

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

JOSEPHINE COUNTY

IN THE MATTER OF TRANSFER APPLICATION)
NO. 2911 IN THE NAMES OF H.M. ESTES,)
VELMA A. ESTES, W.A. ESTES, VESTA)
LOUISE ESTES & R.J. ESTES FOR APPROVAL)
OF CHANGES IN PLACE OF USE AND POINT OF)
DIVERSION OF WATER FROM ALTHOUSE CREEK)

STATEMENT, FINDINGS,
CONCLUSIONS
AND
ORDER

On October 31, 1973, an application was filed in the office of the Water Resources Director, in the names of H. M. Estes, W. A. Estes and R. J. Estes, for approval of changes in place of use and point of diversion of water from Althouse Creek for irrigation purposes, under the provisions of ORS 540.510 to 540.530.

The application was subsequently amended to include Velma A. Estes, wife of H. M. Estes, and Vesta Louise Estes, wife of W. A. Estes, as applicants.

The water rights involved in this matter were allowed by decree of the Circuit Court of Oregon for Josephine County in the Matter of the Determination of the Relative Rights of the Waters of Althouse Creek, a Tributary of the Illinois River, in Josephine County, Oregon, and are as follows:

(a) A right allowed in the name of R. P. George for appropriation of not to exceed 1.94 cubic feet per second for irrigation of 97 acres with a priority date of 1856 and 1.72 cubic feet per second for irrigation of 86 acres with a priority date of 1870; being 36 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$, 39 in SW $\frac{1}{4}$ NW $\frac{1}{4}$, 37 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$, 20 acres in NE $\frac{1}{4}$ SW $\frac{1}{4}$, 39 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 12 acres in SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 13, Township 40 South, Range 8 West, W.M., being a portion of the right described by the certificate recorded at page 2713, Volume 4, State Record of Water Right Certificates.

(b) A right allowed in the name of Hila A. C. Houck for appropriation of not to exceed 2.0 cubic feet per second for irrigation of 100 acres with a priority

date of 1856 and 0.56 cubic foot per second for irrigation of 24 acres with a priority date of 1895; being 39 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$ and 10 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, Township 40 South, Range 8 West, W.M.; 3 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$, 30 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 36 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ and 6 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, Township 40 South, Range 7 West, W.M., as described by the certificate recorded at page 2715, Volume 4, State Record of Water Right Certificates.

Water is diverted from Althouse Creek for the said rights through the Houck and George Ditch from a point located 180 feet South and 1180 feet East from the West Quarter Corner of Section 8, being within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, Township 40 South, Range 7 West, W.M.

The applicants herein, owners of the above described lands at the time the said transfer application was filed, propose to change the place of use for a portion of said rights, and to change the point of diversion for a portion of said rights, without loss of priority, and thereafter exercise the subject water rights as follows:

(AA) Diversion of not to exceed 3.94 cubic feet per second through the said Houck and George Ditch with a priority date of 1856 for irrigation of a certain 0.1 acre in NE $\frac{1}{4}$ NE $\frac{1}{4}$, 30.5 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$, 35.7 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$, 39.7 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$, 30.4 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$, 7.5 acres in NE $\frac{1}{4}$ SW $\frac{1}{4}$, 29.4 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$, 7.2 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 6.9 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 13, Township 40 South, Range 8 West, W.M.; 0.4 acre in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 9.0 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ and 0.2 acre in NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, Township 40 South, Range 7 West, W.M.

(BB) Diversion of not to exceed 0.61 cubic foot per second through the said Houck and George Ditch with a priority date of 1870 for irrigation of a certain 1.4 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 25.5 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ and 3.7 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, Township 40 South, Range 7 West, W.M.

(CC) Diversion of not to exceed 1.11 cubic feet per second through the

Morey Ditch from a point located 860 feet South and 2090 feet East from the Northwest Corner of Section 18, being within the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, Township 40 South, Range 7 West, W.M., with a priority date of 1870 for irrigation of a certain 0.5 acre in SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12; 13.0 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$ and 6.2 acres in NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, Township 40 South, Range 8 West, W.M.; 1.8 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7; 2.9 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$ and 31.0 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 18, Township 40 South, Range 7 West, W.M.

(DD) Diversion of not to exceed 0.56 cubic foot per second through the said Morey Ditch with a priority date of 1895 for irrigation of a certain 3.1 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$ and 20.9 acres in NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 13, Township 40 South, Range 8 West, W.M.

The subsequent purchasers of portions of the above described lands have all submitted statements that they are in agreement with the proposed changes in place of use and point of diversion of water.

Notice of the application, pursuant to ORS 540.520(2), was published in the Illinois Valley News, a newspaper printed and having general circulation in Josephine County, Oregon, for a period of three weeks in the issues of May 1, 8 and 15, 1975.

On June 9, 1975, a protest against approval of the subject transfer application was filed by Richard D. Weaver and Patricia A. Weaver, through their attorney, Mr. Donald H. Coulter, Attorney at Law, Grants Pass, Oregon. The protestants allege that the proposed change in point of diversion would result in interference with their water rights for irrigation of their lands from the natural flow of Althouse Creek; and further allege that they are the owners of the real property upon which the proposed point of diversion is located and that the applicants have not obtained property rights necessary to carry out the proposed change in point of diversion.

The protestants have not objected to the proposed changes in place of use.

Pursuant to notice to the parties, dated September 6, 1977, the matter of the transfer application No. 2911 and the protest against it was brought to hearing before Mr. James W. Carver, Jr., Water Resources Department, on October 5, 1977, at Grants Pass, Oregon.

The applicants were represented by their attorney, Mr. Wally P. Martin, Attorney at Law, Grants Pass, Oregon.

The protestants were represented by their attorney, Mr. Donald H. Coulter, Attorney at Law, Grants Pass, Oregon.

Pursuant to stipulation between counsel, the hearing was recessed to a new date to be determined. The hearing was reconvened on August 17, 1978, upon corrected notice of hearing to the parties, dated June 22, 1978.

EVIDENTIARY RULINGS

Protestants offer as their Exhibit "A" a map entitled: "Plat of Survey in the W $\frac{1}{2}$ of Section 18, T. 40 S., R. 7 W., and in Section 13, T. 40 S., R 8 W., W.M., Josephine County, Oregon, Oct. 11, 1968, For: Mr. W. A. Estes, Cave Junction, Oregon".

Applicants object to the exhibit on the grounds that it is not material to the proceeding.

Objection sustained.

FINDINGS

Althouse Creek is a perennial stream which rises on the northwesterly slope of the Siskiyou Mountains, near the Oregon-California Border, and flows generally north and west for a distance of approximately 15 miles to a confluence with the East Fork Illinois River. The lands to which the subject water rights are appurtenant lie approximately five miles south and three miles east of the town of

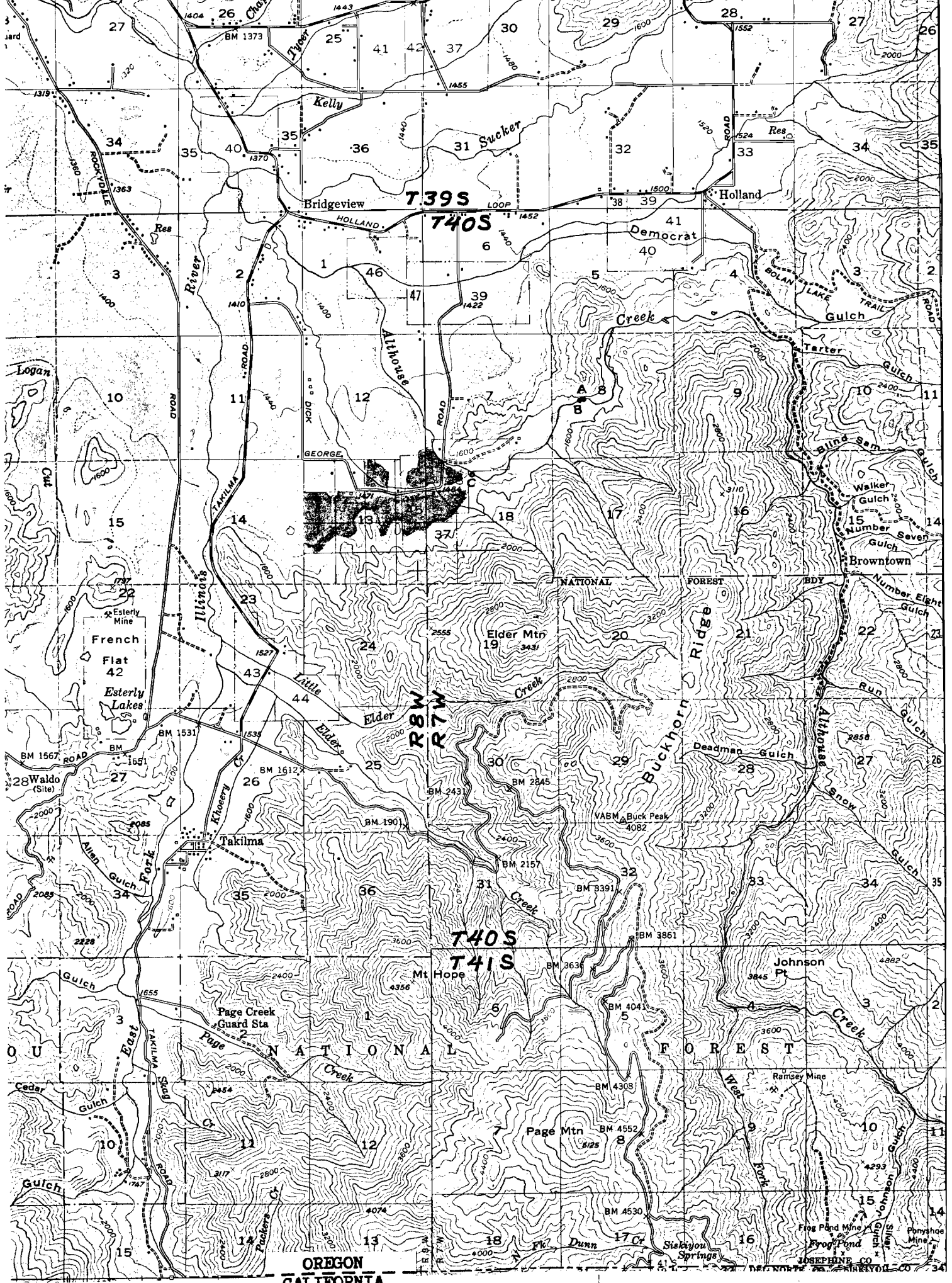
Cave Junction, Oregon.

The water rights of the protestants for the use of waters from the natural flow of Althouse Creek were allowed by decree of the court in the same proceeding as the water rights of the applicants and are for the appropriation of not to exceed 1.26 cubic feet per second with a priority date of 1876 for irrigation of a certain 63 acres within Sections 7 and 18 of Township 40 South, Range 7 West, W.M., as described by the certificate issued in the name of Ed Lind and recorded at page 2717, Volume 4, State Record of Water Right Certificates; and the appropriation of not to exceed 0.6 cubic foot per second with a priority date of 1898 for irrigation of a certain 30 acres within said Section 7, as described by the certificate issued in the name of Joseph Skeeters and recorded at page 2719 of said Volume 4.

The protestants divert their water from Althouse Creek for the said rights at a point located 150 feet South and 1220 feet East from the West Quarter Corner of Section 8, being within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8, Township 40 South, Range 7 West, W.M., which point is designated as point "A" on Figure 1, herein, and is located on the North bank of the stream.

The point of diversion for the Houck and George Ditch, which is the existing, authorized point of diversion for the applicants' water rights described above, is located downstream approximately 50 feet and across the channel from the protestants' point of diversion, and is designated on Figure 1 as point "B".

The point of diversion for the Morey Ditch, which is the applicants' proposed point of diversion for a portion of the subject water rights, is located on the South bank of Althouse Creek approximately one mile downstream from point "B" and is designated on Figure 1 as point "C". The said point of diversion at point "C" and the Morey Ditch are existing works and are used by the applicants and others to obtain water from the flow of Althouse Creek under water rights not



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Figure 1
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involved in this proceeding.

There is no point of diversion for use of water from Althouse Creek between point "B" and point "C".

That section of the channel of Althouse Creek which includes the aforesaid diversion points is formed by erosion in loose gravels and tends to move during times of flood flows.

It has been the practice of the applicants, each irrigation season, to build up a gravel berm across the channel of Althouse Creek immediately below point "B", the inlet to the Houck and George Ditch, and thereby raise the level of the water flowing in the channel so that it fills the concrete pipe inlet to the said Houck and George Ditch. The distances and elevations are such that the said gravel berm also provides a similar benefit to the intake works of the protestants' ditch at point "A".

It is usual for the flow of Althouse Creek to diminish during the irrigation season to where the protestants must be denied water under their said water rights, in whole or in part, to supply the applicants' needs under their said prior water rights.

Without the proposed change in point of diversion from the Houck and George Ditch to the Morey Ditch for a part of the applicants' 1870 and 1895 water rights, at any time that the applicants do not take their full entitlement of water into the intake of the Houck and George Ditch, any surplus water is automatically available to the protestants at the intake to their ditch.

The issue before the Water Resources Director in this matter is defined by ORS 540.530(1) as follows: "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 and fixing a time limit within which the application of water may be made ...".

Evidence was offered by the parties in regard to private property right matters associated with the proposed change in point of diversion. However, the jurisdiction of the Water Resources Director does not extend to matters of easements or rights-of-way or to other private property matters that might be associated with a proposed change in point of diversion of water from a natural stream channel.

During the course of the hearing, the applicants stated through their attorney that they are aware that approval of their pending application would not convey to them any property rights that might be necessary to the project; and that they are willing to risk forfeiture of the water rights involved should they be unable to perform under the provisions of an order approving their application.

Specifically, the question before the Water Resources Director in this proceeding is whether the proposed change in point of diversion from the Houck and George Ditch (point "B") to the Morey Ditch (point "C") for a portion of the applicants' water rights as described above would result in depriving the protestants of water they are entitled to receive under their water rights.

CONCLUSIONS

If the applicants' diversion of water through the Morey Ditch (point "C") under the rights involved in the proposed change in point of diversion were made contingent to the construction, maintenance and operation of a permanent control structure across the channel of Althouse Creek, and a measuring device, adequate to measure the summer flow in the channel of Althouse Creek immediately downstream from the inlet of the Houck and George Ditch, and the construction, maintenance and operation of a measuring device in the diversion works of the Morey Ditch adequate to measure the waters received into the Morey Ditch, so that with regulation by the watermaster, the quantity of water diverted through the Morey Ditch under the subject rights would not exceed the quantity of water available to the subject

rights at the intake to the Houck and George Ditch, the proposed change in point of diversion could be made without injury to the protestants' existing water rights.

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 application should be approved.

ORDER

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

It is FURTHER ORDERED that diversion of water from Althouse Creek through the Morey Ditch under the water rights involved in the change in point of diversion authorized herein shall be contingent to the construction, maintenance, and operation of a permanent control structure across the channel of Althouse Creek and a measuring device, adequate to measure the summer flow within the channel of Althouse Creek immediately downstream from the inlet to the Houck and George Ditch, and the construction, maintenance, and operation of a measuring device in the diversion works of the Morey Ditch, adequate to measure the waters received into the Morey Ditch; and that the type and plans of the measuring devices and associated structures be approved by the watermaster before the beginning of construction work and the installation of said devices and structures shall be under the general supervision of said watermaster.

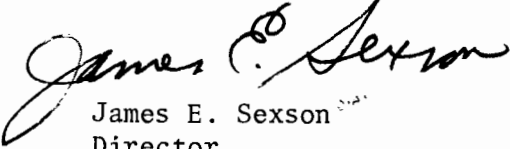
It is FURTHER ORDERED that the quantity of water diverted at the new point of diversion (Morey Ditch) shall not exceed the quantity of water available at the old point of diversion (Houck and George Ditch) under the subject water rights.

It is FURTHER ORDERED that the construction work shall be completed and the change in point of diversion of water made and that said water so transferred

shall be applied to beneficial use on or before October 1, 1980.

It is FURTHER ORDERED that the certificate of water right heretofore issued to R. P. George and recorded at page 2713, Volume 4, State Record of Water Right Certificates, is canceled; and in lieu thereof a new certificate be issued covering the balance of the right NOT involved in this proceeding; that the certificate of water right heretofore issued to Hila A. C. Houck and recorded at page 2715, Volume 4, State Record of Water Right Certificates, is canceled; and upon proof satisfactory to the Water Resources Director of completion of works and beneficial use of water to the extent intended under the provisions of this order, confirming certificates of water right shall be issued to the applicants herein.

Dated at Salem, Oregon this 11th day of January, 1979.


James E. Sexson
Director

NOTICE: You are entitled to a judicial review of this Order. Judicial review may be obtained by filing a petition for review within sixty days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.