

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

BAKER COUNTY

IN THE MATTER OF THE APPLICATION )  
OF JAMES E. KERNS FOR APPROVAL OF )  
CHANGES IN POINT OF DIVERSION OF )  
WATER FROM ROCK CREEK )  
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ORDER APPROVING  
TRANSFER NO. 3000

On March 9, 1974, an application was filed in the office of the Water Resources Director by James E. Kerns for approval of changes in point of diversion of water from Rock Creek, pursuant to the provisions of ORS 540.510 to 540.530, for certain water rights allowed by decree of the court in the matter of the Determination of the Relative Rights to Use of the Waters of Powder River and its Tributaries, as follows:

Irrigation of a certain 23.2 acres (amended to 40.0 acres) in SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 35, Township 7 South, Range 38 East, W.M., by diversion of water from Rock Creek through the George (McCullough) Ditch, with a priority date of 1879, as described by the certificate issued to C.E. Morris and recorded at page 45020, Volume 37, State Record of Water Right Certificates.

Irrigation of a certain 40.0 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$  and 20.0 acres (north of Willow Creek) in SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 3, Township 8 South, Range 38 East, W.M., by diversion of water from Rock Creek, through the George (McCullough) Ditch, with a priority date of 1874, as described by the certificate issued to Blanche McCullough and recorded at page 4341, Volume 5 of said records.

Irrigation of a certain 38.0 acres in NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 3, Township 8 South, Range 38 East, W.M., by diversion of water from Rock Creek, through the Chambers Ditch, with a priority date of 1904, as also described by the certificate recorded at page 4341, Volume 5.

The point of diversion for the George, or McCullough, Ditch is located

1700 feet North and 224 feet West from the Southeast Corner of Section 33, Township 7 South, Range 38 East, W.M., being within the NE $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 33.

The authorized point of diversion for the Chambers Ditch is located 1542 feet North and 1732 feet West from the Southeast Corner of Section 33, Township 7 South, Range 38 East, W.M., being within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 33.

The applicant herein, owner of the lands above described, proposes to change from the above described points of diversion, without loss of priority, and to divert water for the said rights through the Wilcox Ditch from a point of diversion located 1500 feet North and 1410 feet West from the Southeast Corner of Section 33, Township 7 South, Range 38 East, W.M., being within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 33.

Notice of the application, pursuant to ORS 540.520(2), was published in the Record-Courier, a newspaper printed and having general circulation in Baker County, Oregon, for a period of three weeks in the issues of March 16, 23 and 30, 1978.

On April 27, 1978, a protest against approval of said application was filed in the office of the Water Resources Director by Gerald O. Maxwell, et. al. The protest alleges that the proposed changes in points of diversion would be injurious to existing rights, contrary to ORS 540.530.

Pursuant to the aforesaid published notice, the matter of the application and the protest against it was brought to hearing before Mr. James W. Carver, Jr., in the County Court Room of the Baker County Courthouse in Baker, Oregon, on May 9, 1978.

The applicant, James E. Kerns, appeared without counsel and represented himself in the hearing.

The protestants appeared without legal counsel and, pursuant to an oral agreement among the several protestants, Gerald O. Maxwell acted as spokesman for the protestants.

### DENIAL OF OBJECTION

The applicant owns the entirety of the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 35, Township 7 South, Range 38 East, W.M. The certificate issued in the name of C.E. Morris and recorded at page 45020, Volume 37, State Record of Water Right Certificates, describes a right to use the waters of Rock Creek, with a priority date of 1879, through the George (McCullough) Ditch, for irrigation of, among other lands, 40.0 acres in the said SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 35.

Prior to the hearing, the application listed only 23.2 acres of the said 40.0 acres in the said SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 35, to be involved in the proposed change in point of diversion from the head of the George (McCullough) Ditch to the head of the Wilcox Ditch. During the course of the hearing, the applicant amended his application to include the entire said 40.0 acres. The protestants, through Mr. Maxwell, objected to the amendment of the application. The amendment of the application raises no new issues not already before the Director in this matter; therefore, the objection is denied.

### FINDINGS

Rock Creek, a tributary of the Powder River in Baker County, Oregon, is a perennial stream which forms on the east slope of Elkhorn Ridge and flows easterly for a distance of approximately fifteen miles, to its confluence with the Powder River, near the town of Haines.

The flow of Rock Creek past the authorized and proposed points of diversion is subject to fluctuations from release of off-channel stored water through the Rock Creek hydroelectric power plant, which discharges into the channel of Rock Creek approximately one-eighth of a mile upstream from the head of Wilcox Ditch.

The record location of the head of the Chambers Ditch is between the head of the Wilcox Ditch and the point of discharge from the Rock Creek hydroelectric power plant.

In the vicinity of the said power plant, and downstream for a distance of approximately one-half mile, the channel of Rock Creek lies immediately adjacent to the bottom of a steep hillside which rises 640 feet in the horizontal distance of 1500 feet. The hillside is composed of earth and loose rock and is subject to slides, especially when wet.

The Wilcox Ditch runs along the face of the hillside as it winds its way out of the Rock Creek drainage, to where the ditch turns to the south, toward the Willow Creek drainage.

The Chambers Ditch, which has not been used for at least the last fifteen years, ran parallel to, and above, the Wilcox Ditch along the face of the hillside. Whenever the Chambers Ditch would overtop or otherwise fail for any reason, the resulting slide would cause the Wilcox Ditch to fail, also. To alleviate the problems caused by failures of the Chambers Ditch, the users of the Wilcox Ditch and the Chambers Ditch agreed to discontinue use of the Chambers Ditch and carry the additional water in the Wilcox Ditch for those lands formerly served through the Chambers Ditch. However, the change in point of diversion of water from Rock Creek from the head of the Chambers Ditch to the head of the Wilcox Ditch, made in fact, was not then made a matter of record pursuant to the provisions of ORS 540.510 to 540.530.

By the pending application in question, the applicant proposes to change the points of diversion for all of the Rock Creek water rights appurtenant to his lands to the head of the Wilcox Ditch and, by means of the Wilcox Ditch, convey the waters received under various priorities into a pipeline distribution system.

The protestants testified to the effect that they would not be directly injured by the proposed changes in point of diversion, per se, but that water previously received through the George (McCullough) Ditch on the lower portion of the applicant's property would be delivered to the highest point of his irrigated

lands and would provide opportunity for use of that water on lands to which the water rights are not now appurtenant. Also, the opening of the headworks of the Wilcox Ditch earlier in the year to deliver Rock Creek water under a priority date of 1874, which is an older priority date than now received through the Wilcox Ditch, would provide opportunity to divert water into the Wilcox Ditch in addition to that to which the users on the Wilcox Ditch are entitled by their relative dates of priority.

#### CONCLUSIONS

ORS 540.530(1) provides, in part: "If, after hearing or examination, the Water Resources Director finds that the proposed change can be effected without injury to existing rights, he shall make an order approving the transfer ...".

Speculative violations of the water laws do not constitute an injury of water rights upon which the pending application in question should be denied.

Approval of the proposed change in point of diversion from the head of the George (McCullough) Ditch to the head of the Wilcox Ditch for diversion from Rock Creek of that water to which the applicant is entitled under a priority date of 1879 for irrigation of the certain 40.0 acres in SW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 35, Township 7 South, Range 38 East, W.M., would not result in injury to other water rights.

Approval of the proposed change in point of diversion from the head of the George (McCullough) Ditch to the head of the Wilcox Ditch for diversion from Rock Creek of that water to which the applicant is entitled under a priority date of 1874 for irrigation of the certain 40.0 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$  and 20.0 acres (north of Willow Creek) in SW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 3, Township 8 South, Range 38 East, W.M., would not result in injury to other water rights.

Approval of the proposed change in point of diversion from the head of the Chambers Ditch to the head of the Wilcox Ditch for diversion from Rock Creek of that water to which the applicant is entitled under a priority date

of 1904 for irrigation of a certain 38.0 acres in NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 3, Township 8 South, Range 38 East, W.M., would not result in injury to other water rights.

Mr. V. Kent Searles, Watermaster, has filed a statement to the effect that the proposed changes in point of diversion may be made without injury to existing rights.

No other objections having been filed and it appearing that the proposed changes in point of diversion may be made without injury to existing rights, the application should be approved.

NOW, THEREFORE, it hereby is ORDERED that the requested changes in point of diversion of water from Rock Creek, as described herein, without loss of priority, are 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 old points 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 diversion works shall include an in line flow meter, a weir, or other suitable device for measuring the water to which the applicant is entitled;

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.

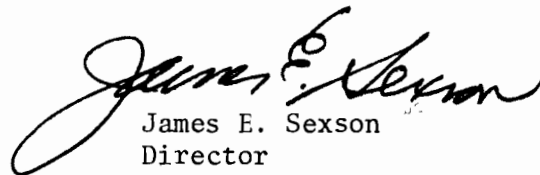
It is FURTHER ORDERED that the construction work shall be completed and the change in point of diversion of water made on or before October 1, 1979.

It is FURTHER ORDERED that the certificate of water right heretofore issued to Blance McCullough and recorded at page 4341, Volume 5, State Record of Water Right Certificates, is canceled; and in lieu thereof a new certificate be issued covering the balance of the right NOT involved in this proceeding; and 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, a confirming certificate of water right shall be issued to the applicant herein.

It is FURTHER ORDERED that the certificate of water right heretofore issued to C.E. Morris and recorded at page 45020, Volume 37, State Record of Water Right Certificates, is canceled; and in lieu thereof a new certificate be issued covering the balance of the right NOT involved in this proceeding; and 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, a confirming certificate of water right shall be issued to the applicant herein.

Dated at Salem, Oregon this 13th day of September, 1978.

  
James E. Sexson  
Director

NOTICE: You are entitled to a 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.