

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

KLAMATH COUNTY

IN THE MATTER OF TRANSFER APPLICA-)	
TION 4431 IN THE NAMES OF ANDREW AND)	FINDINGS OF FACT
DOROTHY POPSON FOR APPROVAL OF A)	CONCLUSIONS AND
CHANGE IN POINT OF DIVERSION OF WATER)	ORDER APPROVING
FROM ANNA CREEK)	

Water Right Transfer Application 4431 in the names of Andrew and Dorothy Popson was filed in the office of the Water Resources Director on March 19, 1980 for approval of a change in point of diversion of water appropriated from Anna Creek under the provisions of certain rights allowed by decree of the court in the matter of the Determination of the Relative Rights of the Various Claimants to Use the Waters of Anna Creek and Its Tributaries.

The certificate recorded at page 1088, Volume 2, State Record of Water Right Certificates, describes a right allowed in the name of Robert Conner, which includes the use of water from Anna Creek under a priority date of 1883, for domestic and stock use and irrigation of a certain 36.0 acres in NE 1/4 NE 1/4, 18.2 acres in SE 1/4 NE 1/4, 40.0 acres in NE 1/4 SW 1/4, 40.0 acres in SE 1/4 SW 1/4, 3.3 acres in NE 1/4 SE 1/4, 40.0 acres in NW 1/4 SE 1/4 and 40.0 acres in SW 1/4 SE 1/4 of Section 12; 40.0 acres in NW 1/4 NE 1/4 and 40.0 acres in NE 1/4 NW 1/4 of Section 13, Township 33 South, Range 6 East, WM.

The certificate recorded at page 1098, said Volume 2, describes a right allowed in the name of George A. Lisk, which includes the use of water from Anna Creek under a priority date of 1883, for domestic and stock use and irrigation of a certain 12.0 acres in SE 1/4 SE 1/4 of Section 1, Township 33 South, Range 6 East, WM; 18.7 acres in NW 1/4 SW 1/4 and 3.3 acres in SW 1/4 SW 1/4 of Section 6, Township 33 South, Range 7 1/2 East, WM.

The authorized point of diversion of record for the aforesaid rights is located 1,850 feet North and 1,650 feet East from the Southwest Corner of Section 31, Township 32 South, Range 7 1/2 East, WM, being within the NE 1/4 SW 1/4 of said Section 31, where the Shattuck Ditch diverts waters of Anna Creek.

Pending Transfer Application 4431 proposes to change the point of diversion therefrom to divert water through the Scott Ditch at a point located 3,650 feet North and 460 feet East from the Southwest Corner of Section 31, Township 32 South, Range 7 1/2 East, WM, being within the SW 1/4 NW 1/4 of said Section 31, without loss of priority.

Notice of Application 4431 describing the proposed change in point of diversion of water from Anna Creek was published pursuant to ORS 540.520(2) in the May 1, 8 and 15, 1980 issues of the Herald and News newspaper in Klamath County, Oregon.

On June 16, 1980, a protest in the name of Elmore Nicholson against approval of the pending application was filed in the office of the Water Resources Director by and through Neal G. Buchanan, Attorney at Law, Klamath Falls, Oregon. In the protest it is alleged that the proposed change in point of diversion of water would result in injury to the water rights of the protestant and others.

The aforesaid protest was accompanied by request by certain other persons to join in the protest as affected persons to the proceedings.

Pursuant to agreement of counsel and notice by the Director, the matter of the pending application and the protest against it was brought to hearing before James W. Carver, Jr., an employee of the Water Resources Department, authorized to preside in behalf of the Director, at Klamath Falls, Oregon, on September 3, 1981.

The applicants were represented by John Svoboda of the firm of Lively, Wiswall, Svoboda, Thorp and Dennett, Attorneys at Law, Springfield, Oregon. The protestants were represented by Neal G. Buchanan, Attorney at Law, Klamath Falls, Oregon.

Figure 1 herein, a photoreduction of Exhibit WRD #4A to approximately one-half original size, shows the relative locations of the channel of Anna Creek, Shattuck Ditch, Scott Ditch, the applicants' lands for which the change in point of diversion is sought, and certain other features.

EVIDENTIARY RULING

Protestants offer as their Exhibit "E" a letter dated June 10, 1980, which bears a signature, "Carl F. Wilson".

Applicant objects on the following grounds: "It is hearsay. It is an unauthenticated letter. The letter itself contains so many ambiguities the right of cross examination is critical. For those reasons, I object."

The said letter refers to a ditch as "this irrigation ditch starts at the Northeast corner of our property"; however, the ditch is not identified by name or by location with reference to the U.S. Public Land Survey or to a property description of record. The letter is not "evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs" as required by OAR 137-03-050(1).

Applicants' objection is sustained.

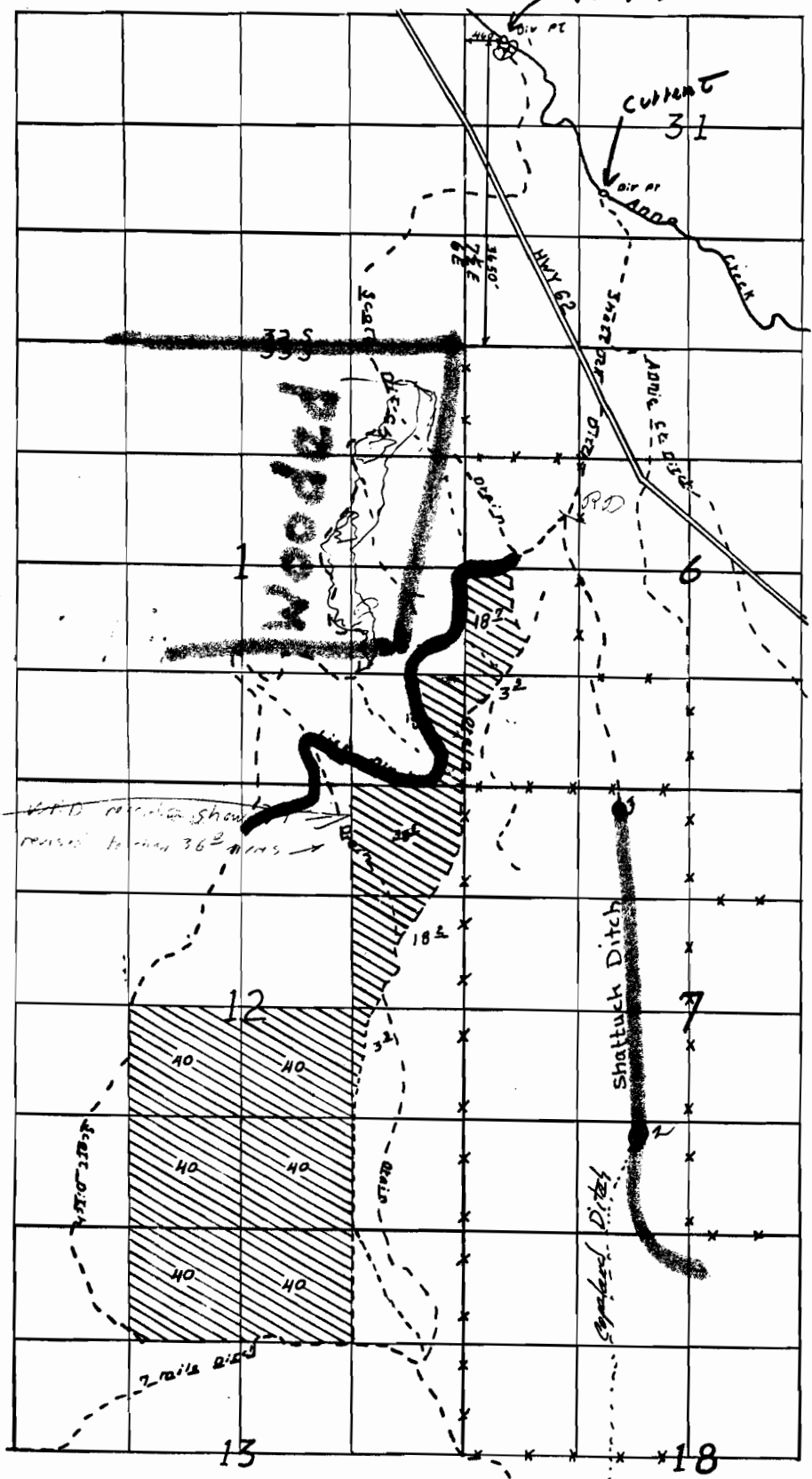
FINDINGS OF FACT

Under the provisions of the water rights described herein above for irrigation of a total of 331.5 acres of land, the applicants are entitled to appropriate from Anna Creek under a priority date of 1883, not to exceed 4.14 cubic feet per second of water within the period of April 1 to July 20 of each year, and thereafter to the close of the irrigation season, not to exceed 2.07 cubic feet per second of water, and not to exceed a total appropriation of three acre-feet per acre irrigated within the irrigation season of each year, measured at the point of diversion.

Until the 1981 irrigation season, water for irrigation of the applicants' lands for which the change in point of diversion is sought by Application 4431, has been diverted from Anna Creek by and through the Scott Ditch since sometime prior to the year 1962.

Prior to the irrigation season of 1980, the applicants were advised by the Watermaster that if they were to continue appropriation of water from Anna Creek for irrigation of the subject lands in subsequent years, they would have to apply for and obtain approval of a change in point of diversion from the Shattuck Ditch to the Scott Ditch, or divert their water by and through the Shattuck Ditch.

FROM INFORMATION FURNISHED BY THE APPLICANT *Proposed*



Sec 1 & 6 is case # 1098
Sec 12 & 13 is case # 1088

TRANSFER MAP

(Figure 1)

WRD # 4-A

During the year of 1981, while the protested Application 4431 was pending before the Water Resources Director, applicants constructed a connecting ditch (shown in pink on Figure 1) from a point of redirection from the Shattuck Ditch within the SW 1/4 NW 1/4 of Section 6 to a point within the NW 1/4 NE 1/4 of Section 12, where it joins with the Scott Ditch. Beginning on July 3, 1981, applicants irrigated the subject lands with water diverted from Anna Creek by and through the Shattuck Ditch, running the water down the Shattuck Ditch to the aforesaid point of redirection, and then down the connecting ditch to the subject lands.

A significant portion of the water run through the connecting ditch was lost by percolation through the sides and bottom of the ditch because the ditch is constructed to a shallow gradient due to the topography of the area, and because the soils through which the ditch is constructed are pumice soils being very permeable by nature.

Applicants testified that due to the high percolation losses in the connecting ditch, it is more advantageous to them to divert their water for the subject lands by and through the Scott Ditch as compared to the Shattuck Ditch-connecting ditch means used during the 1981 season.

Robert S. Blanton, owner of Soils Testing Lab in Medford, Oregon, and a licensed consulting civil engineer with considerable experience in the construction and operation of irrigation canals and ditches, was called as an expert witness for protestants. Mr. Blanton testified that it was his opinion based on his observations of the Shattuck Ditch, without having made specific tests, losses of water being transported down the Shattuck Ditch from Anna Creek to the applicants' point of redirection within the SW 1/4 NW 1/4 of Section 6 would amount to no more than 1% of the water diverted into the ditch from Anna Creek.

Mr. Blanton also testified that from his observations of the Scott Ditch, without specific tests having been made, for any given length of ditch the losses from water flowing in Scott Ditch would be greater than the losses from the same water flowing in Shattuck Ditch, due to greater permeability of the soils through which the Scott Ditch courses.

Mr. Blanton further testified that he had not observed the aforesaid connecting ditch and had no personal knowledge regarding probable losses of water flowing through that ditch.

No testimony was adduced to show that protestants would receive any less water from the flow of Anna Creek at their respective points of diversion, under their relative entitlements to water, if the applicants were to divert their water under their relative entitlements for irrigation of the subject lands by and through the Scott Ditch as compared to diverting the said water by and through the Shattuck Ditch.

Protestants' testimony was that except for ditch losses, whether the applicants' water was taken through the Shattuck Ditch or through the Scott Ditch should not make any difference if the amount diverted is properly measured from the stream.

The Watermaster, Delbert Sparks, has reported to the Water Resources Director that there are no intervening diversions of water from Anna Creek between the Shattuck Ditch diversion and the Scott Ditch diversion; and that in his opinion the proposed change in point of diversion can be made without injury to other water rights, providing the applicants are required to install a suitable measuring device in the diversion works of the Scott Ditch prior to their resuming use of the Scott Ditch for irrigation of the subject lands.

Mr. Blanton testified that the removal of the applicants' water from Shattuck Ditch as proposed by Application 4431 would have little or no effect on the total transportation losses from evaporation, seepage and percolation losses within that portion of the Shattuck Ditch between the diversion point on Anna Creek and the applicants' point of rediversion in the SW 1/4 NW 1/4 of Section 6. We agree.

Protestants contend that if the applicants are allowed to discontinue use of the Shattuck Ditch for irrigation of certain lands as proposed by Application 4431, whereby that water is no longer contributing its proportionate share to the losses which occur in the aforesaid portion of Shattuck Ditch, protestants will suffer greater proportionate shares of the total losses.

In theory, this is true. However, the applicants' proportionate share of said losses, being no more than 1% of the water they seek to transfer from the Shattuck Ditch to the Scott Ditch, is far less than the margin of error for any acceptable method of measurement of the waters diverted from Anna Creek into Shattuck Ditch under the rights that would remain in Shattuck Ditch.

OPINION

Testimony was clear that for a period of at least 18 successive years waters diverted from Anna Creek for irrigation of the applicants' lands for which the proposed change in point of diversion is sought was diverted through the Scott Ditch instead of being diverted through the Shattuck Ditch which is the authorized means of diversion of record.

Protestants question the validity of the subject water rights, suggesting that the subject rights may have been abandoned as provided by ORS 540.610.

The evidence adduced does not establish any five successive year period of nonuse of water from Anna Creek for irrigation of any of the subject lands.

Restating protestants' question in other words, "If the appropriator has not complied with the provisions of ORS 540.510 to 540.530 for changing the point of diversion for the appropriation, does the diversion of water from the source at some point other than the original, established point of diversion constitute a failure to "use the water appropriated" within the meaning of ORS 540.610(1)?"

The Supreme Court of Oregon in Huff v. Bretz, 285 Or 507, discussed ORS 540.510 to 540.530 in regard to performance under the terms of a lease and made the following statement:

"Although ORS 540.510 et seq. do not expressly prohibit the changing of one's point of diversion without making application to the Water Resources Director, we believe that it is clearly implied from these provisions that a person shall not change his point of diversion unless he files such an application and complies with the procedures set forth in ORS 540.520 and 540.530. These procedures are "for the protection of the public" (more specifically, for the protection of the interests of those who own affected or potentially affected water rights) against the evil of unrestrained changes in the point of diversion of water. This legislative purpose would be frustrated if a party could be required under the terms of an agreement to pump from an unauthorized point of diversion-thereby changing the point of diversion without complying with the procedures mandated by ORS 540.510 et seq.-and be held in breach of that agreement if he did not do so."

However, the Court did not answer the question before the Director in this matter.

There is agreement among the parties, as evidenced by the protestants' pending application for approval of the change in point of diversion, that the actions of the protestants and their predecessors in terminating the use of the original, established point of diversion, through the Shattuck Ditch, sometime prior to 1962, and thereafter using the so-called new point of diversion through the Scott Ditch down through the years since, did not serve to overcome the necessity to comply with the provisions of ORS 540.510 to 540.530.

The Water Code of 1909 provided (codified as Lord's Oregon Laws, Section 6668):

"All water used in this State for irrigation purposes shall remain appurtenant to the land upon which it is used; provided, that if for any reason it should at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the water is appurtenant, said right may be severed from said land, and simultaneously transferred, and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights, on the approval of an application of the owner to the Board of Control."

The said section remained substantially unchanged until amended by the Legislative Assembly of 1927, to provide (codified as Olson's Compilation of Oregon Laws, Section 5764):

"All water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of this act; provided that the owner of any water right may, upon compliance with the provisions of this act, change the use and place of use, the point of diversion or the use theretofore made of the water in all cases without losing priority of the right theretofore established. Whenever the owner of a water right for irrigation, domestic use, manufacturing purposes, or other use, for any reason desires to change the place of use, the point of diversion, or the use theretofore made of the water, an application to make such change as may be shall be filed with the state engineer ...".

Section 5764 also provided for publication of a notice of the application for approval of proposed changes, for three consecutive weeks in a newspaper printed and having general circulation in the county where the water right was located, and for a hearing on the matter, to consider the matter of injury to other water rights.

From 1909 to 1927 there was no administrative procedure for making a change in point of diversion from one point to another along the stream a matter of record, or allowing for an administrative determination as to whether a proposed change in point of diversion could be made without injury to other water rights. The point of diversion was subject to being changed, however, as stated by the Court in *Whited v. Cavin*, 55 Or 98, at page 106.

The Legislative Assembly of 1913 enacted an addition to the Water Code, (Laws of 1913, Chapter 279, page 531) which provided:

"Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state, and whenever hereafter the owner of a perfected and developed water right shall cease or fail to use the water appropriated, for a period of five successive years, the right to use shall thereupon cease, and such failure to use shall be conclusively presumed to be an abandonment of such water right, and thereafter the water which was the subject of use under such water right shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities; ...".

This section has continued substantially unchanged, and is now codified as ORS 540.610(1), which is the basis of this proceedings.

From 1909 to 1913, the provisions of the section of law that is now ORS 540.610(1) could not have been construed to conclude that diversion of water from the channel of Anna Creek at some point other than the original, established point of diversion, for irrigation of the lands described by the water right in question, would constitute a failure to "use the water appropriated". Without subsequent specific legislative action, it does not appear that the provisions of the section of law now codified as ORS 540.610(1) could be construed to be more confining than when enacted.

Further, beginning with the Water Code of 1909, the law has provided for the services of a watermaster to distribute the available waters of a stream among the several users in accord with their relative rights to use the water. From 1913 on, the diversion of water from any point along the stream other than the legally established point of diversion would have been an illegal act subject to control by the watermaster, if brought to his attention as would have been expected if an unlawful point of diversion were being used to the injury of another water user.

It is the opinion of the Water Resources Director that the diversion of water from the channel of Anna Creek at some point other than the original, established point of diversion for the irrigation of the subject lands as described herein above, does not constitute a failure to "use the water appropriated" within the meaning of ORS 540.610(1).

ULTIMATE FINDINGS OF FACT

The proposed change in point of diversion of waters of Anna Creek will not deprive any of the protestants of the waters to which they are entitled at their respective points of diversion from Anna Creek.

No actual injury would be suffered by other users of Shattuck Ditch as a result of the applicants' discontinuance of use of Shattuck Ditch for conveyance of waters pursuant to approval of Transfer Application 4431.

CONCLUSION OF LAW

Water Right Transfer Application 4431 should be approved pursuant to ORS 540.530 with such approval requiring applicants to install a suitable measuring device in the diversion works of Scott Ditch.

ORDER

NOW, THEREFORE, it hereby is ORDERED that the requested change in point of diversion of waters of Anna Creek, 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 old point of diversion under the subject right.

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:

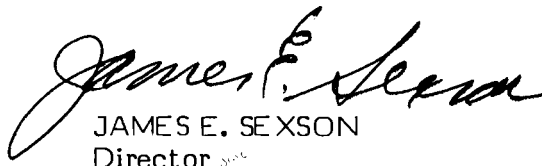
That the diversion works shall include an in line flow meter, a weir, or other suitable device for measuring the water to which the applicant is entitled;

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, 1982.

It is FURTHER ORDERED that the aforesaid certificates of water right recorded at pages 1088 and 1098, Volume 2, State Record of Water Right Certificates, are canceled, and in lieu thereof new certificates be issued covering the balance of the rights 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, confirming certificates shall be issued to the applicants herein.

Dated at Salem, Oregon this 16th day of November, 1981.


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.

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