

BEFORE THE STATE ENGINEER OF OREGON

Baker County

IN THE MATTER OF APPLICATION)
NO. 24940 IN THE NAME OF)
MARY M. BENNETT.)

ORDER
APPROVING APPLICATION

On June 28, 1950 Mary M. Bennett of Medical Spring Route, Baker, Oregon filed an application in the office of the State Engineer for a permit to appropriate one cubic foot per second of water from Powder River and Thief Valley Reservoir, when arrangements can be made for use of stored water, for the irrigation of 27.88 acres of land, described as follows:

0.76 acre in the SW $\frac{1}{4}$ SW $\frac{1}{4}$
Section 26,
20.31 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$
6.81 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$
Section 35,
Township 7 South, Range 41 East, W. M.

This application is designated in the records of the State Engineer as Application No. 24940.

On February 15, 1951 the application was amended by deleting the words "and Thief Valley Reservoir, when arrangements can be made," and adding "and an unnamed tributary" which, it appears, would include seepage and waste water tributary to the unnamed channel from lands irrigated by the applicant above the Emele ditch.

It is proposed to convey the water from Powder River through the Emele ditch for a distance of about two miles to a pumping plant located 634 feet south and 1783 feet east from the quarter corner common to Sections 27 and 34, Township 7 South, Range 41 East, W. M., where the water will be pumped through a pipe line 475 feet in length to a canal which will convey

the water to the lands to be irrigated. It appears that this pumping plant which will be referred to herein as the "upper pumping plant", was constructed to irrigate 14 acres of land with a date of priority of April 6, 1915, which right will be more specifically described herein.

Water from the unnamed stream is to be diverted by means of a canal and pumping plant. The canal is to divert from the unnamed stream at a point 1934 feet north and 2892 feet east of the quarter corner common to Sections 27 and 34, Township 7 South, Range 41 East, W. M. The pumping plant which, it appears, was constructed and operated in 1951, is located 2412 feet east and 1075 feet south of the above described quarter corner. This pumping plant will be referred to herein as the "lower pumping plant".

On July 9, 1951 a protest to the approval of the above described application was filed in the office of the State Engineer. This protest, a copy of which follows, was in the name of the Emele Ditch Company, a voluntary association, and signed by J. J. Colton, an owner of lands irrigated with water conveyed through the Emele ditch.

BEFORE THE STATE ENGINEER OF THE STATE OF OREGON

IN THE MATTER OF APPLICATION OF)
MARY M. BENNETT #24940 TO APPROPRIATE) PROTEST
WATERS.)

COMES NOW, Emele Ditch Company, a voluntary association, employing in the irrigation of the lands of its members the waters of Powder River, including the normal flow and those stored in the Thief Valley Reservoir, and protests and objects to the application of Mary M. Bennett #24940 now pending before the State Engineer of the State of Oregon, wherein and whereby said applicant without legal right or authority undertakes to secure permission to use said waters contrary to law in the following particulars:

- (a) Said proposed use conflicts with existing rights of protestant.
- (b) The so-called waste or seepage waters covered by said application are carried through existing ditches or canals not owned wholly by the applicant.

- (c) The applicant has neither secured nor entered into any agreement authorizing her to use any ditch or canal carrying any such water.
- (d) The proposed use prejudicially affects the public interest.
- (e) Applicant has not shown by a documentary evidence or otherwise that she has an agreement with either the owners of said reservoir or said ditch or canal for any permanent or other interest therein.
- (f) The waters covered by said application have already been appropriated and are not subject to further appropriation.
- (g) Neither protestants nor any other person, firm or corporation has granted to applicant any right to lay or maintain pipes, culverts or other structures through, under or across protestant's ditch or ditches.

WHEREFORE, protestants object to said application and do request a hearing thereon before the State Engineer in time and manner as required by Sections 116-421 and 116-425 O.C.L.A.

Respectfully submitted,

EMELE DITCH COMPANY

By J. J. Colton

HALLOCK, BANTA, SILVEN & HORTON
Attorneys for Protestant

A hearing was held by the State Engineer in the County Courthouse at Baker, Oregon on September 27, 1951 beginning at 10:00 A. M., at which time the applicant, Mary M. Bennett, represented by her legal counsel, Geo. T. Cochran, and the objectors, represented by their legal counsel, Blaine Hallock, appeared and submitted evidence.

At the time of the hearing it was stated that there were no objections to the approval of the application for the appropriation of water of the unnamed stream by means of gravity ditches.

The Emele ditch through which it is proposed to convey water from Powder River diverts on the north side of Powder River at a point 2310 feet

north and 330 feet west from the southeast corner of Section 20, Township 7 South, Range 41 East, W. M. It extends in a general southeasterly direction for several miles, conveying water for the irrigation of about 567 acres of lands, rights for which were allowed in the decree of the Circuit Court of the State of Oregon for Baker County, entered on March 18, 1918 in the Matter of the Determination of the Relative Rights to the Use of the Waters of Powder River and Its Tributaries.

It appears that the Emele Ditch Company is a voluntary association consisting of four land owners with rights to the use of water from Powder River through the Emele ditch. One of the land owners is Mary M. Bennett, the applicant, and another is J. J. Colton who signed the protest. It appears that in operating the Emele ditch, it is understood that there are six shares and that the cost of operating and maintaining the ditch is assessed against the land owners in proportion to the number of shares owned. It also appears that Mary M. Bennett, the applicant, owns one-sixth and J. J. Colton owns one-third interest in the Emele ditch.

The applicant, Mary M. Bennett, owned lands to which there is appurtenant 101.5 acres of water right allowed in the foresaid decree, from Powder River, through the Emele ditch with a date of priority of November 13, 1885.

The State Engineer's maps made at the time of the adjudication proceedings shows all of the 101.5 acres of lands now owned by said Mary M. Bennett, to be located below the Emele ditch.

In addition to the 101.5 acres of land with a water right of a priority of November 13, 1885, the applicant has a right to use 0.18 cubic foot per second of water from Powder River, conveyed through the Emele ditch, for the irrigation of 11.0 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 34 and 3.0 acres

in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 35, Township 7 South, Range 41 East, W. M., with a date of priority of April 6, 1915.

This right was initiated by the filing of an application for a permit by J. S. Miles and W. J. Miles. The application and maps filed therewith show the 11.0 acres to be irrigated within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 34, is in the east half and above the Emele ditch and the 3.0 acres in Section 35, as located in the northeast corner of the SW $\frac{1}{4}$ NW $\frac{1}{4}$ above the Emele ditch.

From testimony introduced at the time of the hearing on September 27, 1951, it appears that the applicant is operating the two pumping plants above described.

In the "upper pumping plant" there are two pumps installed, the combined capacity of which was stated to be from 75 to 100 miners inches of water. The water pumped is taken from the Emele ditch for the irrigation of the 14 acres of land above described, with a date of priority of April 6, 1915 and for the irrigation of the 27.88 acres described in the pending application of which it appears 3.0 acres have a right with a date of priority of April 6, 1915.

The "lower pumping plant" consists of one pump operated with a tractor, with a capacity stated to be about 100 miners inches. It appears that the source of water for this pump is seepage and waste water from the Emele ditch by the "upper pumping plant" and water from the unnamed stream. Water from the unnamed stream and the seepage and waste water is conveyed under the Emele ditch in a pipe to the pump sump. The water from the pump is conveyed in a pipe line which crosses under the Emele ditch.

From the testimony introduced at the hearing it appears that the objection to the approval of the application filed by Mary M. Bennett, with the exception as to the use of water from the unnamed stream by means of gravity ditches, is summarized as follows:

That the applicant does not have any right to the use of water stored in Thief Valley Reservoir. That the applicant owns one-sixth of the carrying capacity of the Emily ditch and does not have any right to use water in excess of the carrying capacity which she owns. That the source of water for operating the "lower pumping plant" would be principally from waste water resulting from the operation of the two pumps at the "upper pumping plant" at maximum capacity which, if done, would result in depriving other land owners with water rights from the Emele ditch of water which they are legally entitled to use beneficially in the irrigation of their lands. That there is no surplus water flowing in Powder River for use during the irrigation season.

It appears that all of the objections as above summarized with the exception of the last can be controlled in the distribution of water from the ditch. The applicant, insofar as the records of the State Engineer show, is entitled to divert water for the irrigation of 14 acres with a date of priority of April 6, 1915 at the rate of 0.18 cubic foot per second or 7.2 miners inches, unless a rotation schedule is arranged. The irrigation of the 14.0 acres is also contingent upon there being water flowing in Powder River in excess of that required to supply existing rights. Further, the approval of the application could not give the applicant any rights to use water to the injury of existing rights or use water from the Emele ditch in excess of her carrying capacity in the ditch. The diversion and use of water from the Emele ditch by the applicant, in excess of her carrying capacity therein is a matter that can and should be controlled in the distribution of water from the ditch.

On June 16, 1952 the State Engineer made an examination of the Emele ditch and measured the water flowing therein. The measurement was made at a place a short distance below the first laterals diverting water for irrigation of applicant's land and the ditch was carrying 17.2 cubic feet per second of water or 688 miners inches. No water was being used for the irrigation of applicant's lands located below the Emele ditch. Water was at that time being released from the Emele ditch at a place about 100 feet below

where the pipe line crosses under the ditch and was being pumped and used for the irrigation of lands located above. The only water available for use at the lower pump was that released from the Emele ditch.

Since objection to the approval of the application involving the use of water of the unnamed stream diverted by gravity ditches has been withdrawn, the question for determination is whether there is surplus water in Powder River available for use.

The Thief Valley Reservoir located on Powder River a few miles above the head of the Emele ditch was constructed by the Bureau of Reclamation to provide supplemental water for the irrigation of 7124 acres of land within the Lower Powder River Irrigation District which includes the 101.5 acres of land now owned by the applicant with an adjudicated right with a date of priority of November 13, 1885.

The only records of the flow of water in Powder River which are of much value in showing whether there is surplus water available for use are the records obtained for the years 1909 to 1924 at a station located above the backwater of the Thief Valley Reservoir. The records during the sixteen years indicated that there would have been some water in excess of that required to fill the Thief Valley Reservoir and irrigate the lands with prior rights during the earlier part of the irrigation season.

At the hearing Mr. Randall Black, who operated the Thief Valley Reservoir in 1950 and 1951, stated that stored water was first released on July 8, 1950 and on June 25, 1951. In operating the reservoir, storage water is not released as long as the natural flow is adequate to supply the 7124 acres of land with adjudicated rights. No records are available from which it can be determined as to when the natural flow during the irrigation season of 1950 and 1951 was all required to supply water for the irrigation of lands with adjudicated rights.

It appears from the available records of the flow of water in Powder

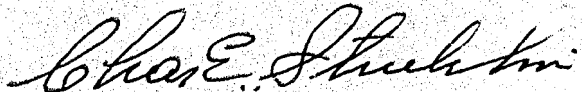
River that with the exception of years in which the runoff is considerably below that of normal as in 1924, there is surplus water available for use during the early part of the irrigation season.

NOW, THEREFORE, it is hereby ORDERED that the application filed by Mary M. Bennett to appropriate the waters of Powder River and an unnamed stream, which application is designated in the records of the State Engineer as application No. 24940, be approved subject to the following limitations and conditions:

That the total quantity of water from all sources shall not exceed one-fortieth of one cubic foot per second for each acre irrigated, measured at the point of diversion from the stream, or its equivalent in case of rotation with other water users.

That the use of water for the irrigation of 3.0 acres within the SW $\frac{1}{4}$, NW $\frac{1}{4}$, Section 35, Township 7 South, Range 41 East, W. M., shall be supplemental to that evidenced by Certificate of Water Right recorded in Volume 3, at page 1898, State Record of Water Right Certificates.

Dated at Salem, Oregon this 20th day of June 1952.


CHAS. E. STRICKLIN
State Engineer