

4431 Popson

PROTESTED

4431

Name Andrew & Dorothy Popson

By _____

Address P.O. Box 435
Fort Klamath, OR 97626

DESCRIPTION OF WATER RIGHT

Name of stream Anna CreekTrib. of _____ County of KlamathUse irrigationQuantity of water _____ No. of acres 3.34Name of ditch Shattuck to ScottDate of priority 1883In name of Robert Connor & George A. LiskAdjudication, Vol. 2, page 15App. No. _____ Per. No. _____ Cert. No. 1088

Certificate cancelled _____

Notation made on record by _____

Change in PODDate filed March 19, 1980Date of hearing June 26, 1980Place of hearing Klamath Falls✓ Date of order 11-16-81 Vol. 35, page 365Date for application of water 12-1-82

Proof mailed _____

Proof received _____

Certificate issued APR 25 1985 Vol. 48, page 53000

FEB 19 2004

80582
80583

53001

REMARKS

7-11-80 Popson can't find application & map, Del Sparks will make copies if necessary.

W.R.I.S.

Assembled 7-11-85 by 728

Entered _____ by _____

Verified _____ by _____

FEES PAID

Date	Amount	Receipt No.
<u>3/19/80</u>	<u>85.00</u>	<u>16725</u>
TOTAL . . .		
	Cert. Fee	

Herald & News #41.62 pd 6/24/80 lkt 4250

FEES REFUNDED

Date	Amount	Check No.
<u>6/24/80</u>	<u>8.38</u>	<u>4251</u>

EX 20-
POD 15-
POD 41.62
76.62

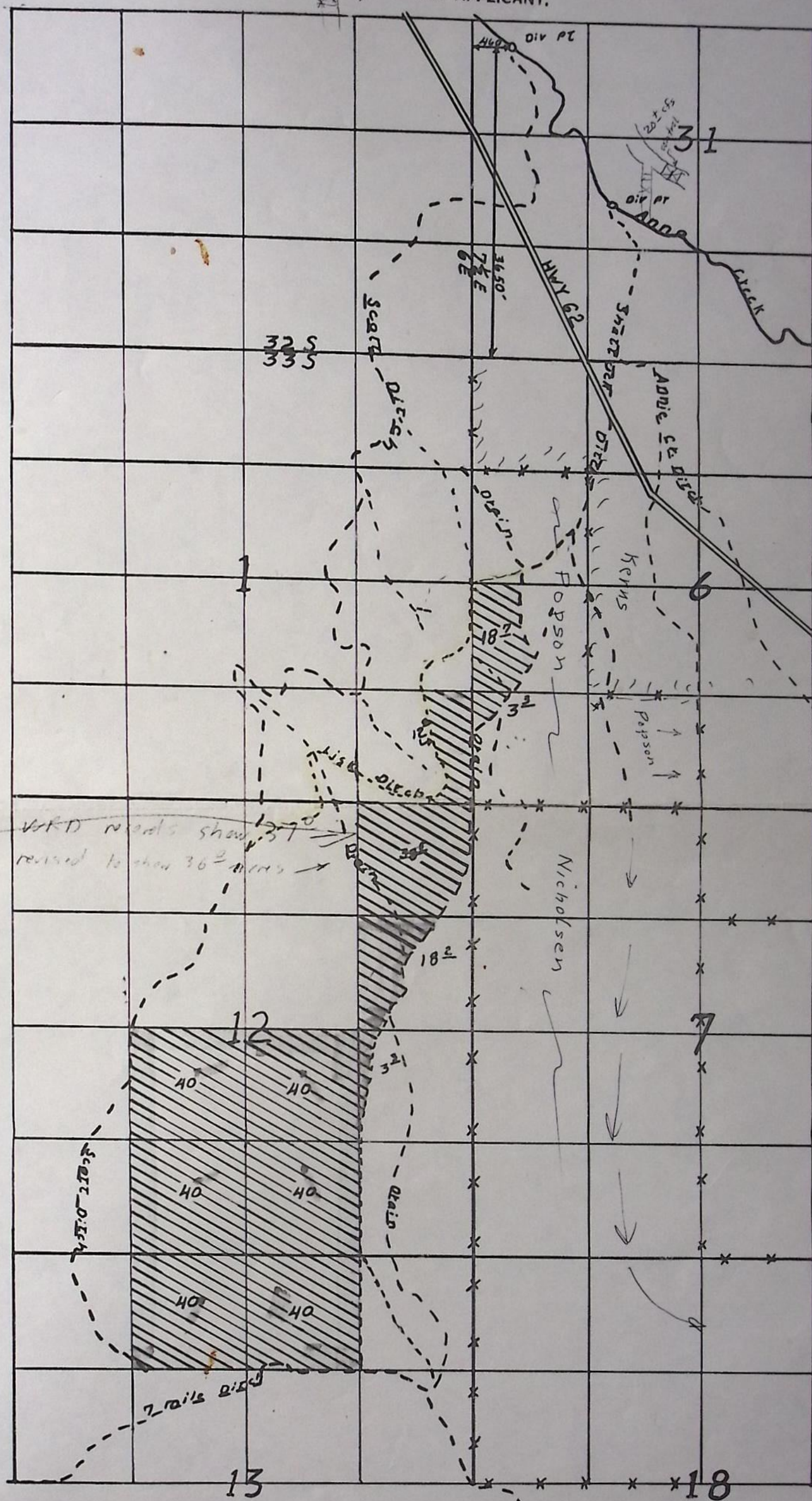
INDEX CARDS:

TO BE ENTERED WHERE CHECKED	✓	Name	<u>SRA</u>	<u>Q4</u>
	✓	Stream	<u>SRA</u>	<u>Q4</u>
	✓	Pt. of Div.	<u>Q4</u>	
	✓	Calendar	<u>Q4</u>	
CHECKED TO RECORDS:				
	✓	Twp. & Rge.		
	✓	Decree-vault	<u>SRA</u>	
	✓	Decree-safe		
	✓	Cert. of W/R	<u>SRA</u>	
	✓	Per. Folder		
	✓	Chainindex		
	✓	Cross Ref.		
	✓	Power Claim		
	✓	Abstracts	<u>Q4</u>	

hsh

24/2

T-4431



TRANSFER MAP

Construction done in 1981 provided for water being run via this course and lands were so irrigated during 1981 irrigation season, beginning in July.

CARVER

STATE OF OREGON

COUNTY OF KLAMATH

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

ANDREW AND DOROTHY POPSON

P.O. BOX 435

FORT KLAMATH, OREGON 97626

confirms the right to use the waters of ANNA CREEK, a tributary of WOOD RIVER, for IRRIGATION of 297.5 ACRES, STOCKWATER, AND DOMESTIC USE.

This right was confirmed by decree of the Circuit Court of the State of Oregon for KLAMATH County. The decree is of record at Salem, in the Order Record of the WATER RESOURCES DIRECTOR, in Volume 2, at Page 1. The date of priority is 1883.

The use is limited to 3.742 CUBIC FOOT PER SECOND FROM APRIL 1ST TO JULY 20TH OF EACH YEAR AND 1.871 CUBIC FOOT PER SECOND, THEREAFTER TO THE CLOSE OF THE IRRIGATION SEASON (IF AVAILABLE AT THE ORIGINAL POINT OF DIVERSION DESCRIBED AS THE SHATTUCK DITCH LOCATED WITHIN THE NE 1/4 SW 1/4, SECTION 31, TOWNSHIP 32 SOUTH, RANGE 7 1/2 EAST, W.M.; 1850 FEET NORTH AND 1650 FEET EAST FROM THE SOUTHWEST CORNER OF SECTION 31), or it's equivalent thereof in case of rotation; the total quantity delivered not to exceed three acre feet for each acre irrigated.

The point of diversion is located as follows:

SCOTT DITCH - LOT 2 (SW 1/4 NW 1/4), SECTION 31, TOWNSHIP 32 SOUTH, RANGE 7 1/2 EAST, W.M.; 3650 FEET NORTH AND 460 FEET EAST FROM THE SOUTHWEST CORNER OF SECTION 31.

A description of the place of use to which this right is appurtenant is as follows:

NE 1/4 NE 1/4	36.0 ACRES
SE 1/4 NE 1/4	18.2 ACRES
NE 1/4 SW 1/4	40.0 ACRES
SE 1/4 SW 1/4	40.0 ACRES
NE 1/4 SE 1/4	3.3 ACRES
NW 1/4 SE 1/4	40.0 ACRES
SW 1/4 SE 1/4	40.0 ACRES

SECTION 12

TOWNSHIP 33 SOUTH, RANGE 6 EAST, W.M.

This is a final order in other than contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review of the order must be filed within the 60 days of the date of service.

NW 1/4 NE 1/4 40.0 ACRES

NE 1/4 NW 1/4 40.0 ACRES

SECTION 13

TOWNSHIP 33 SOUTH, RANGE 6 EAST, W.M.

The use for irrigation purposes hereunder shall conform to any reasonable rotation system ordered by the proper State Officer. The right to use water for domestic and stock purposes shall continue throughout the year.

The diversion works shall include an in-line flow meter, a weir, or other suitable device for measuring the water to which the user is entitled.

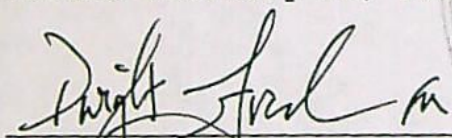
The type and plans of the measuring device be approved by the Watermaster and the weir or measuring device be maintained under the general supervision of said Watermaster.

This certificate is issued to confirm a change in POINT OF DIVERSION approved by an order of the Water Resources Director entered NOVEMBER 16, 1981, and together with Certificates 53001, supersedes Certificates 1088, State Record of Water Right Certificates.

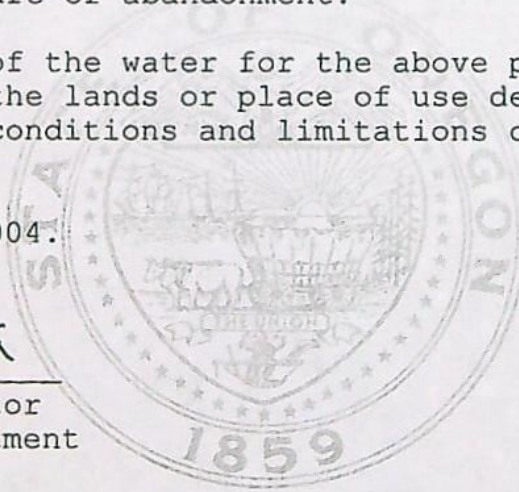
The issuance of this superseding certificate does not confirm the status of the water right in regard to the provisions of ORS 540.610 pertaining to forfeiture or abandonment.

The right to the use of the water for the above purpose is restricted to beneficial use on the lands or place of use described and is subject to all other conditions and limitations contained in said decree.

Issued February 19, 2004.



Paul B. Cleary, Director
Water Resources Department



Recorded in State Record of Water Right Certificates Number 80583.

T-4431B.SB *nk*

179-252C

POD
POU
USE
Add'l POD

County Klamath

1. Name Andrew & Dorothy Posson

2. Source of Water Anna Cr. Trib of

4. Amount of Water

5. Priority Date 1883

6. Proposed Point of Diversion 36.50' N & 46.0' E from SW Cor, S 31, w/in
SW 1/4 NW 1/4, S 31, T 32 S, R 7 1/2 E, WM

7. Completion Date 10-1-82

8. Place of Use:

[illegible]

7/12/90
D. B. S.

CND-624-81

Info Jim Popson and self knowledge

All The Irrigatable Lands west of The main Drain
is Irr. from The SCOTT ditch Diversion

NOTE: This Transfer of POD was to make legal what they have
been doing for years and so this ditch wouldn't get
turned off in years of shortages of water

NOTE There is a lockable headgate ^{on ditch} and a Pot Still flum installed
about 50' below headgate, I believe the measuring device was a part
of the requirement for this Transfer

0

Tie: Inspection

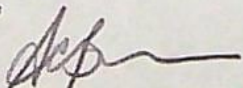
Del Sparks

Watermaster Dist 17

July 12 1990

1-23-04

For call to WM, Del Sparks ditch
has been measured and the capacity is
67 15 cfs.



STATE OF OREGON

COUNTY OF KLAMATH

CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

ANDREW AND DOROTHY POPSON
P.O. BOX 435
FORT KLAMATH, OREGON 97626

confirms the right to use the waters of ANNA CREEK, a tributary of WOOD RIVER, for IRRIGATION of 34.0 ACRES, STOCKWATER, AND DOMESTIC USE.

This right was confirmed by decree of the Circuit Court of the State of Oregon for KLAMATH County. The decree is of record at Salem, in the Order Record of the WATER RESOURCES DIRECTOR, in Volume 2, at Page 1. The date of priority is 1883.

The use is limited to 0.425 CUBIC FOOT PER SECOND FROM APRIL 1ST TO JULY 20TH OF EACH YEAR AND 0.212 CUBIC FOOT PER SECOND, THEREAFTER TO THE CLOSE OF THE IRRIGATION SEASON (IF AVAILABLE AT THE ORIGINAL POINT OF DIVERSION DESCRIBED AS THE SHATTUCK DITCH LOCATED WITHIN THE NE 1/4 SW 1/4, SECTION 31, TOWNSHIP 32 SOUTH, RANGE 7 1/2 EAST, W.M.; 1850 FEET NORTH AND 1650 FEET EAST FROM THE SOUTHWEST CORNER OF SECTION 31), or it's equivalent thereof in case of rotation; the total quantity delivered not to exceed three acre feet for each acre irrigated.

The point of diversion is located as follows:

SCOTT DITCH - LOT 2 (SW 1/4 NW 1/4), SECTION 31, TOWNSHIP 32 SOUTH, RANGE 7 1/2 EAST, W.M.; 3650 FEET NORTH AND 460 FEET EAST FROM THE SOUTHWEST CORNER OF SECTION 31.

A description of the place of use to which this right is appurtenant is as follows:

SE 1/4 SE 1/4 12.0 ACRES
SECTION 1
TOWNSHIP 33 SOUTH, RANGE 6 EAST, W.M.

LOT 6(NW 1/4 SW 1/4) 18.7 ACRES
LOT 7(SW 1/4 SW 1/4) 3.3 ACRES

SECTION 6
TOWNSHIP 33 SOUTH, RANGE 7 1/2 EAST, W.M.

This is a final order in other than contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review of the order must be filed within the 60 days of the date of service.

The use for irrigation purposes hereunder shall conform to any reasonable rotation system ordered by the proper State Officer. The right to use water for domestic and stock purposes shall continue throughout the year.

The diversion works shall include an in-line flow meter, a weir, or other suitable device for measuring the water to which the user is entitled.

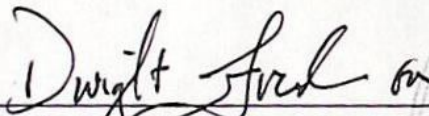
The type and plans of the measuring device be approved by the Watermaster and the weir or measuring device be maintained under the general supervision of said Watermaster.

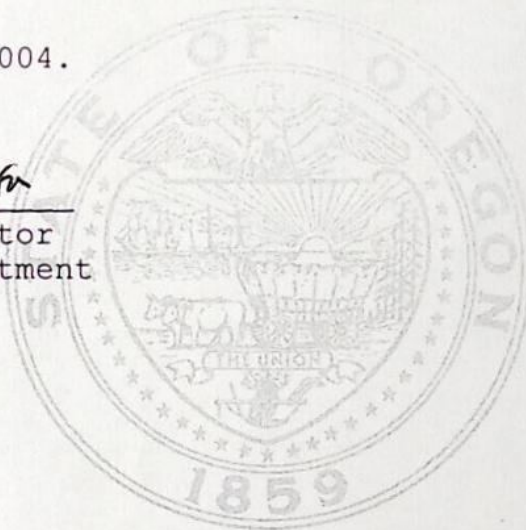
This certificate is issued to confirm a change in POINT OF DIVERSION approved by an order of the Water Resources Director entered NOVEMBER 16, 1981, and together with Certificates 53000, supersedes Certificates 1098, State Record of Water Right Certificates.

The issuance of this superseding certificate does not confirm the status of the water right in regard to the provisions of ORS 540.610 pertaining to forfeiture or abandonment.

The right to the use of the water for the above purpose is restricted to beneficial use on the lands or place of use described and is subject to all other conditions and limitations contained in said decree.

Issued February 19, 2004.


Paul R. Cleary, Director
Water Resources Department



Recorded in State Record of Water Right Certificates Number 80582.

T-4431A.SB *did*

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

KLAMATH COUNTY

IN THE MATTER OF TRANSFER APPLICATION 4431 IN THE NAMES OF ANDREW AND DOROTHY POPSON FOR APPROVAL OF A CHANGE IN POINT OF DIVERSION OF WATER FROM ANNA CREEK)

FINDINGS OF FACT
CONCLUSIONS AND
ORDER APPROVING

Water Right Transfer Application 4431 in the names of Andrew and Dorothy Popson was filed in the office of the Water Resources Director on March 19, 1980 for approval of a change in point of diversion of water appropriated from Anna Creek under the provisions of certain rights allowed by decree of the court in the matter of the Determination of the Relative Rights of the Various Claimants to Use the Waters of Anna Creek and its Tributaries.

The certificate recorded at page 1088, Volume 2, State Record of Water Right Certificates, describes a right allowed in the name of Robert Conner, which includes the use of water from Anna Creek under a priority date of 1883, for domestic and stock use and irrigation of a certain 36.0 acres in NE 1/4 NE 1/4, 18.2 acres in SE 1/4 NE 1/4, 40.0 acres in NE 1/4 SW 1/4, 40.0 acres in SE 1/4 SW 1/4, 3.3 acres in NE 1/4 SE 1/4, 40.0 acres in NW 1/4 SE 1/4 and 40.0 acres in SW 1/4 SE 1/4 of Section 12; 40.0 acres in NW 1/4 NE 1/4 and 40.0 acres in NE 1/4 NW 1/4 of Section 13, Township 33 South, Range 6 East, WM.

The certificate recorded at page 1098, said Volume 2, describes a right allowed in the name of George A. Lisk, which includes the use of water from Anna Creek under a priority date of 1883, for domestic and stock use and irrigation of a certain 12.0 acres in SE 1/4 SE 1/4 of Section 1, Township 33 South, Range 6 East, WM; 18.7 acres in NW 1/4 SW 1/4 and 3.3 acres in SW 1/4 SW 1/4 of Section 6, Township 33 South, Range 7 1/2 East, WM.

The authorized point of diversion of record for the aforesaid rights is located 1,850 feet North and 1,650 feet East from the Southwest Corner of Section 31, Township 32 South, Range 7 1/2 East, WM, being within the NE 1/4 SW 1/4 of said Section 31, where the Shattuck Ditch diverts waters of Anna Creek.

Pending Transfer Application 4431 proposes to change the point of diversion therefrom to divert water through the Scott Ditch at a point located 3,650 feet North and 460 feet East from the Southwest Corner of Section 31, Township 32 South, Range 7 1/2 East, WM, being within the SW 1/4 NW 1/4 of said Section 31, without loss of priority.

Notice of Application 4431 describing the proposed change in point of diversion of water from Anna Creek was published pursuant to ORS 540.520(2) in the May 1, 8 and 15, 1980 issues of the Herald and News newspaper in Klamath County, Oregon.

On June 16, 1980, a protest in the name of Elmore Nicholson against approval of the pending application was filed in the office of the Water Resources Director by and through Neal G. Buchanan, Attorney at Law, Klamath Falls, Oregon. In the protest it is alleged that the proposed change in point of diversion of water would result in injury to the water rights of the protestant and others.

The aforesaid protest was accompanied by request by certain other persons to join in the protest as affected persons to the proceedings.

Pursuant to agreement of counsel and notice by the Director, the matter of the pending application and the protest against it was brought to hearing before James W. Carver, Jr., an employee of the Water Resources Department, authorized to preside in behalf of the Director, at Klamath Falls, Oregon, on September 3, 1981.

The applicants were represented by John Svoboda of the firm of Lively, Wiswall, Svoboda, Thorp and Dennett, Attorneys at Law, Springfield, Oregon. The protestants were represented by Neal G. Buchanan, Attorney at Law, Klamath Falls, Oregon.

Figure 1 herein, a photoreduction of Exhibit WRD #4A to approximately one-half original size, shows the relative locations of the channel of Anna Creek, Shattuck Ditch, Scott Ditch, the applicants' lands for which the change in point of diversion is sought, and certain other features.

EVIDENTIARY RULING

Protestants offer as their Exhibit "E" a letter dated June 10, 1980, which bears a signature, "Carl F. Wilson".

Applicant objects on the following grounds: "It is hearsay. It is an unauthenticated letter. The letter itself contains so many ambiguities the right of cross examination is critical. For those reasons, I object."

The said letter refers to a ditch as "this irrigation ditch starts at the Northeast corner of our property"; however, the ditch is not identified by name or by location with reference to the U.S. Public Land Survey or to a property description of record. The letter is not "evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs" as required by OAR 137-03-050(1).

Applicants' objection is sustained.

FINDINGS OF FACT

Under the provisions of the water rights described herein above for irrigation of a total of 331.5 acres of land, the applicants are entitled to appropriate from Anna Creek under a priority date of 1881, not to exceed 4.14 cubic feet per second of water within the period of April 1 to July 20 of each year, and thereafter to the close of the irrigation season, not to exceed 2.07 cubic feet per second of water, and not to exceed a total appropriation of three acre-feet per acre irrigated within the irrigation season of each year, measured at the point of diversion.

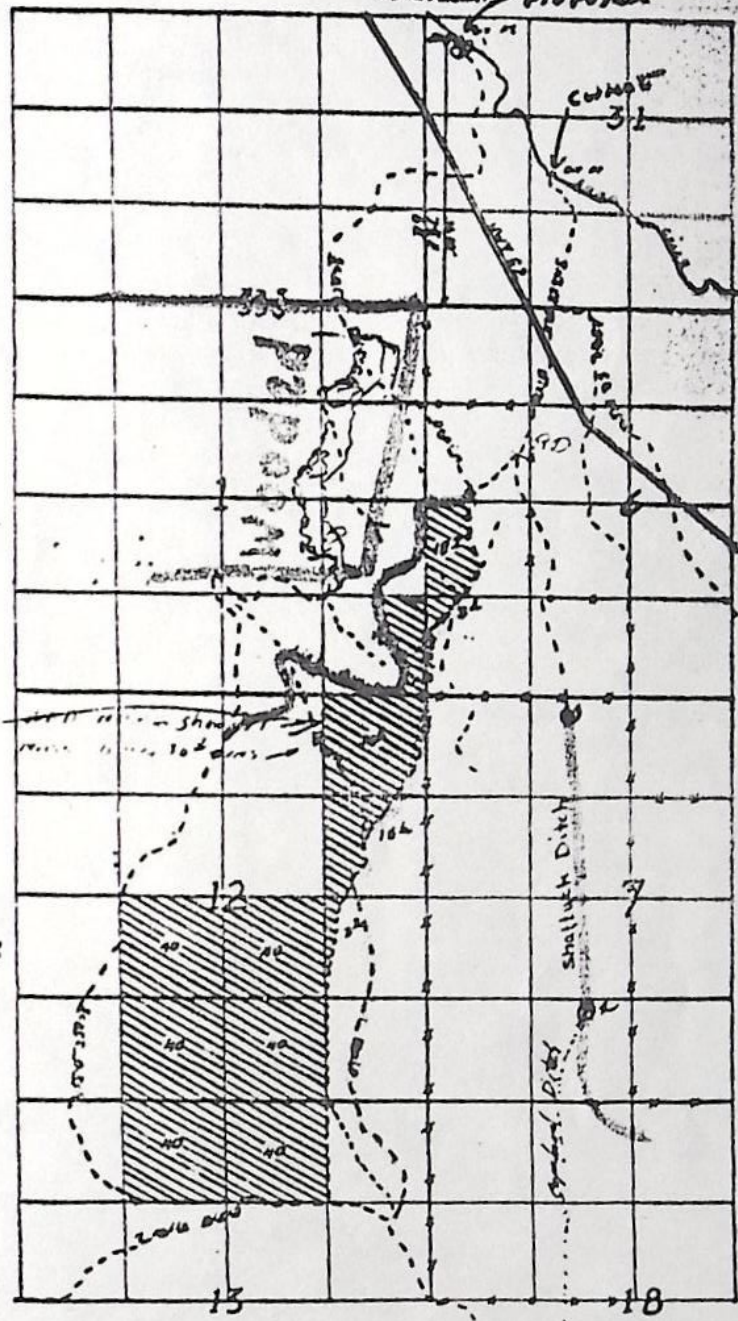
Until the 1981 irrigation season, water for irrigation of the applicants' lands for which the change in point of diversion is sought by Application 4431, has been diverted from Anna Creek by and through the Scott Ditch since sometime prior to the year 1962.

Prior to the irrigation season of 1980, the applicants were advised by the Watermaster that if they were to continue appropriation of water from Anna Creek for irrigation of the subject lands in subsequent years, they would have to apply for and obtain approval of a change in point of diversion from the Shattuck Ditch to the Scott Ditch, or divert their water by and through the Shattuck Ditch.

THIS APPLICATION PREPARED BY T-4431

FROM INFORMATION FURNISHED BY THE APPLICANT PROPOSED

C#1088



Scale 1/4" = 1000'
Scale 1/8" = 1000'

TRANSFER MAP

(Figure 1)

WRD # 4-A

During the year of 1981, while the protested Application 4431 was pending before the Water Resources Director, applicants constructed a connecting ditch (shown in pink on Figure 1) from a point of redirection from the Shattuck Ditch within the SW 1/4 NW 1/4 of Section 6 to a point within the NW 1/4 NE 1/4 of Section 12, where it joins with the Scott Ditch. Beginning on July 3, 1981, applicants irrigated the subject lands with water diverted from Anna Creek by and through the Shattuck Ditch, running the water down the Shattuck Ditch to the aforesaid point of redirection, and then down the connecting ditch to the subject lands.

A significant portion of the water run through the connecting ditch was lost by percolation through the sides and bottom of the ditch because the ditch is constructed to a shallow gradient due to the topography of the area, and because the soils through which the ditch is constructed are pumice soils being very permeable by nature.

Applicants testified that due to the high percolation losses in the connecting ditch, it is more advantageous to them to divert their water for the subject lands by and through the Scott Ditch as compared to the Shattuck Ditch-connecting ditch means used during the 1981 season.

Robert S. Blanton, owner of Soils Testing Lab in Medford, Oregon, and a licensed consulting civil engineer with considerable experience in the construction and operation of irrigation canals and ditches, was called as an expert witness for protestants. Mr. Blanton testified that it was his opinion based on his observations of the Shattuck Ditch, without having made specific tests, losses of water being transported down the Shattuck Ditch from Anna Creek to the applicants' point of redirection within the SW 1/4 NW 1/4 of Section 6 would amount to no more than 1% of the water diverted into the ditch from Anna Creek.

Mr. Blanton also testified that from his observations of the Scott Ditch, without specific tests having been made, for any given length of ditch the losses from water flowing in Scott Ditch would be greater than the losses from the same water flowing in Shattuck Ditch, due to greater permeability of the soils through which the Scott Ditch courses.

Mr. Blanton further testified that he had not observed the aforesaid connecting ditch and had no personal knowledge regarding probable losses of water flowing through that ditch.

No testimony was adduced to show that protestants would receive any less water from the flow of Anna Creek at their respective points of diversion, under their relative entitlements to water, if the applicants were to divert their water under their relative entitlements for irrigation of the subject lands by and through the Scott Ditch as compared to diverting the said water by and through the Shattuck Ditch.

Protestants' testimony was that except for ditch losses, whether the applicants' water was taken through the Shattuck Ditch or through the Scott Ditch should not make any difference if the amount diverted is properly measured from the stream.

The Watermaster, Delbert Sparks, has reported to the Water Resources Director that there are no intervening diversions of water from Anna Creek between the Shattuck Ditch diversion, and the Scott Ditch diversion; and that in his opinion the proposed change in point of diversion can be made without injury to other water rights, providing the applicants are required to install a suitable measuring device in the diversion works of the Scott Ditch prior to their resuming use of the Scott Ditch for irrigation of the subject lands.

Mr. Blanton testified that the removal of the applicants' water from Shattuck Ditch as proposed by Application 4431 would have little or no effect on the total transportation losses from evaporation, seepage and percolation losses within that portion of the Shattuck Ditch between the diversion point on Anna Creek and the applicants' point of rediversion in the SW 1/4 NW 1/4 of Section 6. We agree.

Protestants contend that if the applicants are allowed to discontinue use of the Shattuck Ditch for irrigation of certain lands as proposed by Application 4431, whereby that water is no longer contributing its proportionate share to the losses which occur in the aforesaid portion of Shattuck Ditch, protestants will suffer greater proportionate shares of the total losses.

In theory, this is true. However, the applicants' proportionate share of said losses, being no more than 1% of the water they seek to transfer from the Shattuck Ditch to the Scott Ditch, is far less than the margin of error for any acceptable method of measurement of the waters diverted from Anna Creek into Shattuck Ditch under the rights that would remain in Shattuck Ditch.

OPINION

Testimony was clear that for a period of at least 18 successive years waters diverted from Anna Creek for irrigation of the applicants' lands for which the proposed change in point of diversion is sought was diverted through the Scott Ditch instead of being diverted through the Shattuck Ditch which is the authorized means of diversion of record.

Protestants question the validity of the subject water rights, suggesting that the subject rights may have been abandoned as provided by ORS 540.610.

The evidence adduced does not establish any five successive year period of nonuse of water from Anna Creek for irrigation of any of the subject lands.

Restating protestants' question in other words, "If the appropriator has not complied with the provisions of ORS 540.510 to 540.530 for changing the point of diversion for the appropriation, does the diversion of water from the source at some point other than the original, established point of diversion constitute a failure to "use the water appropriated" within the meaning of ORS 540.610(1)?"

The Supreme Court of Oregon in *Huff v. Bretz*, 285 Or 507, discussed ORS 540.510 to 540.530 in regard to performance under the terms of a lease and made the following statements:

"Although ORS 540.510 et seq. do not expressly prohibit the changing of one's point of diversion without making application to the Water Resources Director, we believe that it is clearly implied from these provisions that a person shall not change his point of diversion unless he files such an application and complies with the procedures set forth in ORS 540.520 and 540.530. These procedures are "for the protection of the public" (more specifically, for the protection of the interests of those who own affected or potentially affected water rights) against the evil of unrestrained changes in the point of diversion of water. This legislative purpose would be frustrated if a party could be required under the terms of an agreement to pump from an unauthorized point of diversion thereby changing the point of diversion without complying with the procedures mandated by ORS 540.510 et seq. and be held in breach of that agreement if he did not do so."

However, the Court did not answer the question before the Director in this matter.

There is agreement among the parties, as evidenced by the protestants' pending application for approval of the change in point of diversion, that the actions of the protestants and their predecessors in terminating the use of the original, established point of diversion, through the Shattuck Ditch, sometime prior to 1962, and thereafter using the so-called new point of diversion through the Scott Ditch down through the years since, did not serve to overcome the necessity to comply with the provisions of ORS 540,510 to 540,530.

The Water Code of 1909 provided (codified as Lord's Oregon Laws, Section 6668):

"All water used in this State for irrigation purposes shall remain appurtenant to the land upon which it is used; provided, that if for any reason it should at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the water is appurtenant, said right may be severed from said land, and simultaneously transferred, and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights, on the approval of an application of the owner to the Board of Control."

The said section remained substantially unchanged until amended by the Legislative Assembly of 1927, to provide (codified as Olson's Compilation of Oregon Laws, Section 5764):

"All water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of this act; provided that the owner of any water right may, upon compliance with the provisions of this act, change the use and place of use, the point of diversion or the use theretofore made of the water in all cases without losing priority of the right theretofore established. Whenever the owner of a water right for irrigation, domestic use, manufacturing purposes, or other use, for any reason desires to change the place of use, the point of diversion, or the use theretofore made of the water, an application to make such change as may be shall be filed with the state engineer ...".

Section 5764 also provided for publication of a notice of the application for approval of proposed changes, for three consecutive weeks in a newspaper printed and having general circulation in the county where the water right was located, and for a hearing on the matter, to consider the matter of injury to other water rights.

From 1909 to 1927 there was no administrative procedure for making a change in point of diversion from one point to another along the stream a matter of record, or allowing for an administrative determination as to whether a proposed change in point of diversion could be made without injury to other water rights. The point of diversion was subject to being changed, however, as stated by the Court in *Whited v. Cavin*, 55 Or 98, at page 106.

The Legislative Assembly of 1913 enacted an addition to the Water Code, (Laws of 1913, Chapter 279, page 531) which provided:

"Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state, and whenever hereafter the owner of a perfected and developed water right shall cease or fail to use the water appropriated, for a period of five successive years, the right to use shall thereupon cease, and such failure to use shall be conclusively presumed to be an abandonment of such water right, and thereafter the water which was the subject of use under such water right shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities; ...".

This section has continued substantially unchanged, and is now codified as ORS 540.610(1), which is the basis of this proceedings.

From 1909 to 1913, the provisions of the section of law that is now ORS 540.610(1) could not have been construed to conclude that diversion of water from the channel of Anna Creek at some point other than the original, established point of diversion, for irrigation of the lands described by the water right in question, would constitute a failure to "use the water appropriated". Without subsequent specific legislative action, it does not appear that the provisions of the section of law now codified as ORS 540.610(1) could be construed to be more confining than when enacted.

Further, beginning with the Water Code of 1909, the law has provided for the services of a watermaster to distribute the available waters of a stream among the several users in accord with their relative rights to use the water. From 1913 on, the diversion of water from any point along the stream other than the legally established point of diversion would have been an illegal act subject to control by the watermaster, if brought to his attention as would have been expected if an unlawful point of diversion were being used to the injury of another water user.

It is the opinion of the Water Resources Director that the diversion of water from the channel of Anna Creek at some point other than the original, established point of diversion for the irrigation of the subject lands as described herein above, does not constitute a failure to "use the water appropriated" within the meaning of ORS 540.610(1).

ULTIMATE FINDINGS OF FACT

The proposed change in point of diversion of waters of Anna Creek will not deprive any of the protestants of the waters to which they are entitled at their respective points of diversion from Anna Creek.

No actual injury would be suffered by other users of Shattuck Ditch as a result of the applicants' discontinuance of use of Shattuck Ditch for conveyance of waters pursuant to approval of Transfer Application 4431.

CONCLUSION OF LAW

Water Right Transfer Application 4431 should be approved pursuant to ORS 540.530 with such approval requiring applicants to install a suitable measuring device in the diversion works of Scott Ditch.

ORDER

NOW, THEREFORE, It hereby is ORDERED that the requested change in point of diversion of waters of Anna Creek, as described herein, without loss of priority, is approved.

It is FURTHER ORDERED that the quantity of water diverted at the new point of diversion shall not exceed the quantity of water available at the old point of diversion under the subject right.

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

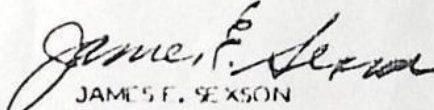
That the diversion works shall include an in line flow meter, a weir, or other suitable device for measuring the water to which the applicant is entitled;

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 construction work shall be completed and the change in point of diversion of water made on or before October 1, 1982.

It is FURTHER ORDERED that the aforesaid certificates of water right recorded at pages 1088 and 1098, Volume 2, State Record of Water Right Certificates, are canceled, and in lieu thereof new certificates be issued covering the balance of the rights NOT involved in this proceeding, 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 shall be issued to the applicants herein.

Dated at Salem, Oregon this 16th day of November, 1981.


JAMES F. SEXSON
Director

NOTICE: You are entitled to 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 183.482.
7765A

X-Sender: sparksdw@mailhub.wrd.state.or.us
X-Mailer: QUALCOMM Windows Eudora Version 5.1.1
Date: Mon, 22 Dec 2003 15:53:20 -0800
To: Laura.K.SNEDAKER@wrд.state.or.us
From: Del Sparks <Delbert.W.Sparks@wrд.state.or.us>
Subject: Scott Ditch Diversion

Diversion dam. large rocks and broken chunks of cement placed across creek channel, raises water so water will flow into the diversion ditch

when the gate is open.

Headgate. Steel frame bolted to a 8 foot long cement channel, the frame is 7 feet wide, screw drops a 7 foot steel gate across the ditch

opening. the headgate is 7' X 3.5'

Ditch. the ditch below the cement channel is 8' X 4' 40' below the headgate is the measuring device. the measuring device is a

Trapezoidal Flume made by Plasti-Fab

GPS. the reading using the UTM was 10 T 577402 E. and 4734317 N. this plots perfectly on a Quad Map.

This with what is in the file should be all you need to finish with the transfer, if more info is needed I guess you know where to get it. Right?

STATE OF OREGON

COUNTY OF

KLAMATH

CERTIFICATE OF WATER RIGHT

This Is to Certify, That

GEORGE A. LISK

of Fort Klamath, State of Oregon 97626, has
a right to the use of the waters of Anna Creek

a tributary of Wood River for the purpose of
irrigation of 126.0 acres, domestic and stock use

and that said right has been confirmed by decree of the Circuit Court of the State of Oregon for
Klamath County, and the said decree entered of record at Salem, in the Order Record of
the WATER RESOURCES DIRECTOR, in Volume 2, at page 1; that the priority of the right
thereby confirmed dates from 1883

that the amount of water to which such right is entitled, for the purposes aforesaid, is limited to an
amount actually beneficially used for said purposes, and shall not exceed 1.575 cubic feet
per second per acre from April 1 to July 20 of each year and thereafter until
the close of the irrigation season 0.788 cubic foot per second, or the
equivalent thereof in case of rotation; the total quantity delivered not to
exceed 3.0 acre-feet for each acre irrigated.

The point of diversion is located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 31, T32S, R7 $\frac{1}{2}$ E, WM, (Shattuck
Ditch).

A description of the place of use under the right, and to which such right is appurtenant, is as
follows:

28.0 acres SW 1/4 NW 1/4

21.3 acres NW 1/4 SW 1/4

36.7 acres SW 1/4 SW 1/4

40.0 acres SE 1/4 SW 1/4

Section 6

Township 33 South, Range 7 1/2 East, WM

This certificate describes that portion of the water right confirmed by the
prior certificate recorded at page 1098, Volume 2, State Record of Water Right
Certificates, NOT modified by the provisions of an order of the Water
Resources Director entered on November 16, 1981, approving Transfer
Application No. 4431.

The issuance of this superseding certificate does not confirm the status of
the water right in regard to the provisions of ORS 540.610 pertaining to
forfeiture or abandonment.

And said right shall be subject to all other conditions and limitations contained in said decree.
The right to the use of the water for the purposes aforesaid is restricted to the lands or place of use herein
described.

WITNESS the signature of the Water Resources Director, affixed

this date April 25, 1985

William M. Young
Water Resources Director

Recorded in State Record of Water Right Certificates, Volume 48, page 53000

To: Tom Paul
From: Laura K Snedaker <Laura.K.SNEDAKER@wrд.state.or.us>
Subject: Annie Creek Decree & Instream Leasing issues for KBRT
Cc: Del Sparks, Bob Rice, Kyle Gorman
Bcc:
Attached:

Tom:

Del, Bob and I need to discuss three issues with you next week, Thursday, if possible. I'm hoping we can arrange a time on Thursday to meet and talk about this issues and hook up Del and Kyle by phone. Everyone, please let me know if you're available on Thursday. So far myself, Tom and Kyle are available.

The issues are:

1. For the Annie Creek decree whether the irrigation season starts April 1st or May 1st. And what is the end of the irrigation season. And finally, what is the irrigation season if stated differently in the certificate. For example, if the decreed season starts May 1 but the certificate identifies the beginning of the season as April 1.
2. The priority dates associated with permits 8029 (certificate 45299) (priority date June 1927) and 8028 (certificate 7641) (priority date June 1927). It appears from findings in the Wood River decree that the priority dates for these permits/certificates should be 1900. See finding #6 in Wood River decree on page 14 and 45. Also see pages 1 and 5. These may be in a supplemental section. Del, please fill in the blanks here, if any. There was also mention of a possible 1883 priority date but I do not see this in the decree pages that Del left with Tom. Del, do you have anything to add?
3. Transfer T-4431 appears to need finalization. The order approving a POD transfer was signed in 1981. It appears that Final Proof was done by the Department (Del Sparks) in 1990. But final proof has not been reviewed to see if it has been done to satisfaction by the Director. Hence, it appears that the water rights involved in the transfer are not subject to transfer and therefore may not be leased. This seems like a process issue that could be cleared up assuming that things are in order.

These issues directly affect instream leases filed by the Klamath Basin Rangeland Trust. Issues 1 and 2 should be cleared up before the Department public notices the leases. #2 being of higher importance than #1. And #3 needs to be resolved before a lease could be approved.

Thanks, Laura

Laura Snedaker, Senior Water Resources Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271
Phone: (503) 986-0884
Web: www.wrd.state.or.us

Del-Phone
Kyle
Tom
Bob

12-16-03

1) End of season is 1st day of Nov.

Begin of Season is
what is on cert - April 1
or if not on cert go w/ decree
May 1

Tom suggested Kyle^{look} in dist^{ribution} files
see if anything diff.

2) Priority dates of cert 45299 + 7641
1927 vs 1900

~~also in permit 8029 (cert?)~~

clarification in Wood R decree
for Annie Cr Decree - 1900

Tom - permits right but decree corrected
Should issue new certs w/ new
pri dates

lease - ref decree, not permit
& put in 1900 pri date

FS can draft certs, Tom wants
run by Reed - new certs ^{out of} decree
~~Tom - wants certified copy of~~

~~Wood River Decree~~

Decree Vol 11, p 449 Finding 7

+ Vol 12, p 269 Finding 3

Supp findings for Anna Cr Decree
Vol 2, pg 1

(2)

3) Transfer (2 rights) - POD

FP Survey not yet reviewed to
see if tot sat of director
rights presently not sub to transfer
Del will go get dimensions for BO
page of rec'd, willing & able
need to grab GPS info for report
get Del or Kyle
FS will draft cert,

Laura

Make sure has F.O. lang
on front pg cert,
may be able to do on one
cert if both relatively
the same

STATE OF OREGON

COUNTY OF

KLAMATH

CERTIFICATE OF WATER RIGHT

This Is to Certify, That

ROBERT CONNOR

of Fort Klamath, State of Oregon 97626, has
a right to the use of the waters of Anna Creek

a tributary of Wood River for the purpose of
irrigation of 139.5 acres, domestic and stock use

and that said right has been confirmed by decree of the Circuit Court of the State of Oregon for
Klamath County, and the said decree entered of record at Salem, in the Order Record of
the WATER RESOURCES DIRECTOR, in Volume 2, at page 1; that the priority of the right
thereby confirmed dates from 1883

that the amount of water to which such right is entitled, for the purposes aforesaid, is limited to an
amount actually beneficially used for said purposes, and shall not exceed 1.758 cubic feet
per second per acre from April 1 to July 20 of each year and thereafter until
the close of the irrigation season 0.879 cubic foot per second, or the
equivalent thereof in case of rotation; the total quantity delivered not to
exceed three acre feet for each acre irrigated.

The point of diversion is located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 31, T32S, R7 $\frac{1}{2}$ E, WM, (Shattuck
Ditch).

A description of the place of use under the right, and to which such right is appurtenant, is as
follows:

1.0 acre NE $\frac{1}{4}$ NE $\frac{1}{4}$
21.8 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$
36.7 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$
40.0 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$
Section 12
40.0 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$
Section 13
Township 33 South, Range 6 East, WM

This certificate describes that portion of the water right confirmed by the
prior certificate recorded at page 1088, Volume 2, State Record of Water Right
Certificates, NOT modified by the provisions of an order of the Water
Resources Director entered on November 16, 1981, approving Transfer
Application No. 4431.

The issuance of this superseding certificate does not confirm the status of
the water right in regard to the provisions of ORS 540.610 pertaining to
forfeiture or abandonment.

And said right shall be subject to all other conditions and limitations contained in said decree.
The right to the use of the water for the purposes aforesaid is restricted to the lands or place of use herein
described.

WITNESS the signature of the Water Resources Director, affixed

this date April 25, 1985.

William H. Young
Water Resources Director

Recorded in State Record of Water Right Certificates, Volume 48, page 53001

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

KLAMATH COUNTY

IN THE MATTER OF TRANSFER APPLICA-)
TION 4431 IN THE NAMES OF ANDREW AND)
DOROTHY POPSON FOR APPROVAL OF A)
CHANGE IN POINT OF DIVERSION OF WATER)
FROM ANNA CREEK)

FINDINGS OF FACT
CONCLUSIONS AND
ORDER APPROVING

Water Right Transfer Application 4431 in the names of Andrew and Dorothy Popson was filed in the office of the Water Resources Director on March 19, 1980 for approval of a change in point of diversion of water appropriated from Anna Creek under the provisions of certain rights allowed by decree of the court in the matter of the Determination of the Relative Rights of the Various Claimants to Use the Waters of Anna Creek and Its Tributaries.

The certificate recorded at page 1088, Volume 2, State Record of Water Right Certificates, describes a right allowed in the name of Robert Conner, which includes the use of water from Anna Creek under a priority date of 1883, for domestic and stock use and irrigation of a certain 36.0 acres in NE 1/4 NE 1/4, 18.2 acres in SE 1/4 NE 1/4, 40.0 acres in NE 1/4 SW 1/4, 40.0 acres in SE 1/4 SW 1/4, 3.3 acres in NE 1/4 SE 1/4, 40.0 acres in NW 1/4 SE 1/4 and 40.0 acres in SW 1/4 SE 1/4 of Section 12; 40.0 acres in NW 1/4 NE 1/4 and 40.0 acres in NE 1/4 NW 1/4 of Section 13, Township 33 South, Range 6 East, WM.

The certificate recorded at page 1098, said Volume 2, describes a right allowed in the name of George A. Lisk, which includes the use of water from Anna Creek under a priority date of 1883, for domestic and stock use and irrigation of a certain 12.0 acres in SE 1/4 SE 1/4 of Section 1, Township 33 South, Range 6 East, WM; 18.7 acres in NW 1/4 SW 1/4 and 3.3 acres in SW 1/4 SW 1/4 of Section 6, Township 33 South, Range 7 1/2 East, WM.

The authorized point of diversion of record for the aforesaid rights is located 1,850 feet North and 1,650 feet East from the Southwest Corner of Section 31, Township 32 South, Range 7 1/2 East, WM, being within the NE 1/4 SW 1/4 of said Section 31, where the Shattuck Ditch diverts waters of Anna Creek.

Pending Transfer Application 4431 proposes to change the point of diversion therefrom to divert water through the Scott Ditch at a point located 3,650 feet North and 460 feet East from the Southwest Corner of Section 31, Township 32 South, Range 7 1/2 East, WM, being within the SW 1/4 NW 1/4 of said Section 31, without loss of priority.

Notice of Application 4431 describing the proposed change in point of diversion of water from Anna Creek was published pursuant to ORS 540.520(2) in the May 1, 8 and 15, 1980 issues of the Herald and News newspaper in Klamath County, Oregon.

On June 16, 1980, a protest in the name of Elmore Nicholson against approval of the pending application was filed in the office of the Water Resources Director by and through Neal G. Buchanan, Attorney at Law, Klamath Falls, Oregon. In the protest it is alleged that the proposed change in point of diversion of water would result in injury to the water rights of the protestant and others.

The aforesaid protest was accompanied by request by certain other persons to join in the protest as affected persons to the proceedings.

Pursuant to agreement of counsel and notice by the Director, the matter of the pending application and the protest against it was brought to hearing before James W. Carver, Jr., an employee of the Water Resources Department, authorized to preside in behalf of the Director, at Klamath Falls, Oregon, on September 3, 1981.

The applicants were represented by John Svoboda of the firm of Lively, Wiswall, Svoboda, Thorp and Dennett, Attorneys at Law, Springfield, Oregon. The protestants were represented by Neal G. Buchanan, Attorney at Law, Klamath Falls, Oregon.

Figure 1 herein, a photoreduction of Exhibit WRD #4A to approximately one-half original size, shows the relative locations of the channel of Anna Creek, Shattuck Ditch, Scott Ditch, the applicants' lands for which the change in point of diversion is sought, and certain other features.

EVIDENTIARY RULING

Protestants offer as their Exhibit "E" a letter dated June 10, 1980, which bears a signature, "Carl F. Wilson".

Applicant objects on the following grounds: "It is hearsay. It is an unauthenticated letter. The letter itself contains so many ambiguities the right of cross examination is critical. For those reasons, I object."

The said letter refers to a ditch as "this irrigation ditch starts at the Northeast corner of our property"; however, the ditch is not identified by name or by location with reference to the U.S. Public Land Survey or to a property description of record. The letter is not "evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs" as required by OAR 137-03-050(1).

Applicants' objection is sustained.

FINDINGS OF FACT

Under the provisions of the water rights described herein above for irrigation of a total of 331.5 acres of land, the applicants are entitled to appropriate from Anna Creek under a priority date of 1883, not to exceed 4.14 cubic feet per second of water within the period of April 1 to July 20 of each year, and thereafter to the close of the irrigation season, not to exceed 2.07 cubic feet per second of water, and not to exceed a total appropriation of three acre-feet per acre irrigated within the irrigation season of each year, measured at the point of diversion.

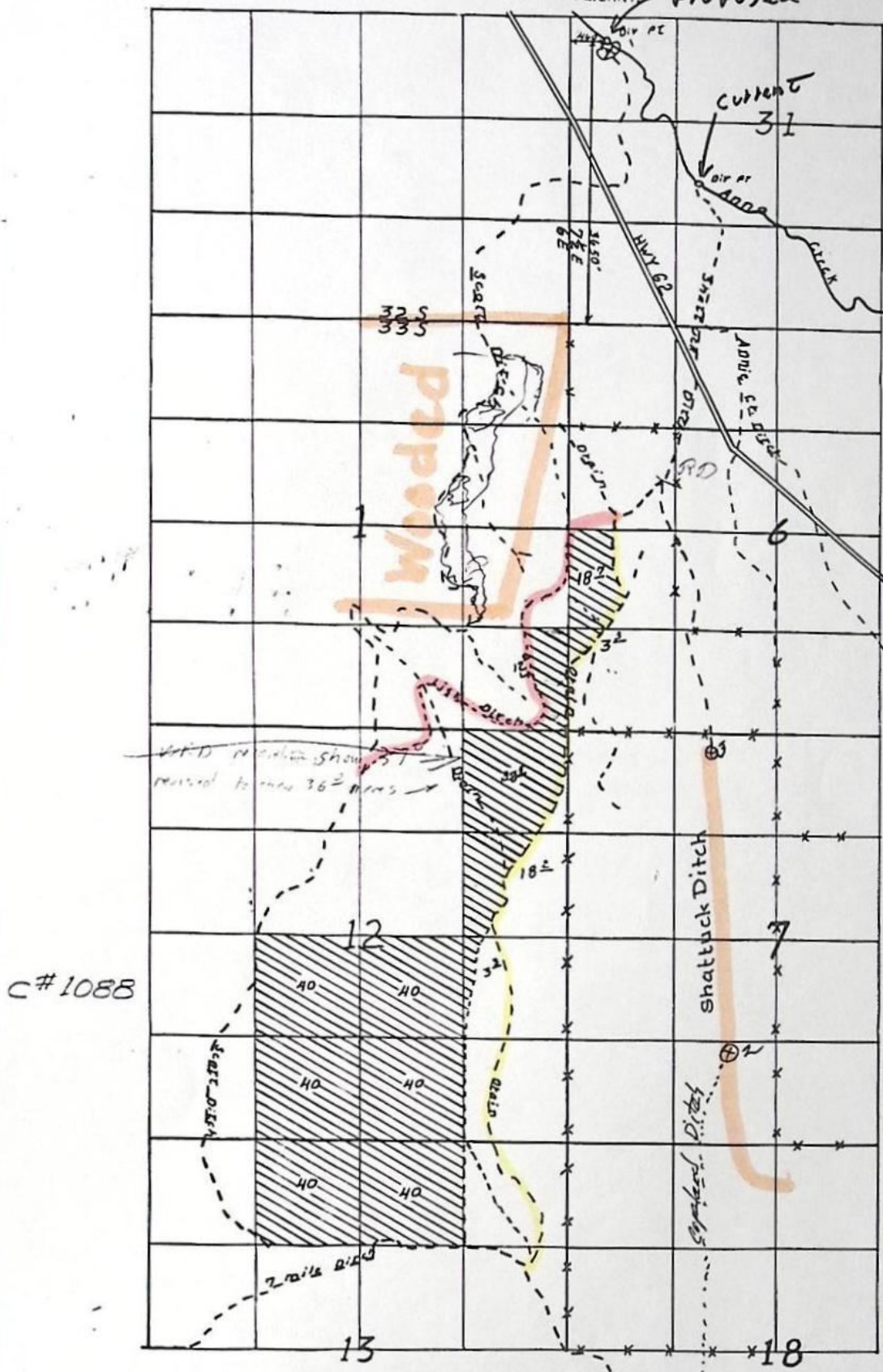
Until the 1981 irrigation season, water for irrigation of the applicants' lands for which the change in point of diversion is sought by Application 4431, has been diverted from Anna Creek by and through the Scott Ditch since sometime prior to the year 1962.

Prior to the irrigation season of 1980, the applicants were advised by the Watermaster that if they were to continue appropriation of water from Anna Creek for irrigation of the subject lands in subsequent years, they would have to apply for and obtain approval of a change in point of diversion from the Shattuck Ditch to the Scott Ditch, or divert their water by and through the Shattuck Ditch.

THIS APPLICATION PREPARED BY:

T-4431

FROM INFORMATION FURNISHED BY
THE APPLICANT *Proposed*



Sac 146 is case # 1098
Sac 12/13 is case # 1088

TRANSFER MAP

(Figure 1)

WRD # 4-A

Volume 35, page 367

During the year of 1981, while the protested Application 4431 was pending before the Water Resources Director, applicants constructed a connecting ditch (shown in pink on Figure 1) from a point of redirection from the Shattuck Ditch within the SW 1/4 NW 1/4 of Section 6 to a point within the NW 1/4 NE 1/4 of Section 12, where it joins with the Scott Ditch. Beginning on July 3, 1981, applicants irrigated the subject lands with water diverted from Anna Creek by and through the Shattuck Ditch, running the water down the Shattuck Ditch to the aforesaid point of redirection, and then down the connecting ditch to the subject lands.

A significant portion of the water run through the connecting ditch was lost by percolation through the sides and bottom of the ditch because the ditch is constructed to a shallow gradient due to the topography of the area, and because the soils through which the ditch is constructed are pumice soils being very permeable by nature.

Applicants testified that due to the high percolation losses in the connecting ditch, it is more advantageous to them to divert their water for the subject lands by and through the Scott Ditch as compared to the Shattuck Ditch-connecting ditch means used during the 1981 season.

Robert S. Blanton, owner of Soils Testing Lab in Medford, Oregon, and a licensed consulting civil engineer with considerable experience in the construction and operation of irrigation canals and ditches, was called as an expert witness for protestants. Mr. Blanton testified that it was his opinion based on his observations of the Shattuck Ditch, without having made specific tests, losses of water being transported down the Shattuck Ditch from Anna Creek to the applicants' point of redirection within the SW 1/4 NW 1/4 of Section 6 would amount to no more than 1% of the water diverted into the ditch from Anna Creek.

Mr. Blanton also testified that from his observations of the Scott Ditch, without specific tests having been made, for any given length of ditch the losses from water flowing in Scott Ditch would be greater than the losses from the same water flowing in Shattuck Ditch, due to greater permeability of the soils through which the Scott Ditch courses.

Mr. Blanton further testified that he had not observed the aforesaid connecting ditch and had no personal knowledge regarding probable losses of water flowing through that ditch.

No testimony was adduced to show that protestants would receive any less water from the flow of Anna Creek at their respective points of diversion, under their relative entitlements to water, if the applicants were to divert their water under their relative entitlements for irrigation of the subject lands by and through the Scott Ditch as compared to diverting the said water by and through the Shattuck Ditch.

Protestants' testimony was that except for ditch losses, whether the applicants' water was taken through the Shattuck Ditch or through the Scott Ditch should not make any difference if the amount diverted is properly measured from the stream.

The Watermaster, Delbert Sparks, has reported to the Water Resources Director that there are no intervening diversions of water from Anna Creek between the Shattuck Ditch diversion and the Scott Ditch diversion; and that in his opinion the proposed change in point of diversion can be made without injury to other water rights, providing the applicants are required to install a suitable measuring device in the diversion works of the Scott Ditch prior to their resuming use of the Scott Ditch for irrigation of the subject lands.

Mr. Blanton testified that the removal of the applicants' water from Shattuck Ditch as proposed by Application 4431 would have little or no effect on the total transportation losses from evaporation, seepage and percolation losses within that portion of the Shattuck Ditch between the diversion point on Anna Creek and the applicants' point of rediversion in the SW 1/4 NW 1/4 of Section 6. We agree.

Protestants contend that if the applicants are allowed to discontinue use of the Shattuck Ditch for irrigation of certain lands as proposed by Application 4431, whereby that water is no longer contributing its proportionate share to the losses which occur in the aforesaid portion of Shattuck Ditch, protestants will suffer greater proportionate shares of the total losses.

In theory, this is true. However, the applicants' proportionate share of said losses, being no more than 1% of the water they seek to transfer from the Shattuck Ditch to the Scott Ditch, is far less than the margin of error for any acceptable method of measurement of the waters diverted from Anna Creek into Shattuck Ditch under the rights that would remain in Shattuck Ditch.

OPINION

Testimony was clear that for a period of at least 18 successive years waters diverted from Anna Creek for irrigation of the applicants' lands for which the proposed change in point of diversion is sought was diverted through the Scott Ditch instead of being diverted through the Shattuck Ditch which is the authorized means of diversion of record.

Protestants question the validity of the subject water rights, suggesting that the subject rights may have been abandoned as provided by ORS 540.610.

The evidence adduced does not establish any five successive year period of nonuse of water from Anna Creek for irrigation of any of the subject lands.

Restating protestants' question in other words, "If the appropriator has not complied with the provisions of ORS 540.510 to 540.530 for changing the point of diversion for the appropriation, does the diversion of water from the source at some point other than the original, established point of diversion constitute a failure to "use the water appropriated" within the meaning of ORS 540.610(1)?"

The Supreme Court of Oregon in *Huff v. Bretz*, 285 Or 507, discussed ORS 540.510 to 540.530 in regard to performance under the terms of a lease and made the following statement:

"Although ORS 540.510 et seq. do not expressly prohibit the changing of one's point of diversion without making application to the Water Resources Director, we believe that it is clearly implied from these provisions that a person shall not change his point of diversion unless he files such an application and complies with the procedures set forth in ORS 540.520 and 540.530. These procedures are "for the protection of the public" (more specifically, for the protection of the interests of those who own affected or potentially affected water rights) against the evil of unrestrained changes in the point of diversion of water. This legislative purpose would be frustrated if a party could be required under the terms of an agreement to pump from an unauthorized point of diversion-thereby changing the point of diversion without complying with the procedures mandated by ORS 540.510 et seq.-and be held in breach of that agreement if he did not do so."

However, the Court did not answer the question before the Director in this matter.

There is agreement among the parties, as evidenced by the protestants' pending application for approval of the change in point of diversion, that the actions of the protestants and their predecessors in terminating the use of the original, established point of diversion, through the Shattuck Ditch, sometime prior to 1962, and thereafter using the so-called new point of diversion through the Scott Ditch down through the years since, did not serve to overcome the necessity to comply with the provisions of ORS 540.510 to 540.530.

The Water Code of 1909 provided (codified as Lord's Oregon Laws, Section 6668):

"All water used in this State for irrigation purposes shall remain appurtenant to the land upon which it is used; provided, that if for any reason it should at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the water is appurtenant, said right may be severed from said land, and simultaneously transferred, and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without detriment to existing rights, on the approval of an application of the owner to the Board of Control."

The said section remained substantially unchanged until amended by the Legislative Assembly of 1927, to provide (codified as Olson's Compilation of Oregon Laws, Section 5764):

"All water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of this act; provided that the owner of any water right may, upon compliance with the provisions of this act, change the use and place of use, the point of diversion or the use theretofore made of the water in all cases without losing priority of the right theretofore established. Whenever the owner of a water right for irrigation, domestic use, manufacturing purposes, or other use, for any reason desires to change the place of use, the point of diversion, or the use theretofore made of the water, an application to make such change as may be shall be filed with the state engineer ...".

Section 5764 also provided for publication of a notice of the application for approval of proposed changes, for three consecutive weeks in a newspaper printed and having general circulation in the county where the water right was located, and for a hearing on the matter, to consider the matter of injury to other water rights.

From 1909 to 1927 there was no administrative procedure for making a change in point of diversion from one point to another along the stream a matter of record, or allowing for an administrative determination as to whether a proposed change in point of diversion could be made without injury to other water rights. The point of diversion was subject to being changed, however, as stated by the Court in *Whited v. Cavin*, 55 Or 98, at page 106.

The Legislative Assembly of 1913 enacted an addition to the Water Code, (Laws of 1913, Chapter 279, page 531) which provided:

"Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state, and whenever hereafter the owner of a perfected and developed water right shall cease or fail to use the water appropriated, for a period of five successive years, the right to use shall thereupon cease, and such failure to use shall be conclusively presumed to be an abandonment of such water right, and thereafter the water which was the subject of use under such water right shall revert to the public and become again the subject of appropriation in the manner provided by law, subject to existing priorities;..."

This section has continued substantially unchanged, and is now codified as ORS 540.610(1), which is the basis of this proceedings.

From 1909 to 1913, the provisions of the section of law that is now ORS 540.610(1) could not have been construed to conclude that diversion of water from the channel of Anna Creek at some point other than the original, established point of diversion, for irrigation of the lands described by the water right in question, would constitute a failure to "use the water appropriated". Without subsequent specific legislative action, it does not appear that the provisions of the section of law now codified as ORS 540.610(1) could be construed to be more confining than when enacted.

Further, beginning with the Water Code of 1909, the law has provided for the services of a watermaster to distribute the available waters of a stream among the several users in accord with their relative rights to use the water. From 1913 on, the diversion of water from any point along the stream other than the legally established point of diversion would have been an illegal act subject to control by the watermaster, if brought to his attention as would have been expected if an unlawful point of diversion were being used to the injury of another water user.

It is the opinion of the Water Resources Director that the diversion of water from the channel of Anna Creek at some point other than the original, established point of diversion for the irrigation of the subject lands as described herein above, does not constitute a failure to "use the water appropriated" within the meaning of ORS 540.610(1).

ULTIMATE FINDINGS OF FACT

The proposed change in point of diversion of waters of Anna Creek will not deprive any of the protestants of the waters to which they are entitled at their respective points of diversion from Anna Creek.

No actual injury would be suffered by other users of Shattuck Ditch as a result of the applicants' discontinuance of use of Shattuck Ditch for conveyance of waters pursuant to approval of Transfer Application 4431.

CONCLUSION OF LAW

Water Right Transfer Application 4431 should be approved pursuant to ORS 540.530 with such approval requiring applicants to install a suitable measuring device in the diversion works of Scott Ditch.

ORDER

NOW, THEREFORE, it hereby is ORDERED that the requested change in point of diversion of waters of Anna Creek, as described herein, without loss of priority, is approved.

It is FURTHER ORDERED that the quantity of water diverted at the new point of diversion shall not exceed the quantity of water available at the old point of diversion under the subject right.

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

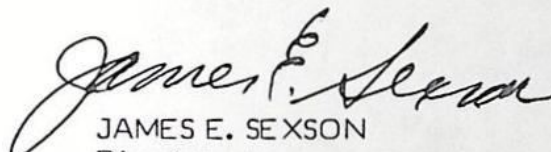
That the diversion works shall include an in line flow meter, a weir, or other suitable device for measuring the water to which the applicant is entitled;

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 construction work shall be completed and the change in point of diversion of water made on or before October 1, 1982.

It is FURTHER ORDERED that the aforesaid certificates of water right recorded at pages 1088 and 1098, Volume 2, State Record of Water Right Certificates, are canceled, and in lieu thereof new certificates be issued covering the balance of the rights NOT involved in this proceeding, 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 shall be issued to the applicants herein.

Dated at Salem, Oregon this 16th day of November, 1981.


JAMES E. SEXSON
Director

NOTICE: You are entitled to 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 183.482.

7765A

for Andrew and Dorothy Popson

RECEIVED

SEP 14 1982

WATER RESOURCES DEPT.
SALEM, OREGON

NOTICE OF COMPLETION OF CHANGE IN
point of diversion of water from Anna Creek

PURSUANT TO TRANSFER APPLICATION NO. 4431

I, Dorothy Popson
Jim Popson
Andrew Popson, hereby certify that completion
of works and use of water to the extent intended within the provisions
of the order of the Water Resources Director approving said water
right transfer application was accomplished by Sept 11, 1982

Sept 11, 1982
Date

Jim Popson
Dorothy Popson
Andrew Popson
Signature

(Mail to the Water Resources Department, Salem, Oregon 97310.)

ok
Jax

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

Klamath County

IN THE MATTER OF TRANSFER APPLICATION)
4431 IN THE NAMES OF ANDREW & DOROTHY)
POPSON FOR APPROVAL OF A CHANGE IN)
POINT OF DIVERSION OF WATER FROM ANNA)
CREEK)

ABSTRACT OF
TESTIMONY

HEARING ON

September 3, 1981

at

Klamath Falls, Oregon

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

KLAMATH COUNTY

IN THE MATTER OF TRANSFER APPLICATION 4431)
IN THE NAMES OF ANDREW AND DOROTHY POPSON)
FOR APPROVAL OF A CHANGE IN POINT OF)
DIVERSION OF WATER FROM ANNA CREEK)

SECOND AMENDED
NOTICE
OF HEARING

TO: Andrew Popson and
Dorothy Popson
*% John Svoboda
Lively, Wiswall, Svoboda
Thorp and Dennett
Attorneys at Law
644 North "A" Street
Springfield, Oregon 97477

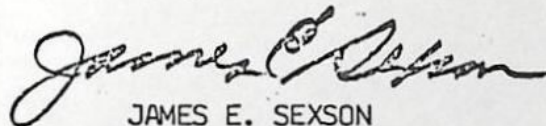
Elmore Nicholson, et al
*% Neal G. Buchanan
Attorney at Law
210 North Fourth Street
Klamath Falls, Oregon 97601

Delbert Sparks
Watermaster, District 17
Klamath County Courthouse
Klamath Falls, Oregon 97601

Notice is given hereby that the hearing in the matter of Water Right Transfer Application 4431 in the names of Andrew and Dorothy Popson for approval of a change in point of diversion of water from Anna Creek, as set forth in the notice published in the Herald and News newspaper in the issues of May 1, 8 and 15, 1980, and a protest by Elmore Nicholson, et al, against approval of said application, has been rescheduled to be held before James W. Carver, Jr., an employee of the Water Resources Department, authorized to preside in behalf of the Water Resources Director, commencing at 9:30 a.m. on Thursday, September 3, 1981 in the Klamath County Courthouse, in Klamath Falls, Oregon.

Attached is informational material on the procedures, right of representation, and other rights of parties relating to the conduct of the hearing as required by ORS 183.413(2).

Dated at Salem, Oregon this 4th day of March, 1981.


JAMES E. SEXSON
Director

CERTIFIED MAIL, RRR



Water Resources Department

MILL CREEK OFFICE PARK

555 13th STREET N.E., SALEM, OREGON 97310

PHONE 378-3066

August 12, 1981

John Svoboda
Lively, Wiswall, Svoboda,
Thorp and Dennett
644 North "A" Street
Springfield, Oregon 97477

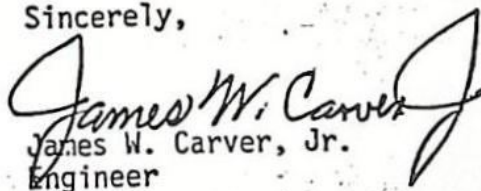
Neal G. Buchanan
Attorney at Law
210 North Fourth Street
Klamath Falls, Oregon 97601

REFERENCE: Transfer Application 4431, Popson

Gentlemen:

The hearing in the matter of water right transfer application numbered 4431 in the names of Andrew and Dorothy Popson, and the protest by Elmore Nicholson, et al, scheduled to commence at 9:30 a.m. on Thursday, September 3, 1981, in Klamath Falls, Oregon, will be held in the Commissioners Hearing Room of the Klamath County Courthouse Annex.

Sincerely,


James W. Carver, Jr.
Engineer

cc: Delbert Sparks, Watermaster

NOTICE OF WATER RIGHT TRANSFER APPLICATION NO. 4431

The Water Resources Director of Oregon has received and filed an application by Andrew & Dorothy Popson for approval, without loss of priority, of a change in point of diversion under certain water rights.

The certificate recorded at page 1088, Volume 2, State Record of Water Right Certificates, in the name of Robert Conner, describes a right which includes the use of water from Anna Creek for domestic, stock and for irrigation of a certain 36.0 ac in NE $\frac{1}{4}$ NE $\frac{1}{4}$, 18.2 ac in SE $\frac{1}{4}$ NE $\frac{1}{4}$, 40.0 ac in NE $\frac{1}{4}$ SW $\frac{1}{4}$, 40.0 ac in SE $\frac{1}{4}$ SW $\frac{1}{4}$, 3.3 ac in NE $\frac{1}{4}$ SE $\frac{1}{4}$, 40.0 ac in NW $\frac{1}{4}$ SE $\frac{1}{4}$, 40.0 ac in SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec 12; 40.0 ac in NW $\frac{1}{4}$ NE $\frac{1}{4}$ & 40.0 ac in NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec 13, T 33S, R 6E, WM, with a date of priority of 1883.

The certificate recorded at page 1098 of said Volume 2, in the name of George A. Lisk, describes a right which includes the use of water from Anna Cr for domestic, stock and for irrigation of a certain 12.0 in Sec 1, T 33S, R 6E, WM & 18.7 ac in NW $\frac{1}{4}$ SW $\frac{1}{4}$ & 3.3 ac in SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec 6, T 33S, R 7 $\frac{1}{2}$ E, WM, with a date of priority of 1883.

The authorized point of diversion for said rights is located 1850 ft N & 1650 ft E from the SW Corner of Sec 31, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec 31, T 32S, R 7 $\frac{1}{2}$ E, WM (Shattuck Ditch).

The applicant proposes to change the point of diversion therefrom to a point located 3650 ft N & 460 ft E from the SW Corner of Sec 31, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec 31, T 32S, R 7 $\frac{1}{2}$ E, WM (Scott Ditch).

Pursuant to ORS 540.520(2), a hearing is scheduled for 9:30 a.m. on Thursday, June 26, 1980, at the Klamath County Courthouse, Klamath Falls, Oregon. Any objection to the proposed change must be prepared in writing: one copy to be served on the applicants at PO Box 435, Fort Klamath, OR 97626; and one copy filed in the office of the Water Resources Director, Salem, OR 97310, together with a \$10 filing fee, at least 10 days prior to the date set for hearing. Rules for filing objections will be furnished upon request.

IF NO OBJECTIONS ARE FILED, THE APPLICATION MAY BE APPROVED BY THE WATER RESOURCES DIRECTOR WITHOUT A HEARING.

Dated at Salem, Oregon this 22nd day of April, 1980.

James E. Sexson, Director *srk*

EXHIBITS::

Received

WRD #1: Photocopy of Transfer Application 4431	Yes
WRD #2: Certificate issued to Robert Conner, page 1088, Volume 2	Yes
WRD #3: Certificate issued to George A. Lisk, page 1098, Volume 2	Yes
WRD #4: Copy of map supporting transfer Application 4431	Yes
WRD #4A: Same as WRD #4, with colored markings by witness	Yes
WRD #5: Copy of portion of Anna Creek adjudication map for T 33 S, R 7½ E.	Yes
WRD #6: Copy of portion of Anna Creek adjudication map for T 33 S, R 6 E.	Yes
WRD #7: Watermaster's memorandum report to Water Rights Division (Introduced on stipulation of counsel)	Yes

NO EXHIBITS SUBMITTED BY APPLICANTS

Protestants'

A: Photo of Scott Ditch at Highway 62	Yes
B: Photo	Yes
C: Photo	Yes
D: Photo	—
E: Letter by Carl F. Wilson, dated June 10, 1980 (Offered by Protestants) (Objection by Applicants) (Ruling to be made in Order)	—
F: Photo, along Scott Ditch between Highway 62 and Applicant's property	Yes
G: Photo, same area	Yes
H: Photo, same area	Yes
I: Photo, same area	Yes
J: Photo, same area	Yes
K: Photo, same area	Yes
L: Photo, same area	Yes

Counsel stipulate that administrative notice be taken regarding the water right records in the Determination of the Relative Rights in Anna Creek

SVOBODA

1st Witness: Delbert W. Sparks, Watermaster for District 17

Watermaster District 17 covers area involved in this matter.

Discussion of duties and responsibilities of watermaster
Mr. Sparks has been watermaster for this district, 3 years, this month

Personally familiar with subject transfer application. Assisted with preparation of application and maps.
Sparks understands that the diversion proposed by the pending application is the way water has, in fact, been diverted for the past several years, with the exception of the immediately past irrigation season.

Sparks personally familiar with the lands and the diversion works involved in the application, both Scott Ditch and Shattuck Ditch.

SVOBODA: Do you have an opinion as to whether or not the application for transfer of diversion point would, under the law existing, put the water granted to the Popsons to the highest and best use?

Objection by Buchanan on grounds that no foundation laid as to qualifications of witness to give opinion.

~~XX~~

H.O. states opinion of Watermaster requested by Water Resources Director. Watermaster has responded to Water Resources Director in form of interoffice memorandum. That memorandum is confidential until such time as Director chooses to make it public.

OFFER OF PROOF MADE BY SVOBODA

H.O.: Witness may answer if he so chooses, recognizing that Watermaster's opinion is not binding on Water Resources Director.

SPARKS: Yes. That the land they are trying to transfer is on the opposite side of a drainage ditch which, at the time of the transfer there was no means of getting that water to the other side of the drainage ditch where their water right was, and to put it down the Scott Ditch would in fact put it on the proper side of the drainage ditch, so that they could irrigate the land they had the water right for.

SVOBODA: Have you made a determination as to whether or not the granting of this application will adversely affect any other users of water out of these particular bodies?

SPARKS: Yes. I have.

SVOBODA: What determination did you reach?

SPARKS: Can I answer that?

H.O.: Not at this time.

Counselor, I'm going to recess this hearing and seek counsel of our assigned Assistant Attorney General. We will go off of the record at this point.

We are back on the record. During the recess I did not contact the assigned Assistant Attorney General for the Water Resources Director. Counsel stipulated that there was no objection by either party to the Watermaster's interoffice memorandum being made a part of the record.

I have that memorandum here with me, and upon stipulation of Mr. Buchanan and Mr. Svoboda, it will be made part of the record in this matter with the understanding that the memorandum is advisory to the Director and that the Director is not bound by the memorandum, by the contents thereof, in reaching his decision.

The said memorandum was then marked as WRD #7.

SVOBODA

In reference to WRD #4A

Watermaster marks Current POD and Proposed POD

BUCHANAN

Authorized point of diversion for properties involved in the pending transfer is the head of the Shattuck Ditch. At the time the transfer application was filed, water could not be delivered to the lands through the Shattuck Ditch.

Except for the 1981 irrigation season, during the time that Sparks has been here the lands have been irrigated through the Scott Ditch.

Sparks not know when Shattuck Ditch last delivered water to subject lands, prior to 1981 season.

Sparks show continuation of Shattuck Ditch with orange highlighter on WRD #4A

Sparks uses yellow hiliter to trace out drain which is lowest feature between Scott Ditch and Buchanan Ditch. Water from Scott Ditch would run east to drain. Water from Buchanan Ditch would run west to drain.

There are a couple of place where the drain can be blocked and cause water to seep or sub out for a short distance to the west. An example is the area between the drain and the ditch shown on WRD #4A within the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 12 and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec. 13. Sparks says there are are couple of other small areas.

Scott Ditch runs through a variety of soils materials; gravels, pumice, dirt.

Earliest water right on the Scott Ditch is 1908.

"Most of the Scott Ditch, I believe, is on Forest Service land."

Sparks has not checked property ownership along Scott Ditch between POD and irrigated lands under right involved in transfer.

X of Delbert Sparks by BUCHANAN (Continued)

Are the waters overflowing the ditch banks along Scott Ditch in that area?
Sparks has never seen it overflow.

Has not walked the whole length between POD and applicant's lands

Has not observed that portion of the Scott Ditch between Highway 62 and where the ditch enters into the applicant's property.

Sparks indicates that Scott Ditch enters Popson land at west line of NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 1, T 33 S, R 6 E.

Popson lands: between Scott Ditch and the lands shown in red and green on WRD #4A is also Popson land, with irrigation priorities of 1914 and 1927. There is also about 45 acres with 1908 priority on Scott Ditch.

Some years, 1914 and 1927 lands cut off prior to July 20th.

If Application 4431 approved, would be only 1883 right on Scott Ditch.

Shattuck Ditch rights mostly 1883. Best priority on creek is Shattuck Ditch. Duty of water for adjudicated rights changes from 1/80th to 1/160th per acre as of July 20th of each year.

Discussion re "rock dam" on Popson land in SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 6, T 33 S, R 7 $\frac{1}{2}$ E. Used to divide water coming down Shattuck Ditch.

In one of the downstream ditches, Sparks drove stake into bottom of ditch and made series of flow measurements at various flows noting the depth of water over the stake. He can now tell within a 1/10th of a c.f.s. or so, the flow in that ditch by measuring the depth of water over the stake.

No monitoring device there.

Re Scott Ditch: No measuring or monitoring devices now in the ditch. Water is taken out of the Scott Ditch at various points, sometimes by a wooden check dam, sometimes by a earthen check dam, in the ditch.

Re the Shattuck Ditch: Usually on the main ditch, sometime of wooden check box is used at take out points.

In this area which is fairly level and with pumice soil, weirs do not work very well for measuring water flow in a channel. Water has to be ponded upstream of the weir and then free fall over the weir notch on the downstream side. The pumice soil sands tend to fill up the pond very rapidly. Also, because there is very little fall to the channels, it is difficult to get free fall over the weir.

The more practical measuring device for this area is a Parshall flume. There can be constructed of concrete, or purchased prefabricated from plastic, fiberglass, or metal. The costs vary.

A request was made this last year, for the Watermaster to take over regulation of water turnouts from the Shattuck Ditch. Mr. Sparks, part of the time, and an assistant watermaster, part of the time, did regulate water on the Shattuck Ditch. (Assistant's name is Mike Lough)
Most of the measurements were made on the Popson's take outs.

Redirect by SVOBODA

Discussion of measurement of water by a Parshall flume.

No other questions - WITNESS EXCUSED

SVOBODA: Renews offer of proof as to testimony re confidential matter of memo.

BUCHANAN: Recall Delbert Sparks, Watermaster

Discussion re difference between duty of water for adjudicated rights and later, permit rights.

How does watermaster distribute available flow prior to July 20?

How distribute available flow among the several rights after July 20?

A.: In accord with the priority of the water right, recognizing the decreed change in duty of water for the adjudicated rights as of July 20th.

SVOBODA

Re exhibit WRD #4A, Is it possible to irrigate the 1883 lands without flooding the water over the lands with later priorities, lying between the Scott Ditch and the 18813 lands?

Sparks: I don't know, out in the field, just where the boundaries of these areas are. It may be necessary to put in additional ditches to do that.

The 1883 lands, shown with red and green on WRD #4A, have been irrigated each year that Sparks has been watermaster there. Except for the 1981 season, the water has been run through the Scott Ditch from Anna Creek.

BUCHANAN

Only in the past year, was the water run run from Anna Creek to these lands through the Buchanan Ditch; at least within the past several years.

H.O.: Re WRD #4A

Using pink hiliter, Sparks traces out flow of water, course used, from Anna Creek to the red and/or green shaded lands during the 1981 season.

The ditch that leaves the Shattuck Ditch in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 6, as marked in pink by Sparks, and conveys water west and south to the Scott Ditch, was constructed and reconstructed in 1981. The construction follows, in part the course of ditches that used to exist in prior times.

Scott Ditch crosses Highway 62 by means of a syphon tube, or submerged culvert. The capacity of the syphon is a controlling factor as to the capacity of the Scott Ditch.

Several rights with Scott Ditch being the authorized point of diversion, have a total diversion amount of approximately 5 c.f.s.

Proposed change in POD involves right at 4 c.f.s. prior to July 20th, after July 20th it is about 2 c.f.s.

Maximum rate of flow in Scott Ditch as measured by Sparks is approx. 7 c.f.s. The measured 7 c.f.s. was not the maximum the ditch can and has carried. Sparks does not how much more than the 7 c.f.s., the ditch can carry.

BUCHANAN

Protestant exhibit "A" identified by Sparks as the Scott Ditch- Highway 62 crossing.
RECEIVED

Sparks measurements on flow through syphon for purpose of determining whether more water running than entitlements call for.

NO FURTHER QUESTIONS

WITNESS EXCUSED

BUCHANAN for Protestants

1st Witness: Jim Popson

Son of Andrew and Dorothy Popson

Popsons have owned the lands involved in transfer Application 4431 for 18 to 20 years. Since about 1962, or thereabouts.

During that time, except for small portions of the lands that can be irrigated from the drains which received water from Shattuck Ditch, the subject lands have been irrigated through the Scott Ditch.

The map, WRD #4A, does not show all of the lateral ditches that allow for irr. of portions of the red shaded area from the drain along the east side. The areas are very close to the drain, itself. Maybe as much as 15 or 18 acres within the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec.12.

Initiated work toward filing for change in POD late winter of 1979. Had been running water through Scott Ditch and had been cut off because of regulation based on priorities of diversions.

1977 was water short year, then this year. (TURN TAPE)

In early July of this year, witness was irrigating subject lands under 1883 priority, through Shattuck Ditch. Was taking approx. 8 c.f.s. prior to 20th of July.

SVOBODA

Does running water via the ditch system show on WRD #4A, as used in 1981, allow for satisfactory irrigation of the lands shown in red and green?

J. Popson: No.

Does flowing water down the Scott Ditch allow you to fully irr. those areas?

A: Yes.

The new construction ditch goes through pumice ground and has a lot of losses, also that ditch does not have sufficient fall.

Scott Ditch was used for running water to subject lands before Popsons aquired the land.

NO OTHER QUESTIONS - WITNESS EXCUSED.

BUCHANAN for Protestants

2nd Witness: Robert S. Blanton
Consulting Engineer,
owns Soils Testing Lab in Medford, 130 West 9th Street

Education and training info.
Licensed as Civil Engineer

August 26th (1981) visited area in question and looked over diversion structures and portions of the Scott and Shattuck Ditches, also the Copeland Field ditch.

On August 26th, made water flow measurements, 3 measurements in 3 different locations.

- | | |
|---|--------------|
| (1) Slightly below diversion of Scott Ditch | 5.051 c.f.s. |
| (2) Copeland Field Ditch, 58 feet down from division box | 4.598 c.f.s. |
| (3) In the Shattuck Ditch, about 180 feet south of the property line above the diversion of the two streams | 9.114 c.f.s. |

Difference in composition of the "stream bed" in the Scott Ditch and the Shattuck Ditch.

Walked about four miles of the Scott Ditch through the Forest Service lands, sampled the soils in the ditch bank and the ditch bottom in about 8 or 10 places. Only one of those had any appreciable amount of silts and clays. The soils were primarily a sandy material, probably what would be called a relatively well consolidated sand.

The relatively consolidated sands will stand in a relatively vertical ditch bank, but they are quite permeable. There would be loss of water from the ditch by percolation through the side and bottom of the ditch.

There are more permeable soils in the Scott Ditch than in the Shattuck Ditch. Also, from the maps, there would be a longer period of time of flow of the waters within the Scott Ditch. Most probably resulting in a greater loss of water.

If water is transferred away from Shattuck Ditch, the remaining water flowing in the ditch would have a higher percentage loss as it travels through the ditch.

Buchanan: Did you have opportunity to walk through properties owned by a fellow by the name of Carl Wilson? We are talking about some overflow problems.

Blanton: Is this the property that is traversed by the Scott Ditch?

Buchanan: Yes.

Blanton: There weren't fences, just brush and tangleweeds out there, so I assume that possibly some of this traverse was through Mr. Wilson's property.

Buchanan: Did you notice any evidence of overflow in that area?

Blanton: I noticed evidence where the ground had been saturated, from the surface of the ground, some certain mottling, saturated conditions

(CONTINUED)

Blanton: that appeared to have been saturated, by rotting leaves and underbrush. It appeared as though it had had standing water on it. Yes.

(Blanton indicates, at request of H.O., with blue pen the wooded areas when he observed the above stated conditions)

To make distribution of the stream flow among the several rights on the various ditches, it will be necessary to have control and measuring devices to regulate the flows into the ditches out of Anna Creek.

It appears from aerial photographs examined by the witness, that there are ditches that could carry water from the Scott Ditch to the subject lands without the water having to flood over other lands to get there.

CROSS BY SVODODA

Witness did not take any measurements to determine losses resulting from water being transported through the Scott Ditch.

Witness was not asked to perform such work by protestants.

The increase of percentage loss in water going down Shattuck Ditch resulting from transferring away the subject water right applies only to that portion of the Shattuck Ditch between the take-out from Anna Creek and the rock dam in SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 6, where subject water would be rediverted from Shattuck.

No measurements made in Scott Ditch and /or Shattuck Ditch to determine comparative losses by diverting the water for the subject right through Shattuck Ditch as compared to diverting through the Scott Ditch.

BY H.O.

Witness' opinion that the materials through which the Scott Ditch passes are more permeable than the materials through which the Shattuck Ditch passes. For equal legths of ditch, the losses by percolation would be greater for the Scott Ditch.

Percolation losses from the Shattuck Ditch would probably go to saturation of the field through which it crosses.

Witness has not made any study of the subsoils except in the ditch sections, themselves. Thinks these are "deep soils", from information he has read.

Percolation losses from the Scott Ditch, within the area the witness observed, were wetting land in the forest land, downslope from the ditch. Did no subsurface excavations or measurements along the observed area of the Scott ditch.

(If transfer allowed, entitlements to flow for the Scott ditch would be approx. 9 c.f.s. prior to July 20th, and 7 c.f.s. after July 20th of each year)

The increased losses resulting from the addition of 4 c.f.s prior to July 20, and 2 c.f.s. thereafter, would be relatively small, from a percolation or evaporation standpoint. Questions whether ditch has capacity to handle the additional 4 c.f.s. at places through the wooded area.

(Continued)

Re Shattuck Ditch, Thinks loss in the approx. 3/4 mile of ditch, from Anna Creek to Popson's rock dam in SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 6, would be no more than 1 %

NO ADDED QUESTIONS BY COUNSEL - WITNESS EXCUSED

Following testimony of Roberts S. Blanton, and prior to taking the testimony of Elmore Nicholson, Buchanan offered Protestants' exhibit "E" which is a letter bearing a signature, "Carl F. Wilson".

SVOBODA: "I'm going to object. It's hearsay. It is an unauthenticated letter. The letter itself contains so many ambiguities the right of cross-examination is critical. For those reasons, I object."

H.O.: "I will note your objection for the record. I will not rule on the objection at this time. The Director will make his ruling in his administrative order as to whether the letter is or is not in the record."

BUCHANAN for Protestants

3rd Witness: Elmore Nicholson

Accompanied Blanton when he made certain measurements on August 26th.

Locations of said measurements marked by witness, in blue pen, by making an "X" with a circle around the "X" and placing a number beside the mark.

#1, on Scott Ditch is in SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 31.

#2, on Copeland Field Ditch, is in SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 7

#3, on Shattuck Ditch, is in NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 7

Witness opinions that allowing applicant to take his water at two different diversions, as proposed, instead of one place, would result in greater losses.

Water rights on Shattuck Ditch are the oldest on Anna Creek in the area. If a part of the old right is moved to Scott Ditch, other than an increase in ditch losses, it should not make any difference if the water is measured properly.

Is this proposed diversion takes place the water will have to be measured. Even if the change does not take place, it still may have to be measured.

Witness opinions that the applicant should be responsible for the costs of installation of measuring devices for diversions into Shattuck Ditch and into Scott Ditch.

Carl Wilson owns Wilson Cottages, north of Fort Klamath, also owns property along Scott Ditch, along the upper portion.

Photo exhibits, Protestants' "B" and "C" were taken by witness, along the Scott Ditch, in the same general area as outlined by Blanton. OFFERED REC'D

Photos taken 5/24/80

Witness' intent to show ditch was at capacity and would not carry additional water.

H.O.: Do you know what the quantity of water was that was flowing in the Scott Ditch at the time those pictures were taken?

Witness: No. I don't.

H.O.: Did you also observe Scott Ditch that date, where it passes under Highway 62?

Witness: Yes.

H.O.: And what was the condition of the, as you saw them to exist at Highway 62, on that date?

Witness: The ditch was full at that point. It had been, just prior to, not many hours before I took the picture, it had been backed up where the water was higher than the level of the road.

H.O.: Did you walk down the Scott Ditch from the highway to the point where you took the photograph "B"?

Witness: Yes

(CONTINUED)

Witness observed no other inflow into Scott Ditch between the highway and where he took photo Exhibit "B".

BUCHANAN

At times the water at the Scott Ditch crossing at Highway 62 "goes over the highway. Witness does not know what the quantity of flow in Scott Ditch is at such times.

Witness does not know the carrying capacity of the flume (syphon) that carries Scott Ditch water under Highway 62. Capacity of ditch within the Wilson property is less than the capacity of the highway crossing.

Photo, Protestants' Exhibit "D", one of Popsons diversion points in the Shattuck Ditch. "Rock Dam"

CROSS BY SVOBODA

Re meeting on Sept. 23, 1980, where all of the parties got together to see if they could work something out:

Q. Do you recall that all of the parties including yourself, did not want to have to be involved with watermasters and establishing of measuring devices down here in the valley . . ?

A. Absolutely.

Q. I gather your opinion has changed since then?

A. Yes.

Witness has about 100 acres of 1883 right

BY H.O.

Q. Do you know when the so-called "new ditch was put into operation during this 1981 irrigation season, by the applicant?

A. Yes. I believe it was the 3rd of July.

Q. And the measurements that were made by Mr. Blanton were made in August?

A. Yes.

Witness takes water from the Shattuck Ditch by means of the Copeland Field Ditch That is, the ranch does. The land he owns personally does not.

The "ranch" is owned by several family members, and witness is one of the owners.

The Copeland Field Ditch serves some of the applicant's lands as well as Nicholson lands. Serves over 200 acres on Nicholson "ranch" lands, and about 70 acres of applicant's lands.

(CONTINUED)

REDIRECT BY BUCHANAN

Q. You have mentioned the ranch and the fact that brother, sister, that sort of thing. . that you have been talking about?

A. Yes.

Q. How many acres are there total, in this partial ownership.

A. Including my aunt, 960, I think.
(all under the 1883 water rights)

On July 4, 1981 protestant says he did get water, barely stock water, from the Shattuck Ditch.

NO ADDITIONAL QUESTIONS FROM COUNSEL - WITNESS EXCUSED

BUCHANAN for Protestants

Recall Robert S. Blanton

Photographs taken by Blanton on August 26, 1981 during the time he and Nicholson were walking the forest along Scott Ditch. They are photographs of area on the downhill side of the Scott Ditch.

The uphill slope was dry.

Protestants' Exhibits, not in order taken. (About 10 to 15 min. apart on 1½ hour walk)

"F" -

"G"

"H"

"I"

"J"

"K"

"L"

All generally show lush green growth downhill from ditch. Witness opinions lush growth results from water overflowing and/or percolating from ditch.

No indication of excessive wetness at surface at time witness was there in Aug.

Buchanan moves to offer photographs "F" through "L" and also "D"
Svoboda has no objection

Exhibits "D" and "F" through "L" received.

BY H.O.

The course of the Scott Ditch does not follow any marked topographic break.

Re exhibit WRD #4A:

Witness has no first hand knowledge in regard to the ditch which leaves the Shattuck Ditch within the SW¼ NW¼ of Sec. 6 at the "rock dam" and carries water southwesterly to the applicant's subject lands.

BY SVODODA

The Scott Ditch passing through the wooded area has one kind of soils conditions. The Shattuck Ditch has a different kind of soils conditions. The edge of the wooded area might make the line of change from one to the other. However, the witness did not make such a determination on the ground.

At request of H.O., witness uses orange hiliter to marks woodland area with "X's" and lines. within Sec. 1 and within Secs. 1 & 12.

NO ADDITIONAL QUESTIONS BY COUNSEL - WITNESS EXCUSED

PROTESTANTS REST

Buchanan allowed 20 days to submit a summarizing memorandum.

Svoboda allowed a subsequent 15 days to submit his reply.

HEARING ADJOURNED

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

KLAMATH COUNTY

IN THE MATTER OF TRANSFER APPLICATION 4431)
IN THE NAMES OF ANDREW AND DOROTHY POPSON)
FOR APPROVAL OF A CHANGE IN POINT OF)
DIVERSION OF WATER FROM ANNA CREEK)

SECOND AMENDED
NOTICE
OF HEARING

TO: Andrew Popson and
Dorothy Popson
*% John Svoboda
Lively, Wiswall, Svoboda
Thorp and Dennett
Attorneys at Law
644 North "A" Street
Springfield, Oregon 97477

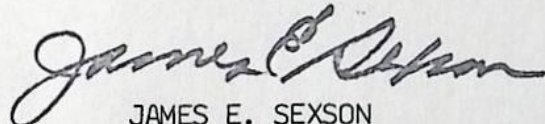
Elmore Nicholson, et al
*% Neal G. Buchanan
Attorney at Law
210 North Fourth Street
Klamath Falls, Oregon 97601

Delbert Sparks
Watermaster, District 17
Klamath County Courthouse
Klamath Falls, Oregon 97601

Notice is given hereby that the hearing in the matter of Water Right Transfer Application 4431 in the names of Andrew and Dorothy Popson for approval of a change in point of diversion of water from Anna Creek, as set forth in the notice published in the Herald and News newspaper in the issues of May 1, 8 and 15, 1980, and a protest by Elmore Nicholson, et al, against approval of said application, has been rescheduled to be held before James W. Carver, Jr., an employee of the Water Resources Department, authorized to preside in behalf of the Water Resources Director, commencing at 9:30 a.m. on Thursday, September 3, 1981 in the Klamath County Courthouse, in Klamath Falls, Oregon.

Attached is informational material on the procedures, right of representation, and other rights of parties relating to the conduct of the hearing as required by ORS 183.413(2).

Dated at Salem, Oregon this 4th day of March, 1981.



JAMES E. SEXSON
Director

CERTIFIED MAIL, RRR

RECEIVED
JUN 16 1980
WATER RESOURCES DEPT
SALEM, OREGON

1 BEFORE THE WATER RESOURCES DIRECTOR OF OREGON
2 In the Matter of the Application)
3 of:) No. T-4431
4 ANDREW & DOROTHY POPSON.) PROTEST TO APPLICATION

5 Comes now Protestant, Elmore Nicholson, by and through his
6 attorney, Neal G. Buchanan, and objects to the application above-
7 denominated providing for a change in point of diversion under
8 certain water rights from Anna Creek, in the County of Klamath,
9 State of Oregon. In support of Protestants' objections, Pro-
10 testants allege:

11 I

12 Attached hereto is a request to join in protest to applica-
13 tion executed by water users in the Fort Klamath area. All said
14 water users would be done grievous injury should the application
15 above-denominated be granted. Protestants, therefore, respect-
16 fully request that the application above-denominated be denied.

17 II

18 Facts supporting Protestants' allegation of injury include:

19 1) At the present time, Applicants are drawing water from
20 a single diversion point under a 1883 water right on the Shattuck
21 Ditch. It appears, however, in accordance with the application
22 for transfer of water rights, that Applicants desire to transfer
23 only a portion of the water right entitlement which they have
24 from Shattuck Ditch, diverting that portion through Scott Ditch.
25 Thus, Applicants would be possessed of a 1883 water right point
26 of diversion on both Shattuck and Scott Ditches. There is, thus,
27 virtually no practical way to determine and guarantee that the
28 Applicants do not, as a result of splitting this point of

diversion, receive a double duty of water.

(2) Applicants do not own substantial parcels of property bordering portions of Shattuck Ditch between Anna Creek and the properties which are the subject of an 1883 water right. However, Applicants do own substantial properties which lie along Scott Ditch, and which can be irrigated from Scott Ditch between the point of diversion and the lands which are the subject of this Application. Thus, Protestants would be done grievous injury should the Applicants be allowed to irrigate their lands between the proposed point of diversion on Scott Ditch, and the lands which are the subject of the within Application. There is again little or no practical way to determine and guarantee that such a usage is not made of diverted waters.

(3) Shattuck Ditch is the very first water right on Anna Creek. Thus, if the first right were split between two diversion points, as Applicants propose, Protestants would be done grievous injury, especially in years when water volume was short. This would be true in that if sufficient waters were not available to fulfill all of the first (1883) water right, losses from absorption, evaporation, leakage, bank breaches, and the like, would prejudice even the percentage rights of downstream holders of the first water right. Some of Protestants are possessed of similar (1883) water rights, and thus, would be severely prejudiced in receipt of even their percentage rights. Again, control and monitoring of such distribution is virtually impossible. Further, it should be asserted that an upstream diversion point with similar

1 percentage rights would still have the ability to draw a larger
2 proportion of the percentage allotted simply because of the ad-
3 vantage that an upstream diversion point has, as further set
4 forth hereinafter.

5
6 (4) Some of Protestants have supplemental rights on drains under
7 Shattuck Ditch, the present point of diversion. If changes in
8 the diversion point were granted, these supplemental rights on
9 drains would be affected as drain water would not be available
10 as run-off from Shattuck Ditch. This is true because waters util-
11 ized for irrigation of Applicants' land would flow in a different
12 direction, and the drains on which Protestants have supplemental
13 rights are nearer to the present Shattuck Ditch. Thus, Protes-
14 tants, Elmore Nicholson, Roger Nicholson, and Lloyd Nicholson,
15 would be severely prejudiced in that their supplemental rights on
16 drains under Shattuck Ditch would be affected adversely.

17
18 (5) Protestant, Carl Wilson, who owns property through which the
19 Scott Ditch (proposed new point of diversion) passes, states that
20 the water used by the Applicants at present has in recent years
21 overflowed the Scott Ditch, flooding his properties and preventing
22 use of the lands in a normal manner during the irrigation season.
23 Any additional waters drawn by Applicants through the Scott Ditch
24 would certainly aggravate this flooding condition. The present
25 Scott Ditch, as it traverses the property of Protestant, Carl
26 Wilson, is totally inadequate to handle the present flow, and cer-
27 tainly not adequate to handle any increased flow.

28 //

1
2 (6) Should Applicants' Application be allowed, it would result in
3 a reduction of water flow in the Shattuck Ditch. Such a reduc-
4 tion will result in a higher percentage of natural water loss in
5 the remaining water flow as a result of ground absorption, evapora-
6 tion, and leakage.

7
8 (7) If Applicants' Application were allowed, the rights of Pro-
9 testants to remaining waters would be prejudiced in that an in-
10 creased flow in the Scott Ditch will apparently result in a higher
11 percentage of natural loss due to soil makeup along the Scott
12 Ditch. The findings of fact entered in "In the Matter of the
13 Determination of the Relative Rights to the Waters of Anna Creek,
14 a Tributary of Wood River, in Klamath County, Oregon", specifically
15 refer to soils along Scott Ditch as being "composed of very fine
16 pumice sand, requiring greater quantities of water for proper ir-
17 rigation than lands of other claimants herein"... "That the lands
18 of H.L. Scott are different in character, the soil thereof is more
19 porous, ... requiring a greater quantity per acre for proper irri-
20 gation."

21 III

22 The Anna Creek adjudication, previously referred to, specific-
23 ally provides for certain distribution of water rights, as well as
24 diversion points. Inasmuch as that adjudication does set forth
25 specific diversion points and lands to be irrigated under those
26 points, Protestants request the Water Resources Director of the
27 State of Oregon to conduct an investigation to determine those
28 lands under the proposed change application which have not been

1 irrigated in accordance with the Anna Creek adjudication, and
2 further determining whether such non-usage should result in an
3 invalidation of those rights.

4 IV

5 At the present time, Applicants have represented that all
6 construction is complete. However, in order to properly monitor
7 and regulate the proposed change of diversion point, and to
8 further protect the rights of other holders of concurrent (1883)
9 water rights, structures, measuring devices, bridges and specific
10 diversion structures may be necessary. Any such structure, measur-
11 ing device, bridge, diversion point; or its maintenance or repair,
12 should be the responsibility of Applicants and not of Protestants
13 or any other funding source. Protestants would suffer grievous
14 injury were such structures or devices necessary, in the absence
15 of a specific order requiring Applicants to be responsible for
16 all such costs into perpetuity.

17 V

18 In addition to the devices referred to above, the present
19 Shattuck Ditch has a rock dam therein. It is likely that, were
20 Applicants' Application allowed, a more sophisticated diversion
21 and measurement device would have to be constructed. In like
22 fashion, any such structure or device should be exclusively the
23 responsibility of Applicants, should Applicants' Application here-
24 in be allowed.

25 VI

26 Should Applicants' Application herein be granted, Protestants
27 ask that the State Engineer guarantee in writing that all diver-
28 sion points affected by the Application be monitored and records

1 kept to ensure that Applicants will not use a double-duty, or ad-
2 ditional percentage of water. Protestants further request that
3 the State Engineer guarantee that waters which would be affected
4 by Applicants' Application herein be used on the lands specifical-
5 ly applied for, and not for additional lands of the Applicants as
6 set forth in Paragraph II-(2).

7 VII

8 Should Applicants' Application herein be granted, and be-
9 cause of the necessity of monitoring and measuring all percen-
10 tage usages of water from both diversion points, Protestants re-
11 quest that all costs of any future Assistant Watermaster or Master
12 appointed to measure and monitor water usage be borne into per-
13 petuity by Applicants.

14 VIII

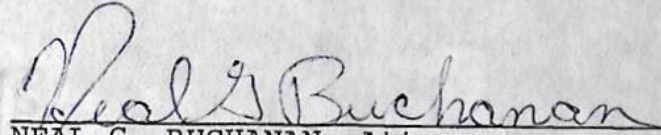
15 The area in question is made up primarily of pumice soils.
16 Such soils require a great deal of water to saturate. Thus, any
17 measurements of the amount of water being consumed at each point
18 of diversion must of necessity be measured at the present point
19 of diversion in the natural stream channels so as to avoid loss
20 by seepage and evaporation.

21 IX

22 The names of Protestants are set forth hereinabove and on
23 the attached Request to Join in Protest to Application. Each of
24 said Protestants may receive mailings at the office of Attorney,
25 Neal G. Buchanan, 210 North Fourth Street, Klamath Falls, Oregon
26 97601.

27 WHEREFORE, Protestants pray that the Application of Appli-
28 cants be denied in its entirety. In the alternative, Protestants

1 pray that each of the concerns above-enumerated be dealt with by
2 decision of the Water Resources Director.

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4 
5 NEAL G. BUCHANAN, Attorney
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BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

In the Matter of the Application)
of:)

ANDREW & DOROTHY POPSON) No. T 4431
)
) REQUEST TO JOIN IN PROTEST
) TO APPLICATION

Come now the below-named individuals, affected persons to the
within proceedings, and request their joinder in the Protest to
Application herein, requesting that the Water Resources Director
of Oregon deny said Application.

Elmore Nicholson
Elmore Nicholson

Leonard Meshke
Leonard Meshke

Anita Nicholson
Anita Nicholson

Ambrose McAuliffe
Ambrose McAuliffe

Glenn T. Williams
Glenn T. Williams

Roger Nicholson
Roger Nicholson

Carl F. Wilson
Carl F. Wilson

Lloyd Nicholson
Lloyd Nicholson
McAuliffe Ranches, Inc.
By Dorman Turner, Director

William Brewer
William Brewer

W. R. Owens
W. R. Owens

Elwood E. Owens
(Unavailable for Signature Prior
to Filing Date)

Lee Hunsaker
Lee Hunsaker

James Peter Owens
(Unavailable for Signature Prior
to Filing Date)

Elaine G. Kerns
Elaine G. Kerns

Clayton Charley
Clayton Charley

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing

PROTEST TO APPLICATION

on Andrew & Dorothy Popson

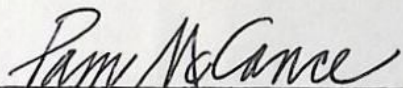
~~of attorneys~~ for SEE BELOW

on the below noted date by mailing to said ~~attorneys~~ ^{APPLICANTS} a correct
copy thereof, certified as such, contained in a sealed envelope,
with postage prepaid, addressed to said ~~attorneys~~ ^{APPLICANTS} at their address
to-wit:

P. O. Box 435 (CERTIFIED MAIL/RETURN RECEIPT
Ft. Klamath OR 97626 REQUESTED)

and deposited in the post office at Klamath Falls, Oregon on said
date. Between the said post office and the address to which said
copy was mailed, there is a regular communication by U.S. Mail.

Dated: June 13, 1980


Secretary to Neal G. Buchanan

Affidavit of Publication

RECEIVED

JUN 5 1980

WATER RESOURCES DEPT
SALEM, OREGON

STATE OF OREGON,
COUNTY OF KLAMATH

ss.

(COPY OF NOTICE TO BE PASTED HERE)

I, Sarah L. Parsons, Office
Manager
being first duly sworn, depose and say that
I am the principal clerk of the publisher of
the Herald and News

a newspaper of general circulation, as
defined by Chapter 193 ORS, printed and
published at Klamath Falls in the aforesaid
county and state; that the

#613 Public Notice

Water Right Transfer

a printed copy of which is hereto annexed,
was published in the entire issue of said
newspaper for Three

~~successive and consecutive weeks~~ day s,

(3 insertion s) in the following issue s: —

May 1

May 8

May 15

Total Cost \$11.62

Sarah L. Parsons

Subscribed and sworn to before me this 15th
day of May 1980

Lita Backa
Notary Public of Oregon

My commission expires Jan 15 1982

NOTICE OF WATER RIGHT TRANSFER APPLICATION NO. 4431

The Water Resources Director of Oregon has received and filed an application by Andrew & Dorothy Popson for approval, without loss of priority, of a change in point of diversion under certain water rights.

The certificate recorded at page 1088, Volume 2, State Record of Water Right Certificates, in the name of Robert Conner, describes a right which includes the use of water from Anna Creek for domestic, stock and for irrigation of a certain 36.0 ac in NE $\frac{1}{4}$ NE $\frac{1}{4}$, 18.2 ac in SE $\frac{1}{4}$ NE $\frac{1}{4}$, 40.0 ac in NE $\frac{1}{4}$ SW $\frac{1}{4}$, 40.0 ac in SE $\frac{1}{4}$ SW $\frac{1}{4}$, 3.3 ac in NE $\frac{1}{4}$ SE $\frac{1}{4}$, 40.0 ac in NW $\frac{1}{4}$ SE $\frac{1}{4}$, 40.0 ac in SW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec 12; 40.0 ac in NW $\frac{1}{4}$ NE $\frac{1}{4}$ & 40.0 ac in NE $\frac{1}{4}$ NW $\frac{1}{4}$, Sec 13, T 33S, R 6E, WM, with a date of priority of 1883.

The certificate recorded at page 1098 of said Volume 2, in the name of George A. Lisk, describes a right which includes the use of water from Anna Cr for domestic, stock and for irrigation of a certain 12.0 in Sec 1, T 33S, R 6E, WM & 18.7 ac in NW $\frac{1}{4}$ SW $\frac{1}{4}$ & 3.3 ac in SW $\frac{1}{4}$ SW $\frac{1}{4}$, Sec 6, T 33S, R 7 $\frac{1}{2}$ E, WM, with a date of priority of 1883.

The authorized point of diversion for said rights is located 1850 ft N & 1650 ft E from the SW Corner of Sec 31, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec 31, T 32S, R 7 $\frac{1}{2}$ E, WM (Shattuck Ditch).

The applicant proposes to change the point of diversion therefrom to a point located 3650 ft N & 460 ft E from the SW Corner of Sec 31, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec 31, T 32S, R 7 $\frac{1}{2}$ E, WM (Scott Ditch).

Pursuant to ORS 540.520(2), a hearing is scheduled for 9:30 a.m. on Thursday, June 26, 1980, at the Klamath County Courthouse, Klamath Falls, Oregon. Any objection to the proposed change must be prepared in writing: one copy to be served on the applicants at PO Box 435, Fort Klamath, OR 97626; and one copy filed in the office of the Water Resources Director, Salem, OR 97310, together with a \$10 filing fee, at least 10 days prior to the date set for hearing. Rules for filing objections will be furnished upon request.

IF NO OBJECTIONS ARE FILED, THE APPLICATION MAY BE APPROVED BY THE WATER RESOURCES DIRECTOR WITHOUT A HEARING.

Dated at Salem, Oregon this 22nd day of April, 1980.

James E. Sexson, Director
#613 May 1, 8, 15, 1980

NAME OF APPLICATOR	DATE OF RELATIVE PRIORITY	APPROXIMATE CUBIC FEET PER SECOND	NUMBER ACRES	USE	NAME OF DITCH	STREAM	DESCRIPTION OF LAND OR PLACE OF USE
¹⁰⁸⁵ L. A. Brannan, Ft. Klamath, Ore.	November 1898	1.50	120.19	Irrigation Dom. & stock	Martin	Anna Creek	41.19 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$; Sec. 9; 33 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$; Sec. 10; 40 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$; 6 acres in NW $\frac{1}{4}$ NE $\frac{1}{4}$; Sec. 16; Twp. 33 S. R. 7 $\frac{1}{2}$ E.W.M.
¹⁰⁸⁶ F. L. Burns, Ft. Klamath, Ore. (Certificate No. 1086 cancelled - 9-15-34 Superseded by Certs. 10,932 & 23. See Decree Vol. 12, (1903 E. W. M.) p. 269.)	1889	6.00	482	Irrigation, domestic and stock	Melhase	Anna Creek	40 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$; 40 acres in NW $\frac{1}{4}$ NE $\frac{1}{4}$; 40 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$; 40 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$; 40 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$; 40 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$; 40 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$; 40 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$; Sec. 28: 40 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$; Sec. 22: 40 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$; 40 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$; 40 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$; 2 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$; Sec. 27: Twp. 33 S. R. 7 $\frac{1}{2}$ E.W.M.
¹⁰⁸⁷ E. R. Cardwell, Ft. Klamath, Ore.	1901	0.50	20	Irrigation, domestic and stock	Loosely- Streeter- Cardwell	Anna Creek	10 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$; 10 acres in SE $\frac{1}{4}$ SW $\frac{1}{4}$; Sec. 3: Twp. 33 S. R. 7 $\frac{1}{2}$ E.W.M.
¹⁰⁸⁸ Robert Connor, Ft. Klamath, Ore. T-4471 A P00	1883	5.50	437	Irrigation, domestic and stock	Shattuck	Anna Creek	37 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$; -38 $\frac{1}{2}$ 40 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$; -18.2 40 acres in NE $\frac{1}{4}$ SW $\frac{1}{4}$; -40 40 acres in SE $\frac{1}{4}$ SW $\frac{1}{4}$; -40 40 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$; -33 40 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$; -40 40 acres in SW $\frac{1}{4}$ SE $\frac{1}{4}$; -40 40 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$; Sec. 12: 40 acres in NW $\frac{1}{4}$ NE $\frac{1}{4}$; -40 40 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$; 40 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$; -40 Sec. 13: Twp. 33 S. R. 6 E.W.M.
¹⁰⁸⁹ L. W. Copeland Ft. Klamath, Ore.	1883	3.00	240	Irrigation, domestic and stock	Shattuck	Anna Creek	40 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$; 40 acres in NW $\frac{1}{4}$ NE $\frac{1}{4}$; 40 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$; 40 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$; 40 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$; 40 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$; Sec. 18: Twp. 33 S. R. 7 $\frac{1}{2}$ E.W.M.
	1905	0.32	25	Irrigation, domestic and stock	Copeland Lateral	Anna Creek	25 acres in SE $\frac{1}{4}$ SW $\frac{1}{4}$; Sec. 31: Twp. 32 S. R. 7 $\frac{1}{2}$ E.W.M.

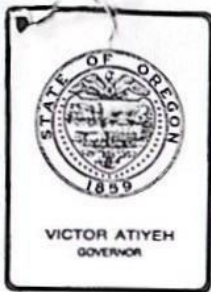
13

18

STATE PRINTING DEPT.

Decree - Feb. 4, 1916
Recorded - Vol. 2 Page 326Suppl. Findings - Nov. 19, '19
Recorded - Vol. 5 Page 401Decree - May 7, 1924
Recorded - Vol. 7 Page 440

1046 Mrs. Louis Hessig Ft. Klamath, Ore.	1901	0.46	36½	Irrigation, domestic and stock	Loosley- Streeter- Cardwell	Anna Creek	25.75 acres in NE¼NE¼; 10.75 acres in NW¼NE¼; Sec. 9: Twp. 33 S. R. 7½ E.W.M.
	November 1898	0.64	51	Irrigation domestic and stock	Martin	Anna Creek	15 acres in NE¼NE¼; 30 acres in NW¼NE¼; 6 acres in NE¼NW¼; Sec. 9: Twp. 33 S. R. 7½ E.W.M.
1047 George C. Hill, Ft. Klamath, Ore.	November 1898	1.60	128	Irrigation, domestic and stock	Martin	Anna Creek	40 acres in NW¼NW¼; 40 acres in SW¼NW¼; Sec. 15: 35 acres in SE¼NE¼; 13 acres in NE¼SE¼; Sec. 16: Twp. 33 S. R. 7½ E.W.M.
1048 George A. Lisk, Ft. Klamath, Ore. T-4431 A P00	1883	2.00	160	Irrigation, domestic and stock	Shattuck	Anna Creek	12 acres in SE¼SE¼; Sec. 1: Twp. 33 S. R. 6 E.W.M. 28 acres in SW¼NW¼; 40 acres in NW¼SW¼; 40 acres in SW¼SW¼; 40 acres in SE¼SW¼; Sec. 6: Tp. 33 S. R. 7½ E.W.M.
1049 Henry B. Loosley, Ft. Klamath, Ore.	1898	0.25	20	Irrigation domestic and stock	Small ditches	Anna Creek	20 acres in SE¼NE¼; Sec. 9: Tp. 33 S. R. 7½ E.W.M.
	November 1898	0.83	66	Irrigation domestic and stock	Martin	Anna Creek	40 acres in SW¼NE¼; 20 acres in SE¼NE¼; 6 acres in SE¼NW¼; Sec. 9: Tp. 33 S. R. 7½ E. W. M.
1050 J. W. McDonough, Ashland, Ore.	1892	4.00	320	Irrigation domestic and stock	Annie Creek	Waste water from Annie Cr. ditch	40 acres in NE¼NE¼; 40 acres in SE¼NE¼; 40 acres in SE¼SW¼; 40 acres in NE¼SE¼; 40 acres in SE¼SE¼; 40 acres in SW¼SE¼; Sec. 29: 40 acres in NW¼NE¼; 40 acres in NE¼NW¼; Sec. 32: Tp. 33 S. R. 7½ E.W.M. 15
1121 Richard Melhase Ft. Klamath, Ore. Cert. 1101 Cancelled - Superseded by Cert. 10,951 See Wood River Decree, Vol. 12, page 269	1889	4.00	320	Irrigation domestic and stock	Melhase	Anna Creek	40 acres in NE¼SW¼; 40 acres in NW¼SW¼; 40 acres in SW¼SW¼; 40 acres in SE¼SW¼; 40 acres in NE¼SE¼; 40 acres in NW¼SE¼; 40 acres in SW¼SE¼; 40 acres in SE¼SE¼; Sec. 28: Tp. 33 S. R. 7½ E.W.M.



Water Resources Department

MILL CREEK OFFICE PARK

555 13th STREET N.E., SALEM, OREGON 97310

PHONE 378-3066

April 6, 1981

Neal G. Buchanan
Attorney at Law
210 North Fourth
Klamath Falls, Oregon, 97601

REFERENCE: Transfer Application 4431, Popson

Dear Mr. Svoboda:

I have your letter dated April 2, 1981 pertaining to the use of the term "status quo" in connection with delaying the hearing until September of this year.

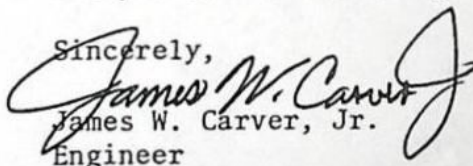
With reference to Mr. Svoboda's letter dated February 26, 1981 and to your letter dated February 27, 1981, and to telephone conversations with you and with Mr. Svoboda during the last week of February, my understanding of the intended application of the term "status quo" was to mean a continuation of past practices in the diversion and conveyance of waters of Anna Creek through the irrigation season of 1981.

Just as was discussed with you and with Mr. Svoboda, I am advised that the diversion and conveyance of water as proposed by Transfer Application 4431 is how the water has been diverted and conveyed for some years. The Watermaster instructed the Popsons to file an application for a change in point of diversion in accord with the actual practices if they wished to continue the "status quo", instead of going back to the diversion point of record.

This was the basis for stipulation to not set the hearing prior to the beginning of the 1981 irrigation season, which would have required your clients to travel from their out-of-state residences to appear at the hearing, instead of waiting until they had moved their cattle up to the Anna Creek area for the pasture season.

In short, it was my understanding that your clients were waiving objection to use of the wrong point of diversion during the 1981 irrigation season in consideration of accommodating them with the delayed date for hearing.

Sincerely,


James W. Carver, Jr.
Engineer

cc: John Svoboda
cc: Del Sparks, Watermaster

Neal G. Buchanan
ATTORNEY AT LAW
210 NORTH FOURTH
KLAMATH FALLS, OREGON 97601
PHONE 882-6607

RECEIVED
APR 6 1981
WATER RESOURCES DEPT
SALEM, OREGON

April 2, 1981

James W. Carver, Jr.
Engineer
Water Resources Department
Mill Creek Office Park
555 13th Street, N.E.
Salem OR 97310

Re: File T-4431 -- Popson

Mr. Carver:

By letter previously forwarded to you dated February 27, 1981, I outlined the tenor of what I understood to be the agreement as between the parties in this matter.

I have also received a letter dated February 26, 1981 from Mr. Svoboda. I do not mean to appear to be litigious about the matter; however, that letter does seem to go somewhat beyond the tenor of our agreement as I understood it. That specific portion that I refer to is contained in the following phraseology, "It is recognized that Popsons have for a previous period of time diverted water out of Anna Creek into and through the Scott Ditch, it being the position, however, of the protestants that Popsons are entitled only to divert at Shattuck Ditch. It is recognized that status quo will, therefore, allow the Popsons through this summer to divert at Scott Ditch."

As I mentioned, it is not my intention to pick nits at this specific point in time. However, it must be made clear that the protestants do not agree to allow waters adjudicated under other diversion points to be placed into the Scott Ditch, absent a specific finding by the Water Resources Department that such is now legal. It is not the protestants' position that an illegal diversion of water should be countenanced.

This may seem a minor area to attempt to clarify; however, we are going into a year that at this point appears to be one where waters may be somewhat scarce. As a consequence, it is very important to protestants that the status quo be maintained until such time as the various rights of the parties can be fully and finally adjudicated.

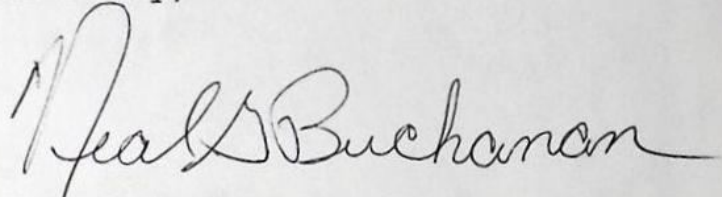
- continued -

James W. Carver, Jr.
April 2, 1981

Page Two

Thank you for your continuing cooperation in this matter.

Sincerely,



Neal G. Buchanan

NGB/pm

cc - Elmore Nicholson
Roger Nicholson
John Svoboda

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

KLAMATH COUNTY

IN THE MATTER OF TRANSFER APPLICATION)
NO. 4431 IN THE NAMES OF ANDREW AND)
DOROTHY POPSON FOR APPROVAL OF A)
CHANGE IN POINT OF DIVERSION OF WATER)
FROM ANNA CREEK)

FIRST AMENDED
NOTICE
OF HEARING

TO: Andrew Popson and
Dorothy Popson
*c/o John Svoboda
Lively, Wiswall, Svoboda,
Thorp and Dennett
Attorneys at Law
644 North "A" Street
Springfield, Oregon 97477

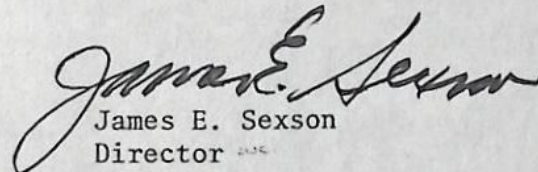
Elmore Nicholson, et al
*c/o Neal G. Buchanan
Attorney at Law
210 North Fourth Street
Klamath Falls, Oregon 97601

Delbert Sparks
Watermaster, District 17
Klamath County Courthouse
Klamath Falls, Oregon 97601

Notice is given hereby that the hearing in the matter of water right transfer application No. 4431 in the names of Andrew and Dorothy Popson for approval of a change in point of diversion of water from Anna Creek, as set forth in the notice published in the Herald and News newspaper in the issues of May 1, 8 and 15, 1980, and a protest by Elmore Nicholson, et al, against approval of said application, has been rescheduled to be held before James W. Carver, Jr., an employee of the Water Resources Department, authorized to preside in behalf of the Water Resources Director, commencing at 9:30 a.m. on Thursday, August 28, 1980, in the Commissioners Hearing Room of the Klamath County Courthouse Annex in Klamath Falls, Oregon.

Attached is informational material on the procedures, right of representation, and other rights of parties relating to the conduct of the hearing as required by ORS 183.413(2).

Dated at Salem, Oregon this 26th day of June, 1980.


James E. Sexson
Director

*CERTIFIED MAIL, RRR

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MAR 2 1981

WATER RESOURCES DEPT
SALEM, OREGON

Neal G. Buchanan

ATTORNEY AT LAW
210 NORTH FOURTH
KLAMATH FALLS, OREGON 97601
PHONE 882-6607

February 27, 1981

James W. Carver, Jr., Engineer
Water Resources Department
Mill Creek Office Park
555 13th Street, N.E.
Salem OR 97310

Re: Water Right Transfer No. 4431, Popson v Nicholson, et al

Mr. Carver:

This will confirm a conversation had with John Svoboda the 24th day of February, 1981, wherein it was agreed as follows:

- 1) The parties would agree that the hearing on this matter should be set during the month of September, meaning either September 1, 2, 3 or subsequent to September 9, 1981.
- 2) During the pendency of the proceeding, and especially during the 1981 irrigation season, the water usage would continue in accordance with the status quo.
- 3) During the interim period, none of the parties would use a greater amount of water than has in the past been withdrawn.

We would appreciate your prompt advice as to the hearing date set in order that Mr. Svoboda and I may attempt to protect that date as against Circuit, District and Workers' Compensation hearing demands.

Thank you for your cooperation in this regard.

Sincerely,

Neal G. Buchanan
Neal G. Buchanan

NGB/pm
cc - John Svoboda
Elmore Nicholson
Roger and Lloyd Nicholson



**OREGON STATE
HIGHWAY DIVISION**

2557 Altamont Drive
Klamath Falls, OR 97601

ROBERT W. STRAUB
GOVERNOR

F. B. KLABOE
Administrator and
State Highway Engineer

May 28, 1980

Water Resources Director
555 13th Street N.E.
Salem, OR 97601

Dear Mr. Sexson:

RE: Application No. 4431
Notice of Water Right Transfer
Klamath County
Modoc Secondary Highway #427

The application for Mr. Popson could cause a problem with the irrigation crossing facility and the roadway grade on the subject highway at the Scott Ditch.

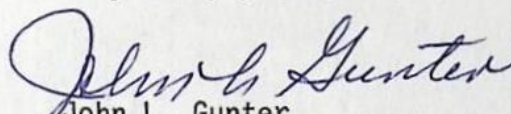
The concrete box culvert at this location is at maximum capacity at this time. (see attached copies of photographs.)

Any increase in volume of water would not be able to flow through this structure. I doubt whether the ditch would handle any increase.

If approval is granted we would require Mr. Popson to increase the capacity of the box culvert and any items necessary to prevent overflow of water onto the highway.

If you have any questions, please call my office at 882-5591.

Very truly yours,


John L. Gunter
District Engineer

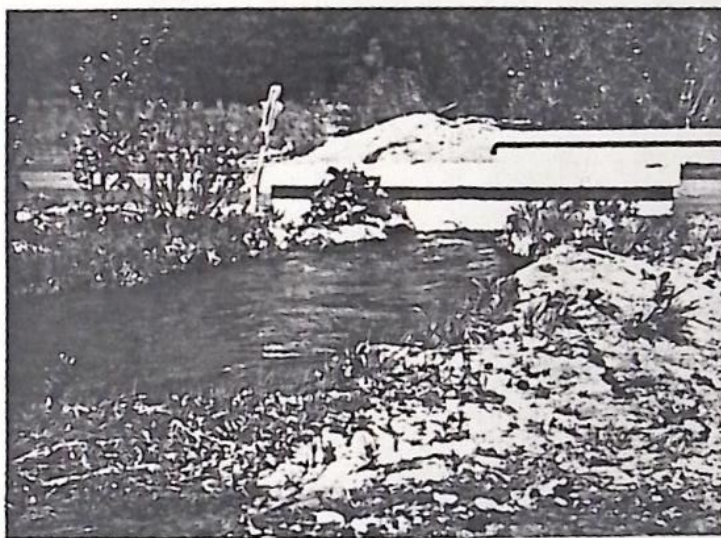
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attachment

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MAY 29 1980

WATER RESOURCES DEPT
SALEM, OREGON



SCOTT DITCH.



STATE OF OREGON

INTEROFFICE MEMO

TO: TRANSFERS, WATER RIGHTS DIVISION

DATE: April 2, 1980.

FROM: ** Delbert Sparks, Watermaster

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APR 3 1980

WATER RESOURCES DEPT
SALEM, OREGON

SUBJECT: WATER RIGHT TRANSFER APPLICATION NO. 4431

IN THE NAME OF Andrew & Dorothy Popson

In my opinion the proposed change in point of diversion from Anna Creek
MAY BE MADE WITHOUT INJURY WOULD RESULT IN INJURY* to an existing water right.

Headgate notices HAVE HAVE NOT been issued for diversion from the sources which
serves this right.

If for change in point of diversion, is there any intervening point of diversion
between the authorized and the proposed points of diversion? NO
(yes or no)

In my opinion, the order approving the subject transfer application should include
the following in regard to the appropriator installing suitable measuring devices
in the diversion works:

- X (1) PRIOR to the diverting of water at the new point of diversion . . .
_____ (2) When in the judgment of the watermaster it becomes necessary . . .

* The approval of this transfer application would result in injury to other water
rights because _____

** Del Sparks
Watermaster's signature or initials

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WATER RESOURCES DEPT
SALEM, OREGON

T-4431

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APR 13 1980
WATER RESOURCES DEPT
SALEM, OREGON

Application for Transfer of Water Right

To the WATER RESOURCES DIRECTOR OF OREGON:

I, Andrew & Dorothy Popson
 of P.O. Box 435, Fort Klamath
 State of Oregon, 97626, 381-2308, do hereby make application for change
in point of diversion
 (In point of diversion; place of use; use heretofore made of the water)

1. Is the water right recorded in your name? Robert Connor George A. Lisk
 (If not, give name)
2. Was your water right determined by Decree of Court? yes If so, give title of proceedings
Anna Creek Tributary at Wood River number of certificate 1088, 1098
 (Yes or No)
3. Was your water right acquired by Water Right Permit? No If so, give number
 of permit — Number of certificate —
 (Yes or No)

NOTE: If the entire right of record is not directly involved in the requested change, only that part of the right that is directly involved should be considered in answering the balance of the questions on this form.

4. The source of water is Anna Creek
5. What is the date of priority of your water right? 1883 1883
6. The authorized point of diversion is located 1850 ft. N and 1650 ft. E from the SW
 corner of Sec 31 being within the NE 1/4 SW 1/4 of Section 31 Tp. 32 S R. 7 1/2 E W. M.,
 in the county of Klamath The name of the ditch used is Shattuck
 (N. or S.) (E. or W.) (No. N. or S.) (No. E. or W.)

NOTE: Answer question if the application is for change in point of diversion.

7. The proposed point of diversion is located 3650 ft. N and 460 ft. E from the SW
 corner of Sec 31 being within the SW 1/4 NW 1/4 of Section 31 Tp. 32 S R. 7 1/2 E W. M.,
 in the county of Klamath The name of the ditch to be used is Scott
 (N. or S.) (E. or W.) (No. N. or S.) (No. E. or W.)

8. The use to which the water is applied is irrigation
(Irrigation, Mining, Power, Manufacturing, etc.)

Location of area irrigated, or place of use if other than irrigation:

C# 1098
C# 1088

Township North or South	Range E. or W. of Willamette Meridian	Section	List 1/4-1/4 of Section	Number Acres To Be Irrigated
33S	7 1/2 E	6	NW 1/4 SW 1/4	18 1
33S	7 1/2 E	6	SW 1/4 SW 1/4	3 2
33S	6 E	1	SE 1/4 SE 1/4	12 0
33S	6 E	12	NE 1/4 NE 1/4	36 2 A-P
33S	6 E	12	SE 1/4 NE 1/4	18 2 D-P
33S	6 E	12	NE 1/4 SW 1/4	40 0
33S	6 E	12	SE 1/4 SW 1/4	40 0
33S	6 E	12	NE 1/4 SE 1/4	3 3
33S	6 E	12	NW 1/4 SE 1/4	40 0
33S	6 E	12	SW 1/4 SE 1/4	40 0
33S	6 E	13	NE 1/4 NW 1/4	40 0
33S	6 E	13	NW 1/4 NE 1/4	40 0
(If more space required, attach separate sheet)				334 0

9. Are you the legal owner of the above described lands? yes
(If not owner, explain your interest)

10. To your knowledge, has any portion of the water right above described undergone a period of five or more consecutive years of nonuse? NO
(Yes or No)

NOTE: Answer questions 11, 12 and 13 if application is for change in use or place of use.

11. Are the lands from which you propose to transfer your water right free of all encumbrances, including taxes, mortgages, liens, etc.? NO
(Answer Yes or No)

12. If not, give below a description of existing encumbrances:

NATURE OF ENCUMBRANCE	HELD BY	AMOUNT

13. The use to which the water is to be applied is
(Irrigation, power, mining, manufacturing, domestic supplies, etc.)

Location of area to be irrigated, or place of use if other than irrigation:

Township North or South	Range E. or W. of Willamette Meridian	Section	List 1/4-1/4 of Section	Number Acres To Be Irrigated

(If more space required, attach separate sheet)

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WATER DIVISION
SALES OREGON

14. Reasons for the proposed changes are more practical to apply
water to the land from this Ditch (Scott)

15. Construction work will be completed on or before completed

16. The water will be completely applied to the proposed use on or before Oct. 1980

Remarks _____

NOTE: THIS APPLICATION MUST BE ACCOMPANIED BY A MAP OR MAPS SHOWING THE BEFORE AND AFTER LOCATIONS OF THE POINT OF DIVERSION AND/OR PLACE OF USE, AS THE CASE MAY BE.

AFFIDAVIT OF APPLICANT

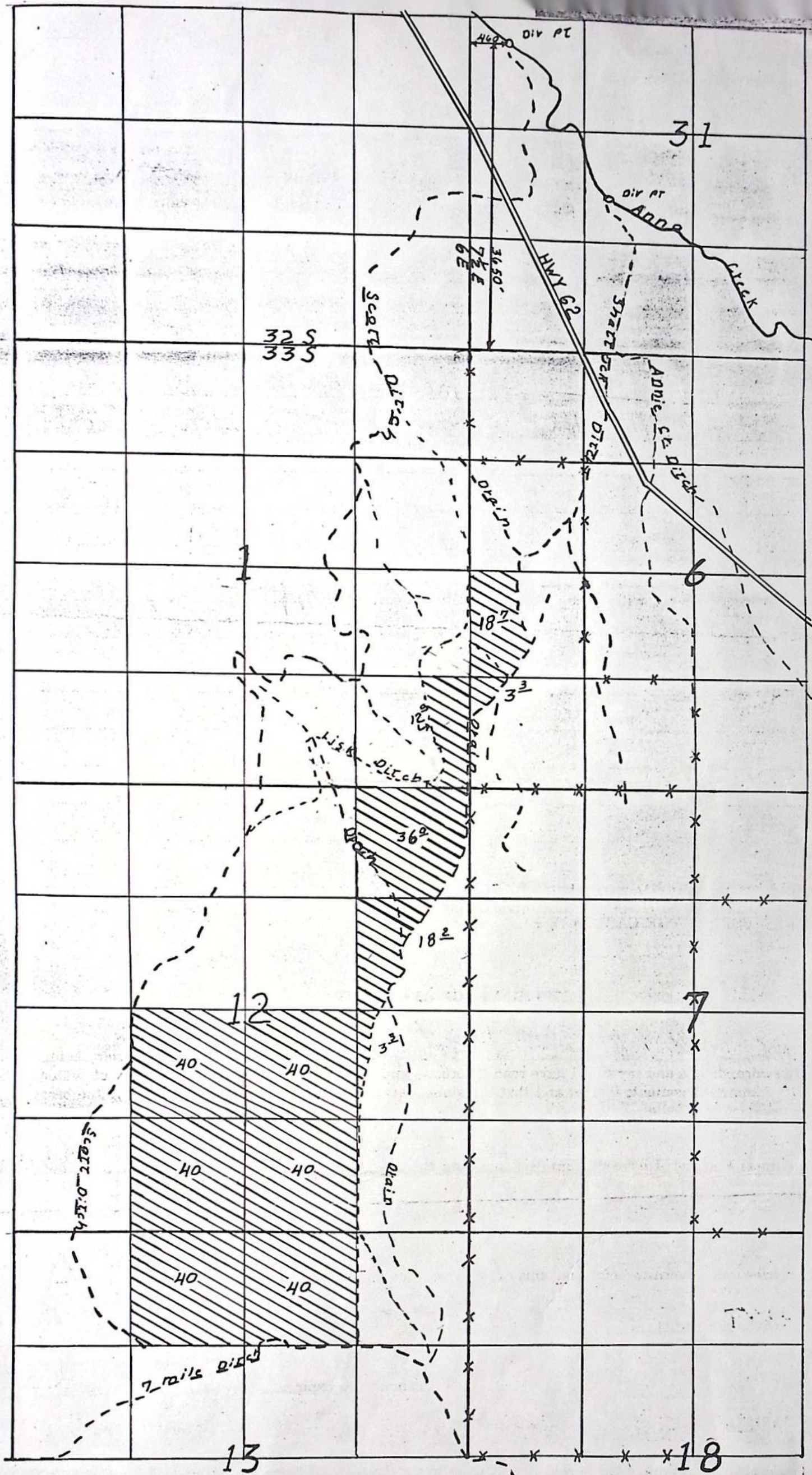
X we, Andrew Pappas & Dorothy Pappas, the applicant herein, being first duly sworn, depose and say that I have read the above and foregoing application for transfer of water right; that I know the contents thereof and that the statements therein made are true and correct to the best of my knowledge and belief.

In Witness Whereof, I have hereunto set ^{our} my hand this 17 day of March, 1980
X Andrew Pappas
X Dorothy Pappas
(Name of applicant)

Subscribed and sworn to before me this 17 day of March, 1980

[Notarial Seal]

X Andrew Pappas
X Dorothy Pappas
NOTARY PUBLIC FOR OREGON
My commission expires 4-17-83



Sec 1 & 6 is cert # 1098

Sec 12 & 13 is cert # 1088