

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

Jackson County

IN THE MATTER OF WATER RIGHT)	
TRANSFER APPLICATIONS NOS.)	
2745 AND 2746 IN THE NAME OF)	<u>Statement, Findings</u>
STUART V. HINSON FOR CHANGES)	<u>Conclusions</u>
IN PLACE OF USE AND POINTS)	<u>and Order</u>
OF DIVERSION OF WATERS OF)	
LITTLE APPLGATE RIVER)	

STATEMENT

On December 18, 1972, two applications were filed in the office of the State Engineer (predecessor to the Water Resources Director) in the name of Stuart V. Hinson, for approval of changes in place of use and points of diversion of waters appropriated from Little Applegate River under the provisions of certain existing water rights of record, pursuant to ORS 540.510 to 540.530.

The said applications, designated as transfer applications numbered 2745 and 2746, were examined and found to be defective in describing the specific portions of the subject water rights to be modified by the proposed changes in place of use and points of diversion. Over the period of time extending from December 1972 until May 1977, and with delays resulting in part from a backlog of pending applications in the Department, the applications were corrected and completed, using superseding copies of the applications, and notice of the proposed changes was published pursuant to ORS 540.520(2).

The said notice which was published in the June 10, 17 and 24, 1977 issues of the Medford Mail Tribune newspaper provided:

Notice of Water Right Transfer Applications Nos. 2745 and 2746

Notice is given hereby that two applications have been filed in the office of the Water Resources Director by Stuart V. Hinson for approval of changes in place of use and point of diversion from Little Applegate River.

(1) The certificate recorded at Page 38773, Vol. 30, State Record of Water Right Certificates, in the name of A. S. Kleinhammer, describes a right which includes the use of not to exceed 0.41 cubic foot per second from Little Applegate River for irrigation of 8.4 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$, 2.0 acres in NE $\frac{1}{4}$ SW $\frac{1}{4}$ and 6.0 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 19, T. 39 S., R. 2 W., W.M., with a date of priority of Sept. 1, 1857.

Water for the said right is diverted through the Upper & Lower Phillips Ditches from points located (1) 680 ft. S. and 9 ft. W., (2) 215 ft. S. and 790 ft. W. from the N.¼ corner of Sec. 29, both being within the NE¼ NW¼ of Sec. 29, T.39 S., R. 2 W., W.M.

By application No. 2745, the applicant herein, owner of the lands above described, proposes to change the place of use and point of diversion therefrom, and without loss of priority to irrigate a certain 0.6 acre in NE¼ SW¼ and 16.0 acres in Lot 3 (NW¼ SW¼) of Sec. 19, T.39 S., R. 2 W., W.M., through the Gin Lin Ditch from a point of diversion located 1430 ft. N. and 1905 ft. W. from the E. ¼ corner of Sec. 29, being within the NW¼ NE¼ of Sec. 29, T. 39 S., R. 2 W., W.M.

(2) The certificate recorded at Page 24479, Vol. 17, State Record of Water Right Certificates, in the names of First National Bank of Ashland & Armin Richter, describes a right which includes the use of not to exceed 0.21 cubic foot per second from Little Applegate River for irrigation of 0.6 acre in NE¼ SW¼ and 16.0 acres in Lot 3 (NW¼ SW¼) of Sec. 19, T. 39 S., R. 2 W., W.M., with a date of priority of Nov. 12, 1929.

Water for the said right is diverted through the Gin Lin Ditch as described above.

By application No. 2746, the applicant herein, owner of the lands above described, proposes to change the place of use and point of diversion therefrom, and without loss of priority to irrigate a certain 8.2 acres in NW¼ NE¼ and 8.4 acres in SE¼ NW¼ of said Sec. 19, through the Upper Phillips Ditch as described above.

All persons interested are notified hereby that a hearing will be held at the county courthouse at Medford, Oregon on August 5, 1977, at 9:30 a.m. All objections to the proposed change, if any there are, will be heard at said time and place. Any and all objections shall be prepared in writing, one copy to be served on Stuart V. Hinson, P.O. Box 579, Jacksonville, Oregon 97530, and one copy filed with the Water Resources Department, Salem, Oregon 97310, together with a \$10 filing fee, at least 10 days prior to the date set for hearing. IF NO OBJECTION IS FILED, THE APPLICATION MAY BE APPROVED BY THE WATER RESOURCES DIRECTOR WITHOUT A HEARING. Administrative rules pertaining to the filing of a protest will be furnished by the Water Resources Department upon request.

Dated at Salem, Oregon, this 24th day of May, 1977.

James E. Sexson, Director

On July 22, 1977 a protest in the names of Everette J. Bostwick and Jimmie F. Bostwick was filed in the office of the Water Resources Director through their attorney, Robert D. Heffernan, against approval of the pending applications numbered 2745 and 2746.

On July 26, 1977 a protest in the names of Glen F. Wegner and Helen A. Wegner and Ralph Richards and June Richards was filed in the office of the Water Resources Director through their attorney, Thomas C. Howser, against approval of the pending applications.

Both protests allege that the protestants would be adversely affected by approval of the pending applications.

Pursuant to the Director's second Amended Notice of Hearing dated April 14, 1980, the matter of pending transfer applications numbered 2745 and 2746 and the protests against approval of the said applications was brought to hearing in Medford, Oregon on June 27, 1980 before James W. Carver, Jr., an employee of the Water Resources Department, authorized to preside at the hearing in behalf of the Water Resources Director.

At the beginning of the hearing, Robert D. Heffernan, Jr., Attorney at Law, appeared in behalf of the protestants, Everett J. and Jimmie F. Bostwick, and withdrew their protest against approval of the pending applications.

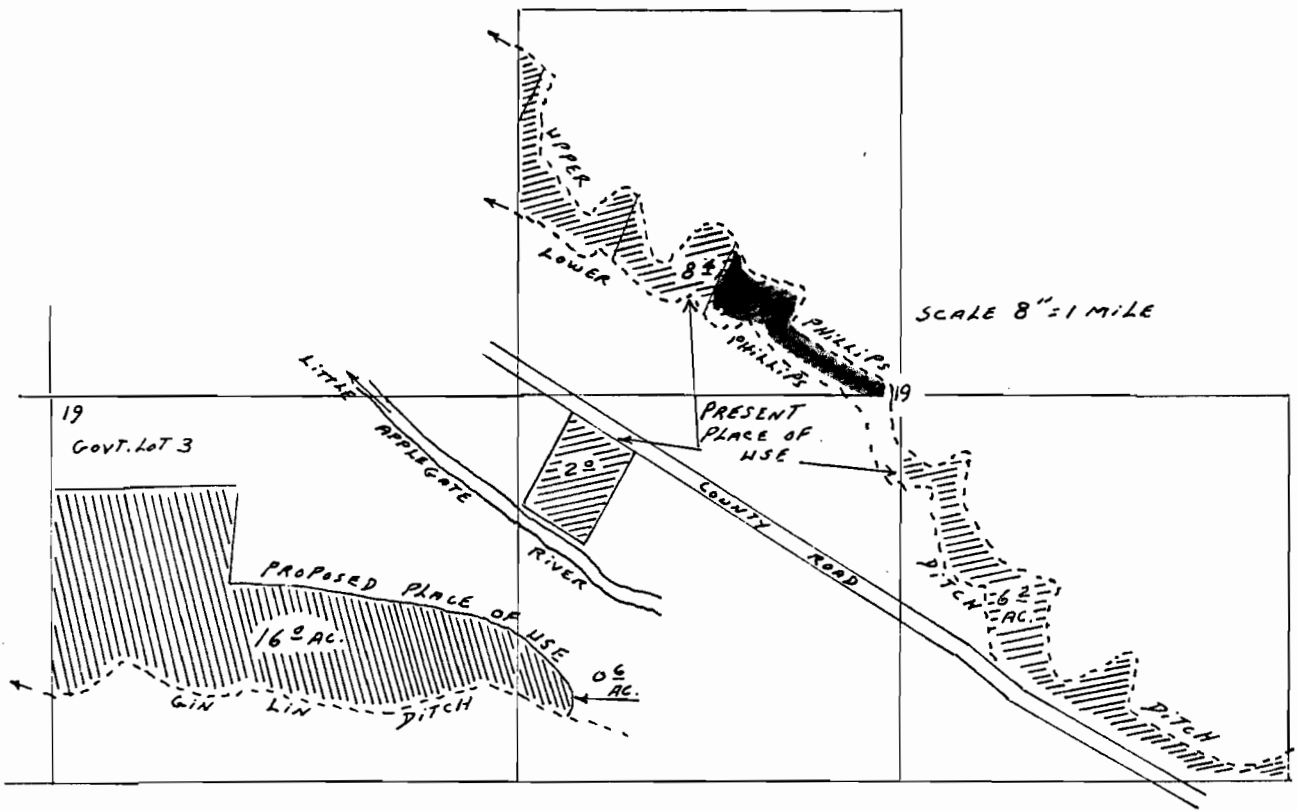
Protestants Glen F. and Helen A. Wegner and Ralph and June Richards were present at the hearing and were represented by Thomas C. Howser, Attorney at Law, of the firm of Cottle, Howser and Hampton of Ashland, Oregon. The applicant, Stuart V. Hinson, was present and was represented by Larry C. Hammack, Attorney at Law, Medford, Oregon.

Also at the beginning of the hearing, David and Anita Willard acting through their attorney, Thomas C. Howser, sought to become parties to the matter through joining in the protest by the Wegners and the Richards. Not having filed a timely protest pursuant to ORS 540.520(3) and not having filed a petition pursuant to OAR 137-03-005(2), David Willard and Anita Willard do not have party status in this matter.

The location of the lands from which the 1857 priority water right is proposed to be severed by change in place of use, and the portions thereof now owned by the protestants herein and by the Willards are shown by Figure 1 herein. The effect of the proposed transfers of water right would be to change the priority for use of water on the lands now owned by the protestants and the Willards, and others, from September 1, 1857 to November 12, 1929.

The amendments to the original transfer applications numbered 2745 and 2746, including the use of superseding copies of the applications, did not result in more lands or different lands being involved in the proposed changes in place of use and points of diversion.

T. 39 S. R. 2 W. W. M.



- Glen F. & Helen A. Wegner
- Ralph & June Richards
- David & Anita Willard

(Figure 1)

RULING ON MOTION

On June 23, 1980, Thomas C. Howser, acting in behalf of his clients: Glen F. Wegner, Helen A. Wegner, Ralph Richards, June Richards, David Willard and Anita Willard submitted to the Director a motion to dismiss the proceeding for approval of the pending applications as the same would affect the objectors.

The said motion is denied.

EVIDENTIARY RULINGS

Applicant offers as his exhibit B the original of transfer application numbered 2746 that was filed in the office of the State Engineer on December 18, 1972.

Applicant offers as his exhibit C the original of part "1" of transfer application numbered 2745 that was filed in the office of the State Engineer on December 18, 1972.

Applicant offers as his exhibit D the original of part "2" of transfer application numbered 2745 that was filed in the office of the State Engineer on December 18, 1972.

Applicant offers as his exhibit E a packet containing originals of superseding copies of transfer applications numbered 2745 and 2746, which copies were first received in the office of the State Engineer on July 16, 1973, together with supporting maps, and a copy of a letter dated April 12, 1973 from the office of the State Engineer to John E. Ferris, Attorney at Law, Medford, Oregon.

Protestants object to admission of the said exhibits into the record.

Testimony was received in regard to how the superseding copies of transfer applications numbered 2745 and 2746 conform to or differ from the original documents that were filed on December 18, 1972. Therefore, protestants objections are overruled. Applicants' exhibits B, C, D and E are received into the record of this proceeding.

FINDINGS

At the time water right transfer applications numbered 2745 and 2746 were filed in the office of the State Engineer, Stuart V. Hinson, applicant, was the owner of record of all of the real property that would be directly affected by the proposed changes in place of use and points of diversion of waters of the Little Applegate River, as described above.

The portion of the subject real property now owned by Ralph and June Richards was conveyed from Stuart V. Hinson to Edward M. Lewis and Rachel Lewis by a warranty deed dated September 5, 1974 (Applicant's exhibit G). The said real property was conveyed from Edward M. Lewis and Rachel Lewis to Ralph J. Richards and June L. Richards by a warranty deed dated January 18, 1977 (Applicant's exhibit L). Both deeds were silent as to water rights.

Mr. Lewis testified that when they purchased the subject property from Mr. Hinson they understood that they would enjoy the 1857 priority water rights on certain lands served from the Lower Phillips Ditch and 1929 priority water rights on certain lands served from the Upper Phillips Ditch, and that he conveyed this same information to Mr. Richards prior to his sale of the property to the Richards.

Mr. Richards testified that in addition to a conversation with Mr. Lewis regarding water rights, prior to purchase of the subject property he inquired of the watermaster, David Hendrix, who told him what the water rights of record were for the property and informed him that there was a "transfer in the works".

The portion of the subject real property now owned by David and Anita Willard was conveyed from Stuart V. Hinson to Robert Start by a special warranty deed dated May 5, 1977 (Applicant's exhibit I). The said real property was conveyed from Robert Start to David A. Willard and Anita C. Willard by a warranty deed dated November 9, 1977 (Applicant's exhibit M). Both deeds were silent as to the subject water rights.

Mr. Start testified that his understanding of the water rights he would enjoy through the Upper and Lower Phillips Ditches was the same as that testified to by Mr. Lewis. No evidence was adduced as to whether there was any communication between Mr. Start and Mr. and/or Mrs. Willard in regard to the subject water rights.

The portion of the subject real property now owned by Glen F. and Helen A. Wegner was conveyed to them from Stuart V. Hinson by a warranty deed dated September 7, 1976 (Applicant's exhibit H). The said deed is silent as to the subject water rights.

Mr. Wegner testified that he first contacted Mr. Hinson early in the spring of the year of 1976 in regard to purchase of the subject land. He does not recall any discussion with Mr. Hinson regarding the subject water rights or any changes to the water rights prior to completion of the sale in the fall of 1976.

Mr. Wegner further testified that after having received certain papers from "the title people", he read them and found no reference to the water rights for the property and therefore went to the Watermaster, Mr. Hendrix, to ask him about the water rights. Mr. Wegner stated that he received from Mr. Hendrix the water rights information he asked for, but does not recall Mr. Hendrix having said anything about a pending transfer application or changes to the water rights for the property he was buying from Mr. Hinson.

Mr. Hinson testified that when the Wegners first came to him and expressed an interest in purchasing the subject property he explained to them that the land between the road and the Lower Phillips Ditch would have an 1857 priority for water, and that the land between the Lower Phillips Ditch and the Upper Phillips Ditch and the land around their house would have a 1929 priority for water. He does not recall whether he again discussed the subject water rights with the Wegners during later negotiations for sale of the property to them.

Mr. Hendrix testified that he recalls having talked with Mr. and/or Mrs. Wegner several different times in regard to the subject water rights; that he does not have a specific recollection of a conversation with Mr. and/or Mrs. Wegner in regard to the subject water rights prior to their purchase of the property from Mr. Hinson, but that he has made a point of informing anyone who inquired about the subject water rights that there was a proposed transfer of the rights pending in the Salem office of the Water Resources Department.

The testimony of other witnesses indicates that Mr. Hinson did make a practice of informing prospective purchasers in regard to the water rights as they would exist upon completion of the changes proposed by the pending applications, and that Mr. Hendrix did make a practice of informing persons who inquired about the subject water rights that transfer applications proposing changes to the rights were pending.

The said transfer applications numbered 2745 and 2746 have been pending before the Water Resources Director (or his predecessor, the State Engineer) and have been a matter of public record since they were filed on December 18, 1972.

The evidence adduced does not establish any intent on the part of the applicant or any agreement between the applicant and anyone purchasing a portion of the subject lands that the purchaser would receive anything but a 1929 priority right for water for irrigation of the portion of the subject lands between the Upper Phillips Ditch and the Lower Phillips Ditch. It is noted, however, that any question of misrepresentation of the water rights in connection with the sale of the subject property would not be within the jurisdiction of the Water Resources Director to determine, but within the court's jurisdiction.

The protestants argue that the applicant should not be allowed, now, to carry out the proposed changes in points of diversion and place of use that would effect a change in priority of the water right for irrigation of portions of the subject property he sold to them and to others after he filed the pending transfer applications numbered 2745 and 2746.

The protestants cite: Dry Gulch Co. v. Hutton et al., 170 Or 656; Broughton V. Stricklin, 146 Or 259; and Haney et al. v. Neace-Stark Co. et al., 109 Or 93, and also refer to an opinion of the Oregon Attorney General to Mr. Rhea Luper dated June 7, 1930. Neither the cases cited nor the said opinion of the Attorney General provides a basis for the position held by the protestants that the pending transfer applications must be denied because of the period of time they have been pending, or that they must be denied because superseding copies were used in correcting defects in the original copies of the applications.

The question before the Water Resources Director in this proceeding is set forth by ORS 540.530, which provides in part:

"If, after hearing or examination, the Water Resources Director finds that the proposed change can be effected without injury to existing rights, he shall make an order approving the transfer..."

The evidence adduced fails to show that the water rights held by the protestants through their purchase of portions of the subject real property, which was owned by the applicant at the time he filed the pending water right transfer applications numbered 2745 and 2746, would be adversely affected by the changes in place of use and points of diversion as proposed by the said applications. In fact, approval of the said applications would be necessary for the protestants to have appurtenant to their respective properties the water rights as discussed at their times of purchase of the properties.

The Watermaster, David C. Hendrix, has filed a statement to the effect that the proposed changes in place of use and points of diversion may be made without injury to other existing water rights.

ULTIMATE FINDING OF FACT

The evidence adduced fails to show that any other water rights, not directly involved in the proposed changes in place of use and points of diversion, would be adversely affected by the proposed changes. Therefore, approval of the subject water right transfer applications would not result in injury to existing water rights.

CONCLUSION

No other objections having been filed and it appearing that the proposed changes in place of use and point of diversion may be made without injury to existing rights, the applications should be approved.

ORDER

NOW, THEREFORE, it hereby is ORDERED that the requested changes in place of use and point of diversion as described herein, without loss of priority, are approved.

It is FURTHER ORDERED that the quantity of water diverted at the new points of diversion as authorized herein, together with that diverted at the old points of diversion, shall not exceed the quantity of water available at the old points of diversion under the aforesaid water rights.

It is FURTHER ORDERED that the following provisions shall be carried out prior to the diverting of water at the new points of diversion as herein confirmed:

That the diversion works shall include an in line flow meter, a weir, or other suitable devices 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 changes in place of use and points of diversion of water as authorized herein be completed, and the water so transferred be applied to beneficial use on or before October 1, 1982.

It is FURTHER ORDERED that the certificate heretofore issued to A. S. Kleinhammer and recorded at page 38773, Volume 30, State Record of Water Right Certificates, and the certificate heretofore issued to First National Bank of Ashland and Armin Richter and recorded at page 24479, Volume 17, State Record of Water Right Certificates, are hereby canceled; and in lieu thereof new certificates be issued to describe the balance of each of the aforesaid water rights, not involved in this proceeding; and upon proof satisfactory to the Water Resources Director of completion of the changes in place of use and points of diversion as authorized herein, certificates of water right shall be issued to describe the rights involved in this proceeding as modified under the provisions of this order.

Dated at Salem, Oregon this 3rd day of November 1980.

James E. Sexson, Director


By Chris L. Wheeler, Deputy

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 service of this order. Judicial review is pursuant to the provisions of ORS 183.482.