BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

WASHINGTON COUNTY

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| IN THE MATTER OF THE APPLICATION OF ADRIAN L. & PAULINE E. VANDEHEY FOR APPROVAL OF A CHANGE IN POINT OF DIVERSION OF WATER | STATEMENT, FINDINGS CONCLUSIONS AND ORDER APPROVING TRANSFER NO. 3106 |

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On August 5, 1974, an application was filed in the office of the Water Resources Director by Adrian L. and Pauline E. Vandehey for approval of a change in point of diversion from West Dairy Creek, pursuant to the provisions of ORS 540.510 to 540.530, for the water rights described by the certificates recorded at page 23463, Volume 16, and pages 26477 and 26480, Volume 18, State Record of Water Right Certificates.

Certificate 23463 describes a right to use not to exceed 0.30 cubic foot per second of water from West Dairy Creek for irrigation of 7.0 acres in NW¼ SE¼ and 21.3 acres in SW¼ SE¼ of Section 7, Township 1 North, Range 3 West, W.M., with a date of priority of December 28, 1949.

Certificate 26477 describes a right which includes storage of 22.08 acre feet of water from West Dairy Creek in a reservoir located within the SW¼ SE¼ of Section 7 and N½ NE¼ of Section 18, Township 1 North, Range 3 West, W.M., with a date of priority of December 8, 1954, for irrigation purposes.

Certificate 26480 describes a right to use not to exceed 0.31 cubic foot per second of water from West Dairy Creek and from said stored water for irrigation of 7.2 acres in NE¼ NE¼ and 17.2 acres in NW¼ NE¼ of Section 18, Township 1 North, Range 3 West, W.M.; and to use from said stored water only for supplemental irrigation of 7.0 acres in NW¼ SE¼ and 21.3 acres in SW¼ SE¼ of Section 7, Township 1 North, Range 3 West, W.M., all with a date of priority of March 28, 1955.

The point of diversion of record from West Dairy Creek for said rights is located 10 feet North and 1660 feet West from the East Quarter Corner of Section 13,

being within the SW¼ NE¼ of Section 13, Township 1 North, Range 4 West, W.M. However, the point actually used is located 1160 feet North and 370 feet West from the Center of Section 13, being within the SE¼ NW¼ of said Section 13.

The applicants herein, owners of the lands above described, propose to change the point of diversion, without loss of priority, to a point located 650 feet South and 530 feet West from the Northeast Corner of Section 18, being within the NE¼ NE¼ of Section 18, Township 1 North, Range 3 West, W.M.

Notice of the application, pursuant to ORS 540.520(2), was published in the Hillsboro Argus, a newspaper printed and having general circulation in Washington County, Oregon, for a period of three weeks in the issues of February 24, March 3 and 10, 1977.

Objections against approval of said application were filed by Clarence Van Dyke, Joseph A. Evers, Eugene E. Evers, and Gervase Jansen, in the office of the Water Resources Director on April 22, 1977.

Pursuant to notice, the matter of said transfer application No. 3106 and the objections against it were brought to hearing in Conference Room 409 of the Washington County Administrative Building, in Hillsboro, Oregon, on May 4, 1977, before Mr. James W. Carver, Jr. The applicants were represented by their attorney, Mr. Thomas J. Moore, Attorney at Law, Hillsboro, Oregon. The objectors were represented by their attorney, Mr. J. W. Darr, Attorney at Law, Hillsboro, Oregon.

By agreement of the parties, the hearing on this matter was held concurrently with the hearings on two other matters involving the same issues.

West Fork Dairy Creek is a perennial stream which forms on the East slope of the Coast Range Mountains, approximately 18 miles North and West of Forest Grove, Oregon, and flows generally South for a distance of approximately 15 miles, crossing under the Sunset Highway and under the Wilson River Highway, to where it reaches the location of the authorized point of diversion for the subject water rights, point "B" on Figure 1. There the historic channel of West Fork Dairy Creek continues South for

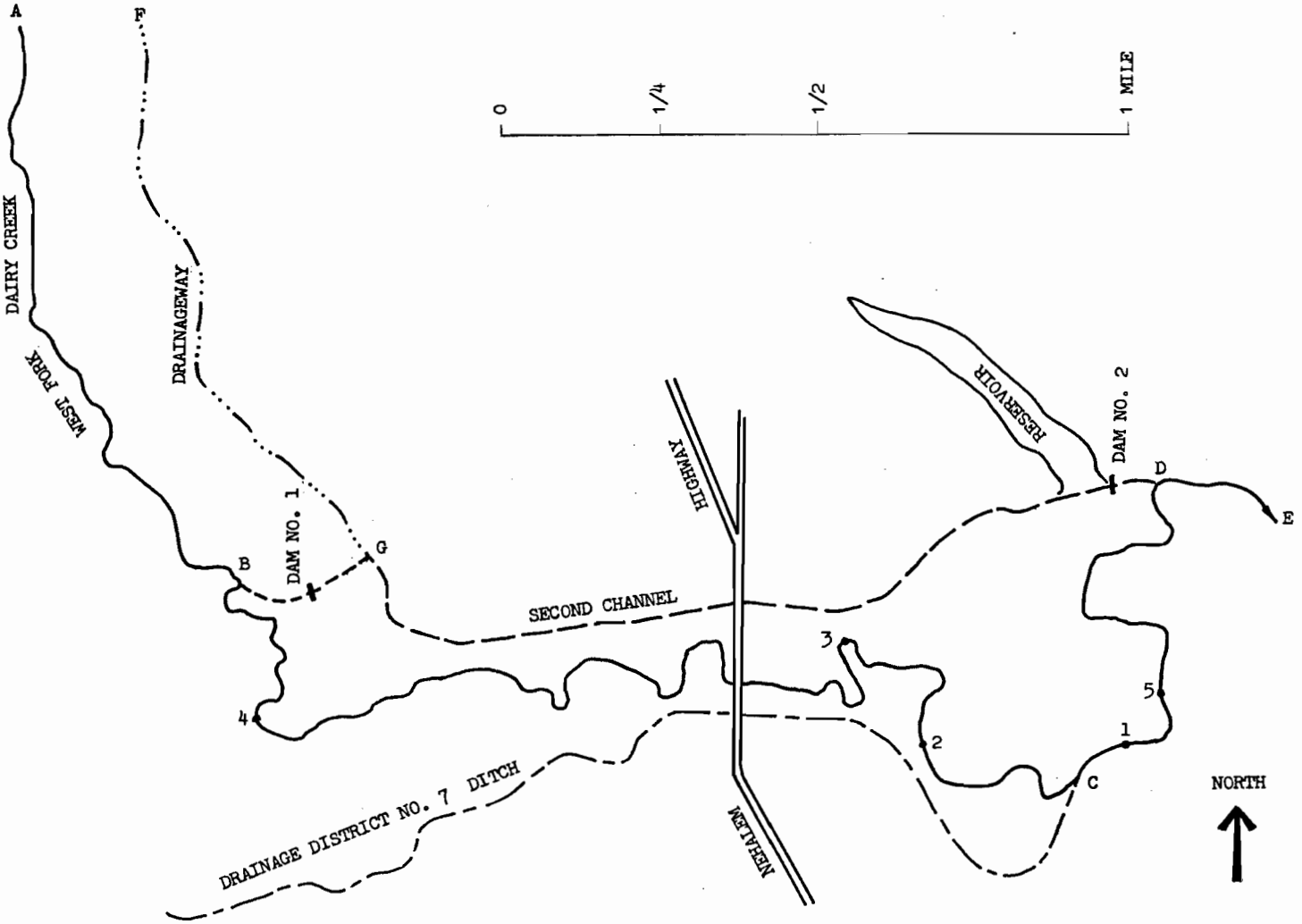
A
F
DAIRY CREEK
WEST FORK
DRAINAGEWAY
0
1/4
1/2
1 MILE
DAM NO. 1
B
G
HIGHWAY
RESERVOIR
DAM NO. 2
D
E
SECOND CHANNEL
3
4
5
2
1
C
NORTH
DRAINAGE DISTRICT NO. 7 DITCH
NEHALEM

Figure 1

a few hundred feet, then turns East, generally following the course B-C-D, crossing under the Nehalem Highway, and continuing easterly from point "D" for approximately another 1½ miles to where it joins the channel of East Fork Dairy Creek. The channel of West Fork Dairy Creek, from point B to where it joins the channel of East Fork Dairy Creek, flows through an essentially flat area with a down-gradient to the East of less than 10 feet per mile.

The protestants and others have certain rights of record to appropriate waters of West Fork Dairy Creek by diversion of water, with various dates of priority, at the points designated "1", "2", "3", "4" and "5" on Figure 1. Diversion point "1" is used by protestant Clarence Van Dyke; diversion point "2" is used by protestants Eugene E. Evers and Joseph A. Evers; and diversion point "5" is used by protestant Gervase Jansen.

From the vicinity of the applicant's authorized point of diversion, point B, a second channel extends easterly from point G running generally parallel to and North of the aforesaid channel of West Fork Dairy Creek and joins the first channel at point D, near the Northwest Corner of Section 19, Township 1 North, Range 3 West, W.M. The dam forming the applicant's storage reservoir, Dam No. 2 on Figure 1, is located within the second channel, less than ¼ mile above point D.

EVIDENTIARY RULINGS

(a) Applicant holds that findings of fact made by the Circuit Court of the State of Oregon for the County of Washington, in Case No. 34-330 are binding on the Water Resources Director in the matter here before him. There is testimony and evidence now before the Water Resources Director that was not before the Court. While the findings of the Court may be persuasive, they are not binding.

(b) Protestants offer, as their exhibit "B", an "agreement between Van Dyke and Evers and Louis Spiering and Adrain Vandehey" for construction of a dam. Applicant objects on the grounds the document is not material to this hearing. Applicant's objection is overruled; and testimony in reference to Protestant's exhibit "B" is

included in the record.

## FINDINGS OF FACT

The land surface area along the second channel, G-D, is at a slightly lower elevation than the land surface area along the channel B-C. Historically, at times of flood flow, water would over-top the banks of channel B-C, traveling overland to the North and then flow easterly through a series of swales and eroded channels toward the general vicinity of point D. One of the witnesses testified that in years past, prior to the reconstruction of the Nehalem Highway, a continuous bridge or trestle extended across the low area traversed by the three channels G-D, B-C, and Drainage District No. 7 ditch, and that at times of high flood flows, the entire said low area traversed by the Nehalem Highway was covered with water. During the summer of 1950 or 1951, a diesel powered Lima backhoe with a 3/4 yard bucket was brought in and used to construct a continuous, improved channel extending easterly from point G, passing under the Nehalem Highway, and continuing toward point D reaching to, or almost to, the applicant's reservoir.

The applicants testified that as far back as the early 1930's, an eroded flood water channel existed between points B and G; that the conditions of channel B-C-D and B-G-D were such that during periods of high flow, water would follow both channels; but beginning in the spring or early summer of each year, as the flows decreased, water would cease flowing from B to G and the entire summer flow would follow the channel B-C-D.

Testimony was in agreement that in subsequent years, upland owners along the channel of the West Fork Dairy Creek, North of point B, have done substantial work in clearing brush from along the channel and cleaning the channel to maintain or enhance its ability to carry water. Testimony was further in agreement that such channel maintenance work has not been carried out on that stretch of the channel of West Fork Dairy Creek from point B to point C.

The water carrying capacity of channel B-G changed over the years as a result

of erosion due to increased velocities resulting from the improvement of channel G-D, and the works of man, so that it became necessary to control the flow of water between points B and G so the summer flow would continue to follow the course B-C-D.

In 1954, an agreement was entered into between Mike and Rose Yunker, first parties; A. H. Evers, Clarence and Eunice M. Van Dyke, Albert J. and Mary Evers, and William J. and Louise Marie Vanderzanden, as second parties; and Edward and Madeline Vanderzanden, third parties, for construction and maintenance of a dam at the location designated on Figure 1 as "Dam No. 1". The first party to the agreement was the owner of the land where the said dam is located. The second parties to the agreement were to pay the cost of the construction of the dam to be constructed in accord with specifications developed by the Soil Conservation Service, United States Department of Agriculture; and the third party was to pay the costs of a headgate or a water control gate to be installed in the dam. The agreement provided that the headgate or water control gate to be installed in the dam was to be under the control of the watermaster.

Testimony established that a concrete dam with provisions for wood flash boards, was constructed under the terms of the agreement. The dam was constructed to a sufficient height to force the flow of West Fork Dairy Creek, during the irrigation season, down channel B-C-D and the headgate provided in the dam was operated by the watermaster to pass down channel B-G-D only that amount of water necessary to satisfy the entitlements of the applicant's and/or their successors in interest, under their water rights of record. During the non-irrigation season, the flash boards were removed to allow the flood flows of West Fork Dairy Creek to follow the course B-G-D.

Testimony also developed that prior to construction of the said concrete dam, sand bags had been placed in channel B-G to force the flow of West Fork Dairy Creek down channel B-C-D.

Faster moving water, in improved channel sections, has the ability to pick up heavier silt loads which remain in suspension until the water reaches a slower moving

section where the silt settles out of the water and is deposited in the bottom of the channel.

It appears from testimony that water moving down the improved channel of West Fork Dairy Creek above point B would at times carry an appreciable silt load and that upon the water entering channel section B-C, the velocity of the stream was slowed by the brush-filled, winding channel, allowing the silt to settle out of the water, being deposited in the stream channel. Testimony showed that in the upper reaches of channel B-C, a silt accumulation in excess of 18 inches in depth had accumulated in the bottom of the channel. Testimony also established that the concrete dam (Dam No. 1) in channel B-G is no longer of adequate height to force the waters down channel B-C and that in the years 1974, 1975, and 1976, earth fill has been placed in channel B-G near Dam No. 1, to a height of at least 18 inches above the crest of the concrete dam, in order to force water down channel B-C-D.

Testimony indicates that sometime subsequent to the improvement of channel G-D by operation of a backhoe during the early 1950's, a portion of channel B-G, extending upstream from point G toward Dam No. 1, was straightened and improved, as evidenced by a berm of excavated materials along one side of the subject portion of the channel. Who was responsible for the work, or to what extent the channel was improved by such work, was not established by the testimony.

Under present conditions, if all man made obstruction were removed from channel B-G, the major portion of the winter flood flows and all of the summer flow would follow the course B-G-D.

The question before the Water Resources Director in this matter, as posed by ORS 540.530(1), is whether the proposed change in point of diversion of water under the provisions of the applicant's water rights described above, can be effected without injury to other existing water rights.

It is clear from the testimony that channel B-G-D has been, historically, a natural floodwater channel of West Fork Dairy Creek. Present day conditions of the

channel segments, resulting from natural processes, inseparably intertwined with the works of man in farm management practices affecting the stream channels, are such that channel B-G-D has become a year-round channel of West Fork Dairy Creek.

The proposed change in point of diversion from point B to Dam No. 2 can be effected without injury to the rights with points of diversion on channel B-C-D, if the applicant is required to maintain suitable measuring devices to measure the water flowing into the reservoir in the channel G-D and the water flowing out of the reservoir at Dam No. 2, so that distribution of the available flow of West Fork Dairy Creek can be made by the watermaster in accord with the relative entitlements to its use.

The protestants, in their testimony at the hearing, expressed a fear that approval of the applicant's proposed change in point of diversion from point B to Dam No. 2 would, somehow, prevent them from continuing to maintain a dam in channel B-G to force waters of West Fork Dairy Creek, to which they are entitled under the provisions of their water rights, to flow down channel B-C-D to their respective points of diversion.

The decision of the Water Resources Director in this matter will not change the authority or the obligation of the protestants to maintain a dam or other control works in channel B-G, or to carry out such channel maintenance and improvement practices in channel B-C-D so that such control works would no longer be necessary to obtain their desired flow of water down channel B-C-D.

ULTIMATE FINDINGS OF FACT

Present day conditions of the channel segments of West Fork Dairy Creek are such that if the natural flows of West Fork Dairy Creek, other than that portion of such flows necessary to satisfy the needs of water rights with points of diversion on channel B-C-D, in accord with their relative entitlements to water, were allowed to pass down channel B-G-D there would not be a detrimental effect on rights with diversion points on any segment of the aforesaid historic channel of West Fork Dairy Creek.

The proposed change in point of diversion, from point B to Dam No. 2, can be effected without injury to other water rights if the applicant installs and maintains adequate measuring devices immediately above and below his reservoir impoundment on channel G-D so the amount of water diverted from the flows of West Fork Dairy Creek, during the irrigation season, to satisfy the needs of his rights under their relative dates of priority, can be determined accurately at all times.

CONCLUSION

The applicant's proposed change in point of diversion can be effected without injury to other water rights. Therefore, the applicant's water right transfer application No. 3106 should be approved.

NOW, THEREFORE, it hereby is ORDERED that the requested change in point of diversion, as described herein, without loss of priority, is approved.

It is FURTHER ORDERED that the quantity of water diverted at the new point of diversion shall not exceed the quantity of water available at the original point of diversion under the subject rights.

It is FURTHER ORDERED that the following provisions shall be carried out prior to the diverting of water at the new point of diversion as herein confirmed:

> That the applicants shall install and maintain in operable condition, in line flow meters, weirs, or other suitable devices for measuring the flow of water in channel G-D (Figure 1, above) flowing into the applicant's reservoir in said channel, and for measuring the flow of water in said channel G-D flowing out of said reservoir.
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> That the type and plans of the measuring device be approved by the watermaster before the beginning of construction work and that the weir or measuring device be installed under the general supervision of said watermaster.

It is FURTHER ORDERED that the construction work shall be completed and the change in point of diversion of water made on or before October 1, 1980.

It is FURTHER ORDERED that upon proof satisfactory to the Water Resources Director of completion of works and beneficial use of water to the extent intended under the provisions of this order, the certificates of water right recorded at page

23463, Volume 16, and at page 26480, Volume 18, State Record of Water Right Certificates, be canceled; and in lieu thereof new confirming certificates of water right be issued to the applicants herein.

Dated at Salem, Oregon this 13th day of June, 1979.

James E. Sexson
Director

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within sixty days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.