

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

In the Matter of Transfer Application ) PRELIMINARY DETERMINATION  
T-10997, Grant County ) PROPOSING DENIAL OF A CHANGE  
 ) IN POINT OF DIVERSION

**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.

**Applicant**

GARY ENGLE  
37796 COTTONWOOD ROAD  
MONUMENT OR 97864

**Findings of Fact**

**Background**

1. On December 28, 2009, GARY ENGLE filed an application to change the points of diversion under Certificate 946. The Department assigned the application number T-10997.

2. The right to be transferred is as follows:

**Certificate:** 946 in the name of J. E. JOHNSON (perfected under Permit S-1239)  
**Use:** IRRIGATION of 20 ACRES  
**Priority Date:** JULY 2, 1912  
**Rate:** 0.25 CUBIC FOOT PER SECOND  
**Limit/Duty:** The amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed 0.25 cubic feet per second, or its equivalent in case of rotation.  
**Source:** COTTONWOOD CREEK, tributary to the JOHN DAY RIVER

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:**

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
10 S	27 E	WM	25	SE SW	1.0
10 S	27 E	WM	25	SW SE	19.0

3. Certificate 946 does not describe the diversion rate for the right, however Permit 1239 indicates that the rate allowed for the right shall be limited to one-eightieth of one cubic foot per second for each acre irrigated.
4. Certificate 946 does not describe the location of the points of diversion, however Application 2419 indicates that the points of diversion are located as follows:

**Authorized Points of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
10 S	27 E	WM	36	NW NE	DITCH NO. 1 - 130 RODS WEST AND 52 RODS SOUTH OF THE NE CORNER OF SECTION 36
10 S	27 E	WM	36	SE NE	DITCH NO. 2 - 145 RODS SOUTH AND 40 RODS WEST OF THE NE CORNER OF SECTION 36

5. Application S-2419 describes the authorized points of diversion as stated in Finding of Fact No. 4 above.
  - a. The transfer application, however, depicts the points of diversion under Certificate 946 as being:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
10 S	27 E	WM	36	NE NE	DITCH NO. 1 - 850 FEET SOUTH AND 1170 FEET WEST OF THE NE CORNER OF SECTION 36
10 S	27 E	WM	36	SE NE	DITCH NO. 2 - 1500 FEET SOUTH AND 730 FEET WEST OF THE NE CORNER OF SECTION 36

- b. On the ground it is very evident due to the elevations of the hills and creek that the ditches could have never been in the locations where the permit placed them. There is in excess of 15 feet of elevation difference between the creek and the ditch in the locations where the permit placed the head of the ditches. The Department considers there was an error or mistake made when the locations of the points of diversions were finalized for this right. The ditches appear not to have moved any significant distance over time and the current survey accurately describes the location of the two ditches which serve Certificate 946.

- c. The following table lists the points of diversion as described in Application S-2419 (Certificate 946) and a proposed re-description based on the above findings:

Original Description of Points of Diversion		Proposed Re-Description of Points of Diversion		
¼-¼	Measured Distances	¼-¼	Measured Distances	Current Tax Lot
NW NE	DITCH NO. 1 - 130 RODS WEST AND 52 RODS SOUTH OF THE NE CORNER OF SECTION 36	NE NE	DITCH NO. 1 - 850 FEET SOUTH AND 1170 FEET WEST OF THE NE CORNER OF SECTION 36	5600
SE NE	DITCH NO. 2 - 145 RODS SOUTH AND 40 RODS WEST OF THE NE CORNER OF SECTION 36	SE NE	DITCH NO. 2 - 1500 FEET SOUTH AND 730 FEET WEST OF THE NE CORNER OF SECTION 36	2500
Township 10 S, Range 27 E, Section 36				

6. Certificate 946 describes the authorized place of use as 1 acre in the SE SW and 19 acres in the SW SE of Section 25, Township 10 S, Range 27 E, Willamette Meridian, Grant County, Oregon.

- a. The transfer application depicts the place of use under Certificate 946 as being:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
10 S	27 E	WM	25	SE SW	0.7
10 S	27 E	WM	25	SW SE	19.3

- b. The map for Permit S-1239/Certificate 946 did not clearly define the location of the irrigated acreage with much precision. The landscape of the area is physically marked by knobs, rises, outcroppings of rock and sloping small pastures. The fields are odd shaped as a result of the lay of the land. It appears that no significant alterations to the landscape have occurred over the life of this water right based upon the Department's visual inspection of the area. The locations noted on the permit map for Certificate 946 apparently described the place of use at the time the permit was awarded a certificate of water right. It is clear based upon the permit map that the intent was to show the place of use being shaped to fit the overall lay of the land. However, survey technology today can better show the locations on the ground than was possible back in 1912.
- c. The following table lists the place of use as described in existing Certificate 946 and a proposed re-description based on the above findings:

Original Description of Place of Use		Proposed Re-Description of Place of Use		
¼-¼	Acres	¼-¼	Acres	Current Tax Lot
SE SW	1.0	SE SW	0.7	2700
SW SE	19.0	SW SE	19.3	2700
Township 10 S, Range 27 E, Section 25				

7. Transfer Application T-10997 proposes to replace the two authorized points of diversion by moving to a single point approximately 1,000 feet upstream from the currently authorized point of diversion for Ditch No. 1, which is the actual point that has been used for POD No. 2:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
10 S	27 E	WM	36	SE NE	POD NO. 4 - 1500 FEET SOUTH AND 730 FEET WEST FROM THE NE CORNER OF SECTION 36

***Clarification of the Diversion Point Location for Certificate 47400***

8. On January 6, 2010 the Department sent a request to Oregon Department of Fish and Wildlife to review the proposed point of diversion and indicate any fish screen, by-pass device or fish passage devices that should be installed at the proposed point of diversion. To date, no response has been received.
9. Notice of the application for transfer was published on January 12, 2010, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
10. On May 3, 2010, the Department mailed a copy of the draft Preliminary Determination proposing to deny Transfer Application T-10997 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of June 4, 2010, for the applicant to respond. The applicant requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.

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

11. 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.
12. 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-10997.
13. The proposed change would not result in enlargement of the right.
14. An instream water right, Certificate 63251, exists to maintain an instream flow for the purpose of anadromous and resident fish habitat and recreational fishing in the reach of the river in which the authorized point of diversion for Ditch No. 1 would be moved upstream, and stream flows during the summer months within the reach are frequently below the levels allocated under the instream water right. Thus, the instream water right would be injured as a result of the proposed change in point of diversion. This instream water right was applied for by the Oregon Department of Fish and Wildlife and the Oregon Department of Parks and Recreation.

15. Notwithstanding injury to instream water rights, the Oregon Department of Fish and Wildlife has stated that this project may create a net benefit to fish and wildlife habitat in the North Fork of the John Day River but reserves its final determination until a more thorough review of the transfer application can be conducted.
16. On March 1, 2010, the applicant requested that the Department seek a recommendation from the Oregon Department of Fish and Wildlife and the Oregon Parks and Recreation Department as to whether the Department should consent to injury of the instream water right pursuant to OAR 690-380-4030.
17. The proposed point of diversion location for T-10997 is also currently in use as the diversion point for another right evidenced by Certificate 47400 which is not involved in the transfer. No movement of the POD is proposed under Certificate 47400, however, the description of the POD location needs to be clarified as follows:

**Point of Diversion location as listed on Certificate 47400:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
10 S	27 E	WM	36	NE NE	900 FEET SOUTH AND 1180 FEET WEST FROM THE NE CORNER OF SECTION 36

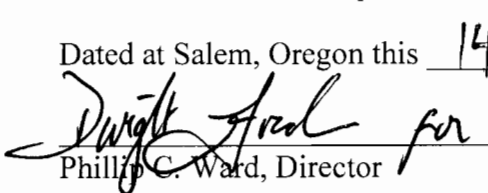
**Actual Location of Point of Diversion as per Current Survey:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
10 S	27 E	WM	36	SE NE	POD NO. 4 - 1500 FEET SOUTH AND 730 FEET WEST FROM THE NE CORNER OF SECTION 36

**Determination and Proposed Action**

The change in point of diversion proposed in Transfer Application T-10997 appears to be not consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000. The transfer application will be denied unless the Oregon Department of Fish and Wildlife recommends that the Department consent to injury of an instream water right pursuant to OAR 690-380-5050 or protests are filed pursuant to OAR 690-380-4030.

Dated at Salem, Oregon this 14 day of May 2010.

  
Phillip C. Ward, Director

This Preliminary Determination was prepared by a Reimbursement Authority contractor. If you have questions about the information in this document, you may reach Dorothy Pederson at 503-986-0890 or [Dorothy.I.Pederson@wrд.state.or.us](mailto:Dorothy.I.Pederson@wrд.state.or.us).

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