Before the Oregon Water Resources Department

In the Matter of Protested Transfer)	Final Order
oplication T7435 in the name of)	
A.D. Dority)	

BACKGROUND

Applicant A. D. Dority filed application T7435 on October 17, 1995. The applicant requests approval of an additional point of diversion from the Willamette River for use under his existing water right evidenced by Certificate 35500.

Protestant Stan Hiller filed a protest against the proposed additional point of diversion on May 22, 1996, asserting that use of the additional point of diversion would cause injury to Hiller's water right.

The matter came on for hearing on February 11, 1997, before Weisha Mize, Administrative Law Judge. Applicant Dority was represented at the hearing by Kathleen Moss, attorney at law. Protestant Hiller was represented by Karen Johnson, attorney at law. Called as witnesses by the applicant were William Porfily, A. D. Dority III, and the applicant. The protestant called no witnesses and did not testify. The ALJ called Larry Nunn, Department staff, as a witness on the Department's injury determination.

A Proposed Order was issued on March 12, 1997. Exception was filed by the Applicant requesting elimination of the reference in Finding 5 to Hiller as owner of the pump and pipeline. On agreement of the parties, the reference was deleted, the exception was withdrawn and this Final Order entered.

FINDINGS OF FACT

- 1. Dority has 1962 and 1971 priority rights for irrigation use out of the Willamette River. The 1971 right has three authorized points of diversion, described as upstream, middle and downstream points. {stipulated fact}
- 2. Hiller has a supplemental irrigation right for use out of the Willamette River. This right has a 1964 priority and an authorized point of diversion at the same location as the point described as the middle point of diversion for Dority's 1971 priority water right. The point of diversion, pump and delivery system are located on Dority's land. {stipulated fact}
- 3. Dority seeks to add an additional point of diversion for his 1962 right at same pod shared by his 1971 priority right and Hiller's 1964 priority right. {stipulated fact}
- 4. Water is available in the Willamette River in quantities substantially over and above the quantities authorized for use by applicant and protestant. {Porfily, Nunn testimony}

- 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 undoubtably 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.

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.