

5. Beginning in 1994, the parties have developed a history of disputes and difficulties centering around the location of a pump and pipeline, culminating in Dority filing a quiet title action against Hiller in Marion County Circuit Court in 1996. {Dority testimony}

6. The basis for protestant's assertion that approval of this transfer application would cause injury is the history of disputes over and interference with protestant's pump at the middle point of diversion and with the diversion pipe from the pump, which crosses the applicant's property in order to reach protestant's lands. {protest, protestant's brief}

ULTIMATE FACT

The quantity of water to which the protestant is entitled under his right will undoubtedly be present at the shared location, even at times applicant Dority is actively pumping. As water is and will be available, there would be no injury.

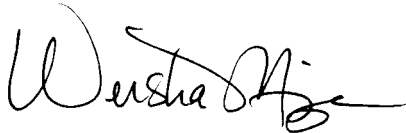
CONCLUSIONS OF LAW

1. Injury means the proposed transfer would result in a water right not receiving the water to which it is legally entitled.
2. When evaluating an application to determine whether injury would occur as a result of a proposed transfer, the Department determines whether water is and would be available at the points of diversion for those rights which could be affected by the proposed transfer.
3. Approval of a transfer application does not create a right of access or affect potential liability for trespass if such access is not obtained.
4. The application mapping requirements at OAR 690-15-070(1)(d) allow a variance in actual location of the diversion point of up to 10' between the mapped/requested coordinates and the actual physical location of the point of diversion. Approval of this transfer application carries with it no legal requirement that the additional point of diversion applied for and approved physically displace protestant's point of diversion.
5. Nothing in the law prevents two or more water rights from sharing the same point of diversion, as Hiller's 1964 and Dority's 1971 priority rights have since 1971. The absence of a recorded easement does not render an existing water right or authorized point of diversion invalid.
6. Approval of a transfer application for additional point of diversion does not authorize taking any action in violation of ORS 540.710 or 540.730.

ORDER

NOW, THEREFORE, it is ORDERED that transfer application T7435 may be APPROVED.

May 2, 1997.

A handwritten signature in black ink, appearing to read "Weisha Mize". The signature is fluid and cursive, with a large initial "W" and a long, sweeping tail.

Weisha Mize, ALJ

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review 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.