

BEFORE THE STATE ENGINEER OF OREGON

Umatilla County

IN THE MATTER OF)
THE CANCELATION)
OF A WATER RIGHT)

STATEMENT
FINDINGS OF FACT
CONCLUSIONS AND ORDER

*Amended 502
10/19/69*

STATEMENT

This proceeding was initiated by the State Engineer under the provisions of ORS 540.631 to 540.650 for the cancelation of a certain water right.

The water right in question is for the use of not to exceed 0.29 cubic foot per second of the waters of McKay Creek, tributary of Umatilla River, for irrigation of 9.0 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ and 14.0 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 1, Township 1 South, Range 32 East, W.M., with a date of priority of December 24, 1913, evidenced by certificate of water right issued in the name of A. Pecavet and J. W. Rook and recorded at page 2736, Volume 4, State Record of Water Right Certificates.

Notice dated April 3, 1968, of initiation of the proceeding for cancelation of the water right in question was given to the owner and occupant of said lands.

On May 31, 1968, a protest against the proposed cancelation was filed in the office of the State Engineer by Mr. Carl Wilson, owner and occupant of the lands to which the above water right is appurtenant.

Pursuant to notice of hearing and amended notice of hearing given to all interested parties, and dated April 17 and April 28, 1969, respectively, the matter was brought to hearing before Mr. James W. Carver, Jr., Deputy State Engineer, at the Umatilla County Courthouse, Pendleton, Oregon on May 15, 1969.

Proponents of cancelation were represented by Mr. Robert T. Mautz Attorney at Law, Pendleton, Oregon. Mr. Tom L. Ellis, Mr. James S. Miller

and Mr. H. P. Jamison were called and gave testimony for the proponents.

The protestant, Mr. Carl Wilson, appeared and was represented by Mr. Gene B. Conklin, Attorney at Law, Pendleton, Oregon. Mr. Carl Wilson, Mr. James Sampson, Jr., Mr. James Hatley, Mr. C. C. Gilbert, Mr. George Gilbert, Mr. Richard Stanhope, Mr. J. E. Sutherlin and Mrs. Rebecca Wilson were called and gave testimony for the protestant.

McKay Creek, a perennial stream in Umatilla County, Oregon, rises on the northwesterly slope of the Blue Mountains and flows in a generally northwesterly direction to a confluence with the Umatilla River near the city of Pendleton, passing through McKay Reservoir about five miles above, or south of, Pendleton.

The lands in question lie on a flood plain of McKay Creek approximately four miles above McKay Reservoir. McKay Creek flows northerly through the subject lands bisecting them with a channel some fifteen feet in depth at the southerly boundary and a lesser depth as it approaches the northerly boundary.

The field to the east of the channel approximates the shape of a long narrow triangle, with the base of the triangle being the south property line and the sides being formed by the channel on the west and a sharply rising rock bluff on the east, and includes an area of about 15.0 acres.

The field to the west of the channel is bounded on the west by a steep grassy bluff which extends the length of the Wilson lands and lies nearly parallel to the stream channel.

A diversion dam and ditch, known as the Walker-Brown ditch, diverts water from the west side of the channel of McKay Creek near the south property line and within the west-side field for irrigation purposes under rights not in question herein. One of the water rights served by the said Walker-Brown ditch is for the use of not to exceed 0.10 cubic foot per second of the waters of McKay Creek, tributary of Umatilla River, for irrigation of

8.0 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 1, Township 1 South, Range 32 East, W.M., (the northerly portion of the west-side field) with a date of priority of 1895, established by the Decree of the Circuit Court in and for Umatilla County, entered September 9, 1916, in the Matter of the Determination of the Relative Rights to the Use of the Waters of Umatilla River and its Tributaries, in the name of Jas. R. Brown, and evidenced by certificate of water right recorded at page 2496, Volume 3, State Record of Water Right Certificates.

FINDINGS OF FACT

A system of works formerly used for irrigation of the lands in question is comprised of a log dam across the channel of McKay Creek at a point approximately one-half mile upstream from the subject lands; a concrete headworks without means of controlling inflow; a ditch, known as the Pecavet-Roorck ditch which extends in a northwesterly direction and enters the southeasterly corner of the lands in question on the east side of McKay Creek, where the ditch divides into three ditches, one following along the toe of the rocky bluff, the second extending northwesterly through the center of the field and the third extending westerly to the channel of McKay Creek to a point where water used to be conveyed across the channel to the west side lands by means of a flume crossing.

The subject west side lands were last irrigated through the Pecavet-Roorck ditch sometime during the mid 1950's when the flume crossing was destroyed by flooding.

From the mid 1950's until the summer of 1966 the only irrigation of Wilson lands west of McKay Creek was carried out by means of the Walker-Brown ditch and was confined to an area determined to include not more than eight acres.

Testimony was in agreement that subsequent to the mid 1950's very little maintenance work was carried out on the Pecavet-Roorck diversion

works and ditch but that during the spring runoff season (during the months of May and June of most years and on into July in some years) the diversion dam would sufficiently raise the level of the flowing water in McKay Creek to cause water to flow into the headworks and on down to the subject lands lying east of McKay Creek.

No testimony was received regarding the quantity of water delivered to the said lands or regarding the portion or portions of the said lands benefited by the water in the above described manner.

The stream flow records from Gaging Station 14-225, located about 3 miles downstream from the subject lands, show that in most years water ceases to be available to a December 24, 1913 priority right about the middle of June.

The protestant, Carl Wilson, testified that the last year the Pecavet-Roork ditch conveyed water to the subject lands lying east of the McKay Creek channel was 1963.

During the irrigation season of 1966 the subject lands lying on both sides of the McKay Creek channel were irrigated by means of a sprinkler system diverting water from McKay Creek at a point downstream from Walker-Brown diversion dam.

CONCLUSIONS

Prior to 1966, for a period of more than five consecutive years, the only water appropriated for irrigation of the subject lands lying west of the channel of McKay Creek was appropriated under the provisions of the right established by the Circuit Court decree in the matter of the Determination of the Relative Rights to the Use of the Waters of Umatilla River and its Tributaries, in the name of Jas. R. Brown and evidenced by the certificate recorded at page 2496, Volume 3, State Record of Water Right Certificates.

Prior to 1966, for a period of more than five consecutive years, water was not appropriated for irrigation of the subject lands lying west of the channel of McKay Creek, under the provisions of the water right in question. Therefore, that part of the water right in question appurtenant to the lands lying west of the channel of McKay Creek, being 8 acres within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 1 South, Range 32 East, W.M., should be canceled.

A period of five or more consecutive years of nonuse of that part of the water right in question appurtenant to the subject lands lying east of the channel of McKay Creek has not been shown. The burden of proof rests upon the proponents of cancelation and that burden has not been met in regard to the said lands lying east of the channel of McKay Creek, being 1.0 acre within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and 14 acres within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 1 South, Range 32 East, W.M.

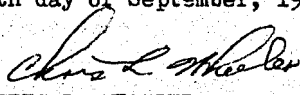
The diversion of water from the authorized source at a point other than that established of record will not serve to effect nonuse of the right in question. However, it is noted that unless a change in point of diversion is accomplished under the provisions of ORS 540.520 to 540.530 no right exists to demand that water be furnished to the appropriator under the right in question at any point except the inlet of the Pecavet-Roork ditch.

ORDER

NOW, THEREFORE, it is hereby ORDERED that the water right for appropriation of not to exceed 0.10 cubic foot per second of water from McKay Creek with a date of priority of December 24, 1913, for irrigation of 8.0 acres within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 1, Township 1 South, Range 32 East, W.M., evidenced by the certificate recorded at page 2736, Volume 4, State Record of Water Right Certificates, be and the same hereby is canceled.

It is **FURTHER ORDERED** that the certificate recorded at page 2736, Volume 4, State Record of Water Right Certificates be canceled and in lieu thereof a new certificate be issued in the name of Carl Wilson in evidence of the remaining right for appropriation of not to exceed 0.19 cubic foot per second of water from McKay Creek with a date of priority of December 24, 1916, for irrigation of 1.0 acre within the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and 14.0 acres within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 1, Township 1 South, Range 32 East, W.M.

Dated at Salem, Oregon, this 19th day of September, 1969.


CHRIS L. WHEELER
State Engineer

Amended sec
SPOR. Vol. 19, P. 85