

BEFORE THE WATER RESOURCES DEPARTMENT  
OF THE STATE OF OREGON

IN THE MATTER OF WATER RIGHT TRANSFER )	
APPLICATION 5903 IN THE NAME OF DOUG )	STATEMENT, FINDINGS OF
BURGESS FOR APPROVAL OF A CHANGE IN )	FACT, CONCLUSION OF
POINT OF DIVERSION OF WATER FROM )	LAW, OPINION, AND
COW CREEK, MALHEUR COUNTY )	FINAL ORDER

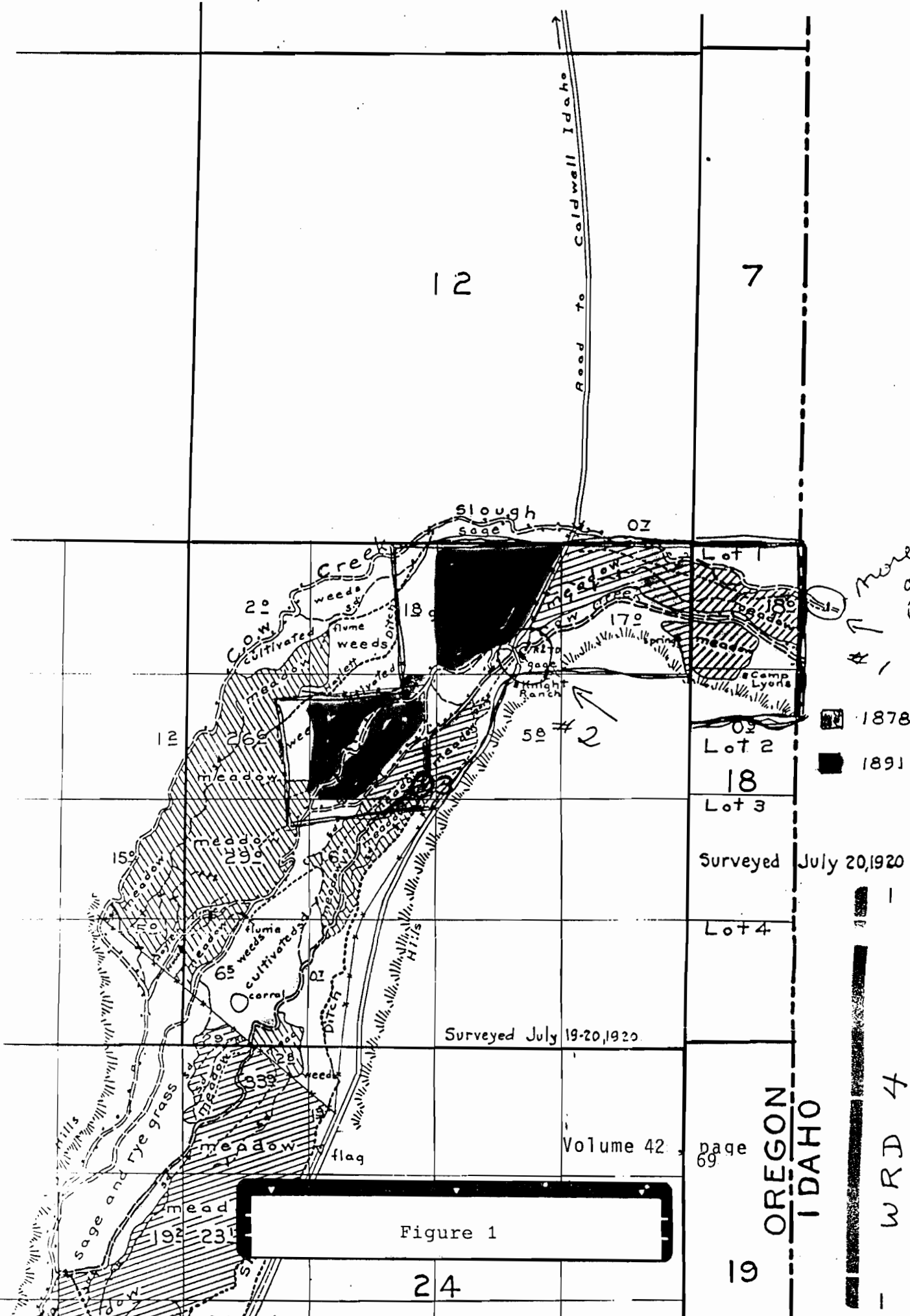
On February 3, 1987, Water Right Transfer Application 5903 in the name of Doug Burgess was filed for approval of an additional point of diversion of water from Cow Creek, pursuant to the provisions of ORS 540.510 to 540.530.

The certificate recorded at page 8392, Volume 8, State Record of Water Right Certificates, in the name of W.C. Wilson and Sons, describes a right to use water from Cow Creek for irrigation of a certain 50.9 acres of land in Tract 1 under a priority date of 1878, and for irrigation of a certain 60.0 acres of land in Tract 2 under a priority date of 1891. Tract 1 includes 18.0 acres in Lot 1 NW 1/4 NW 1/4 and 0.9 acre in Lot 2 (SW 1/4 NW 1/4) of Section 18, Township 28 South, Range 47 East; 0.7 acre in SE 1/4 SE 1/4 of Section 12, 17.0 acres in NE 1/4 NE 1/4, 3.1 acres in NW 1/4 NE 1/4, 5.8 acres in SW 1/4 NE 1/4 and 5.4 acres in SE 1/4 NW 1/4 of Section 13, Township 28 South, Range 46 East. Tract 2 includes 30.0 acres in NW 1/4 NE 1/4 and 30.0 acres in SE 1/4 NW 1/4 of said Section 13.

The existing point of diversion is located 900 feet north and 30 feet east from the Southwest Corner of Section 26, being within the SW 1/4 SW 1/4 of Section 26, Township 3 South, Range 6 West, BM, in Idaho.

The applicant proposes to establish a second point of diversion at a point located 1300 feet north and 984 feet east from the Center Corner of Section 13, being within the SW 1/4 NE 1/4 of Section 13, Township 28 South, Range 46 East, WM, in Oregon.

Notice of the application was published pursuant to ORS 540.520(2) in the April 8, 15, and 22, 1987 issues of the Malheur Enterprise newspaper, which is a newspaper having general circulation in the area in which the water right is located.



more or less

1878

1891

1

W R D 4

Figure 1

A protest against approval of the application was filed by Baltzor Cattle Co. and Daniel R. Arritola on April 30, 1987. In the protest it is alleged that the proposed addition of a second point of diversion as described in the application would result in injury to the existing water rights of the protestants by decreasing the return flow into Cow Creek below the existing diversion.

Pursuant to the Notice of Hearing dated July 6, 1987, the matter of Transfer Application 5903 and the protest was brought to hearing in Jordan Valley, Oregon on August 4, 1987, before James W. Carver, Jr., an employee of the Water Resources Department authorized to preside in behalf of the Director as a finder of fact. The applicant and both protestants appeared and represented themselves without the services of legal counsel.

Figure 1, herein, a xerographic copy of a portion of exhibit WRD 4 shows the approximate locations of the existing point of diversion (#1) and the proposed additional point of diversion (#2), and the applicant's benefitted lands. Tract 1 lands are shaded in yellow. Tract 2 lands are shaded in red.

#### RULING ON OBJECTION

Applicant offered into evidence a document marked Burgess-A, which is a hand-written page of calculations by Mr. Clair Levitt, District Conservationist, Soil Conservation Service, Marsing, Idaho. The calculations estimate the efficiency of Applicant's lands and irrigation delivery system as currently exist and as might be expected with leveling and improvements. The document not having been served on Protestants as provided for in OAR 137-03-050(5), and the author not being called or present to be examined in person, Protestants objected to the entry of the document into the hearing records.

The contents of the document are found to be neither probative or relevant to the issues in dispute in this matter, nor are they relevant to the final decision in this matter. Protestant's objection is sustained.

A proposed order was served on the parties on December 11, 1987, by Certified mail with return receipt. No exceptions or objections to the proposed order were received either within or after the time allowed. Therefore, the Water Resources Director now makes the following:

## FINDINGS OF FACT

Cow Creek originates within the State of Idaho, flows into the State of Oregon within the lands of the Applicant, and becomes tributary to upper Cow Creek Lake within the drainage area of Jordan Creek, a tributary of the Owyhee River. As it traverses lands within Oregon, Cow Creek is a seasonal stream. The flow of Cow Creek is high in the early spring season of the year and diminishes to little or no flow in June and July of most years.

The benefitted lands as shown on Figure 1 are irrigated from Diversion Point 1 by means of gravity flow through a system of open ditches. Diversion Point 1 is located upstream (east) a distance of approximately 330 feet from the Oregon-Idaho border.

The historic use of the benefitted lands has been for the production of wild hay crops. In recent years, the lands have been cultivated, leveled and planted to alfalfa for production of hay crops. Both applicant and protestants testified that the hay harvest activities on these lands were, in all years, ended by August at the latest. Applicant further indicated that he was usually done with haying by July 4.

Return flow from irrigation of the benefitted lands enters the channel of Cow Creek between Diversion Point 1 and proposed Diversion Point 2 and is available for use by downstream appropriators including the protestants herein. The record does not establish the amount of the return flows entering the said reach of the channel.

The Applicant testified that he intends to continue the use of Diversion Point 1 and the system of gravity flow ditches for irrigation of the benefitted lands. Applicant proposes to divert water at proposed Diversion Point 2 by means of a diversion dam and by pumping water into a gravity flow ditch system.

Applicant further testified that water diverted from the channel of Cow Creek at the proposed alternate Diversion Point 2 would be used to irrigate a portion of the benefitted lands on which he is attempting to establish alfalfa seedlings, with the goal of establishing more ground in alfalfa and increasing production. The lands in question have recently been leveled and sloped.

Water would be applied on these lands from proposed Diversion Point 2 at such times as the gravity flow ditch system from Diversion Point 1 is shut off to dry up other portions of the benefitted lands for hay harvesting purposes. Applicant indicated that he has never irrigated from Diversion Point 1 after the hay has been harvested. Under Applicant's stated plan, water would be appropriated at proposed Diversion Point 2 later in the year than has historically been done at the existing diversion.

Both Applicant and Protestants testified that irrigation return flows from lands irrigated from Diversion Point 1 enter the channel above proposed Diversion Point 2. Both parties further testified that diversion of water had been made at proposed Diversion Point 2 the year of 1987.

#### CONCLUSIONS OF LAW

Location of an additional point of diversion at Proposed Diversion Point 2 with use of water as Applicant has proposed would result in an impermissible change in circumstances and may not be had without injury or prejudice to other existing rights. ORS 540.530(1).

#### OPINION

When water rightly diverted from a waterway and beneficially applied returns without measurement and control to that waterway at some downstream point, it again becomes part of the public waters and is subject to appropriation by other users. Vested downstream water rights may in fact be based, in whole or in part, upon the return flows of an upstream appropriator. See, e.g., Jones v Warm Springs Irrigations District, 162 OR 186 (1939).

Applicant contends that the diversion at proposed Diversion Point 2 existed at least in 1920 and that the diversion has been used for fulfillment of his 1878 right in years past, and that he simply wants to reestablish this diversion.

The record is clear that in the eight years that the applicant has been on the subject property, 1987 is the first year he diverted water from Cow Creek at the proposed Diversion Point 2 for irrigation of benefitted lands. The record is not clear as to what use may have been made of proposed Diversion Point 2 in the years prior to the applicant's control and use of the property.

However, the question before us in this proceeding is whether approval of the applicant's request for authorization for diversion of water at proposed Diversion Point 2 in addition to use of existing Diversion Point 1 would result in injury to the water rights of protestants and others. The burden of proof is on the applicant to show by reliable, probative and substantial evidence that such injury would not occur. Applicant has failed to meet this burden.

The statute setting the standard for approval or denial of an application for a change in diversion point is ORS 540.530(1). The statute does not limit possible harm resulting from a change in diversion point to rights of prior appropriators only, but requires denial of an application if there may be harm to any existing rights, whether prior or subsequent in priority. The statutory protection thus afforded to all affected existing rights does not concern itself with the rule of priority applicable elsewhere in water law, but rather with changes in circumstances resulting from the change in use, time, place or method of application or point of diversion which may have a deleterious effect on existing rights.

It is well established in Oregon law that a subsequent appropriator acquires a vested right to insist that the conditions of the measure of a prior appropriation should not thereafter be changed to his detriment by the prior appropriator. Oliver v. Skinner & Lodge, 190 Or. 423 (1951). In this case, the court held that where a prior appropriator had historically taken water only up to a certain point in the year, subsequent appropriators after that point in time had priority to use those waters remaining in the stream.

There, as here, subsequent downstream appropriators had acquired vested water rights based in large part on the return flow of an upstream irrigator. The existence of sufficient return flows on which to acquire a vested right depend not only on the irrigation methods of the upstream appropriator but also on the time the water is diverted and beneficially applied.

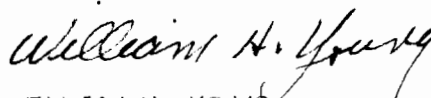
Water rights on a given stream system can be thought of as an interdependent network. Where a downstream subsequent appropriator has obtained a vested right based in whole or in part on the return flow of a prior appropriator, a displacement of one element of that network through a change in circumstances of appropriation can prejudice the remaining elements of that network, even if the displaced element is of an earlier priority date. See Broughton v. Stricklin, 146 Or. 259 (1934); Hutchinson v. Stricklin, 146 Or. 285 (1934).

Significant changes in circumstances would occur as a result of diversion of water from the channel of Cow Creek at proposed Diversion Point 2 at a time later in the year than that historically utilized by applicants or his predecessors. Approval of applicant's request for an additional point of diversion would result in injury to other existing water rights including the water rights of the protestants.

FINAL ORDER

NOW, Therefore, it is ORDERED that Transfer Application 5903 for a proposed additional point of diversion be and is hereby DENIED.

DATED at Salem, Oregon this 25<sup>th</sup> day of February, 1988.



WILLIAM H. YOUNG  
Director

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 (date of mailing) of this order. Judicial review is pursuant to the provisions of ORS 536.075 and 183.482.