

## Malheur County

IN THE MATTER OF THE APPLICATION OF )  
 CARROL LOCEY AND SYLVIA LOCEY, HIS )  
 WIFE, FOR THE APPROVAL OF A CHANGE )  
 IN POINT OF DIVERSION OF WATER FROM )  
 WILLOW CREEK, PURSUANT TO THE PRO- )  
 VISIONS OF SECTION 116-606, O.C.L.A. )  
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O R D E RAPPROVING APPLICATION

On October 10, 1945, Carroll Locey and Sylvia Locey filed application in the State Engineer's Office for the approval of a change in point of diversion of water from Willow Creek, tributary of Malheur River, Malheur County, Oregon.

By decree of the Circuit Court of the State of Oregon for Malheur County, Oregon, dated June 6, 1916, in the matter of the determination of the relative rights of the various claimants to the waters of Willow Creek, a tributary of Malheur River, and its tributaries, in Malheur County, Oregon, which decree will be referred to herein as Willow Creek Decree, a water right was allowed in the name of James Morfitt for the irrigation of 25.0 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$ , 30.0 acres in NW $\frac{1}{4}$  NE $\frac{1}{4}$ , 30.0 acres in NE $\frac{1}{4}$  NW $\frac{1}{4}$  and 40.0 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 6, Township 14 South, Range 41 East, W. M., through the Morfitt Ditch from Willow Creek with a date of priority of 1868. In said decree James Morfitt was allowed an additional right for the irrigation of 15.0 acres in SW $\frac{1}{4}$  SE $\frac{1}{4}$ , 30.0 acres in SE $\frac{1}{4}$  SW $\frac{1}{4}$ , and 15.0 acres in SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 31, Township 13 South, Range 41 East, W. M., through the Rich Creek Ditch from Rich Creek with a date of priority of 1897; and a supplemental right from Willow Creek, through the Rich Creek Ditch, with a date of priority of 1868. In said Willow Creek Decree there is a finding providing that James Morfitt shall be entitled to a priority date of 1868 from Willow Creek for the irrigation of 15.0 acres in the SW $\frac{1}{4}$  SE $\frac{1}{4}$ , 30.0 acres in SE $\frac{1}{4}$  SW $\frac{1}{4}$ , and 15.0 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 31, Township 13 South, Range 41 East, W. M., except when he is not able to obtain sufficient water from Rich Creek

under the date of priority of 1897 for the irrigation thereof.

The applicants, Carroll Locey and Sylvia Locey, owners of the above described lands in said application proposes to construct four new ditches; two to divert water from Willow Creek near the West line of  $NW\frac{1}{4} NW\frac{1}{4}$ , Section 6, Township 14 South, Range 41 East, W. M., one diverting on the north and the other on the south side; the other two ditches are to divert from Willow Creek, one on the south and the other on the north side, near the West line of the  $NE\frac{1}{4} NW\frac{1}{4}$  of said Section 6. The lands lying above these four new ditches are to be irrigated from two ditches known as the Morfitt Ditch and Rich Creek Ditch; the Morfitt Ditch diverts from the south side of Willow Creek near the northeast corner of the  $SW\frac{1}{4} SW\frac{1}{4}$ , Section 1, Township 14 South, Range 40 East, W. M., and the Rich Creek Ditch diverts from the north side of Willow Creek in the  $NW\frac{1}{4} SW\frac{1}{4} NE\frac{1}{4}$ , Section 1 of said Township and Range. The area to be irrigated from the ditches is not designated in the application, but it appears from the map accompanying the application that it is proposed to irrigate a part of the following described lands: 30.0 acres in  $SE\frac{1}{4} SW\frac{1}{4}$ , 15.0 acres in  $SW\frac{1}{4} SE\frac{1}{4}$ , Section 31, Township 13 South, Range 41 East, W. M., 40.0 acres in  $NW\frac{1}{4} NW\frac{1}{4}$ , 30.0 acres in the  $NE\frac{1}{4} NW\frac{1}{4}$ , 30.0 acres in  $NW\frac{1}{4} NE\frac{1}{4}$ , and 25.0 acres in  $NE\frac{1}{4} NE\frac{1}{4}$ , Section 6, Township 14 South, Range 41 East, W. M., which lands have a water right.

Notice of the filing of said application was given by publication in three issues of the Malheur Enterprise, a newspaper printed and published in Vale, Malheur County, Oregon, and of general circulation in said county, said three issues being November 22, November 29 and December 6, 1945

On January 7, 1946, an objection to the approval of the aforesaid application was filed in the office of the State Engineer by O. F. Bronson, Earl Lofton, E. E. Oliver, Elmer Molthan and Fred Laurance through their attorney, E. Otis Smith of Ontario, Oregon. The objections to the approval of the application as set forth in the statement filed asserts that the applicant is only entitled to the diversion and use of 1.25 cubic feet per

second of water from Willow Creek for the irrigation of 125 acres of land under a date of priority of 1868, and further objection is made to the installation of any new means of diversion from Willow Creek which in any way will flood or damage any lands owned by the objectors.

A hearing was not held by the State Engineer as it was agreed between the applicant through his attorneys, Hallock, Donald and Banta, of Baker, Oregon, the objectors through their attorney, E. Otis Smith, and the State Engineer that the matter could be submitted by the filing of briefs.

Briefs by both the applicant and the objectors have been filed.

In the brief of the objectors it was asserted that during the past several years water from Willow Creek has not been applied to the lands in Section 31, Township 13 S., Range 41 East, W. M. and that the water right appurtenant to these lands may have been lost through non-use or abandonment.

The State Engineer being fully advised in the matter is of the opinion that: The right to the use of the water of Willow Creek, as defined in the Willow Creek Decree, in the name of James Morfitt is for the irrigation of 25.0 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$ , 30.0 acres in NW $\frac{1}{4}$  NE $\frac{1}{4}$ , 30.0 acres in NE $\frac{1}{4}$  NW $\frac{1}{4}$ , and 40.0 acres in the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 6, Township 14 South, Range 41 East, W.M., with a priority of 1868; that in addition to this right a supplemental right from Willow Creek was allowed for the irrigation of 15.0 acres in SW $\frac{1}{4}$  SE $\frac{1}{4}$ , 30.0 in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , and 15.0 acres in SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 31, Township 13 South, Range 41 East, W. M., with a priority of 1868; that for these lands the owners must first use the water from Rich Creek as long as water from this source is available, but when the quantity of water from Rich Creek is not sufficient, or there is no water available from this source, the owner of the lands can divert water from Willow Creek under a date of priority of 1868, providing that the total quantity diverted from Rich Creek and Willow Creek does not exceed the quantity allowed in said Decree;

That the approval of the application by the State Engineer could not be considered as a determination as to whether the water right had not been lost by abandonment or by non-use. Abandonment of a water right or forfeiture for non-use is a question of fact and law to be determined by a court of competent jurisdiction and in an appropriate proceeding;

That the approval of the application would not result in injury to existing right as contemplated in Section 116-606, O. C. L. A. providing that proof is submitted showing the area that will be irrigated from each of the six ditches to be used, which information is necessary in order to distribute the waters of Willow Creek and its tributaries.

NOW, THEREFORE, it hereby is Ordered that the application by Carroll Locey and Sylvia Locey filed in the office of the State Engineer on October 10, 1945, requesting the approval of a change in the point of diversion for the irrigation of part of the applicants lands from the afore described Morfitt Ditch and Rich Creek Ditch diverting from Willow Creek down stream to four ditches to be constructed as above described, subject to all other provisions and limitations of the Willow Creek Decree, be and the same is hereby approved without loss of priority.

It is further ORDERED that the construction work be completed and the change in diversion be made on or before October 1, 1946, or within such extension of time as may be granted by the State Engineer for good cause shown.

It is further ORDERED that after the completion of the construction work and the change of diversion made that the applicant shall submit a map on scale not less than four inches to one mile showing the location of the ditches to be constructed and the location and areas of lands served by each of the six ditches used by the applicants.

Dated at Salem, Oregon, this 13th day of February, 1946.

  
CHAS. E. STRICKLIN  
State Engineer

*Refer to Decree,  
Vol. 3, p. 296 and  
Cert. 1603  
(Tr. No. 1-18)*