

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

Curry County

IN THE MATTER OF THE DETERMINATION )  
OF THE RELATIVE RIGHTS TO THE USE )  
OF THE WATERS OF MCVAY CREEK )  
AND ITS TRIBUTARIES, CURRY COUNTY )

FINDINGS OF FACT

AND

ORDER OF DETERMINATION

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Now at this time the above-entitled matter coming on for consideration by the Water Resources Director, and it appearing that all evidence and testimony have been taken in the above-entitled proceeding, and the Water Resources Director having carefully considered all such evidence and testimony and the engineering data and information gathered in accordance with law, and being fully advised in the premises, makes and orders to be entered of record in his office the following:

FINDINGS OF FACT AND ORDER OF DETERMINATION

-1-

The watershed of McVay Creek and its tributaries is a small basin in southwestern Curry County. It is bounded on the east by small foothills of the Coast Range; on the north by the divide of Johnson Creek and on the south by the divide of an unnamed stream.

McVay Creek originates in the SW $\frac{1}{4}$ , Section 11, Township 41 South, Range 13 West, W. M., and flows southwesterly approximately two miles to its confluence with the Pacific Ocean within Lot 1 (NE $\frac{1}{4}$  NW $\frac{1}{4}$ ), Section 22, Township 41 South, Range 13 West, W. M.

The basin comprises 0.5 square mile. The highest elevation is 1,347 feet near the northeastern end of the watershed. The stream falls rapidly for the first mile to the flat bench land. Over the remainder of its course, the stream flows with a uniform grade to the Pacific Ocean and receives some ground water discharge depending somewhat on climatic conditions.

The runoff of McVay Creek is derived from precipitation in the form of rain.

The flow of the stream usually becomes low (20 to 30 gallons per minute) from the first of July through September, depending on the summer rains.

-2-

That on the 9th day of October, 1972, there was filed with the State Engineer (now Water Resources Director) a petition signed by Carol L. Freeman, user of McVay Creek, praying that a determination of the relative rights of the various claimants to the use of the waters of said stream system be made by the State Engineer (now Water Resources Director) in accordance with the provisions of the Oregon Water Rights Act.

That the Water Resources Director thereafter fixed a time for the making of the necessary surveys and examinations and the beginning of the taking of such testimony as would enable him to determine the relative rights of the various claimants to the use of the waters of McVay Creek and its tributaries, as provided by law.

-3-

That a notice was prepared setting forth the date when the Water Resources Director would begin the investigation of the flow of water in McVay Creek and its tributaries, and the existing works for the utilization of the waters thereof; and said notice was published in the Brookings-Harbor Pilot, Brookings - published each Thursday, and the Curry County Reporter, Gold Beach - published each Thursday.

That each of said newspapers are published and of general circulation in Curry County, Oregon, and publication was in two consecutive weeks being October 23 and 30, 1975, the date of the last publication being more than ten days prior to the date fixed for the beginning of the investigations and measurements of said stream system by the Water Resources Director.

-4-

That the Water Resources Director did send by certified mail to each person, firm or corporation owning or being in possession of lands in or bordering on or having access to said stream or its tributaries, insofar as said claimants and owners and persons in possession could reasonably be ascertained, a notice similar to such published notice, and included therewith an explanatory statement and a blank form upon which the claimant or owner could prepare in writing his notice of intention to file a statement and proof of claim of his right to the use of the waters of said McVay Creek and its tributaries, if any he had.

-5-

That the following named persons, firms or corporations were duly notified of the proceeding by certified mail, as set forth in Paragraph 4 above:

BEAR, Ermin Frank & Paula Gale	Rt. 1, Box 91, Brookings, Oregon 97415
CAMPBELL, C. F.; CAMPBELL, Jim L.;	Box 806, Brookings, Oregon 97415
DREWS, Jess T.; SWEET, A. W.;	
SWEET, Donald H.; GERLACH, Randall;	
and ZEIGLER, C. E.	
CLINKINBEARD, Wm. H. & Kent S.	2116 Woodlawn Dr., Medford, Oregon 97501
COLEGROVE, Gene Noel & Judith	Box 2005, Harbor, Oregon 97415
FREEMAN, Carol Lee	Harbor, Oregon 97415
FREEMAN, Edward W.	Box 411, Brookings, Oregon 97415
HASTINGS BULB GROWERS, INC.	Box 2186, Harbor, Oregon 97415
HASTINGS, Robert K. & Elizabeth C.	Box 2186, Harbor, Oregon 97415
HAYS, Leonard & Carol J.	3550 Lancaster Dr. NE, Salem, Oregon 97303

HERKELRATH, Blaine M. & Janet C.	Brookings, Oregon 97415
LAYTON, Charles B. & Joan A.	Box 908, Brookings, Oregon 97415
LONG, Rush E.	c/o Kenneth W. & Doris M. Miller
	501 Linden St., Midland, Oregon 97634
MILLER, Kenneth W. & Doris M.	501 Linden St., Midland, Oregon 97634
MUSSER, Calvin C. & Alta I.	Harbor, Oregon 97415
MUSSER, John D. (Life Estate)	Rt. 1, Box 90, Brookings, Oregon 97415
OREGON, STATE OF, Dept. of Transportation	Highway Div., Salem, Oregon 97310
OREGON, STATE OF, Dept. of Veterans Affairs	1225 Ferry St., Salem, Oregon 97310
SMITH, Dale & Melvin	Box A D, Brookings, Oregon 97415

-6-

That all of said certified notices, addressed as tabulated in the preceding finding, which addresses were secured from the records of the County Assessor and Tax Collector of the County in which the property is located, were delivered to the addresses by the Post Office Department except those hereinafter tabulated, which were returned by the Post Office Department bearing a notation as to the reason for non-delivery as shown by the statement following the name:

HERKELRATH, Blaine M. & Janet C.	Forwarding Expired
SMITH, Dale and Melvin	Forwarding Expired

-7-

That duly qualified assistants to the Water Resources Director did proceed to make examinations, surveys, and measurements of said McVay Creek and its tributaries, and of the works diverting water therefrom, and surveys of the lands irrigated, and gathered such other data and information as were essential to the proper determination of the relative rights of the parties interested, which observations and measurements were reduced to writing and made a matter of record in his office. The Water Resources Director did cause to be prepared a map or plat, showing with substantial accuracy, the location of all streams in the drainage basin, the location of each means of conveyance of appropriated water and the points of diversion thereof, and the number of acres of land being irrigated in each legal subdivision, or other use of water; prints of said map or plat being on file and a part of the record herein.

-8-

That as soon as practicable after the examinations and measurements were completed, as described in the preceding finding, the Water Resources Director did prepare a notice setting forth a place and time certain when he would begin the taking of statements and proofs of claim as to the relative rights of the various claimants to the use of the waters of McVay Creek and its tributaries; and said notice was published in the Brookings-Harbor Pilot, Brookings - published each Thursday, and the Curry County Reporter, Gold Beach - published each Thursday.

That each of said newspapers are published and of general circulation in Curry County, Oregon, and publication was in the consecutive weeks being April 22 and 29, 1976, the date of the last publication being at least thirty days prior to the first date set for the taking of statements and proofs of claim by the Water Resources Director.

-9-

That the Director did send by certified mail to each person, firm or corporation who had filed a declaration of intention to file a claim to the use of the waters of McVay Creek and its tributaries in this proceeding in response to the notice described in Finding 4 above, a notice similar to such published notice described in the preceding finding, setting forth the date when the Director would receive the statements and proofs of claim to the use of the waters of said stream and its tributaries. That said notice was mailed at least thirty days prior to the date set for receiving of said statements and proofs of claim. The Water Resources Director did include with each notice a blank form upon which the claimant or owner could prepare in writing all the particulars necessary for the determination of his right, under oath, and a pamphlet of information for water users in the preparation of their statements and proofs of claim in connection with the adjudication of water rights.

-10-

That the times and places where the Water Resources Director did appear and receive the statements and proofs of claim of the various parties, were fixed in said notice as follows:

On Wednesday, June 2, and Thursday, June 3, 1976 in the Council Chambers, Brookings City Hall, Brookings, Oregon.

And, for a period of five days beginning with Monday, June 7, and ending Friday, June 11, 1976 at the office of the Water Resources Department, 1178 Chemeketa Street NE, Salem, Oregon.

-11-

That the following named persons, who had filed their notice of intention to file a statement and proof of claim, were duly notified by certified mail, as provided by law, of the commencing of the taking of statements and proofs of claim of their rights to use of the waters of said McVay Creek and its tributaries:

CAMPBELL, C. F.	Box 806, Brookings, Oregon 97415
FREEMAN, Carol L.	Winharbor Farm, Harbor, Oregon 97415
FREEMAN, Edward W.	P.O. Box 411, Brookings, Oregon 97415
HASTINGS BULB GROWERS, INC.	P.O. Box 2186, Harbor, Oregon 97415
HASTINGS, Robert K. & Elizabeth C.	P.O. Box 2155, Harbor, Oregon 97415
VAN HARDENBERG, A. W. or A. I.	Route 1, Box 91, Brookings, Oregon 97415

That all of said notices to the above-listed persons, firms or corporations at said addresses, appear to have been delivered by the Post Office to the addressees.

-12-

That in response to said notice to file statements and proofs of claim, the following named persons, firms or corporations did submit to the Water Resources Director statements and proofs of claim:

FREEMAN, Carol L.	Harbor, Oregon 97415
HASTINGS BULB GROWERS, INC.	Harbor, Oregon 97415

That all of said statements and proofs of claim were in sufficient form accompanied by the statutory fees and filed with the Water Resources Director.

-13-

That all persons, firms or corporations to whom notices were sent by certified mail, as tabulated under Findings 5 and 11 above, who have failed, neglected or refused to appear herein and submit proof of a claim of right to the use of the waters of McVay Creek and its tributaries, initiated prior to the adoption of the Oregon Water Code on February 24, 1909, if any they have or claim, are in default; such default is here and now entered against them, and each of them, and such parties are hereby barred and estopped from using or asserting any rights to the use of the waters of said McVay Creek or any tributary thereof, except by, through or under the rights of persons whose water rights are defined herein, or under and by virtue of permits issued by the Water Resources Director, as provided by law.

-14-

That after the completion of the taking of such statements and proofs of claim, the Water Resources Director did, on the 25th day of August, 1976, give notice by certified mail to each of the various claimants to the use of the waters of McVay Creek and its tributaries, as provided by law, that at the times and places named in said notice, to wit:

On Tuesday, September 14, and Wednesday, September 15, 1976  
in the Council Chambers, Brookings City Hall, Brookings, Oregon.

And, for a period of eight days beginning with Friday, September 17  
and ending with Tuesday, September 28, 1976 (Saturdays, Sundays,  
and holidays excepted) at the office of the Water Resources  
Department, 1178 Chemeketa Street NE, Salem, Oregon.

the statements and proofs of claim theretofore filed would be open to public inspection between the hours of 8:00 a.m. to 12:00 noon and from 1:00 p.m. to 5:00 p.m. on each of said days. That said notice did state that the determination of the Water Resources Director would be heard by the Circuit Court of the State of Oregon, for the County of Curry.

-15-

That the Water Resources Director did, in accordance with said notice as described in the preceding Finding 14, keep said statements and proofs of claim open to public inspection at said times and places.

-16-

That the time set by law for filing of statements of contest, within fifteen days after the expiration of the period for public inspection, would expire on October 13, 1976 and it appearing that additional time was required by certain parties to properly prepare and file their statements of contest, the Water Resources Director did, on the 5th day of October, 1976, enter an order directing that the time within which to file statements of contest, be extended, as provided by law, and the same was thereby extended and continued to include the 2nd day of November, 1976. That within the time, as extended by order of the Water Resources Director, the following contest was initiated by the filing with the Water Resources Director a notice of contest, in writing:

Robert K. Hastings, Elizabeth Carol Hastings, and Hastings Bulb Growers, Inc.

vs.

Carol L. Freeman

-17-

That after the filing of said statement of contest, the Water Resources Director did fix a time and place for the hearing of said contest, and did on the 7th day of March, 1977, serve notice of said hearing, by certified mail, on each of the parties to said contest and on their respective counsel.

As set in the notice, the hearing of Contest was held before the Deputy Director, commencing at 9:00 a.m. on Wednesday, May 11, 1977 in the Council Chambers, Brookings City Hall, in Brookings, Curry County, Oregon.

-18-

That due proof of the sending of the various notices by certified mail, as provided by law, and as hereinbefore set forth, has been made and filed as a part of the record herein.

CONTEST Hastings Bulb Growers, Inc. Contestant  
by President Robert K. Hastings

vs.

Carol L. Freeman Contestee

Contestee, Carol L. Freeman, being represented by Mr. Paul W. Haviland of the firm of Haviland, de Schweinitz, Stark and Hammack, Attorneys at Law, Medford, Oregon, filed Statements and Proof of Claim No. 1 claiming a right to the use of the waters of McVay Creek and its tributaries, a tributary of Pacific Ocean for domestic, stock, and irrigation of the following tabulated lands:

13.2 acres in SW $\frac{1}{4}$  SE $\frac{1}{4}$   
Domestic, Stock, and 12.4 acres in SE $\frac{1}{4}$  SE $\frac{1}{4}$   
Section 15  
T. 41 S., R. 13 W., W. M.

by diversion and use, through dam, pipeline, and pump, with a date of priority of 1885.

To said Statements and Proof of Claim, Robert K. Hastings, et al, filed a Statement of Contest, being represented by Mr. G. Jefferson Campbell, Jr. of the firm of Newhouse, Foss, Whitty and Roess, Attorneys at Law, Coos Bay, Oregon. The pertinent part of the issues set forth therein are as follows:

- A.-That the contestant alleges the Statement and Proof of Claim is insufficient to confer jurisdiction on the Water Resources Director and does not comply with the statutory requirements under ORS 539.050.
- B.-That the contestant alleges there was no beneficial use of water prior to February 24, 1909 as alleged in the Statement and Proof of Claim.
- C.-That the contestant alleges the vested use of water, if any there were, was abandoned for periods exceeding two years.
- D.-That the contestant alleges the claimed vested use of water was limited in use to stock and in an amount of 0.01 cubic foot per second during the ownership of part of the property by Victor Pomerlo and is evidenced by affidavits of Victor Pomerlo, Edward W. Freeman, and Carol L. Freeman and a cancellation order of the State Engineer dated November 19, 1964.
- E.-That the contestant alleges the contestee is estopped from claiming vested rights to the use of water because of an application filed November 2, 1936 by W. L. McVay for a permit to appropriate waters for 13 acres irrigation, domestic, and stock use within the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 14 and the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 15, Township 41 South, Range 13 West, W. M.
- F.-That the contestant alleges the contestee is estopped from claiming vested rights to the use of water because permit No. 12430 was issued January 8, 1937 for the use of 0.04 cubic foot of water per second for domestic and stock use and 0.16 cubic foot of water per second for irrigation.
- G.-That the contestant alleges the contestee is estopped from claiming vested rights to the use of water because of certificate of water right No. 14129 issued June 22, 1942 for the use of 0.02 cubic foot of water per second for domestic and stock use within the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 14, the NE $\frac{1}{4}$  SE $\frac{1}{4}$  and the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 15, Township 41 South, Range 13 West, W. M.
- H.-That the contestant alleges the contestee is estopped from claiming vested rights to the use of water because of an application filed by Edward W. Freeman and contestee for a transfer of water rights under permit No. 12430 solely for stock use.

- I.-That the contestant alleges the contestee is estopped from claiming vested rights to the use of water because an order approving transfer No. F-54 for a change in the point of diversion on McVay Creek was issued by the State Engineer November 20, 1964.
- J.-That the contestant alleges the contestee is estopped from claiming vested rights to the use of water because of an affidavit executed by contestee and her husband on July 15, 1964 requesting the cancellation of said water rights for domestic use because of abandonment.
- K.-That the contestant alleges the contestee is estopped from claiming vested rights to the use of water because of an order issued November 19, 1964 by the State Engineer canceling a water right in the name of W. L. McVay for the use of 0.01 cubic foot of water per second for domestic and stock use with a date of priority of November 2, 1936.
- L.-That the contestant alleges the contestee is estopped from claiming vested rights to the use of water because of an application filed April 13, 1964 by contestee and her husband for a permit to appropriate 0.25 cubic foot of water per second from McVay Creek and reservoir "A" for irrigation of 20 acres being 8.1 acres in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  and 11.9 acres in the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 15, Township 41 South, Range 13 West, W. M.
- M.-That the contestant alleges the contestee is estopped from claiming vested rights to the use of water because of permit No. 29474 issued May 20, 1964 for the use of 0.25 cubic foot of water per second from reservoir "A" and McVay Creek for irrigation.
- N.-That the contestant alleges the contestee is estopped from claiming vested rights to the use of water because of the grounds set forth in above paragraphs E through M.
- O.-That contestee has no ownership interest in the diversion and distribution system other than ownership of her own pipeline as the same crosses her property and subject to the lease and license of contestants as the same crosses their property.

The contestee, Carol L. Freeman, filed her Statement and Proof of Claim with the Water Resources Department on June 11, 1976. Although the claim was modified on September 13, 1976, such claim was in sufficient form when filed to assert jurisdiction. The claim was lacking in detail as it pertains to irrigation use, but since the irrigation and domestic use portion of the claim is herein denied, it is not necessary to determine if the lack of facts would be fatal.

A vested right to the use of water is not automatically forfeited by filing an application for water right permit or transfer of water rights nor by issuance of a permit or order approving such filings (See Staub v. Jansen 180 OR. 682); therefore, Paragraphs E, F, G, H, I, L, and M of said contest are not well taken.

An ownership or possessory interest to a diversion and distribution system, while an important factor between parties involved, is not a requirement to claiming a vested right, but only the showing or proof that beneficial use of water has been made prior to February 24, 1909 and continued to date; therefore, this part of said contest is not valid.



The testimony and evidence presented to the Water Resources Director in the Hearing on Contest is clear that no irrigation was made on the subject property until approximately the early 1940's;

Testimony of Benjamin Archie McVay, Contestees Witness, at pages 32 and 33, Hearing on Contest, states that no irrigation was done for potatoes, grain or barley crops nor for commercial crops.

Testimony of Dole Garven, Contestees Witness, at page 43, Hearing on Contest, states "they didn't water them days" (testifying for the period in 1914) "They didn't irrigate any of their grains or anything".

Testimony of Donald Crockett, Contestees Witness, at page 61, Hearing on Contest, states there was no irrigation for hay or potatoes during the 20's and 30's, that it was dry farming type. On page 65, he states the first bulb patch was planted in 1941. The bulb patches were irrigated only three years during the period of 1941 to 1946 from Cooley Creek.

that no domestic use or garden irrigation was made on the subject property until approximately 1971 when the contestee moved a house on the property and first lived on the property.

Testimony of Benjamin Archie McVay, Contestees Witness, at page 30, Hearing on Contest, states that they had a home garden, probably a half acre to an acre for home use. He further states on page 31 that the "old McVay house" is a two story house still located on the east side of the highway.

Testimony of Ed H. Vernon, Contestants Witness, at page 170, Hearing on Contest, states there was no domestic use of water from McVay Creek on the Freeman property from 1952 to 1965. He further states on page 171-172 that he lived in the "old McVay house" and the source of water during that time for the "old McVay house" was Cooley Creek or the unnamed creek. He further states on page 173 that during the period of time 1952 to 1965 there was no water being supplied to the "old McVay house" or any other house from McVay Creek.

Testimony of Carol Freeman, Contestee, at page 99 to 100, Hearing on Contest, states from 1948 to 1971, she did not reside on the subject property as "My home was not contiguous to the property". She further states that in 1971 she moved the house to the subject property.

The testimony presented in the Hearing on Contest is clear that the original house in connection with the subject property called the "old McVay house" is still in existence at the original location being located east of the old and new highways and is not located on the contestee's property.

The contestee's house, which she moved on the subject property, is not a replacement house for the original house. Testimony to garden irrigation would refer to the "old McVay house" and its property located east of the highway rather than to the contestee's property, located west of the highway. Testimony revealed the original dairy barn burned down, which was replaced by a new barn located within what is now the new highway right of way. The contestee stated this new barn was moved to the present location on her property.

Testimony of Carol Freeman, at page 114, Hearing on Contest, states she did not take any steps to reestablish a dairy, "since it's not really economical. That would not be the highest and best use".

The contestant raises several points that could be sufficient to deny the claim. The essential relationships were not completely defined in the hearing. However, it is not necessary to address these in detail since the Contestee did not submit any evidence at the hearing to support the claim of vested right for domestic or irrigation purposes. Therefore, the claim of right to use the waters of McVay Creek for domestic and irrigation purposes must be denied.

The uncontroverted testimony was that the first irrigation on the property was for lily bulbs in 1941 and there was no house on the property until Mrs. Freeman had her present house moved there in 1971.

The contestant can not, as a practical matter, seriously question the vested claims to stock water. He has raised the question of estoppel by virtue of a certificate of water right No. 14129 acquired through the permit for use of 0.01 cubic foot of water per second from McVay Creek for stock use on the Carol Freeman property in the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 15, Township 41 South, Range 13 West, W. M. This is the same as claimed herein except for the date of priority of November 2, 1936 instead of 1885. As a practical matter, it makes no difference since there are no intervening rights.

The evidence submitted is not completely clear, but it appears that use for stock use was initiated as claimed and used without abandonment continuously to date. Since the late 1960's, that use has been limited to a few beef cattle and horses necessary for the family use and recreation.

Application No. 16659 for irrigation, domestic, and stock was made by W. L. McVay on November 2, 1936 and the State Engineer approved Permit No. 12430 on January 8, 1937 for stock and irrigation of 13 acres being 3.0 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 14, 10 acres in the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 15 and domestic use in the NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 15 and the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 14. The location of the 10 acres irrigation in the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 15 is substantially within the same area as Carol Freeman has claimed a vested right for irrigation. Mr. W. L. McVay executed and submitted his proof of appropriation of water for this permit on September 15, 1941 in which there was indicated no irrigation had been made from McVay Creek under the terms of the permit. This would support the testimony given in the hearing.

That under Item 18 of the Statement and Proof of Claim, filed by Carol Freeman, the place of use was listed as Section 22 and under Item 28 of the claim, the claimant listed the description of the land in Section 15. That under Item 22 of the claim, the claimant accepts the map prepared by the Water Resources Department as correctly showing the location of the property. An examination of the map prepared by the Water Resources Department locates the place of use within Section 15; therefore, the listing of the place

of use in Section 22 under Item 18 is obviously a typographical error and the correct place of use is Section 15.

Permit No. 12430, Certificate No. 14129, issued in the name of W. L. McVay, evidences in part the right to the use of not to exceed 0.01 cubic foot of water per second for stock with a date of priority of November 2, 1936. An application of transfer No. F-54 has been made for this right for a change in location of diversion point.

An order of the State Engineer, dated November 20, 1964, approved the transfer, which appears to be identical with this claimed right for stock use.

Therefore, based on the evidence and testimony taken herein, the asserted claim for the use of the waters of McVay Creek for domestic and irrigation purposes is denied.

It appears that beneficial use of the waters of McVay Creek has been made for stock use within the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 15, Township 41 South, Range 13 West, W. M., with a date of priority of 1885 and should be limited to 0.01 cubic foot of water per second; said right being more particularly set out and described in the tabulation of water rights under Finding 31 herein.

-20-

Hastings Bulb Growers, Inc., by President Robert K. Hastings, filed herein Statement and Proof of Claim No. 2, asserting a right to the use of the waters of McVay Creek, tributary of Pacific Ocean, for irrigation, stock, and commercial use, with a date of priority of July 29, 1963 for 0.08 cubic foot of water per second and October 16, 1963 for 0.295 cubic foot of water per second. The description of the lands owned by claimants to which their asserted claim of appropriation is appurtenant is set out in said statement and proof of claim as the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 14; Lot 2 (SE $\frac{1}{4}$  SW $\frac{1}{4}$ ), SW $\frac{1}{4}$  SE $\frac{1}{4}$ , SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 15; NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Lot 2 (NW $\frac{1}{4}$  NE $\frac{1}{4}$ ), Lot 1 (NE $\frac{1}{4}$  NW $\frac{1}{4}$ ), Section 22; NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 23, Township 41 South, Range 13 West, W. M., under State Engineer's Permit No. 29203.

That claimants herein, also being the applicants (Robert K. and Elizabeth C. Hastings) for a permit, perfected their water right in accordance with the provisions of the permit and that on October 21, 1970, a water right certificate was issued by the State Engineer confirming the rights acquired, said certificate being recorded in State Record of Water Right Certificates, Volume 29, Page 36986.

It appears that beneficial use of the waters of McVay Creek is still being made as allowed in said certificate of water right upon the lands therein designated; therefore, claimant's rights herein shall be as set out and defined in the above mentioned certificate of water right, designated as No. 36986.

DUTY OF WATER, HEAD OF WATER, FOR IRRIGATION USE

Taking into consideration all of the various elements and conditions having a bearing on the quantity of water essential for the irrigation of crops within McVay Creek and its tributaries, the duty of water hereby is fixed at not to exceed 2.5 acre feet per acre during any one irrigation season.

The rate of flow or head of water to be diverted or definitely fixed in a permit or certificate of water right hereby is fixed at not to exceed one-eightieth of one cubic foot per second for each acre irrigated.

It is further provided that the quantity of water, which a claimant whose right has been determined herein shall be entitled to divert at any time, shall be based on the acreage actually prepared for irrigation and to which water may be beneficially applied in the production of crops.

DUTY OF WATER FOR RIGHTS EVIDENCED BY CERTIFICATES

Claimants who have asserted rights to the use of the waters of McVay Creek and its tributaries, based upon a certificate of water right issued by the Water Resources Director, recognized herein, are limited to the quantity of water and rate of diversion set out in such certificate.

RIGHTS UNDER PERMITS ISSUED BY THE WATER RESOURCES DIRECTOR

Subject to the terms and conditions and modifications herein, each and every appropriator of the waters of McVay Creek and its tributaries, who has initiated a right to the use of said waters by filing an application with the Water Resources Director for a permit, where the right has not been confirmed by the issuance of a certificate of water right, or where in the specific findings herein no reference is made to a certificate of water right, whether a claim was filed in this proceeding or not, shall have such rights thereunder as provided by law, and such rights shall be perfected in the manner provided by law for the completion thereof.

STOCK USE BY DIVERSION

Where a claimant in this proceeding asserted a right to the use of water for stock purposes by diversion and it was allowed herein, it is to be understood that the claimant has a right to the use of the water for such animals as are essential to the proper sustenance of the family and also water for stock when the claimant is engaged in

the raising of livestock or when the claimant takes in livestock for pasturage and is limited to the use of such quantity of water as is necessary for the number of stock claimed; provided that where the claimant was allowed a right herein for irrigation use through the same ditch, pipeline or other means of conveyance, no additional water shall be diverted for stock use while water is being diverted for irrigation purposes.

-25-

DOMESTIC USE, DOMESTIC AND STOCK USE, STOCK USE

The right to divert and use the waters of McVay Creek and its tributaries, as allowed herein, for domestic use, domestic and stock use, or stock use shall continue throughout the year.

-26-

HEAD-GATES AND MEASURING DEVICES

The owner or owners of any ditch, pump, pipeline or other means of diversion and conveyance, whether the rights are determined in this proceeding or subsequently initiated and perfected, shall maintain to the satisfaction of the watermaster a substantial head-gate at the point of diversion, which shall be constructed so that it can be set and locked or closed and locked by the watermaster. And when in the distribution of water by the watermaster, he may require the installation of suitable head-gates or measuring devices, such owner or owners shall construct and maintain such suitable head-gates or measuring devices as may be necessary to assist the watermaster to determine the quantity of water that is to be diverted into said ditch, pipeline or other means of conveyance, from the spring, stream or other source of supply.

If the owner or owners shall refuse or neglect to install such head-gates or measuring devices after ten days written notice, the watermaster may close and post such ditch, pump, pipeline or other means of conveyance and the same shall not be opened or any water diverted from the source of supply under the penalties prescribed by law for the illegal opening of head-gates lawfully closed, until the requirements of the watermaster as to such head-gates or measuring devices have been complied with.

-27-

IRRIGATION SEASON

The irrigation season for McVay Creek and its tributaries hereby is fixed as commencing on April 1 and ending September 30 of each year.

PLACE OF MEASUREMENT

The place of measurement of the water to which any appropriator of the waters of McVay Creek and its tributaries is entitled hereby is fixed to be at the point of diversion from the stream or source of supply.

RIGHTS APPURTENANT TO LAND

The rights to the use of the waters of McVay Creek and its tributaries for irrigation purposes, as herein confirmed, are appurtenant to the lands herein described in connection with such rights, and are limited and confined to the irrigation of the lands described herein, and the priorities of rights confirmed confer no right to the use of the waters of said stream and its tributaries on any lands than those specified tracts to which such rights are herein set forth as appurtenant, and each and every person, association or corporation, or their respective successors in interest, shall be and hereby are prohibited, restrained and enjoined from diverting and using water from said stream or any of its tributaries on any other lands without lawful permit thereto first obtained from the Water Resources Director.

The rights to the use of water for other useful and beneficial purposes as herein confirmed are appurtenant to the lands and place of use as herein described and the priorities and rights herein confirmed confer no rights to the use of the waters of said McVay Creek or any of its tributaries on any lands other than those specified tracts to which such rights are set forth herein as appurtenant, and each and every person, association or corporation, or their respective successors in interest, shall be and hereby are prohibited, restrained and enjoined from diverting and using water from said stream or any of its tributaries on any other lands without lawful permit therefor first obtained from the Water Resources Director.

DIVERSIONS GOVERNED BY PRIORITIES AND BENEFICIAL USE

The order of rights of the respective appropriators of the waters of McVay Creek and its tributaries, and the order in which they are entitled to divert and use said water shall be and is according to the date of relative priority of the rights as determined and set forth herein, and the first in order of time according to the date of relative priority shall be and hereby is first in order of right, and so on down to the latest priority, and those having prior rights are entitled to divert and use the waters of said stream and its tributaries when necessary for the irrigation of their respective lands, or other useful

and beneficial purposes for which they were allowed a right of use, and in accordance with such right at all times against those having rights of subsequent priority, without let or hindrance, and whenever the water is not required for beneficial use by the appropriator having such prior right to its use for the purpose for which such water was appropriated, he must and shall permit it to flow down the natural channel of the stream as it was wont to flow in its natural course, without let or hindrance or diversion thereof, and those having subsequent rights are entitled to the use of said waters and to divert the same to the extent of their respective rights, according to the order of priority of their respective rights; and at all times the water diverted by the appropriator whose rights have been determined herein, shall be beneficially and reasonably used without waste, and no rights of appropriation are hereby confirmed to divert a greater quantity of water into the head of the ditch, pump, pipeline, or other means of conveyance of the appropriator having a valid right to divert the water than such appropriator can beneficially use for the purpose to which the water is to be used, in accordance with his right.

-31-

ORDER OF DETERMINATION

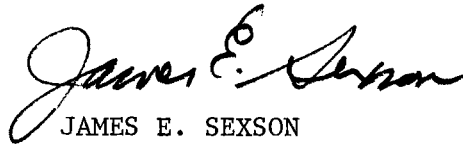
To summarize and supplement the specific findings herein, the rights of the claimants to the use of the waters of McVay Creek and its tributaries as determined herein, are arranged in tabulated form, with the date of relative priority of such appropriation, the quantity or rate of flow of the water allowed such appropriator, the number of acres to be irrigated by such appropriation, the use or uses to which such water is applied, the means by which the water so appropriated has been diverted, the name of the stream or other source from which the water is appropriated and diverted, and the description of the lands upon which the water has been used and is fixed as appurtenant; the tabulated right of each appropriator being set opposite and following his name and post office address, as stated in his statement and proof of claim as follows:

Name and Postoffice Address of Appropriator	Date of Relative Priority	Amount Cubic Feet Per Second	Number Acres	Use	Name of Ditch	Stream	Description of Land or Place of Use
<p>51618  FREEMAN, Carol L.  Winharbor Farm  Harbor, Oregon 97415  (Proof No. 1)  (See Finding 19)</p>	1885	0.01		<p>Stock</p> <p>Land on which water is to be used is further described as that part of the SE<math>\frac{1}{4}</math> SE<math>\frac{1}{4}</math>, Section 15, T. 41 S., R. 13 W., W. M. lying west of the present highway 101 within the following described legal description:</p> <p>Beginning at a point on the Westerly right-of-line of (old) U. S. Highway 101, said point being North 382.3 and West 94.3 feet from the Section corner common to Sections 14, 15, 22 and 23, Township 41 South, Range 13 West, W. M.; thence West 4000.0 feet, more or less, to the Ordinary High Tide Line of the Pacific Ocean; thence following said tide line Northwesterly to its intersection with the North boundary line of Government Lot 2 in Section 15; thence following the North boundary lines of Lot 2 and the South one half of the Southeast quarter of Section 15, East 3550.0 feet, more or less, to a point on the Westerly right-of-line of (old) U. S. Highway 101; thence following said highway line Southeast to the point of beginning.</p> <p>The North and South boundary lines of the above-described lands are parallel and 937.2 feet distant from each other.</p>		McVay Creek	<p>SE<math>\frac{1}{4}</math> SE<math>\frac{1}{4}</math>  Section 15  T. 41 S., R. 13 W., W. M.</p>
<p>HASTINGS BULB GROWERS, INC., by President Robert K. Hastings  Harbor, Oregon 97415  (Proof No. 2)  (See Finding 20)</p>	Right acquired	under	State Engineer's	Permit No. 29203,	Certificate No. 36986.		



And the Water Resources Director of Oregon, being fully advised in the premises, it is hereby CONSIDERED AND ORDERED that the relative rights of the various claimants to the use of the waters of McVay Creek and its tributaries, be and the same are hereby determined and settled as set forth in the foregoing Findings and Order of Determination.

Dated at Salem, Oregon, this 24th day of April, 1978.



JAMES E. SEXSON  
Water Resources Director