

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON
HARNEY COUNTY

IN THE MATTER OF TRANSFER APPLICA-)
TION 4647 IN THE NAME OF WRIGHT WILBER)
FOR APPROVAL OF AN ADDITIONAL POINT)
OF DIVERSION OF WATER FROM MIDDLE)
FORK MALHEUR RIVER)

STATEMENT, FINDINGS
CONCLUSION AND
ORDER

STATEMENT

Transfer Application 4647 in the name of Wright Wilber was filed in the office of the Water Resources Director on November 28, 1980 for approval of an additional point of diversion of water from Middle Fork Malheur River under certain water rights, pursuant to ORS 540.510 to 540.530, for use as an alternate point of diversion.

The subject water rights for which the additional point of diversion is sought are as described as follows:

(a) An appropriation of water from Middle Fork Malheur River under a priority date of 1889, limited to a diversion of not to exceed one and one-half acre-feet per acre during any thirty day period prior to June 1 of each year, and thereafter not to exceed one acre-foot per acre during any thirty days, provided that the total quantity of water diverted during the irrigation season shall not exceed three acre-feet per acre, and that the rate of flow shall not exceed one-twentieth of a cubic foot per second per acre, for irrigation of a certain 40.0 acres in NE 1/4 NE 1/4 and 20.0 acres in SE 1/4 NE 1/4 of Section 25, Township 20 South, Range 35 East, WM, as described by the former certificate issued to Pacific Livestock Company and recorded at page 6989, Volume 7, State Record of Water Right Certificates, and the administrative order recorded at page 136, Volume 33, Special Order Record of the Water Resources Director.

(b) An appropriation of not to exceed 2.70 cubic feet per second of water from Middle Fork Malheur River under a priority date of June 17, 1912, for irrigation of a certain 14.8 acres in SW 1/4 NE 1/4, 19.0 acres in SE 1/4 NE 1/4, 14.4 acres in NE 1/4 SE 1/4, and 0.5 acre in SE 1/4 SE 1/4 of Section 25, Township 20 South, Range 35 East, WM; 26.0 acres in SW 1/4 NW 1/4, 1.2 acres in SE 1/4 NW 1/4, 28.8 acres in NE 1/4 SW 1/4, 40.0 acres in NW 1/4 SW 1/4, 32.0 acres in SW 1/4 SW 1/4, and 29.6 acres in SE 1/4 SW 1/4 of Section 30; 8.0 acres in NE 1/4 NW 1/4 and 1.3 acres in NW 1/4 NW 1/4 of Section 31, Township 20 South, Rang 36 East, WM, being a portion of the right described by the certificate issued to Drewsey Reclamation Company and recorded at page 49862, Volume 43, State Record of Water Right Certificates.

Water for the aforesaid rights is diverted from Middle Fork Malheur River by means of the Drewsey Reclamation Company Ditch with its point of diversion located 220 feet South and 1,484 feet East from the West Quarter Corner of Section 11, being within the NE 1/4 SW 1/4 of Section 11, Township 20 South, Range 34 East, WM.

The applicant herein proposes to maintain the said point of diversion and, without loss of priority, to also divert water from Middle Fork Malheur River by means of a pump at an additional, alternate point described by the application as being located 200 feet North and 200 feet East from the Center of Section 25, being within the SW 1/4 NE 1/4 of Section 25, Township 20 South, Range 35 East, WM.

*49682
Dorothy P.
3/23/2010*

It is noted that the map received from the applicant in support of Transfer Application 4647 shows the location of the proposed alternate point of diversion as being located approximately 660 feet North and 890 feet East from the Center of said Section 25.

Notice of the change proposed by Transfer Application 4647 was published, pursuant to ORS 540.520(2), in the Burns Times-Herald, a newspaper printed and having general circulation in Harney County, Oregon, for a period of three weeks in the issues of December 10, 17 and 24, 1980.

On January 26, 1981, a protest in the name of Rotha Williams French, against approval of Transfer Application 4647, was filed in the office of the Water Resources Director. In the protest it is alleged that use of the proposed additional point of diversion by the applicant would injuriously affect the existing water rights of the protestant and others.

Pursuant to amended Notice of Hearing dated October 16, 1981, the matter of pending Transfer Application 4647 and the protest against it was brought to hearing at Burns, Oregon on December 16, 1981 before James W. Carver, Jr., an employee of the Water Resources Department, authorized to preside in behalf of the Director.

The applicant was represented by Donald W. McEwen, Attorney at Law, Portland, Oregon.

The protestant was represented by H. Clifford Looney, Attorney at Law, Vale, Oregon.

The relative locations of the point of diversion for the Drewsey Reclamation Company Ditch, the applicant's proposed additional point of diversion and the protestant's point of diversion are shown on Figure 1, herein.

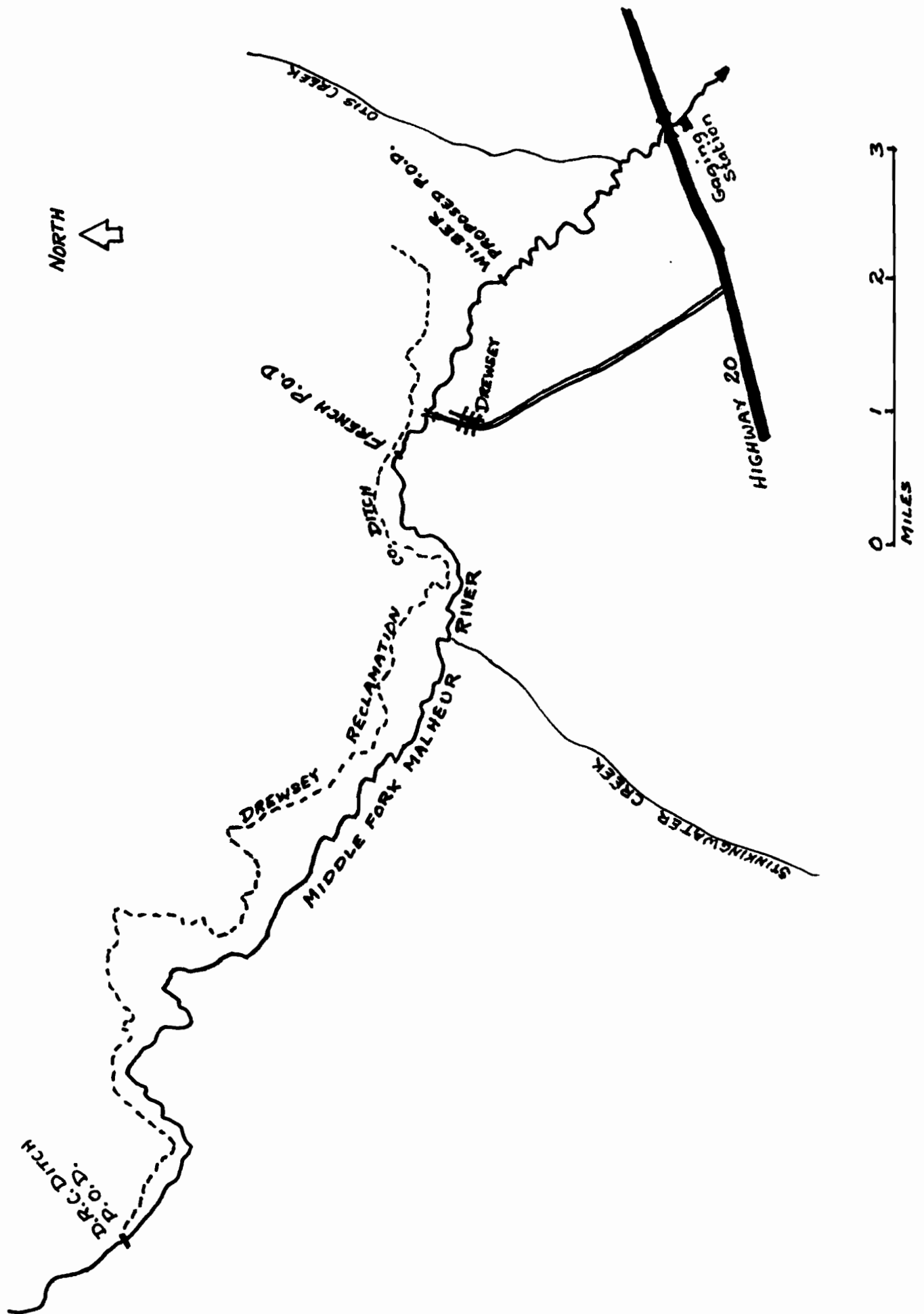
From sometime prior to 1933, until 1948 the applicant's water rights as described herein and the protestant's water right as cited in her protest, shared a common point of diversion from Middle Fork Malheur River, being the head of the Drewsey Reclamation Company Ditch, as shown on Figure 1. In 1948 protestant's predecessor, acting under the provisions of ORS 540.510 to 540.530, changed to the location of the protestant's present point of diversion as also shown on Figure 1.

EVIDENTIARY RULINGS

Protestant offers as her Exhibits A, B, C, E, and F, the following:

- Exhibit A: Report of H. G. Kennard, Watermaster, District 1.
- Exhibit B: Administrative Order of the State Water Board dated November 22, 1921.
- Exhibit C: Administrative Order of the State Engineer dated May 18, 1926.
- Exhibit E: Agreements for enlargement and extension of the Drewsey Reclamation Company Ditch.
- Exhibit F: Copies of minutes of meetings of the Drewsey Reclamation Company Board of Directors and stockholders on the dates of May 24, 1948, March 15, 1956, and August 20, 1956.

Applicant objects on the grounds that the offered exhibits are not relevant to the question before the Water Resources Director in this matter.



(Figure 1)

Applicant's objections to Protestant's Exhibits A, B, C, E and F are sustained.

Also, applicant's objections to testimony of witness Tom Howard on Protestant's Exhibits E and F are sustained.

FINDINGS OF FACT

Accretions to the flow of Middle Fork Malheur River occur at several locations along the channel between the head of the Drewsey Reclamation Company Ditch and the applicant's proposed additional point of diversion. During the early portion of the irrigation season, tributary streams contribute substantial inflow to the river. Also, along certain reaches of the channel, waste and return flows from irrigated lands find their way back to the channel as uncontrolled subsurface flows. Between the protestant's present point of diversion and the applicant's proposed additional point of diversion, return flows from a total of 350 to 400 acres of irrigated lands find their way back to the channel of the river. All such accretions to the river lose their identity and become a part of the natural flow subject to appropriation. (See Jones v. Warm Springs Irrigation Dist., 162 Or 186.)

Protestant argues, and correctly so, that a water right cannot be enlarged through a change in point of diversion from the source stream. (See ORS 540.510 to 540.530 and Broughton v. Stricklin, 146 Or 259.)

Applicant states in his application: "No water is removed from the Middle Fork of the Malheur River downstream from the proposed new point of diversion, as there are no lands subject to irrigation from the Middle Fork between my ranch and the Warm Springs Reservoir." Applicant misunderstands the situation. There are a substantial number of existing water rights for use of the waters of the Malheur River system at downstream locations below the Warm Springs Reservoir, which rights have a demand on the natural flow of the river, including flows occurring above Warm Springs Reservoir.

Both the applicant and the protestant, under their respective water rights as cited or described herein, have a demand against only those waters available as natural flow of Middle Fork Malheur River at the point of diversion into the head of the Drewsey Reclamation Company Ditch. Neither party has any demand under their aforesaid water rights to accretions to flow of Middle Fork Malheur River below the Drewsey Reclamation Company Ditch point of diversion.

Approval of pending Transfer Application 4647, with the provision that the applicant is limited to obtaining the water to which he is entitled under the subject rights from either the present point of diversion or from the proposed additional point of diversion, but not from both at the same time, would leave the applicant and the protestant in the same relative position as when they were sharing a common point of diversion at the head of the Drewsey Reclamation Company Ditch.

The testimony and evidence fails to show that approval of the pending application would result in injury to the existing water rights of the protestant or any other party.

ULTIMATE FINDING OF FACT

Diversion of water to which the applicant is entitled under the subject water rights, by means of the proposed alternate point of diversion as described in pending Transfer Application 4647, at times he does not use the present point of diversion at the head of the Drewsey Reclamation Company Ditch, can be effected without injury to other existing water rights.

ORDER

NOW, THEREFORE, it is ORDERED that the requested alternate, additional point of diversion from Middle Fork Malheur River, as described herein pursuant to the supporting map filed by the applicant, without loss of priority, is approved.

It is FURTHER ORDERED that the applicant shall divert the water to which he is entitled under the subject water rights at either the point of diversion for the Drewsey Reclamation Company Ditch or at the herein approved alternate point of diversion, but not at both at the same time.

It is FURTHER ORDERED that the amount of water diverted from Middle Fork Malheur River at the herein authorized alternate point of diversion shall not exceed the quantity available for the subject water rights at the Drewsey Reclamation Company Ditch point of diversion from Middle Fork Malheur River.

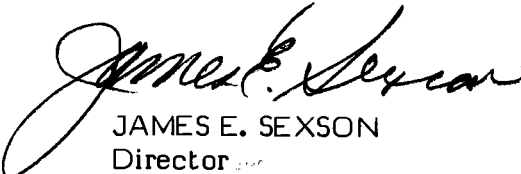
It is FURTHER ORDERED that diversion of water from Middle Fork Malheur River at the herein authorized alternate point of diversion shall be subject to the installation, operation and maintenance of an in line flow meter or other suitable measuring device for measuring the water to which the applicant is entitled; and

That the type and plans of the measuring device be approved by the Watermaster before the beginning of installation, and that the measuring device be installed under the general supervision of said Watermaster.

It is FURTHER ORDERED that the alternate additional point of diversion herein authorized be completed on or before October 1, 1983.

It is FURTHER ORDERED that upon proof satisfactory to the Water Resources Director of completion of the alternate additional point of diversion as authorized herein, the certificate issued to Drewsey Reclamation Company and recorded at page 49682, Volume 43, State Record of Water Right Certificates, and the certificate issued to Wright and Kathleen Wilber and recorded at page 50450, Volume 44, State Record of Water Right Certificates, to supersede in part the prior certificate recorded at page 6989, Volume 7, of said record, be canceled and in lieu thereof new certificates be issued to confirm the change herein authorized.

Dated at Salem, Oregon this 12th day of March, 1982.


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 183.482.
9847A