BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF APPLICATION 69655 IN THE NAME OF DAN KOVTYNOVICH FOR THE USE OF WATER FROM AN UNNAMED SPRING AREA, FOR MAINTENANCE OF A NATURAL POND FOR THE REARING OF RAINBOW TROUT	STATEMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER

STATEMENT

On June 30, 1988, Application 69656 in the name of Dan Kovtynovich was filed in the office of the Water Resources Department for a permit to appropriate .06 cubic feet per second (cfs) (26.9 gpm) of water from an unnamed spring area. The proposed point of diversion is located 860 feet South and 813 feet east of the West Quarter Corner of Section 16, Township 18 South, Range 3 West, WM. Water would be used for maintenance of a natural pond for rearing of rainbow and other trout. The pond is located on applicant's property, in the NW¼ SW¼ of Section 16, Township 18 South, Range 3 West, WM, Lane County, Eugene, Oregon.

On November 7th, 1988, Vernon Albert filed a protest against approval of application 69656, alleging that applicant's use of water from the spring would reduce the flow of water in an unnamed stream from which Mr. Albert had a permit to appropriate 2 gpm for trout rearing and 4 gpm for irrigation during the irrigation season, and that applicant should be limited to no more than 4 gallons per minute in the event the application was approved. Albert alleged further that this unnamed stream runs through a city park, and that taking water directly from the spring would harm wildlife in the city park, contrary to the public interest.

On January 15, 1989, Gerald Black also filed a protest against the application, alleging harm to the aesthetics in the park, and that there would be no water left for appropriation in the event that Black's pending application was approved. The protest was accepted only on the ground of possible impact to the pending application, aesthetics not being a public interest value cognizable by the Water Resources Commission except on scenic waterways.

Pursuant to the provisions of ORS 183.415, 537.170 and 537.180 and the Director's Notice of Hearing dated January 24, 1989, the matter was brought to hearing on March 14, 1989 at Eugene, Oregon. The hearings referee was Weisha Mize, an employee of the Water Resources Department, authorized to preside in behalf of the Director as a finder of fact.

Applicant Dan Kovtynovich was present at the hearing and was represented by his attorney, William Kloos of the law firm of Johnson and Kloos, Eugene, Oregon.

Protestants Vernon Albert and Gerald Black were present at the hearing and were represented by their attorney, Randall Bryson, of the law firm of Bryson and Bryson, Eugene, Oregon.

After all testimony and evidence had been received from all parties and their witnesses, the hearings referee recessed the hearing in the event further testimony was required. The record was left open for the purposes of receiving: response from Oregon State University Professor George Brown regarding application of a model developed by Dr. Brown for predicting water temperature; figures from a series of flow measurements conducted by Watermaster Gene McGinnis at several points in the area of the spring, unnamed stream, and applicant's and protestants' properties; and post-hearing memoranda from counsel.

Based on the hearing record and the additional information received, the Water Resources Director issued a proposed Order. The proposed Order was served on the parties on November 23, 1989.

On December 22, 1989, Randall Bryson filed Exceptions to the proposed Order on behalf of the applicant. Counsel for the parties were given an opportunity to file written argument on the exceptions, and were informed that they would be limited to written argument only. Written argument was received from Bill Kloos on behalf of the protestants on January 18, and from Randall Bryson on January 19, 1990.

At a regularly scheduled meeting in Portland, Oregon on February 12, 1990, the Water Resources Commission considered the applicant's exceptions, together with the parties' written arguments and staff's report, and voted to adopt the proposed Order without change as the Commission's Final Order.

NOW, THEREFORE, the Water Resources Commission makes the following:

FINDINGS OF FACT

Applicant and protestants reside in a residential area of Eugene known as Skyline Park. The location of applicant's and protestants' properties, the springs in question, points of diversion, and a "finger" ridge are identified on Figure 1. Figure 1 is a copy of a portion of Protestant's Exhibit 1, with additional identification of features added based on testimony given at the hearing.

Applicant has resided at his current address since the area was first developed in the early 1940's. He was a principal in the organization and development of the Skyline Park Mutual Water District (SPMWD). In 1946, SPMWD obtained a state water permit to develop the springs in question and installed a domestic water supply delivery system capable of delivering water to 32 homes.

The SPMWD delivery system has not been used to provide domestic water since 1974, when the system was turned over to the Eugene Water and Electric Board (EWEB). The delivery and storage system was disconnected and the Skyline Park area hooked up to EWEB's municipal system.

All flow from the spring has been diverted by the applicant through a pipeline for use in a trout pond since 1974. Applicant received authorization from EWEB for the use of the spring, which EWEB was not using. EWEB did not and has not obtained authorization from the Water Resources Department for this change of use.

Applicant's diversion pipe at the spring is exposed for some distance and has been disconnected, tampered with or smashed and rendered inoperable several times in the last two years.

The average flow from the spring is 16 gallons per minute (gpm) or 0.0355 cubic feet per second (cfs).

Water leaving applicant's pond flows in a northwesterly direction and fills several ponds, including a sizeable trout pond, on a neighbor's property, and ultimately flows into a storm drain and into the Amazon storm system (Amazon Creek).

A "finger" ridge running in a north-south direction is located to the west and slightly north of the springs in question, and south-east of Black's property. Because of the barrier presented by this finger ridge, flow or overflow from the springs in question would not naturally flow through either Black's or applicant's property. It would, however, enter Albert's property on the east, cross the property and flow off at the northwest corner.

Skyline Loop Road was constructed in approximately 1948. In 1974, EWEB added a culvert which directed any overflow from the spring into a channel which now cuts through this finger ridge. It was unclear from the record whether the flow from the spring was diverted into this channel or unnamed stream prior to 1974.

When the applicant's diversion pipe is shut off, flow from the spring now runs in the unnamed stream flowing in a north-northwesterly direction through protestant Black's property and then into a drainage ditch running along the south side of Skyline Loop Road.

There are a number of undeveloped seeps to the west of the finger ridge. There are also seeps on the north side of Skyline Loop Road, across the road from the springhouse. These seeps provide between 1 and 2 gpm of flow in the unnamed stream running through Black's property. There also appear to be two undeveloped springs in the same area as the spring in question. The output or contribution, if any, of these undeveloped springs to the flow in this unnamed stream is unknown.

During the time when applicant was diverting the entire output of the spring into his trout pond, protestant Albert appropriated the entire flow of 2 gpm from the unnamed stream after it left Black's property. This water was used in 1983 for irrigation of a garden, and in 1987-1988 for use in an existing trout pond on Albert's property. At the time of the hearing, Albert's trout pond had been largely filled in and was unusable. Albert intended to relocate the pond to another part of his property.

Since applicant was diverting the entire output of the spring during the time Albert was diverting water from the unnamed stream, the source of the waters in the unnamed stream used by Albert were the undeveloped seeps and springs.

Albert has a permit for use of up to 2 gpm for fish rearing and up to 4 gpm for irrigation during the irrigation season, to be taken from the unnamed stream. Black has a pending application for 4.4 gpm for fish rearing, from the same source.

The source of water for Albert's use in 1983 and 1987-1988 was the unnamed stream flowing through Black's property. During this period of time, this unnamed stream received water from the several seeps and undeveloped springs but not from the spring in question.

Due to human interference, the natural channel of the spring has been rerouted so that it runs into the unnamed stream flowing through Black's property. It no longer flows across Albert's property. Albert must run a hose across the road to get any water from the spring onto his property. It does not appear possible to return the outflow of the spring to its original, natural channel.

Applicant's fish occasionally experienced stress during summer months when the spring flow was somewhat reduced and direct solar radiation was at its most intense. The Brown model indicates that between .04 and .06 cfs are needed in the pond in its current configuration to avoid stress and disease.

When his pond was in usable condition, Albert successfully raised trout for two years on a total flow of 2 gpm or less. While

Applicant has no pre-existing right to the use of the waters of the spring for trout rearing based on their domestic use until 1974 under the Skyline Mutual Water Supply District's certificate 27986. When the delivery system was cut off in 1974 and the residence connected to the EWEB municipal system, water ceased to be used under the terms of certificate 27986.

Applicant's use of waters of the spring following 1974 was without benefit of a state water right.

The protestants have the burden of producing evidence to support their claim that the use applied for would impair or be detrimental to the public interest. The protestants have not met their burden.

Modification of applicant's trout rearing operation would allow successful trout rearing with a lesser quantity of water than that requested. As such, grant of the permit application in a lesser amount would not constitute a wasteful, uneconomic, impractical or unreasonable use of the waters and would not be contrary to the public interest.

If applicant elects not to modify his operation to meet proposed conditions and limitations in the permit, he may withdraw his application instead of accepting the permit.

Approval of application 69655 and issuance of a permit would not impair or be detrimental to the public interest.

Application 69655 should be approved pursuant to the provisions of ORS 537.160 to 537.230, subject to the following terms and conditions:

(a) The permit issued in approval of this application shall limit the appropriation to not more than 0.036 cfs. (16 gpm)

(b) Applicant shall install, at his own expense and under the general supervision and subject to the approval the watermaster, a device at the diversion point capable of measuring and regulating the quantity of flow diverted.

(c) Applicant's diversion is subject to Albert's prior right to appropriate 2 gpm for a trout pond and up to an additional 4 gpm during the irrigation season for irrigation of .73 acre.

ORDER

NOW, THEREFORE, it is ORDERED that Application 69655 in the name of Dan Kovtynovich be approved, subject to the terms and conditions set out below, to authorize the appropriation of not

to exceed 0.036 cfs from the unnamed spring in question for maintenance of a natural pond for rearing of rainbow and other trout. The pond is located on applicant's property, Tax Lot 4200,in the NW¼ SW¼ of Section 16, Township 18 South, Range 3 West, WM, Lane County, Eugene, Oregon.

The permit issued in approval of this application shall limit appropriation to not more than 0.036 cfs

Applicant shall install, subject to the prior approval and under the general supervision of the watermaster, at his own expense, a device at the diversion point capable of measuring and regulating the quantity of flow diverted.

Applicant's diversion is subject to Albert's prior right to appropriate 2 gpm for a trout pond and up to an additional 4 gpm during the irrigation season for irrigation of .73 acre.

DATED this 28 day of February, 1990.

WILLIAM R. BLOSSER
Chairman

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within 60 days from the service (date of mailing) of this Order. Judicial review is pursuant to the provisions of ORS 536.073 and 183.482.