

Washington County

IN THE MATTER OF PERMIT)
 NUMBERS R-950 and 18494)
 IN THE NAME OF HERMAN R.)
 AND HELEN HORNECKER)

O R D E RMODIFYING PERMITS

On July 1, 1948 Herman R. and Helen Hornecker filed in the office of the State Engineer an application for a permit to construct a reservoir in the Southwest quarter, Section 9, Township 1 South, Range 2 West, W.M., Washington County and store therein 1 acre-foot of water from an unnamed stream. On September 20, 1948 Herman R. and Helen Hornecker filed in the office of the State Engineer the secondary application for a permit to appropriate 0.01 second-foot of water from the unnamed stream and reservoir for domestic, stock and 0.38 second-foot of water for irrigation of 30 acres of land in the Southwest quarter Section 9, Township 1 South, Range 2 West, W.M., Washington County.

The applications were subsequently completed and approved by issuance of permits designated in the records of the State Engineer as Permit Numbers R-950 and 18494. The time in which to prosecute the project was set in the permits as follows:

Beginning of construction on or before January 17, 1950
 Completion of construction on or before October 1, 1950
 Completely apply water to use on or before October 1, 1951.

Notices were filed by Herman R. and Helen Hornecker that the construction was commenced on September 12, 1949 and completed on September 27, 1950. The time for complete application of water to the proposed use was extended by the State Engineer to October 1, 1953 and Herman R. and Helen Hornecker filed notice that the water was completely applied on September 29, 1953.

On June 1, 1953 Odlat R. Merrill filed in the office of the State Engineer an application for a permit to appropriate 0.112 second-foot of water from an unnamed stream for the irrigation of 8.93 acres, the point of

diversion and place of use being described as being within Lot 16, Witch Hazel Little Farms in the E $\frac{1}{2}$ of the SW $\frac{1}{4}$, Section 9, Township 1 South, Range 2 West, W.M., Washington County, Oregon.

The application was subsequently completed and approved by issuance of a permit designated in the records of the State Engineer as Permit No. 22406 on August 21, 1953. On September 30, 1953 Mr. Merrill filed notice that the project had been completed and the water completely applied to the proposed use.

On October 26, 1953 Mr. O. R. Merrill filed a protest in the office of the State Engineer against the issuance of certificates confirming the rights under Permit Numbers R-950 and 18494 in the name of Herman R. and Helen Hornecker and requesting cancelation of the permits.

The pertinent matter in the protest is summarized as follows:

1. that the reservoir constructed by protestees is inadequate, does not comply with the requirements of the laws of the State of Oregon or the Rules and Regulations of the State Engineer, and is so faulty in construction that at least one-half of the water attempted to be impounded leaks from said reservoir and is wasted, and the beneficial use of said water is of no benefit to any one;
2. that the waters of Rock Creek are available to the protestees and flow through their lands in more than sufficient quantity to satisfy their needs;
3. that ever since protestees filed their original application as herein described, they have used the waters of Rock Creek exclusively for irrigation, domestic and stock purposes, and during said period of time have failed and neglected to use the waters of said unnamed stream for any of said purposes.

Pursuant to the provisions of ORS 537.420, a registered notice was sent to the owners of the permits for the use of the waters of the unnamed stream setting forth the time and place for the hearing to be held under the provisions of ORS 537.430 and the grounds for cancelation of the permits as set forth in the protest.

On February 18, 1954 beginning at 10:00 a.m. a hearing was held by Chris L. Wheeler, Assistant State Engineer, in the County Courtroom, Court House, Hillsboro, Oregon, at which Herman R. and Helen Hornecker, hereafter referred to as protestees, appeared represented by their legal counsel,

Francis Sturgis of the firm: Hare, Sturgis and Burdett, Hillsboro, Oregon and called the following witnesses: Mr. William Coffield of the Soil Conservation Service Office, Hillsboro, and Thomas Southwell, Tualatin Valley Cooperative. Mr. O. R. Merrill, hereafter referred to as protestant, appeared represented by his legal counsel, John Hall of Portland, Oregon and called the following witnesses: Arleigh Berget, Watermaster District No. 17 and Dave Williams, long time resident of the area.

Following the hearing an examination of the grounds was made by Chris L. Wheeler, Assistant State Engineer, accompanied by Herman R. Hornecker, O. R. Merrill and Dave Williams. A second examination of the grounds was made by Chris L. Wheeler, accompanied by Herman R. Hornecker on June 2, 1954.

This order is based on testimony introduced at the hearing, the terms of the permits, information on file in the office of the State Engineer and reports of Chris L. Wheeler on the field examinations dated February 19 and June 3, 1954.

Record of Water Rights:

The relative rights to the use of the waters of the unnamed stream have never been adjudicated, therefore, the only rights of record are those initiated by application to the State Engineer for permits to appropriate water. The only rights initiated by application to the State Engineer on the unnamed stream are those of the protestant and protestees previously described.

Records of Flow:

There are no records of the water supply of the unnamed stream but Mr. Merrill testified that from July 20, 1953 to August 10, 1953, at his point of diversion, his pump rated at 50 gallons per minute took essentially all of the flow. Mr. Hornecker testified that both during this period and afterwards he measured the flow below his dam through a notch cut in a board 3/4 inch wide and 1/2 inch deep. From the examination of the site it would appear that this was only that water passing over the spillway.

Testimony regarding Mr. Hornecker's reservoir is conflicting, however, from Mr. Wheeler's report it is in poor condition but essentially to the size and estimated capacity of one acre-foot as set out in the permit. As no survey of its size or location was made by this office it is assumed that the location shown on the survey of Vernon H. Rosebraugh, Registered Professional Engineer, dated September 7, 1948 and submitted as the application map is correct.

On June 2, 1954 there was evidence of saturation and considerable seepage through the fill. A dense heavy growth of brush covered the downstream toe, part of the top, banks of the reservoir and extended into the shallower portions of the pond. The slopes and clearing are such that stock could have drunk from the reservoir as claimed by Mr. Hornecker, protestee.

Mr. Hornecker, protestee, testified that no water from the unnamed stream or reservoir had been used for domestic purposes. According to the testimony the first sprinkling from the unnamed stream and reservoir was on about August 11, 1953, the date the first equipment was delivered by the Tualatin Valley Cooperative. According to Mr. Hornecker, protestee, the pump was set up and ran for $3\frac{1}{2}$ hours on a small meadow consisting of some cleared land and some brush. He stated it was not to raise crop but to soak up the ground so it could be cultivated and seeded which was not done. From the examination of the ground it does not appear that the 400 feet of pipe testified to as delivered and used would be sufficient to reach any land except that mostly covered with brush. It is not believed that use of the water as noted above can be considered as beneficial.

O. R. Merrill, protestant, and Dave Williams, witness, testified that the next use of water from the unnamed stream and reservoir was on September 24, 1953, at which time one line of 15 sprinklers was used part of the day on the south edge of the field of rye grass and ladino clover. The equipment was then idle until September 28, 1953, at which time the irrigation of the grass field and adjacent alfalfa field were completed from Rock Creek.

Mr. Hornecker's testimony regarding his use of the water is rather indefinite but after careful consideration it appears that it may be summarized as follows: that the next use of the waters of the unnamed stream and reservoir was late in the season after he had borrowed sufficient pipe to reach the upper fields seeded to ladino clover-rye grass and alfalfa but that he could not state the area of lands irrigated from this source; he further stated that he did not know how many sprinklers had been used, how many sets made, or how long the system had been operated from the unnamed stream and reservoir; that after this use the equipment was idle for a short time after which he moved it to Rock Creek and irrigated the remainder of the upper fields; that this made complete coverage of one application of water to all the land for which he desired a right and it was his impression that this would entitle him to a certificate.

The only testimony regarding the weather at this time was that of Mr. Hornecker, protestee, to the effect that it was raining when he finished the irrigation of the field and filed notice of completion in the office of the State Engineer. From the U. S. Department of Commerce, Weather Bureau Publication Climatological Data For September 1953 Volume LIX No. 9 and October 1953 Volume LIX No. 10, it is noted that 0.18 inch of precipitation was recorded at the Hillsboro station on September 28 and 0.64 inch on September 30. On October 1 and 2, 0.43 inch and 0.01 inch respectively, were recorded indicating that the rainy season had actually commenced.

In determining the extent that the rights have been completed, we are limited to the actual beneficial use of the waters of the unnamed stream and reservoir that has been made and cannot consider any use of the waters of Rock Creek since it was not designated in the permits as a source.

It appears that the fields claimed as irrigated are principally for the production of hay, having been sown to alfalfa and a mixture of rye grass and ladino clover. Considering the climatic conditions, general farm practices and the normal season for the harvesting of hay crops in the area, it

does not appear that any benefit could have been derived or expected from irrigation commencing September 24, nor was any evidence introduced at the hearing to show that any actual benefit was derived from the irrigation.

ORS 537.120 provides " * * * all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise * * ".

A permit issued by the State Engineer for the appropriation of water to beneficial use is an incomplete right and may ripen into a completed or perfected right only upon the actual diversion of the water from its natural course and application of the water so diverted to the useful or beneficial purpose in accordance with the terms of the permit. Sub-section ORS 537.260 provides that the State Engineer may cancel the permit or determine the extent to which the appropriation claimed thereunder has been perfected, and issue the water right certificate accordingly.

It appears after full consideration of the testimony presented, physical evidence on the grounds, the terms of the permits and the way under which they were issued, that the appropriations have been completed for the storage of water during the non-irrigation season and the use of water from the unnamed stream and reservoir for stock water only.

The only indication of the quantity of water appropriated was Mr. Hornecker's testimony that the stream and reservoir were his only supply for 26 head of horses. The average consumption for one horse is about 10 to 12 gallons per day. Assuming a maximum use of 15 gallons per day per horse the total use would be an average of 390 gallons per day. A continuous diversion at the rate of 0.005 cubic foot per second of water will amount to 3,230 gallons per day or approximately 8 times the actual use to be expected. With due consideration for the circumstances it appears the right should be limited to a diversion of not to exceed 0.005 second-foot of water measured at the point of diversion where the stream enters the reservoir for stock water and shall not carry the right to compel the continuance of the flow for the purpose of refilling the reservoir or to offset seepage and evaporation

losses after April 30th of each year. From the evidence presented and examination of the grounds, it appears that in order to continue his use it will be necessary for Mr. Hornecker, protestee, to decrease seepage from the reservoir. A more satisfactory operation would be obtained by piping the water into a stock water trough and may become necessary in the future to improve the quality of water and minimize waste.

NOW THEREFORE IT IS HEREBY ORDERED that a certificate of water right be issued confirming the right under Permit No. R-950 to the storage of not to exceed 1.0 acre-foot of water during the period of December 1st to April 30th of the following year in a reservoir located in the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$, Section 9, Township 1 South, Range 2 West, W.M.

IT IS FURTHER ORDERED that a certificate of water right be issued confirming the right under Permit No. 18494 to the appropriation of not to exceed 0.005 second-foot of water from the unnamed stream and reservoir constructed under Permit No. R-950 for stock water only in the SE $\frac{1}{4}$ of the SW $\frac{1}{4}$, Section 9, Township 1 South, Range 2 West, W.M.

Dated at Salem, Oregon this 5th day of August 1954.


CHAS. E. STRICKLIN
State Engineer