

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

IN THE MATTER OF PERMIT NO. 22581        )  
IN THE NAME OF SOUTH FORK                ) DECLARATORY RULING  
WATER COMMISSION (BOARD)                )  
\_\_\_\_\_)

**BACKGROUND**

The South Fork Water Commission applied for a water right on August 3, 1953, and received Permit No. 22581 to appropriate 60 cubic feet per second from the Clackamas River on January 22, 1954. The South Fork Water Board (Board) is the successor to the South Fork Water Commission. The Board is currently the holder of water right Permit No. 22518 (Permit). The Permit allows the Board to divert water from the Clackamas River at a point of diversion located 1800 ft. north, and 850 ft. east from the S.W. corner of Section 21, T.2 S., R. 2 E., WM.

The Clackamas River in the vicinity of the above-described point of diversion has undergone, and continues to undergo, natural deviation from its historic channel. This channel deviation has and will physically limit the Board's ability to divert water from the above-described point of diversion. In order for Board to fully exercise its water right under the Permit it must reconfigure its diversion facility. This diversion facility reconfiguration must be relocated to follow the changing channel of the Clackamas River.

### RELIEF REQUESTED

The Board seeks a declaratory ruling from the Director of the Department of Water Resources (Department) pursuant to ORS 183.410 and OAR 137-02-010 through -060 that:

1. The Board may divert water from the Clackamas River under the Permit at a proposed relocated point of diversion located at a point 1,765 feet north and 300 feet east from the S.W. corner of Section 21, T.2 S., R.2 E., W.M. Said relocated point of diversion is within 500 feet of the point of diversion as described in the Permit on record with the Department.
2. The above-described relocated point of diversion, if actually developed and perfected, will be certificated by the Department upon completion of the final proof survey and final water use report.

### QUESTIONS PRESENTED

1. Does the development and perfection of the water right described in the Permit at the relocated point of diversion constitute a legal change in point of diversion?
2. Upon completion of development and perfection of the Permit, can a certificate be issued confirming the relocated point of diversion?

**A. FACTS UPON WHICH THE RULING IS BASED**

1. The Board filed a Petition for Declaratory Ruling (Petition) with the Department on November 25, 1994, under the provisions of ORS 183.410 and OAR 137-02-010 through -060,
2. The Department issued a NOTICE OF PETITION FOR DECLARATORY RULING; NOTICE OF HEARING; NOTICE OF OPPORTUNITY TO INTERVENE on January 25, 1995. In addition, the Department issued an AMENDED NOTICE OF PETITION on January 30, 1995. The original NOTICE and the AMENDED NOTICE were mailed to the following interested parties:

Kevin Hanway  
Western Advocates  
7150 SW Hampton St., Suite 130  
Tigard, OR 97223-0298

Joni Lowe  
League of Oregon Cities  
P.O. Box 928  
Salem, OR 97308

City of Gladstone  
525 Portland Avenue  
Gladstone, OR 97027

City of Lake Oswego  
P.O. Box 369  
Lake Oswego, OR 97034

Portland Water Bureau  
Attn: Lorna Stickel  
1120 S.W. Fifth Ave.  
Portland, OR 97204

Jan Boettcher  
OWRC  
727 Center St. NE,  
Suite 107  
Salem, OR 97301-3821

WaterWatch of Oregon  
c/o Karen Russell  
921 SW Morrison, Suite 438  
Portland, OR 97205

Clackamas Water District  
P.O. Box 67  
Clackamas, OR 97015

Oak Lodge Water District  
14496 SE River Road  
Milwaukie, OR 97267

City of Estacada  
P.O. Box 247  
Estacada, OR 97023

City of Oregon City  
320 Warner Milne Road  
Oregon City, OR 97045

Oregon Trout  
5331 S.W. Macadam, #228  
Portland, OR 97201

3. No Petitions for Intervention were filed or received by the Department.
4. The proposed relocated point of diversion identified in the Board's Petition is within 500 feet of the point of diversion as described in the Permit on record with the Department.
5. The Clackamas River channel is naturally changing its course at the location of the point of diversion described in the Permit. All physical evidence indicates that the river channel will continue to change, and therefore it will not be possible for the Board to fully perfect its water right at the point of diversion as described in the Permit.
6. The proposed change in point of diversion will not move the diversion point of the Permit upstream or downstream beyond the diversion point of any other appropriator. There are no such intervening appropriators.

**B. STATUTES AND RULES AT ISSUE**

For the purposes of this Ruling, the following statutes and rules are at issue:

1. The Director or a designee is authorized to make declaratory rulings pursuant to ORS 183.410 and OAR 137-02-010 through -060. The declaratory ruling statute and rules authorize an agency to provide a binding ruling on application of agency law to particular facts.
2. Except as provided in ORS 540.510(5), water use shall remain appurtenant to the premises upon which it is used and no

change in such use, place of use or point of diversion may be made without compliance with the provisions of ORS 540.520 and 540.530. Pursuant to ORS 540.510(5), the relocation of a point of diversion does not constitute a change in point of diversion for purposes of ORS 540.520 if:

- 2.1 The relocation is necessary to follow the movements of a naturally changing stream channel;
- 2.2 The diversion point stays within 500 feet of the point of diversion of record with the Water Resources Department; and
- 2.3 The relocation does not move the diversion point upstream or downstream beyond the diversion point of another appropriator.

3. Pursuant to ORS 537.250, after the Water Resources Commission receives a request for the issuance of a water right certificate accompanied by a survey that shows to the satisfaction of the Commission that an appropriation has been perfected in accordance with the provisions of the Water Rights Act, the Commission shall issue a certificate setting out the elements of the perfected water right.

C. **THE DIRECTOR'S CONCLUSIONS AS TO THE APPLICABILITY OF THE STATUTES OR RULES TO THE FACTS**

The Director concludes that the statutes and rules set out in Part B above apply to the facts set forth in Part A above.

**D. THE DIRECTOR'S CONCLUSION AS TO THE LEGAL EFFECT OR RESULT OF APPLYING THE STATUTES AND RULES TO THE FACTS**

The Director concludes that the legal effect of applying the statutes and rules to the facts set forth in Part A above would result in:

1. A determination that the perfection of the water right described in the Permit at the relocated point of diversion does not constitute a change in point of diversion.
2. Upon perfection of the water right described in the Permit, the Department will issue a certificate of water right describing the relocated point of diversion as the official location for diversion of water from the Clackamas River under the Permit.

**E. THE REASONS RELIED UPON BY THE DIRECTOR TO SUPPORT HER CONCLUSIONS**

1. The facts presented in this case meet the criteria set out in ORS 540.510(5).
  - 1.1 Relocation of the point of diversion is necessary to follow the movements of the naturally changing stream channel of the Clackamas River;
  - 1.2 The relocated diversion point is within 500 feet of the diversion point described in the Permit of record with the Department; and
  - 1.3 The relocation does not move the diversion point upstream or downstream beyond the diversion point of another appropriator.

Because these criteria are met, this relocation does not constitute a "change in point of diversion for purposes of ORS 540.520." (ORS 540.510(5).)

2. Since the Board's point of diversion relocation does not constitute a change in point of diversion under ORS 540.520, there is no requirement that a transfer application be filed to request a change in point of diversion.

This conclusion is consistent with the legislative history of ORS 540.510(5). This statute was adopted by the 1989 Legislative Assembly in an effort to codify the Department's long-standing practice of not requiring water right holders to go through the formal transfer process to relocate a point of diversion when the need for the relocation arose because of a change in a natural stream channel. (*Oregon Senate Staff Measure Summary on Senate Bill 146, January 24, 1989.*) In fact, the Water Resources Commission's rules in place in 1989 stated that "[A]n application for a change in point of diversion is not required for a diversion point to follow the movements of a naturally changing stream channel if the diversion point stays within the same quarter-quarter section and the change does not move the diversion point upstream or downstream beyond the diversion point of another appropriator." (OAR 690-15-010, 1988.)

It is important to note that the 1991 Legislative Assembly adopted a subsequent amendment to ORS 540.510 limiting all transfers to only those water rights that had been certificated. (1991 Or. Laws Ch. 957, § 7.) However, testimony in 1989 before the House Water Policy Committee regarding the effect of the House Bill 146 included a hypothetical relocation specifically involving a permitted water right. (*Testimony of Bill Young, Senate Water Policy*

*Committee, January 24, 1989, Tape 4, Side A, 110; and House Water Policy Committee, February 16, 1989, Tape 9, Side A, 330.)*

There appears to be a clear inference that the exemption from the provisions of the formal change process of ORS 540.520 was applicable to both permitted and certificated rights. In addition, the legislative policy embodied in ORS 540.510(5), which allows a diversion point to be relocated to follow the movement of a naturally changing stream channel, would be frustrated if the relocation of a diversion point of a water right in permit status were not able to take advantage of the exception set out in subsection (5).

3. The relocation of the Board's diversion point to a location that is within 500 feet of the diversion point described in the Permit is consistent with the Water Rights Act and will allow the Board to perfect the right at the relocated point of diversion. ORS 537.250 provides that when the Water Resources Commission receives a request for the issuance of a water right certificate with a final proof survey showing that an appropriation has been perfected in accordance with the provisions of the Water Rights Act, the Commission shall issue a water rights certificate to the applicant.

Under the Water Rights Act an appropriator who relocates its diversion point to follow the movements of a naturally changing stream channel has not legally changed their point of diversion. Relocation of the point of diversion by the Board which is necessitated by the naturally changing channel of the Clackamas River will not prevent perfection and certification of the Permit at the relocated point of diversion.



F. STATEMENT OF JUDICIAL REVIEW UNDER ORS 183.480

Pursuant to ORS 183.480, the Board may obtain judicial review by filing a Petition with the Court of Appeals of the State of Oregon within 60 days from the date the Declaratory Ruling is served.

DECLARATORY RULING

1. The relocation of the point of diversion of Permit No. 22581 to a point which is 1,765 feet north and 300 feet east from the S.W. corner of Section 21, T.2 S., R.2 E., W.M., does constitute a legal change in point of diversion.
2. Upon completion of development and perfection of the Permit, a certificate can be issued confirming the relocated point of diversion?

Water rights appropriated under Permit No. 22581 at the above-described relocated point of diversion, when perfected, will be certified by the Department upon completion of the final proof survey and submittal of the final water use report.

DATED this 12<sup>th</sup> day of May, 1995:

WATER RESOURCES DEPARTMENT

By:   
Martha O. Pagel, Director

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