

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) **PREHEARING ORDER**
WATER COMMISSION (BOARD))
_____)

THIS MATTER having come before the Director of the Water Resources Department (Director) upon the Petition for Declaratory Ruling (Petition) of the South Fork Water Board (South Fork) pursuant to ORS 183.410 and OAR 137-02-010, et seq., the Hearings Officer hereby issues this PREHEARING ORDER.

South Fork's Petition for a Declaratory Ruling was filed with the Department on November 25, 1994. The Petition seeks a declaratory ruling to confirm that relocation of its point of diversion on the Clackamas River to a point approximately 500 feet downstream from its diversion point of record does not constitute a change in point of diversion for purposes of ORS 540.520.

1. SCHEDULE OF PROCEEDINGS

On January 25, 1995, the Director issued a NOTICE OF PETITION FOR DECLARATORY RULING; NOTICE OF HEARING; NOTICE OF OPPORTUNITY TO INTERVENE. In addition, the Director issued an Amended NOTICE OF PETITION on January 30, 1995. The NOTICE and Amended NOTICE set forth the following schedule of proceedings:

- 1.1 Petitions for intervention must be received at the Department on or before 5:00 p.m. February 10, 1995;

- 1.2 A prehearing conference be held February 21, 1995, to describe the facts upon which the declaratory ruling would be based and to identify the statute or rule at issue;
- 1.3 A prehearing order be issued by the Director or her designee on March 2, 1995, which order would accept or deny petitions for intervention and would determine the facts upon which the declaratory ruling may be based; and
- 1.4 The hearing on the Petition be held March 15, 1995, at 1:00 p.m. at the office of the Water Resources Department in Salem, Oregon.

2. PETITIONS FOR INTERVENTION

No petitions for intervention were received by the Department. Therefore, no person or entity may participate in the proceeding as a party other than the petitioner South Fork.

3. PREHEARING CONFERENCE

The Prehearing Conference was held by telephone at 1:30 p.m. on February 21, 1995, before A. Reed Marbut, the Department's duly designated Hearings Officer, to acknowledge the facts upon which the declaratory ruling would be based and to identify the statute(s) or rule(s) at issue. Appearing on behalf of the South Fork Water Board was its counsel, Thomas J. Rastetter. No other parties appeared. At the Prehearing Conference counsel for Petitioner South Fork waived the hearing scheduled for March 15, 1995. Counsel for South Fork requested that the record remain open for South Fork to submit additional facts or legal argument until March 15, 1995.

4. FACTS UPON WHICH RULING WILL BE BASED

Having reviewed the record of this proceeding, the following facts are the basis for the declaratory ruling:

- 4.1 The proposed relocated point of diversion identified in South Fork's Petition is within 500 feet of the point of diversion as described in Permit No. 22581 on record with the Water Resources Department.
- 4.2 The Clackamas River channel is naturally changing its course at the location of the point of diversion described in Permit No. 22581. All physical evidence indicates that the River channel will continue change, and therefore it will not be possible for South Fork to fully perfect its water right at the point of diversion as described in Permit No. 22581.
- 4.3 The proposed change in point of diversion will not move the diversion point of Permit No. 22581 upstream or downstream beyond the diversion point of any other appropriator. There are no such intervening appropriators.

5. STATUTE(S) AND RULE(S)

The following statute(s) or rule(s) are at issue:

- 5.1 The Director or her designee is authorized to make declaratory rulings pursuant to ORS 183.410 and OAR 137-02-010 through - 060. The declaratory ruling statute permits an agency to provide a binding ruling on application of agency law to particular facts.

5.2 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 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 the relocation is necessary to follow the movements of a naturally changing stream channel, the diversion point stays within 500 feet of the point of diversion on record with the Water Resources Department and the relocation does not move the diversion point upstream or downstream beyond the diversion point of another appropriator.

5.3 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.

6. QUESTIONS PRESENTED

Based upon the facts set forth above, the South Fork Petition poses the following questions:

6.1 Does the development and perfection of the water right described in Permit No. 22581 at the relocated point of diversion constitute a change in point of diversion?

6.2 Can Permit No. 22581 be perfected and certificated at the relocated point of diversion?

7. PREHEARING ORDER

It is therefore ordered:

- 7.1 South Fork Water Board is the only party to this proceeding;
- 7.2 The March 15, 1995, Hearing is canceled;
- 7.3 South Fork may have until March 15, 1995, to submit additional facts or legal argument; and
- 7.4 The facts upon which the declaratory ruling will be based are set forth in Part 4 above.

DATED this 2nd day of March, 1995:



A. Reed Marbut
Hearings Officer