

BEFORE THE STATE ENGINEER OF OREGON

Baker County

IN THE MATTER OF THE APPLICATION)
OF W. R. HAWLEY AND BROOKS HAWLEY)
FOR CHANGE OF POINT OF DIVERSION)
AND PLACE OF USE OF WATERS OF)
POWDER RIVER.)
-----)

ORDER APPROVING
APPLICATION NO. H-41

On July 16, 1946, under and pursuant to Section 116-606,
O. C. L. A., W. R. Hawley and Brooks Hawley filed an application with
the State Engineer for the approval of a change in place of use and point
of diversion of water from Powder River, a tributary of Snake River, Baker
County, Oregon, which application reads as follows:

"The undersigned, W. R. HAWLEY and BROOKS HAWLEY, of Baker
County, Oregon, hereby apply for an order permitting them to change
the point of diversion and place of use of the waters of Powder River,
in Baker County, Oregon, and in support of said application respectfully
show:

1 - That applicant W. R. Hawley is the owner of certain
adjudicated and decreed rights to the use of the waters of Powder
River and its tributaries, in Baker County, Oregon for irrigation,
stock and domestic purposes, which rights are appurtenant to certain
lands in Township 10 South, Range 37 East, W. M., to the extent of the
acreage, carrying the dates of relative priority and heretofore employed
through the ditches and in the irrigation of certain lands subsequently
dredged, all as hereinafter set forth, to-wit:

<u>Description</u>	<u>Sec.</u>	<u>Acres</u>	<u>Priority</u>	<u>Ditch</u>	<u>Area Dredged</u>
NE $\frac{1}{4}$ NE $\frac{1}{4}$	10	40	1886	Duckworth	9.51
NW $\frac{1}{4}$ NE $\frac{1}{4}$	10	25	1886	"	6.81
SW $\frac{1}{4}$ NE $\frac{1}{4}$	11	40	1886	"	17.84
NE $\frac{1}{4}$ NW $\frac{1}{4}$	11	30	1886	"	10.91
NW $\frac{1}{4}$ NW $\frac{1}{4}$	11	37	1886	"	17.16
SE $\frac{1}{4}$ NE $\frac{1}{4}$	11	21.3	1886	")	
SE $\frac{1}{4}$ NE $\frac{1}{4}$	11	10	1892	Tibbs)	24.32
NE $\frac{1}{4}$ SE $\frac{1}{4}$	11	40	1892	Scott	1.77
NW $\frac{1}{4}$ SE $\frac{1}{4}$	11	40	1891	Tibbs	7.50
SW $\frac{1}{4}$ NW $\frac{1}{4}$	12	30	1886	Hawley	5.89
NW $\frac{1}{4}$ SW $\frac{1}{4}$	12	20	1886	Hawley)	
NW $\frac{1}{4}$ SW $\frac{1}{4}$	12	20	1891	Tibbs)	12.27
Total					113.98

2 - That the several tracts of land aggregating 113.98 acres and appearing in the right hand column of the foregoing tabulation have been dredged by the Sumpter Valley Dredging Company, the over-burden or top soil has been removed and said ground has been left in the form of huge piles of gravel with no possibility of future irrigation.

3 - That applicants W. R. Hawley and Brooks Hawley own certain land in Baker County, Oregon susceptible of and which requires artificial irrigation to make the same productive; that said land could and should be beneficially irrigated by the waters theretofore employed by applicants upon lands so subsequently dredged and that the ownership, description and portion of said acreage so requiring such irrigation is as follows, to-wit:

<u>Owner</u>	<u>Description</u>	<u>Sec.</u>	<u>Tp.</u>	<u>R.</u>	<u>Acreage</u>
W. R. Hawley	NE $\frac{1}{4}$ NW $\frac{1}{4}$	11	10 S.	37 E. W. M.	5
W. R. Hawley	NW $\frac{1}{4}$ NE $\frac{1}{4}$	11		do.	10
W. R. Hawley	SW $\frac{1}{4}$ SE $\frac{1}{4}$	2		do.	30
W. R. Hawley	SE $\frac{1}{4}$ SE $\frac{1}{4}$	2		do.	25
W. R. Hawley	NE $\frac{1}{4}$ SE $\frac{1}{4}$	2		do.	7
W. R. Hawley	NW $\frac{1}{4}$ SE $\frac{1}{4}$	2		do.	7
Brooks Hawley	SW $\frac{1}{4}$ NE $\frac{1}{4}$	3		do.	10
Brooks Hawley	SE $\frac{1}{4}$ NE $\frac{1}{4}$	3		do.	10
Brooks Hawley	NE $\frac{1}{4}$ SE $\frac{1}{4}$	3		do.	9.98
Total					113.98

4 - That applicants plan to construct a ditch for the purpose of handling water for the irrigation of the lands last hereinabove described to the extent of 113.98 acres by making a diversion from Powder River in the northwest quarter of the northeast quarter of Section 32, Township 9 South, Range 37 East W. M., and by carrying said ditch in a general southeasterly and easterly direction along the northerly boundary of the several tracts of land last hereinabove described to a point in the northwest quarter of the southeast quarter of Section 2, Township 10 South, Range 37 East W. M.

5 - That because of the dredging of portions of the lands first hereinabove described to the extent indicated in the tabulation covering the same, it is no longer possible to employ the waters appurtenant to such lands in the irrigation thereof and that it will be a benefit and advantage to applicants and will not result in any detriment or damage to anyone whomsoever should applicants be permitted to transfer the said water rights to the extent of 113.98 acres from the said lands so dredged to an equal amount of land as last hereinabove described and to change the point of diversion of said waters from the said Duckworth, Tibbs, Scott and Hawley ditches to the said ditch so to be constructed by applicants.

6 - That attached hereto and made a part of this application is a sketch showing the approximate location of said lands and said proposed ditch, together with the approximate acreage of the lands dredged and that to be irrigated through said new ditch.

WHEREFORE, applicants request permission and authority to construct the said proposed ditch and to divert the waters of Powder River through the same for the irrigation of 113.98 acres of land to the extent and under the priorities hereinabove set forth, all consistent with and not in violation of the said priorities and consistent with and not in violation of the rights of applicants and others in and to the waters of Powder River and its tributaries, as adjudicated."

In the decree of the Circuit Court of Baker County entitled "In the matter of the determination of the relative rights of the Various Claimants to the use of the waters of Powder River, a tributary of Snake River, and its tributaries in Baker and Union Counties, Oregon", rights to the use of water from Powder River were allowed for the irrigation of the lands from which it is proposed to transfer the water. These rights as tabulated in the decree are shown in the following table:

Name	Date of Priority	Name of Ditch	Stream	Description of Lands
Hawley, W. R.	Feb. 16, 1886	Duckworth	Powder	40.0 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$ 25.0 acres in NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 10, T. 10 S., R. 37 E.W.M. 40.0 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$ 30.0 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$ 37.0 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$ 21.3 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 11, T. 10 S., R. 37 E.W.M.
"	1892	Tibbs	Powder	10.0 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$
"	June 8, 1891	Swamp	Powder	40.0 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 11, T. 10 S., R. 37 E.W.M.

Name	Date of Priority	Number of acres	Ditch	Stream	Description of Lands
Mary E. Cole	1892		Scott	Powder	40.0 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 11, T. 10 S., R. 37 E.W.M.
	1886	50	Hawley		30.0 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$
	1891	50	Tibbs		40.0 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$
	1892	50	Swamp		40.0 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 12, T. 10 S., R. 37 E.W.M.

Notice, as provided for by Section 116-606, O. C. L. A., was published in the Baker Democrat-Herald, a daily newspaper of general circulation, printed and published in Baker, Oregon, once a week for three successive weeks, commencing with the issue dated the 30th day of August, 1946, and ending with the issue dated the 13th day of September, 1946, and the dates of publication were August 30, September 6 and 13, 1946.

Section 116-606, O. C. L. A., provides that "any person having objections to the proposed change as set forth in the published notice shall file such objections with the State Engineer at least 10 days previous to the date set for the hearing". The published notice states "All persons interested are notified hereby that a hearing will be held in the County Court House at Baker, Oregon, on October 25, 1946, at 10:00 o'clock A. M. All objections to the proposed change, if any there are, will be heard at said time and place. Any objections should be prepared in writing and mailed to the State Engineer, at least 10 days prior to the date set for hearing, and one copy served on Hallock, Donald & Banta, Attorneys, Baker, Oregon. If no objections are filed, the hearing will not be held."

No objections were filed with the State Engineer to the approval of the application within the time set forth in the published notice and as required by law.

There were received two letters, one signed by M. W. Kline, Secretary of the McEwen Valley Ditch Company dated October 18, 1946, and received in the office of the State Engineer on October 21, 1946, and the other signed by Mrs. Josephine Hudspeth, Baker, Oregon, dated October 19, 1946, and received in the office of the State Engineer on October 23, 1946, objecting to the approval of the application filed by W. R. and Brooks Hawley. Neither of these letters can be considered an objection to the approval of the application, as contemplated in Section 116-606, O. C. L. A., as they were not filed on or before 10 days from the date of hearing, and were not served upon the applicants or their attorneys, as provided in the published notice, nor do they set forth that by making the proposed change in place of use and point of diversion injury would result to existing rights.

On the afternoon of November 15, 1946, the State Engineer made an examination of the grounds from which it is proposed to change the water, of the lands to which it is proposed to transfer the water, and obtained a general idea of the location of the proposed canal, the lands from which it is proposed to transfer the water, and of the land on which the water is to be used.

On the morning of November 15, 1946, a meeting was held in the Court House at Baker, Oregon, at which were present a number of owners of irrigated land in Sumpter Valley, and also the applicants.

It appears that it is the opinion of the owners of land with a right to the use of water from Powder River for irrigation purposes located in and adjacent to the lands from which it is proposed to transfer the water, that the State Engineer in determining where the approval of the application would result in injury to existing rights must take into consideration whether the

water right has been lost by abandonment or failure to use the same for a continuous period of five years.

It is the opinion of the State Engineer that the question as to whether a water right has been lost by abandonment or forfeited for failure to use the water for a continuous period of five years is not within the jurisdiction of the State Engineer in a proceeding of this kind.

That the loss of a water right by abandonment or failure to use the same for the statutory period, as fixed in Section 116-437, O. C. L. A., is one for determination by the courts, and that the approval of the application by the State Engineer cannot be construed as passing upon this. Should the courts find that the water rights appurtenant to the lands from which it is proposed in this application to transfer the water have been lost by abandonment or failure to use the same for the statutory period, the order of the State Engineer approving the change in place of use and point of diversion would be nullified.

At the meeting the applicants, W. R. Hawley and Brooks Hawley, through their attorney, Blaine Hallock, requested that the application be amended by eliminating the 7.5 acres located within the NW $\frac{1}{4}$ SE $\frac{1}{2}$, Section 11, Township 10 South, Range 37 East, W. M., with a date of priority of June 8, 1891, and irrigated through the Swamp Ditch, and to reduce the area in the SE $\frac{1}{4}$ NE $\frac{1}{2}$ of Section 3, Township 10 South, Range 37 East, W. M., which is to be irrigated, from 10 acres to 2.5 acres reducing the area from which it is proposed to transfer the water from 113.98 acres to 106.48 acres.

As stated in the application, the lands from which it is proposed to transfer the water have been dredged, the top soil removed, and the lands are no longer agricultural lands. The lands to which it is proposed to transfer the water are located on a bench, and are adjacent to other lands now irrigated by the applicants.

The proposed point of diversion of the new ditch is from Cracker Creek, which joins with McCully's Fork, a short distance below, forming Powder River proper. The proposed ditch for a distance of about 12,700 feet below the point of diversion will not at any point be more than 1/4 mile from channel of Cracker Creek or Powder River, and in places only a few hundred feet. The canal from the point of diversion for a distance of about 4800 feet below will be constructed through ground that has been dredged and any seepage from the ditch in these sections should return to the stream.

Daily records are available of the flow of water in Cracker Creek and McCully's Fork for the month of June, July, August, and September, 1927, at stations located a short distance above their junction. In the following table the maximum, minimum and average daily flow in second feet for the three months is shown.

CRACKER CREEK

Month	Maximum	Minimum	Mean
June	660	86	236
July	83	16	38.5
August	16	6.3	10.4
September	14	5.8	8.96

MC CULLY'S FORK

June	160	24	72.1
July	21	3.9	9.3
August	4.9	0.8	2.1
September	4.4	1.0	2.43

The area in which the lands involved in this application are located is known as Sumpter Valley and there is a considerable area of irrigated lands located below, which have earlier dates of priority. In the distribution of water under the court's decree it has been necessary in each year to close all headgates in the Sumpter Valley area so as to serve land with earlier dates of priority. From the time it is necessary to close the headgates of ditches with the latest priorities in the Sumpter Valley area to the time that it is necessary to close all of the ditches in this area varies on an average year from 10 to 15 days.

It appears that the proposed change in place of use and point of diversion can be effected without injury to existing rights.

NOW, THEREFORE, it hereby is ORDERED that the proposed change in place of use of water and change in point of diversion be and the same hereby is approved, and the water rights described in the application as appurtenant to 9.51 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 6.81 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 10, Township 10 South, Range 37 East, W. M.; 17.84 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 10.91 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, 17.16 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$, 21.30 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 11, Township 10 South, Range 37 East, W. M., with a date of priority of February 16, 1886, and served through Duckworth Ditch; 3.02 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of said Section 11, served through the Tibbs Ditch, with a date of priority of 1892; 1.77 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 11, served through the Scott Ditch, with a date of priority of 1892; 5.89 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, 12.27 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 12, Township 10 South, Range 37 East, W. M., served through the Hawley Ditch with a date of priority of 1886; be severed therefrom and simultaneously, and without loss of priority, be transferred to 5.0 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, 10.0 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 11, Township 10 South, Range 37 East, W. M., 30.0 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$, 25.0 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$, 7.0 acres in

the NE $\frac{1}{4}$ SE $\frac{1}{4}$, 7.0 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 2, Township 10 South, Range 37 East, W. M., 10.0 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, 2.5 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, 9.98 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 3, Township 10 South, Range 37 East, W. M.; said lands to be served through a ditch to be constructed diverting from Cracker Creek, a tributary of Powder River, at a point within the NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 32, Township 9 South, Range 37 East, W. M.

It is FURTHER ORDERED that construction of the proposed ditch and complete application of the water to beneficial use be made on or before October 1, 1948, or such extension of time as may be granted by the State Engineer for good cause shown.

It is FURTHER ORDERED that upon receipt of proof satisfactory to the State Engineer of the completion of the construction of the proposed ditch and complete application of the water to beneficial use upon the lands to which the water is transferred hereby, a certificate of water right shall be issued in the name of W. R. Hawley and Brooks Hawley, or their successors in interest, to the extent the transferred right has been perfected.

It is FURTHER ORDERED at the time of issuance of the aforesaid certificate, that new certificates of water right shall be issued in lieu of the certificates recorded in State Record of Water Right Certificates, Volume 5, Pages 4207 and 4069 eliminating the lands which are transferred hereby; that these certificates be issued in the original names and the cost of the recording of the three certificates be paid by W. R. Hawley and Brooks Hawley, or their successors in interest.

Dated at Salem, Oregon, this 14th day of December, 1946.


CHAS. E. STRICKLIN
State Engineer

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Noted on Certs. 4069 + 4207
Decree Vol. 6 p 372, 375

See Sp. Or. Vol. 10 p 346