

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CERTIFICATE 4316)  
AND ITS SUPERSEDING CERTIFICATE )      FINAL ORDER  
63763 ISSUED IN THE NAME OF      )  
A. LONG      )      Case No. ACC 96-1

A contested case hearing in the above-captioned matter was held on July 23, 1996, in the courtroom of the Baker County Courthouse, before Weisha Mize, Administrative Law Judge. The questions to be determined were:

whether Certificate 63767, issued by the Department as a remaining right certificate, incorrectly included Rock Creek as an authorized source of water for irrigation of the lands described in that certificate, inconsistent with the right allowed by the court in the Powder River Decree;

if the answer to the first question is in the affirmative, whether a corrected order approving transfer application 6286 should issue, and Certificate 63767 be cancelled, with a superseding certificate to be issued as proposed by the Department in its Propose Order Correcting Certificate issued April 16, 1996.

The Department was represented by Reed Marbut, staff. The protestant was represented by Alan Schmeits, attorney at law. The record was left open for the purpose of accepting legal briefs from the parties on the issue of estoppel.

A Proposed Order was issued September 3, 1996. No exceptions having been filed by either party within the time allowed, or at any time thereafter, this FINAL ORDER is now issued.

FINDINGS OF FACT

1. The relative rights to the use of the Powder River and its tributaries which were initiated and developed prior to 1909 were adjudicated and a decree defining those rights issued in 1918 by the Baker County Circuit Court. The decree specifies the date of priority, the source of water, the point of diversion from the natural water course, and the location of the lands to which each right adjudicated is appurtenant. *1918 Powder River Adjudication Decree.*
2. A right appurtenant to lands owned by A. Long, a portion of which lands are currently owned by the protestant, Tommy Duncan, was adjudicated by the Baker County Circuit Court and described in the 1918 decree. In the Powder River Adjudication Decree, the court specified which of A. Long's lands under this right received water from Big Muddy Creek under certain priority dates, and which lands received water from Rock Creek under other priority dates. *1918 Powder River Adjudication Decree.*

3. Lands under this right which are now owned by Tommy Duncan, being 40 acres in the SE¼ NW¼ and 14 acres in the SE¼ NE¼ of Section 20, Township 7 South, Range 39 East., WM, received water from Big Muddy Creek under priorities of 1886 and 1900, respectively. Other lands under this right, located in Sections 23 and 26 of Township 7 South Range 38 East and now served by the Power Valley Water Control Irrigation District, received water from Rock Creek through the Fisher-Long ditch under 1872 and 1879 priorities. *1918 Powder River Adjudication Decree.*
4. Protestant's lands are located between Little Muddy Creek to the north and Big Muddy Creek to the south. *USGS Haines Quadrangle map.*
5. The authorized point of diversion for the rights allowed in the Powder River adjudication are not specified in the decree outside the reference to named ditches as the means of conveyance from the natural watercourses which are the adjudicated sources for the several rights confirmed in the decree. For the lands now owned by protestant, the 40 acre parcel was to have water conveyed to it through the A. Long ditch, and the 14 acre parcel through the Long-Eilertson ditch. Lands receiving Rock Creek water were to have that water conveyed through the Fisher-Long ditch. *1918 Powder River Adjudication Decree.*
6. In 1923, pursuant to statutory directive, the State Engineer, predecessor to the Water Resources Department, subsequently prepared and issued Certificate 4316 to A. Long for the lands which the court had adjudicated a water right, including those lands now owned by Tommy Duncan. *ORS 539.140.*
7. The adjudication statutes in place at the time of the adjudication, which are now contained in ORS Chapter 539, allowed parties who disagreed with the circuit court's determination 60 days from the issuance of the decree to file an appeal with the Oregon Supreme Court. That appeal now goes to the Oregon Court of Appeals. The parties and the Department also had six months in which to file a request for rehearing, which ran from the time the decree was issued or, if there was an appeal, from the date of the circuit court's decree on the decision of the Supreme Court. *ORS 539.150; 539.190.*
8. No appeal or request for rehearing of the court's decree of the right on which Certificate 4316 was issued was made within the time allowed, or at any time thereafter. *Department Records.*
9. In 1989, the Powder Valley Water Control District, current owner of the A. Long lands determined in the adjudication to have a right from Rock Creek, filed transfer application 6286 for an additional point of diversion for its lands. In approving the District's application, the Department cancelled Certificate 4316. In its place, the Department issued an Order approving the additional point of diversion for the Rock Creek lands and "remaining right" Certificate 63767 for the Big Muddy Creek lands now owned by protestant. *Department's "Proposed Order Correcting Certificate" issued April 16, 1996.*
10. The Order approving transfer 6286 and Certificate 63767 identify both Rock and Big Muddy

Creeks as sources for the lands covered by the transfer Order and the Certificate. *Id.*

#### ULTIMATE FACTS

1. As issued, Certificate 4316 was inconsistent with the 1918 Powder River Adjudication Decree, in that it incorrectly showed both Rock and Big Muddy Creeks as sources for all the A. Long lands and failed to retain the specific allocation contained in the decree.
2. As issued, Certificate 63767 and the Order approving Transfer 6286 continued the State Engineer's earlier error identifying both Rock and Big Muddy Creeks as sources for the lands now owned by the District and by the protestant.

#### CONCLUSIONS OF LAW

1. Where water rights have been adjudicated, the decree is the final determination of the right, notwithstanding any contrary inference created by errors in a certificate issued by the State Engineer or Water Resources Department in carrying out its non-discretionary, administrative responsibilities under ORS 539.140. ORS 539.200; Rencken v. Young, 300 Or 352, 363 (1985).
2. Where there is a discrepancy between an adjudication decree and the administrative act, the decree controls. *Id.*
3. Certificate 63767 should be corrected to show that the lands to which this right is appurtenant are entitled only to Big Muddy Creek as a source of water.
4. The Order approving Transfer 6828 should be corrected to show that the lands to which this right is appurtenant are entitled only to Rock Creek as a source of water.

#### DISCUSSION

The Department makes a copy of water right certificates available to the landowner and the public on request. The field staff also utilize a field copy of decrees issued for streams systems within their district, and other tools staff prepare to assist in their duties, such as distribution maps which may combine adjudication maps and county tax plat maps to illustrate the location and ownership of water rights within the watermaster district.

In the District 8 Watermasters' office, staff made pencilled notations in the margin of the field copy of the Decree and on the working copy of the distribution map. These pencilled notes incorrectly state that all lands originally under Certificate 4316 are entitled to water from both Big Muddy and Rock Creeks. The protestant obtained a copy of the certificate from the Department, reviewed the distribution map and field copy of the decree which contained the pencilled margin note, and inquired as to the position of the Watermasters' office regarding the right appurtenant to the 40 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  and 14 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 20,

T7S R39E prior to purchasing those lands.

Because of these facts and in light of the elements of estoppel set out in 31 CJS Estoppel, §67, page 402, the protestant asserts that the Department is equitably estopped from correcting Certificate 63767. Protestant cites Bennett v. City of Salem, 192 Or 532 (1951), Savage v. City of Salem, 23 Or 381 (1893), City of Molalla v. Coover, 192 Or 233 (1951), Douglas County v. Umpqua Valley Grange, 45 Or App 739 (1980) in support of this assertion. The protestant seeks to have the Department estopped from changing the certificate in the manner proposed to show only Big Muddy Creek as a source of water for his lands, in order to continue using Rock Creek water, which is a more reliable source of water.

In response, the Department argues that the issuance of a certificate based on a decree is a governmental (ministerial, or administrative) act against which estoppel will not lie, as opposed to a proprietary one for which the state may be estopped. The Department relies on Rohde v. SAIF, 108 Or 426 (1923) and Teel Irrigation District v. Water Resources Department, 135 Or App 16 (1995) (decided on other grounds), *aff'd*, Teel Irrigation District v. Water Resources Dept., 323 Or 663 (1996) on the question of estoppel. The State also reminds us that in the event of a discrepancy between the decree and the later-issued certificate, the decree provisions control. Rencken v. Young, 300 Or 352 (1985).

I find that protestant's assertion of estoppel and the cases relied on in support of this position are legally distinguishable from the present case and not persuasive. In issuing Certificate 4316 in 1923, the Department was performing a ministerial act. In doing so, it made, at best, a clerical error by failing to retain the precise language of the decree which unambiguously allocated Big Muddy Creek water to protestant's lands and Rock Creek water to the Powder Valley Irrigation District lands. In the ministerial act of issuing the transfer order and Certificate 63767 in 1989, the Department repeated that clerical error. However, incorrectly delineating the elements of a water right originally determined by a court cannot serve to overturn or modify the terms of the adjudication Decree, which established the legal allocation of water and source of water to the lands under Certificate 4316.

The Powder River Adjudication Decree was not challenged regarding the water right in question within time allowed by statute. The time for challenging a decree found in ORS 539.150 is the same as that in place at time of adjudication and original certificate issuance and has not, in fact, changed since the adjudication statutes were first adopted in 1909. The unambiguous terms of the Decree regarding the right in question are *res judicata*, and neither a pencil notation in the margin or a later error in setting out these terms in a certificate can serve to change the Decree.

The Department may not alter or otherwise change the terms of a water right except in accordance with the process established in law. Only the court may correct its decree; the Department's actions in issuing Certificate 4316 and in approving later additional points of diversion pursuant to ORS Chapter 540 do not correct or change the decree issued by the court.

Finally, estoppel cannot lie against the state where to find estoppel would allow, if not require, the state to act in a way that was inconsistent with the clear direction of the court and contrary to

law.

Where the law directs issuance of a certificate consistent with the provisions of the decree, issuance of a certificate containing terms inconsistent with those set out in decree may be considered an act outside the scope of statutory authority. In that sense, the department's action in issuing Certificate 4316 might be considered *ultra vires*. I think it the more correct view, however, that the Department made a mistake and that the state cannot be bound to ratify or continue that mistake where it is legally in error and in conflict with the decree, which controls here.

### ORDER

It is ORDERED that the records of the Department be corrected to show that cancelled Certificate 4316 should have distinguished which source of water and which priority date applied to the several separate tracts of land as described in the tabulation found at Volume 6, page 281, 1918 Powder River Adjudication Decree, as follows:

Acreage	Twp/Rng/Section	Priority Date	Source
40 SE $\frac{1}{4}$ NW $\frac{1}{4}$	7 S 39 E 20	1886	Big Muddy Creek
14 SE $\frac{1}{4}$ NE $\frac{1}{4}$	7 S 39 E 20	1900	Big Muddy Creek

It is FURTHER ORDERED that the Order approving Transfer 6286, issued December 29, 1989 and recorded in Volume 5, pages 511-514, Special Order Volume, be corrected by stating the priority dates for each 40-acre parcel involved in the Order, showing only Rock Creek as the authorized source of water and deleting the reference to Big Muddy Creek as a source of water for the lands described in the Order, as follows;

40 acres NE $\frac{1}{4}$  NW $\frac{1}{4}$  and 40 acres NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 26,  
40 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$  and 40 acres SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 23,  
under a priority of 1872;

40 acres NE $\frac{1}{4}$  NE  $\frac{1}{4}$  and 40 acres NW $\frac{1}{4}$  NE  $\frac{1}{4}$ , Section 26,  
40 acres SE $\frac{1}{4}$  SE  $\frac{1}{4}$  Section 23,  
under a priority of 1879,  
all in Township 7 South, Range 38 East

It is FURTHER ORDERED that upon proof satisfactory to the Direct of completion of works and beneficial use of water made to the extent intended under the provisions state in the Order approving Transfer 6286, as corrected by this Order, a confirming certificate of water right shall be issued identifying only Rock Creek as the source of water for the lands described therein. No additional time for submittal of proof of completion is granted under this Order.

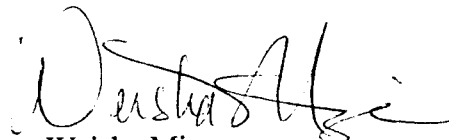
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It is FURTHER ORDERED that Certificate 63767 issued in the name of A. Long be canceled, and a superseding certificate be issued in the name of Tommy Duncan describing only Big Muddy Creek as the source of water for the following lands, and with the following rate of appropriation:

40 acres in the SE¼ NW¼  
14 acres in the SE¼ NE¼,  
all in Section 20, Township 7 South, Range 39 East, WM

This remaining right being for the appropriation of not to exceed 1.25 cubic feet per second of water from Big Muddy Creek, under a priority of 1886 for 40 acres and of 1900 for 14 acres set out herein.

Issued this 22nd day of October, 1996.



Weisha Mize  
Administrative Law Judge

**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.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing FINAL ORDER by placing a true copy of same in the United States Mail at Salem, Oregon, on October 23, 1996, postage prepaid, addressed to the parties or to their legal or authorized representative at their regular mailing addresses as shown below:

Reed Marbut  
Water Resources Department  
158 12th St. NE  
Salem OR 97310

Alan Schmeits  
Silven, Schmeits & Vaughan  
1950 Third St.  
Baker City OR 97814

A handwritten signature in black ink, appearing to be 'Sara Carter', with a long horizontal flourish extending to the right.

Sara Carter  
Administrative Hearings Coordinator