

BEFORE THE OREGON WATER RESOURCES COMMISSION

In the Matter of the Protest against) FINAL ORDER ON
Transfer Application T8286,) CONTESTED CASE HEARING
T.O. Williams & Assoc, Applicant,)
Calvin Neal Blessinger and)
Christine Wallace, Protestants)

BACKGROUND

The applicant filed Transfer Application 8268 seeking an additional point of diversion to his existing surface water rights evidenced by Certificates 5541 and 5532. If approved, the Applicant would be allowed to appropriate water at two existing points of diversion on Pine and Dry Creeks and at one new point of diversion on Pine Creek.

The Department reviewed the application and determined that the proposed additional point of diversion could be made without injury if conditioned on water being available at the original point of diversion.

The protestants asserted that the proposed additional point of diversion would cause injury to their water rights by making insufficient water available for their water rights, and asked that the Department deny the application.

Issue to be determined

To prevail, the protestants had the burden to factually demonstrate by a preponderance of the evidence that the proposed additional point of diversion will result in injury as they have claimed.

The applicant must address the protestants' assertion that the proposed additional point of diversion will injure the protestant's water right by reducing the quantity of water (net loss) previously available to them and to which they are entitled.

Hearing was held on December 13, 1999 before Hearings Judge Weisha Mize. A Proposed Order was issued December 22, 1999. No exceptions having been filed within the 30-day period provided by law, this FINAL ORDER is issued.

Official Notice Taken

Notice is taken of documents in the official records of the Water Resources Department setting out the source and priority dates of those water rights held by the Hudson Bay Improvement Company (HBIC). The HBIC holds water rights from the Little Walla Walla River under priorities of 1903, 1945, 1959 and 1978. Water is diverted from the Little Walla Walla River into Pine Creek and subsequently turned into the Dickerson ditch at the authorized point of diversion for Certificate 5541 held by the Applicant. That water is carried northward in the Dickerson ditch approximately ½ mile and then turned into the most southerly branch of the Dickerson ditch and delivered to HBIC patrons.

FINDINGS OF FACT

1. The two natural sources of water at issue in this proceeding are Pine and Dry creeks in Umatilla County. Pine Creek runs through Section 26 in a northerly direction until it is joined by Dry Creek in the NE 1/4 NW 1/4 of Section 26, at which juncture Pine Creek travels in a northwesterly direction, traversing Applicant's property, running under Troyer Bridge, and making a sharp turn to flow due west. *Map, Ex. A-5*
2. The applicant holds a number of water rights, two of which are involved in this transfer application. Certificate 5541 allows appropriation of water from Pine Creek under a priority of 1861. The authorized point of diversion is at the Dickerson Ditch, which applicant shares for approximately one-half mile with the Hudson Bay Improvement Company. Applicant's water right is senior in priority to those of the Hudson Bay Improvement Company. *File, official notice*
3. Certificate 5532 authorizes Applicant to appropriate water from Pine Creek under a priority of 1861, and from Dry Creek under a priority of 1885. Applicant shares a point of diversion with protestant Blessinger from Dry Creek. Dry Creek Ditch carries the water for both rights to the point at which it intersects Troyer Bridge. At this point the water is split by a weir with each user's share being delivered to their respective properties. *Testimony of Applicant, Blessinger, Johnson*
4. Protestant Blessinger holds water rights from Dry Creek with a priority of 1885, and from Pine Creek with priorities of 1964 and 1976. *Testimony of Blessinger, Johnson*
5. Pine Creek and Dry Creek are both primarily spring season streams. As its name suggests, there is no flow in Dry Creek after mid-June. Pine Creek runs through the summer but loses the majority of its flow, and may dry up completely, by mid-July. Both streams remain dry or nearly dry until around the end of November. Exercise of the water rights on Dry Creek often results in the entire flow of Dry Creek being diverted into the Dry Creek ditch, leaving no flow in Dry Creek itself below the parties' shared point of diversion. *Testimony of Blessinger, Johnson*
6. The applicant has installed measuring devices at the existing points of diversion on Pine and Dry creeks. A meter or other measuring device will be installed at the proposed point of diversion. Use of water at the additional point of diversion will be limited in the amount which may be appropriated by quantity and priority date. No more may be taken at the new additional point of diversion than is available at the existing point of diversion for that priority date. *Testimony of Applicant, Johnson.*
7. Applicant has installed a pump and pipeline system capable of delivering water from other surface and ground water rights Applicant holds, as well as the water rights in question. *Testimony of Applicant*
8. Subject to the prior appropriation doctrine, regulation under that doctrine and natural water conditions in the subject streams, water will be available for the protestant's water rights.

CONCLUSIONS OF LAW

1. OAR 690-15-0005(5) defines injury to an existing water right as a water right not receiving the water to which it is legally entitled, as a result of the proposed transfer.
2. OAR 690-15-0050(1) provides that injury includes a resulting reduction in the quantity of water (net loss) previously available to downstream water rights. Changes in water rights which 'shall' result in injury include those which reduce the quantity of water previously available to another water right and to which the other water right is entitled, and those resulting in a diversion of more water than is specified as a rate of flow or duty of water per acre for the changed water right.
3. Both definitions impliedly, if not expressly, take into consideration the prior appropriation doctrine and regulation of all water rights on that basis. Regulation and the prior appropriation doctrine apply to the water right(s) not being modified as well as the water right which is the subject of the transfer application, and are considered in making a determination of possible injury, as is the natural hydrology of the system involved.
4. The watermaster may, at any time and whenever necessary, regulate the amount of water being diverted at any of the applicant's and protestant's authorized points of diversion based on the priority dates of the rights involved and on the amount of flow available.
5. The amount of water to which a right is entitled is measured at the point of diversion from the natural stream flow, not at the place of use or the turnout from the ditch. Additional water is not authorized or added on for ditch or transmission losses.
6. The appropriator is responsible for diversion and conveyance of water from the natural source to the place of use. A co-user on a private ditch may not be required to maintain a wasteful practice or to avoid making an improvement to an appropriation and delivery system to provide water to other users on the shared system. A transfer may not be denied because it will remove the applicant's authorized of water from a privately-owned ditch, leaving less water in the ditch to assist in the delivery of the remaining ditch users' share through that ditch. ORS 540.420; OAR 690-250-030.
7. Except where petitioned and paid to regulate use from privately-owned, shared ditches, the watermaster's authority to regulate diversions stops at the point of diversion from the natural water course. The watermaster is not required to allow the diversion of water over and above the amount of the water right to make up for ditch leakage or other transmission losses in the private ditch. ORS 540.045; 540.100; 540.210; 540.420.
8. The protestant alleged that because of the size of the district for which he was responsible, the watermaster could not or did not respond to complaints he had made regarding the Applicant's use of water in a timely manner, This, Protestant argued, meant that injury would occur. Workload and staffing limitations do not constitute injury.

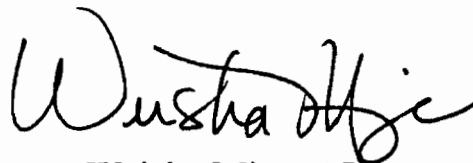
9. Past disputes between the parties over water, or requests by one party for regulation of the other party, neither demonstrate nor constitute injury.
10. The size of a pump being such that it can pump more water than is authorized under the rights which are the subject of this proceeding neither demonstrates nor constitutes injury.
11. Authorizing reciprocal access between the parties to measuring devices on private property is a civil matter outside the authority of the Department.
12. Appropriation of water at the proposed additional point of diversion, as conditioned to require installation of measuring devices and with the limitations on appropriation set out above, will not injure the protestant's water rights.
13. Appropriation of water at the proposed additional point of diversion, as conditioned to require installation of measuring devices and with the limitations on appropriation set out above, will not result in a net reduction of water to which the protestant is entitled.

ORDER

NOW, THEREFORE, it is ORDERED that transfer application T8286 may be APPROVED, authorizing an additional point of diversion 70' S & 270' W from the NE Corner Sec. 27, in the NE¼ NE¼ Sec. 27, Township 6 North, Range 34 East, WM, subject to the following condition and to any other conditions the Director deems necessary and appropriate:

So long as no more water is taken at the additional point of diversion than is available at the existing points of diversion under the subject water rights.

January 26, 2000.


Weisha Mize, ALJ

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals within 60 days from the date of service (date of mailing) of this Order. Judicial review is pursuant to the provisions of ORS 536.075.