BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

Jackson County

IN THE MATTER OF A WATER RIGHT IN THE NAME OF GEORGE PUTMAN)

Statement
Findings of Fact
Conclusions of Law
and Order

STATEMENT

This proceeding was initiated by the Water Resources Director under the provisions of ORS 540.610 to 540.650 for the cancellation of a certain water right. The water right in question was adjudicated In the Matter of the Determination of the Relative Rights to the Use of the Waters of Little Butte Creek and its Tributaries, a tributary of the Rogue River, Jackson County, Oregon. It is for the appropriation of not to exceed 40.0 cubic feet per second of water from Little Butte Creek, with a priority date of 1872, for power purposes at Butte Creek or Daley Flouring Mill at Eagle Point, Oregon in Section 3, Township 36 South, Range 1 West, W.M., as evidenced by the certificate recorded in Volume 14, page 17191, State Record of Water Right Certificates, in the name of George Putman.

The Butte Creek Mill was owned and operated by the Putman family from the early 1930's until its sale to Peter B. and Cora D. Crandall in August 1972. During the late summer of 1973, Mr. Crandall made a request for additional water to be delivered to the mill under the power right. This brought the issue to the attention of the Medford and Rogue River Valley Irrigation districts as their members could be injured by delivery of water to the mill under the 1872 priority. The attorneys for the irrigation districts obtained affidavits alleging forfeiture of the right in question, and filed those affidavits with the State Engineer along with a request that a determination of forfeiture be made.

The proceeding for cancellation of the water right in question was initiated by notice dated April 7, 1975 and given to Peter B. Crandall and Cora D. Crandall, legal owners of the land to which the water right in question is appurtenant.

On May 21, 1975 a protest was filed in the office of the State Engineer (now Water Resources Director) against the proposed cancellation of the water right.

Pursuant to notice dated November 21, 1975, the matter was brought to hearing before Chris L. Wheeler, Deputy Director, Water Resources Department, in Conference Room B, Jackson County Courthouse, Medford, Oregon, commencing on January 21, 1976 at 9:30 a.m. and continuing through January 22, 1976 when the hearing was recessed for the purpose of carrying out certain examinations of the present capacity and the water use in the Butte Creek Mill. The hearing was reconvened on January 19, 1977 at 9:30 a.m. and concluded on January 21, 1977.

The proponents of cancellation appeared represented by counsel: Medford Irrigation District by John DuBay; Rogue River Valley Irrigation District by Frank Van Dyke and Patrick G. Huycke, all of the offices of Van Dyke and DuBay, Medford, Oregon. C. A. Tingleaf, Donald Bieberstedt, Jack A. Hoffbuhr, and W. Lyle Van Scoy who had submitted affidavits alleging forfeiture of water right were also present and represented by the law offices of Van Dyke and DuBay. The protestants: Peter B. Crandall and Cora D. Crandall appeared with their attorney, William H. Ferguson, of Medford, Oregon. Clarence Kruger, Assistant Attorney General, represented the Water Resources Director at the reconvened session of the hearing.

At the beginning of the hearing, Frank Van Dyke filed the following Motion with the Hearings Officer:

> "COMES NOW THE Rogue River Valley Irrigation District and the Medford Irrigation District and move for an order of this administrative agency requiring the inspection and view of the Daley Mill in Eagle Point, Oregon by a qualified expert, chosen either by the aforesaid districts or by the Oregon State Department

> of Water Resources, in order to determine an actual capacity of the Daley Mill for the production of power and the amount of water required to produce such power. Further the aforesaid districts move for an order of this administrative agency continuing this matter at the conclusion of this hearing until such time said districts and the protestants have had an opportunity to examine, for the record, the expert chosen to inspect the Daley Mill."

The Hearings Officer reserved ruling on the Motion for Inspection until later to determine, after part of the evidence had been presented, whether or not there was a necessity for such inspection. After presenting substantial evidence, counsel for the Medford Irrigation District, the Rogue River Valley Irrigation District, and the affiants requested a ruling on their Motion for continuance of the hearing until an examination and determination by the Water Resources Director had been made as to the actual operating capacity or beneficial use of water being made under present conditions.

The Hearings Officer granted the Motion, set the basic conditions for conducting the examination of the present capacity of the power plant and use being made, and continued the hearing until a time to be set after completion of the examination.

FINDINGS OF FACT

1

Great effort was made to accommodate Mr. Crandall's wishes on the date, time and method of carrying out the examination of the Butte Creek Mill. The examination was scheduled for February 11, 1976 and carried out as far as permitted by Mr. Crandall. However, he refused to permit dewatering the turbine for examination of its condition and of any leaks that might be in the conveyance of water to the turbine. This required a second inspection of the facilities and the dewatered turbine works on February 24, 1976. At this time it was found that an opening through the floor of the turbine bay had been manipulated by Mr. Crandall to bypass or convey around the turbine, part of the water that was in the forebay.

These facts necessitated a third examination in order to measure the maximum quantity of water that could be passed through the turbine under the requested maximum load. The third examination was carried out October 29, 1976.

2

The characteristics of the turbine, mill and refrigeration system make it difficult, time consuming and costly to precisely determine changes in load by operator manipulation. The type of examination directed was to determine maximum system capability, not average operating load. Mr. Crandall was therefore directed to adjust settings for maximum power loading which occur during actual and normal conditions of operation (exhibit No. 34).

3

A quick reading of Mr. Oberholtzer's report of October 29, 1976 might appear confusing in that less water, with larger load, produced higher speed (129 to 117 revolutions per minute). It is characteristic of this type of turbine that a substantial variance in speed (in the order of 15%) can be obtained for any given load. As the speed increases beyond the upper point, work, efficiency and discharge through the turbine decreases quite rapidly.

4

It is clear that 24.4 cubic feet per second is an adequate flow of water to be passed through the turbine to meet the maximum power needs of the system as installed. This is set forth in Mr. Oberholtzer's report (exhibit No. 22) and not refuted by any evidence. No power to operate the mill is developed by the water that passes over the overflow weirs, through the clean out or bypass opening, or leaks from the system. Power can only be developed by that water that passes through the turbine.

5

The purpose of this right, as determined in the decree, is power alone. There is no evidence in the record to show that any use other than development of power was contemplated by the initiators of this right at the time of its initiation.

6

Since reconstruction of the power system by the Putman family in the 1930's up to the date of the hearing, the beneficial use of water has been not more than 24.4 cubic feet per second, the present maximum hydraulic capacity of the turbine with the compressors, elevators, grindstone, scourer, and scalper in operation.

The uncontroverted testimony of Mr. Putman and Mr. Crandall is that, at least for the last 30 years, they have not needed and the system has not normally operated with all of the facilities in use at the same time. Even during maximum refrigeration demand, the condenser pumps are operated only part time and the busiest season of grinding grain and operating the mill works is in the winter. The normal practice required grinding grain for one, sometimes two days a week, and that the grain was processed, cleaned, and elevated to storage on the upper floors prior to grinding. Except when the weather is hot in the summer and the demand for refrigeration higher, they shut the machinery down at night. They did not run a night shift and all but the refrigeration pumps were shut off at night. When shut down at night the flow is normally bypassed, partially through the opening in the floor of the turbine bay and partially through the overflow just outside the mill.

7

The uncontroverted testimony of several witnesses was to the effect that substantial daily fluctuation occurred in the amount of water reaching the Butte Creek Mill during the irrigation season (months of May, June, July, August and September). David Hendrix, watermaster for the area since 1951, testified that fluctuation was very spasmodic and would vary several cubic feet per second throughout the day when the average flow in Little Butte Creek at the Butte Creek Mill diversion was about 20 to 22 cubic feet per second.

8

From 1951 to 1973, over 22 years, the owners of the right failed to exercise the priority of their water right against upstream junior appropriators. During this period the owners made no demand on the irrigation districts (the principal users), other subsequent appropriators, or the watermaster for additional water.

The casual nature of the requests testified to by Mr. Putman and the response of a "little more water in a few days", does not negate the clear testimony of the assistant watermaster, Bruce Hansen, who positively denied receiving any such request and that of the watermaster, David Hendrix, who testified that from 1951 until the dry year of 1973, that he had received no requests for more water at the mill. Their testimony is buttressed by their records of the daily log of complaints received from water users of insufficient water for their needs. These are official records of the office and have been officially noticed and do not have any record of such requests. The primary duty of the watermaster, during the season of short supply, is to regulate the use of water so that each user gets his proper entitlement in accordance with his rights. During the critical period, many requests are received daily from users who believe they should have a little more water. A record of these requests is kept as the daily log of complaints.

9

There was considerable evidence in the testimonies of several witnesses: Mr. Van Scoy, Mr. Bieberstedt, and C. A. Tingleaf, all longtime residents of the area, that could support a finding of total forfeiture by nonuse from 1928 until 1937. It is almost impossible to remember details of use 40 to 50 years ago. Under cross examination, the testimony was less definitive and not clearly supportive of the required five year period. This was during the depression years with many businesses failing and being abandoned. It is easy for a longtime resident to know the old mill was abandoned and not used for many years without being able to positively testify as to specific dates or years. Prior to the mill and buildings being sold to the Putman family, the machinery was sold to a Medford

business man for junk. Some time after the Putmans bought the property they bought part of the mill machinery from the junkman, rehabilitated the turbine and started hammering hay and feed.

10

The evidence and the definition of the water right in the Findings of Fact and Order of Determination of April 17, 1928 and the subsequent decree of the Court is limited. The record does not clearly define the specific turbines in use or the process being carried out to utilize the power developed, either at the time of initiation of the right or at the time of submission of the statement of proof of claim in December 1909.

11

The records of the office disclose that the first annual fee and statement of proof of claimant, required by ORS 543.710 and 543.720, was filed by George Putman in 1935, with such fees and statements paid and filed for every year thereafter. From the statement received on December 11, 1950 through the statement received January 12, 1977, the manner of developing power is described as 17 inch standard trump turbines. In the statement dated December 7, 1977, filed by Peter Crandall, it is described as 19 inch Standard Leffel turbines (exhibits Nos. 38 and 40).

12

The evidence is not clear on how much water was required to power this use. It could not have exceeded the present hydraulic capacity of the turbine because it is the same one. Testimony of Mr. Putman was there had been two penstocks and they had used only one, and later rebuilt that one and enlarged it slightly. The Putmans used the water power for hammering hay and feed off and on until the beginning of World War II when they built cold storage lockers. They used the water power for running the refrigeration pumps only until 1945 or 1946 when they rebuilt the grindstone and started grinding flour. In 1955, they rebuilt the penstock.

13

The turbine, refrigeration works, and the flour mill are an old primitive system. Properly operated, the turbine can do a fair job of developing power. The turbine does not have a forebay and pipe penstock of the type that most power plants have. It has a large enclosure with the turbine set in the floor that serves as a combined penstock and forebay and can properly be called a turbine bay. The draft discharge is similar to those in use at the time this turbine was built and the head over the discharge is maintained by the level of the floor of the ditch or canal leading from the turbine back to the stream, not by water through the bypass. A 17 inch Samson turbine manufactured by the Leffel Company in 1890, requires a submergence of the discharge cylinder of at least three inches to be maintained to prevent air from entering the turbine and to insure proper operation.

14

Mr. Putman testified that he had used 40 cubic feet per second, but under cross examination it was shown that this was a vague guess without any measurement. He further testified that he had made no determination or computation of power developed or needed, but had taken the figures from a receipt that Mrs. Campbell had given him when they bought the property: "40 second feet or 60 horsepower". He testified there was always water running through the bypass (Tr. No. 2, P. 234) so it wouldn't overflow. When the Putmans purchased the mill there were two penstocks (Tr. No. 2, P. 257), of which they used only one and eventually rebuilt only one.

15

Mr. Hendrix testified that, based on his 25 years experience as watermaster, measuring and distributing the waters of Little Butte Creek, the flow of Little Butte Creek at the highway bridge just below Eagle Point, would be about equal to or slightly more than the available flow at the Butte Creek Mill diversion. Records of streamflows at this location were collected and maintained by the U. S. Geological Survey for the years 1946 through 1950. These records (exhibit No. 10) shows a consistent period of low flow from mid June through September.

The monthly averages for July, August, and September are as follows:

Year	July	August	September
1946	14.9 cfs	15.0 cfs	18.5 cfs
1947	19.6 cfs	18.3 cfs	18.9 cfs
1948	25.0 cfs	23.2 cfs	28.7 cfs
1949	19.0 cfs	20.0 cfs	24.3 cfs
1950	21.4 cfs	24.1 cfs	27.6 cfs

These records and Mr. Hendrix' testimony show that the mill did not receive the full amount of the right (40 cubic feet per second) or the capacity of the present turbine (24.4 cubic feet per second) during these months of this five year period.

16

The records of flow released past the Medford and Rogue River Valley Irrigation Districts' diversion works for a 14 year period, 1959 to 1974, with records missing for 1971 and 1972, averaged 19.7 cubic feet per second for the months of July, August and September. This amount has been released to satisfy prior rights below the districts' diversion points. It corresponds with the testimony of Mr. Hendrix the watermaster, his assistants, and the manager of the district: Mr. Jack Hoffbuhr, for the years 1951 to 1964, and Mr. J. O. McGinnis from 1969 to date. That testimony was to the effect that the districts were required to and did release about 20 cubic feet per second in order to satisfy prior rights. This release with all return flows, satisfies all prior rights except the Butte Creek Mill for which it supplies about 20 to 22 cubic feet per second of water.

17

Trash and silt have not been a major problem in the operation of the turbine. The allusion to the problems of silting or debris is not supported by the evidence. One witness claimed to remember one time that the turbine had plugged up, but he couldn't remember when that was. Mr. Crandall, the operator of the system, has no memory of when it was last cleaned. He could not state an average time period for needing cleaning or whether it was even once a year. The greatest amount of debris is during fall and winter high water periods, and it is not during the irrigation season when there are conflicting uses. Likewise, the sweeps for removing leaves or other

floating debris would not be necessary during the summer when the water flow is low and clean. Mr. Hendrix testified that the water quality was not bad and that it was normally reasonably clean except in periods of heavy rain, snowmelt or freshets and alder leaves in the fall.

Virtually all power plants have trash racks, gates or some kind of device to prevent or reduce the amount of debris that gets into the turbine. As a practical matter, most do not try to stop silt or fine sand. There is a maintenance requirement for occasionally building up the blades by welding to repair the erosion that has taken place.

18

The pertinent actions and dates for those actions In the Matter of the Determination of the Relative Rights to the Use of the Waters of Little Butte Creek and its Tributaries is as follows:

	Date	Volume	Page
Findings of State Water Board	April 12, 1916	3	1
Supplemental Findings of State Engineer	December 7, 1917	3	512
Modified Findings of State Engineer	December 31, 1925	8	327
Second Modified Findings of State Engineer	April 17, 1928	10	1
Decree of Circuit Court	August 15, 1949	14	498

19

The decree of August 15, 1949 was preceded by a decree signed October 24, 1947 that contained several errors and was of the same substance, but not recorded. That decree was considered by the Court as not recorded and held open for correction of errors, as found, and is therefore not recorded in the Water Resources Department or of any force or effect. All amendments, modifications and corrections were included in the August 15, 1949 decree and recorded. Certificates of water rights were issued in conformance with the Findings of April 17, 1928 and the August 15, 1949 decree on April 28, 1950.

The adjudication of the relative rights to the use of the waters of Little Butte Creek and its tributaries was somewhat unusual as to time (40 years from initiation to decree). The State Engineer gave notice and took claims in December 1909; held the first hearings in May 1910; and began the hotly disputed proceedings on the proper duty of water, level and rate of development of irrigated lands to fulfill the requirements of the Water Code, and resulted in the proceedings being remanded back to the State Engineer four times. There is no indication that any question was raised on any of the rights to the use of water for power that were claimed.

CONCLUSIONS AND OPINION

1

There was a large amount of irrelevant evidence submitted at the hearing. Some was under the rule and other was admitted because of a desire to give the parties the widest latitude in presenting evidence which might be pertinent.

The sole issue here is whether or not the statutory abandonment or forfeiture for failure to use the water for five successive years has or has not taken place. If it has, the right was lost at that time and the water reverted to the public. If it wasn't, the right to the use of the water must be affirmed. This is equally applicable whether the forfeiture occurred for all or any part.

ORS 540.640 reads:

> "After the hearing the Water Resources Director shall enter an order canceling the water right, canceling in part or modifying the water right, or declaring that the water right shall not be canceled or modified."

2

There is no statutory definition of a part or a whole water right. Such delineation does not serve any real purpose except for administrative convenience in maintaining the records or for inclusion in one or more

certificates. When division of the lands and rights in subsequent sales, transfers or inheritances causes a physical separation, each parcel is entitled to the full rights appurtenant thereto. Likewise, if the right to one parcel is forfeited it cannot forfeit the rights on other parcels that remained in full use.

3

The principle that a water right is limited to the purposes for which the appropriation is made has been held by our Supreme Court in many cases from the very beginning. It was restated in the adjudication of In re Owyhee River, 124 Or. 44, as it relates to power use. It clearly negates protestants claim that ancillary uses are included in a water right that are not set forth in the claim or contemplated at the time of the adjudication.

In the Owyhee River case the Court denied the related use for power to pump the irrigation water, even though the need was obvious, because the use of water for power was not included in the notice of appropriation. At page 47, the Court stated:

> "The contestants claim that such a use of the water is appurtenant to the claim of water for irrigation. The contestants claim that the entire flow of the Owyhee River at low water, estimated to be from 1,800 to 3,000 inches, is necessary to the operation of the contestants' water wheels. They claim for irrigation purposes only about 400 inches. Using a water wheel propelled by the current of a stream for irrigation is lawful in this state: Or. L., Sec. 5798. In order, however, for a water user to have a valid appropriation of water for that purpose we believe his notice of the appropriation should have included a claim of the quantity of water desired to be appropriated for power purposes. Even then the appropriation of the current of a stream would necessarily have to be reasonable: Schodde v. Twin Falls Land & Water Co., 161 Fed. 42 (212 U.S. 581, 53 L. Ed. 659, 30 Sup. Ct. Rep. 698).
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> "It would be unreasonable, in our opinion, to permit a water user whose notice was for a definite quantity of water for irrigation purposes to hold five or six times the quantity of water so claimed as appurtenant to such claim to operate a wheel for raising the water for irrigation from the stream on to the land of the user."

The proponents of cancellation cannot question if the claim should have been allowed. Likewise, the protestants cannot claim new uses (regardless of how desirable they may be: fishery concerns, etc.) They are strictly limited to the claim made.

4

Counsel for protestant in his brief misstates the court's rulings in: In re Waters of the Deschutes River, 134 Or. 623. The uses referred to in the Deschutes River case were not an inclusion within the broad term of "power use", but a separate and distinct claim made for each use by the Deschutes Power and Light Company of 1325 cubic feet per second of water for power; 10 cubic feet per second for carrying off ice; 40 cubic feet per second for carrying off river debris and 20 cubic feet per second for operation of a fish ladder. The State Engineer found that no appropriation had been initiated prior to 1909 except for power. The Circuit Court in affirming the State Engineer's findings as to the operation of the fish ladder, held that if it was to be a valid use of water it would have to be a new appropriation. The 10 cubic feet per second allowed by the Circuit Court for carrying off ice and approved by the Supreme Court, was for ice alone and during the nonirrigation season when it would not interfere with other users. Also, the 10 cubic feet per second was not a standard for any power plant but related to a small percentage (less than 1%) of the appropriation for power. If the same percentage were applied in this case, the quantity would be 0.18 cubic foot per second. The Circuit Court, rather than approving any use of water for debris control, felt that the company could and the usual practice was for the use of mechanisms that did not require water. The Supreme Court's decision of this claim reads as follows:

> "Appeal of Deschutes Power & Light Company"
>
> (Formerly the Bend Water, Light & Power Company)
>
> "This appeal involves that part of the trial court's decree which disallows to the Deschutes Power & Light Company that part of its claim for the use of 40 second feet of water of the Deschutes River,

in its power operations, for the purpose of carrying off river debris. It is claimed that without such use of the water it would seriously interfere with the successful operation of claimant's power plant located at Bend, Oregon.

"This company claims, under a notice of appropriation of water, filed on December 30, 1905, by the Pilot Butte Development company, where it claimed the right to appropriate and divert 2,000 cubic feet per second of the waters of Deschutes river, "for the purpose of developing power for electric and other purposes."

"The state engineer allowed this claimant a priority as of December 30, 1905, for 1,325 second feet of water for power purposes and disallowed the additional claim for 50 second feet claimed to take care of debris and ice at the claimant's dam. The circuit court allowed the claimant 10 second feet for carrying off ice from the dam and approved the disallowance by the engineer of 40 second feet claimed for the disposal of debris. The circuit court stated: "In the construction of a dam site of this kind, and the turning of water in the turbines, without exception, is contained devices and means to keep such debris out of the turbines.

"An extravagant and wasteful application of water, even though a useful project, or the employment of water in an unbeneficial enterprise, is not included in the term "use" as contemplated by the law of waters: Caviness v. LaGrande, 60 Or. 410 (119 P.731); Cantrall v. Sterling Min. Co., 61 Or. 516 (122 P.42).

"In the latter cases it was held, in effect, that one is entitled to use water only in such quantities and at such times as may be reasonably necessary for some useful purpose, either existing or fairly contemplated in the future and cannot waste water even for a useful purpose. "Use of water by any one, in a legal sense, is always qualified by the condition that it must be restricted to such quantity and time of employment only, as may be reasonably necessary for the accomplishment of some useful purpose." The circuit court held that to allow the company to use continuously a volume of water, such as that claimed for carrying off debris, would be to deprive a large body of land that might be irrigated for agricultural purposes. This of itself, under the code, is a greater use than the use that might be made by the water, as claimed, for carrying off debris. We concur in this finding.

"It is a duty of the court in adjudicating water rights to suppress all wasting of water and the court may go further and declare what shall constitute the economic use of the water and to fix its proper duty by a decree awarding the use of a certain amount of water for that purpose. Water is too precious an article in the arid region, or semi-arid region, to be permitted to run to waste: Kinney on Irrigation, etc., (2d Ed.) p. 1622, Sec. 916.

"The trial court stated that no doubt the company could devise ways and means to dispose of the debris that comes into the water in the dam and that this disposal, perhaps, could be made without the use of the additional quantity of water.

It is stated in that section of Kinney on Irrigation as follows on page 1623:

"As to the second phase of the proposition, the power of the court of equity to determine what is an economic use of the water and to make a decree accordingly, we take the same view. As we have said, there is a wide margin between the absolute waste of water and its economical use. But the difference between the two questions is one of degree only."

"It is proposed to raise flash boards 12' by 12" on the dam and let the water carry off the matter that has collected in the river above the dam. The measurement for this is 40 second feet of water. It would seem that except at times of high water there would be but little natural debris floating in the river. To allow such use during the irrigation season would be equal to depriving about 1,600 acres of land of water for irrigation. This amounts to a waste of water. The trial judge who must be somewhat acquainted with the prevailing condition seemed to believe that the debris could be conveniently cared for in a more economical way. A strong argument is made in support of this appellant's claim, but it is not convincing. There is no question raised as to the facts of this claim. The only thing for consideration is the conclusion to be reached from the facts.

"The fact that this claim for 40 second feet of water is not contested is not controlling. The state engineer, in an adjudication proceeding of this kind, is only authorized to make an award of water for a legitimate beneficial use. Wasteful methods should be curtailed. Only such awards should be approved by the court.

"The claim that the matter is not within the issue cannot be maintained. A liberal rule in regard to pleadings (which are blended with the proof) was adopted in this state some time ago: Hough v. Porter. 51 Or. 318 (95 P. 732, 98 P. 1083, 102 P. 728). It is assumed that the award to this claimant of 1,325 second feet of water for power included therein the usual and unavoidable loss.

"After considering the record of this claimant we believe it might be beneficial to the claimant and not detrimental to the rights of other appropriators, especially for irrigation, to allow the defendant the use of 40 second feet of water for the purpose of carrying off debris from the water in its dam, during the non-irrigating season, to wit, between November 1 to April 1 of the following year, at such times only

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> as the waters of the Deschutes river are not desired or used for storage purpose for the purpose of irrigation or so as not to interfere with such storage. So with this slight modification the decree as to the rights of the Deschutes Power & Light company is affirmed."

In reaching this balance it is clear that the Supreme Court has decided that such claims could only be allowed to the extent they did not interfere with any other rights to the use of water for the primary purpose of irrigation.

See also pages 679 to 684 for the Court's affirmation of the Findings of the State Engineer denying a claim by Cline Falls Power Company for use of 20 cubic feet per second for operation of a fish ladder. The denial was based on the fact that operation of a fish ladder was not contemplated in 1892 at the time of investigation of the power and irrigation rights.

5

Beneficial use without waste is the foundation of our water law. Our Supreme Court held that 40 cubic feet per second leaking through boards in a dam was a waste and not to be tolerated (See Broughton v. Stricklin, 146 Or. 275). The purpose of a power right is to do work, generate electricity or turn the works and acts of commerce such as grinding grain or powering a sawmill. Bypassing 40% or more of the water diverted around the turbine is a waste. When this project was designed and built, the bypass was not intended for fish passage. The usual practice for such an opening is to clean out or shovel out the silt and material that settled out of the water in the turbine bay.

The water right under consideration was granted for power alone. There was no identification or listing of any use of water for passage of debris or fish. The record is clear that none was intended or allowed. See In re Deschutes, 134 Or. 665 to 668. Rights for the generation of power is the capability of doing work utilizing the energy potential of water.

A substantial part of the total volume of water included in the water right has not been put to beneficial use set forth therein; namely, development of direct water power. The evidence is clear and essentially uncontroverted on this fact. The difficult determination (the evidence is conflicting on this point) is the exact limit of the forfeiture or that amount of the water right which had not been put to beneficial use in the development of direct water power for five or more successive years. It is also clear that the forfeiture has existed at least since the end of World War II or about 1945 (George Putman testimony) up to the present date and including the period of ownership of the protestant. It is likely that a forfeiture of a large portion of the water right occurred before this time, but the passage of time has severely limited the availability of the evidence necessary to prove the fact. Considering that the benefit of doubt must be given to the water right holders, it has not been shown that there was a total abandonment during this period.

7

The holders of the water right imply that the loading was less on the October test than on the February test because it was not finitely measured. This implication is without merit. Varied loading is entirely possible, but Mr. Crandall was solely responsible for the loading. He was requested to maximize the loading in the first test and to duplicate that maximum for the later test. If he deliberately manipulated the system to give inaccurate results or mislead the Water Resources Director in his analysis of the results of the test, he cannot complain of the inaccuracy. As a matter of fact, it was within his capability to change the loading without it being determined by the parties under the procedures followed. In fact, misinformation on the amount of water used in developing power was implied in the first test by operation of the bypass, not advising the investigators of its existence, and refusing to allow the turbine inspection. There is evidence

that other manipulations were carried out during the October test which could have misled the investigators of the effect on speeds. The operating speed of the turbine can be varied substantially at near maximum load. However, above or below the proper range of revolutions per minute, the flow of water through the turbine and the maximum horsepower developed drop off significantly.

8

Protestants assertion that the Water Resources Director is estopped from finding a forfeiture because he accepted the annual fees and furnished protestants with a copy of the certificate of water right is without merit. The requirements for payment of an annual fee are set forth in ORS 542.710 and for filing an annual statement of water power claim are set forth in ORS 543.720 (1). The statutes provide for claimants, not necessarily holders of valid rights.

ORS 543.720 (3) reads in part as follows:

> "The filing of a claim to water in excess of the amount to which the claimant is legally entitled shall not operate to vest in him any right to the use of such excess water, nor shall the payment of the annual license fee provided for in ORS 543.710 operate to vest in any claimant any right to the use of such water beyond the amount to which claimant is legally entitled. The filing of any such claim to water shall be conclusive evidence as to the abandonment by the claimant of all rights to water for power purposes in excess of the claim as filed."

The legislature very carefully insured that the filing of the claim or paying the fee did not operate to vest any rights that were not otherwise valid. The issuance of a certificate of water right following a decree of adjudication as provided in ORS 539.140 is not a determination, but a ministerial act to give the individual evidence of his right.

9

The appropriative right is valid only for the specific needs and times that it has been put to beneficial use in accordance with the law. It therefore follows that a right once acquired could be forfeited if a firm

pattern of nonuse developed for the statutory period. The pattern of nonuse could be for consistent hours of the day as well as month or seasons of the years.

Wells Hutchins in Misc. Pub. No. 418 "Selected Problems in the Law of Water Rights in the West", page 299, writes as follows:

> "The appropriative right commonly relates to a period during which water may be diverted for use. One may be entitled to divert a given quantity continuously throughout the entire year, or during only a portion of the year, or only at intervals. The Nevada Supreme Court stated in one of the early important water cases:
>
> "We think the rule is well settled, upon reason and authority, that if the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person, or persons, may not only appropriate a part, or the whole of the residue and acquire a right thereto, as perfect as the first appropriator, but may also acquire a right to the quantity of water used by the first appropriator at such times as not needed or used by him. In other words, if plaintiff only appropriated the water during certain days in the week, or during a certain number of days in a month, then the defendants would be entitled to its use in the other days of the week, or the other days in the month.
>
> "Various other courts have held to the same effect. The principle is logical, for one perfects an appropriative right only to the extent of actual application of water to beneficial use; the flow during other seasons or periods, in which there was no attempt or intent to divert the available flow, has not been applied to beneficial use by this particular appropriator and therefore is unappropriated water so far as he is concerned."

See Nev. Barnes v. Sabron, 10 Nev. 217, and Davis v. Chamberlain, 51 Or. 304. In a California case, Thorne v. McKinley Bros., 5 Calif. 2nd 704; only the daytime flows of a stream had been devoted to beneficial use prior to a certain time. It was held that the rights thereunder were limited to daytime use, and that when use of the night flow was commenced that constituted a new appropriation which was subject to intervening rights.

The right was forfeited for failure to exercise, or attempt to exercise, the right against upstream junior appropriators during the months of July, August and September of each year.

In Hutchinson v. Stricklin, 146 Or. 285, the Court held that the principle of forfeiture for part of a season on a power right was valid, but could not exist short of the statutory period. In the Hutchinson case, the Court followed the established distinction between forfeiture and abandonment. The Court held that abandonment could not occur without intent. The facts in that case were an intent to sell and transfer part of a water right to specific parties to the detriment of others and this cannot be permitted, by subterfuge or otherwise.

In the original determination of the power right involved in the Hutchinson case, the season of use for power purposes was limited by failure of the power company to demand water during part of the irrigation season.

In: In re North Powder River, 75 Or. 83, 95, the Court stated:

> "According to the modern accepted doctrine, it is the use of the water, and not the water itself, in which one acquires property in general.
>
> See, also Caviness v. La Grande Irr. Co., 60 Or. 410 (119 Pac. 731).
>
> "Therefore, the milling company not having used or needed the water in July after the 10th and during August of each year, we find that it is not entitled thereto during that period of time: The water is subject to use by the appropriator next in priority. The milling company owned no interest therein that it could sell or transfer to others, and therefore the purchasers of a portion of the milling company's appropriation may not change the point of diversion, the purpose of its use, or claim of priority therefor from 1870, as disclosed by the facts in this case, and the attempt to change the point of diversion and the character of the use by Dalton, Smith and McPhee was in violation of the rights of others. Whited v. Cavin, 55 Or. 98 (105 Pac. 396), Williams v. Altnow, 51 Or. 275 (95 Pac. 200, 97 Pac. 539)."

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Without deciding how much, if any, water could be diverted with the intent of bypassing, contrary to the desires of any other water user (including the fishery needs of the Department of Fish and Wildlife), it is clear that there should be no water bypassed when developing the maximum power for maximum load. If the system is adjusted for maximum load with all water diverted being put through the turbine and the load or amount of work being done drops, at least temporary adjustment could be conveniently made by opening the flap gate. As a convenience, it would benefit Mr. Crandall. If properly operated and adjusted, any silt that has tended to settle out during any period of maximum operation could be flushed out during the period of less than full loads, or at night when the mill and cold storage works are shut down. As long as this can be bypassed without injury to any other parties, it will be allowed. Our courts have repeatedly held that water is too precious to be wasted and water users are obligated to improve their systems for the benefit of other users.

The record does not disclose the details of the original development. In view of the size of the turbine and the improbability of building the second penstock for nothing, it would be logical to assume that originally there were two turbines and both would have been required to use 40 cubic feet per second of water as claimed in the adjudication.

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No question was raised by any party on the (Butte Creek Mill certificate 17191) water right following entry of the second Modified Findings of the State Engineer on April 17, 1928. Since no challenge was raised the Court had no authority or reason to change the determination in its decree ORS 539.150 (3). The decree of August 15, 1949, in effect, relates back to the findings of April 17, 1928 for all rights upon which no exceptions were filed. This is particularly critical when, as in this case, there is a long dormant period (22 years) in processing the exceptions. Parties not

involved in those exceptions have their rights protected by law (ORS 539.130 (4); 539.150; 539.170 and 539.200). They could not be expected to follow the entry of a decree 21 years later when they were not given notice of possible change in the status of their rights (ORS 539.130 (4); 539.150 and 539.170).

The decree of the Court is a determination of all issues properly before it. The critical part here is issues. The issues were limited to those set forth in the exceptions filed as provided in ORS 539.150.

Since no exceptions were taken to the State Engineer's Findings and Order of Determination that pertained to the mill at Eagle Point prior to the hearing as provided for in ORS 539.130, the issue of potential abandonment or forfeiture subsequent to the State Engineer's Order of April 17, 1928 was not before the Court.

The statutory adjudication system does not contemplate the extended period of 20 years between the order and decree so that forfeiture after the order could become a potential. The question of possible forfeiture having occurred after the order was entered in 1928 was not raised, not in issue, nor was it decided by the Court decree entered August 15, 1949. The doctrine of res judicata applies only to those issues before it that were decided. As stated in Bull v. Siegrist, 169 Or. 180, 187:

> "The question, therefore, of the source or sources from which these springs were fed was not in issue nor was it decided in the water adjudication. The right claimed by plaintiff and his co-owners was a right to divert the water from those springs as they then existed and not from any source or sources by which they were fed. Since that question was not in issue in those proceedings and was not decided by the decree entered therein, we hold that the plaintiff was not precluded by said decree from asserting and establishing if he could in this suit that said springs are fed by waters flowing underground from End creek in known and defined channels. Hence, the doctrine of res adjudicata is not involved in this suit."

In the matter of forfeiture, the determination of the Water Resources Director as incorporated in the court decree adjudicates only that forfeiture had not occurred on the effective date of the determination. The determination does not find that a period of nonuse (leading to a forfeiture) could not have occurred. The determination that a forfeiture occurred could only be found if the five year period of nonuse preceded the date of determination. If the forfeiture occurred partly before and partly after the date of determination by the Water Resources Director, the issue could not possibly be raised at or before the date determination.

A person might not have used water in the year preceding the determination or, for that matter, four years preceding the determination. The right would not have been forfeited and would remain valid as long as water was put to beneficial use for the described purposes prior to passage of the statutory period of five successive years nonuse. In the example, the nonuse for four years preceding the determination and one year following, could be examined in a subsequent forfeiture proceeding. This preserves both the doctrine of res judicata and the law of forfeiture. To hold otherwise would fly in the face of the plain statute and give the party nine successive years of nonuse rather than the statutory five years. This may appear to have been held otherwise in Abel v. Mack, 131 Or. 586. However, a careful reading shows a clear distinction. There the plaintiff alleged the right had been forfeited prior to the Order of the State Engineer entered November 17, 1915. The decree of the Court was entered March 18, 1918.

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It appears that the right to use 15.6 cubic feet per second of water for generation of power to operate the Butte Creek Mill has been forfeited for failure to apply the water to beneficial use for more than five successive years, during the period from the mid 1930's to 1976, and the right should be canceled.

It further appears that the owners of the Butte Creek Mill have forfeited the right to exercise their date of priority against existing users above their point of diversion on Little Butte Creek during the months of July, August and September, for failure to exercise such superior right of use for more than five successive years, during the period of 1951 to 1973, and the priority right should be canceled.

It further appears that, subject to the forfeited date of priority specified above, the right to the use of not to exceed 24.4 cubic feet per second of water from Little Butte Creek for development of direct water power has not been forfeited and the water right certificate should be canceled; and in lieu thereof a new certificate should be issued describing the water right as modified herein.

ORDER

NOW, THEREFORE, it hereby is ORDERED that the right for the use of not to exceed 15.6 cubic feet per second of water from Little Butte Creek, with a date of priority of 1872, for power purposes at Butte Creek or Daley Flouring Mill at Eagle Point, Oregon in Section 3, Township 36 South, Range 1 West, W.M., as evidenced by the certificate recorded in Volume 14, page 17191, State Record of Water Right Certificates, in the name of George Putman, is canceled.

It is further ORDERED that the certificate recorded in Volume 14, page 17191, State Record of Water Right Certificates, is canceled and in lieu thereof a new certificate of water right be issued confirming the right to the use of not to exceed 24.4 cubic feet per second of water from Little Butte Creek for development of direct water power in the Butte Creek Mill located in the NE¼ NE¼ of Section 3, Township 36 South, Range 1 West, W.M.

It is further ORDERED that the new certificate of water right issued herein is subsequent in priority to all existing rights to the

use of the waters of Little Butte Creek above the Butte Creek Mill's diversion point near the south line of Section 35 in the SW¼ SW¼ of Section 35, Township 35 South, Range 1 West, W.M., during the months of July, August and September.

Dated at Salem, Oregon this 27th day of July 1978.

James E. Sexson

JAMES E. SEXSON
Director

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within sixty days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.