLATION OF A WATER RIGHT

Authority

Oregon Revised Statute (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. Oregon Administrative Rule (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.

Applicants

HENRY AND MARIETTA NIGHTENGALE
694 ROAD SS
SUBLETTE, KS 67877

Findings of Fact

1. On March 17, 2014, HENRY AND MARIETTA NIGHTENGALE filed an application to change the point of diversion under Certificate 2334. The Department assigned the application number T-11764.
2. Notice of the application for transfer was published on March 25, 2014, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On March 17, 2014, HENRY AND MARIETTA NIGHTENGALE submitted an "Ownership Update" for Certificate 2334.

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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4. On September 24, 2014, the Department contacted the applicants' agent by written correspondence to notify the applicants of deficiencies in the application. The main deficiencies being that no documentation was submitted to support the Evidence of Use Affidavit and the acres the proposed change would affect needed correction. The Department requested that the deficiencies be resolved by October 30, 2014. On October 17 and November 5, 2014, the applicants' agent submitted documents resolving the deficiencies.
5. On November 24, 2014, the Department sent a copy of the draft Preliminary Determination proposing to approve Transfer Application T-11764 to the applicants. The draft Preliminary Determination cover letter set forth a deadline of December 29, 2014, for the applicants to respond. Upon the applicant's request the deadline was subsequently extended. The applicants requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicants are authorized to pursue the transfer.
6. The map depicting the place of use described by water right Certificate 2334 broadly defines the actual location of the irrigated lands. No final proof survey was performed by the Department and the original Application map (S-4934) for Certificate 2334 was used as the final proof map.
7. As part of the field inspection, the CWRE found the 74.0 acres of the place of use for Certificate 2334 located as follows:

Twp	Rng	Mer	Sec	Q-Q	Acres
16 S	47 E	WM	36	NE NW	7.40
16 S	47 E	WM	36	SW NW	13.82
16 S	47 E	WM	36	SE NW	29.78
16 S	47 E	WM	36	NW SW	23.00
Total:					74.00

8. Aerial photos from the 1950-1960s era and 1994 show the irrigated lands as described by the CWRE on the transfer application map.
9. Based on the CWRE's field inspection and historic photos, the place of use for Certificate 2334 has always been located as follows:

Twp	Rng	Mer	Sec	Q-Q	Acres
16 S	47 E	WM	36	NE NW	7.40
16 S	47 E	WM	36	SW NW	13.82
16 S	47 E	WM	36	SE NW	29.78
16 S	47 E	WM	36	NW SW	23.00
Total:					74.00

10. The following table lists the place of use as described in existing Certificate 2334 and a proposed re-description based on the above findings:

Twp	Rng	Sec	Original Description of Place of Use		Proposed Re-Description of Place of Use	
			Q-Q	Acres	Q-Q	Acres
16 S	47 E	36	NE NW	11.00	NE NW	7.4
16 S	47 E	36	SW NW	12.00	SW NW	13.82
16 S	47 E	36	SE NW	28.00	SE NW	29.78
16 S	47 E	36	NW SW	23.00	NW SW	23.00
Total:				74.00	Total: 74.00	

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

Certificate: 2334 in the name of JESSE H. NEWTON (perfected under Permit S-2945)
Use: IRRIGATION of 58.57 ACRES
Priority Date: MAY 29, 1916
Rate: 0.74 CUBIC FOOT PER SECOND
Source: DRAWS

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
16 S	47 E	WM	36	W1/2 NW1/4

12. Certificate 2334 does not describe the measured distances of the authorized point of diversion. The applicant and their agent have provided information that further describes the authorized point of diversion as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
16 S	47 E	WM	36	W1/2 NW1/4	S20 57'E2063'

13. Transfer Application T-11764 proposes to move the authorized point of diversion approximately 2.6 miles downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
16 S	47 E	WM	36	SE NW	N44 55'W 3701'

14. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screen is necessary at the new point of diversion to prevent fish from entering the diversion and that the diversion is not currently equipped with an appropriate fish screen. This diversion may be eligible for screening cost-share funds.

Transfer Review Criteria [OAR 690-380-4010(2)]

15. Water has been used within the last five years according to the terms and conditions of the right. There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.

16. 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 Transfer Application T-11764.
17. The proposed change would not result in enlargement of the right.
18. The proposed change would not result in injury to other water rights.

Partial Cancellation of a Water Right

19. On March 17, 2014, an affidavit certifying that a portion of a water right has been abandoned and requesting cancellation of the right was received from the applicants' agent.
20. The right to be cancelled is as follows:

Certificate: 2334 in the name of JESSE H. NEWTON (confirmed by Malheur River Decree)
Use: IRRIGATION of 6.09 ACRES
Priority Date: MAY 29, 1916
Rate: 0.07 CUBIC FOOT PER SECOND
Source: DRAWS
Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q
16 S	47 E	WM	35	N1/2 SW1/4
16 S	47 E	WM	36	W1/2 NW1/4

Authorized Place of Use to be Cancelled:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
16 S	47 E	WM	36	NE NW	6.09

Determination and Proposed Action

The change in point of diversion proposed in Transfer Application T-11764 appears to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000 and the abandoned right should be cancelled. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be approved and the abandoned right will be cancelled.

If Transfer Application T-11764 is approved, the final order will include the following:

1. *The change in point of diversion proposed in Transfer Application T-11764 is approved. The portion of the right that has been abandoned is cancelled.*
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 Certificate 2334 and any related decree.*

3. *Water Right Certificate 2334 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer and cancellation.*
4. *The quantity of water diverted at the new shall not exceed the quantity of water lawfully available at the original point of diversion.*
5. *Prior to diverting water, the water user shall install an approved fish screen at the new point of diversion and shall provide to the OWRD a written statement from Oregon Department of Fish and Wildlife (ODFW) that the installed screen meets the state's criteria, or that ODFW has determined a screen is not necessary.*
6. *The water user shall operate and maintain the fish screen at the new point of diversion consistent with ODFW's operational and maintenance standards. If ODFW determines the screen is not functioning properly, and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that OWRD regulate the use of water until OWRD receives notification from ODFW that the fish screen is functioning properly.*
7. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2016**. 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 change and full beneficial use of the water.*
8. *After satisfactory proof of beneficial use is received, a new certificate confirming the right transferred will be issued.*

Dated at Salem, Oregon this 19 day of February, 2015.



Dwight French, Water Right Services Administrator, for
Thomas M. Byler, Director
Oregon Water Resources Department

This Preliminary Determination was prepared by Tracy Fox. If you have questions about the information in this document, you may reach me at 503 986-0827 or Tracy.L.Fox@wrdd.state.or.us.

Protests should be addressed to the Water Rights Services Division, Oregon Water Resources Department, 725 Summer Street, Suite A, Salem, OR 97301-1266.