

BEFORE THE STATE WATER BOARD OF OREGON

Clackamas County.

IN THE MATTER OF THE DETERMINATION OF)
THE RELATIVE RIGHTS TO THE USE OF THE)
WATERS OF BACHERT CREEK AND NETTER)
CREEK, AND THEIR TRIBUTARIES, TRIBU-)
TARIES OF PUDDING RIVER, IN SECTION 13)
OF TOWNSHIP 4 SOUTH, RANGE 1 WEST, W.M.)

FINDINGS AND ORDER
OF DETERMINATION.

Now at this time the above entitled matter coming on for consideration by the State Water Board, and it appearing to said Board that all of the evidence and testimony taken in the above entitled proceedings has been duly filed in the office of said Board, and the Board having carefully considered all of said evidence and testimony, and the information and data gathered by the State Engineer, and being now fully advised in the premises, makes and orders to be entered of record in its office the following

FINDINGS OF FACT AND ORDER OF DETERMINATION.

1.

That on the 19th day of November, 1920, there was filed in the office of the State Water Board a certified copy of an order of the Circuit Court of the State of Oregon for Clackamas County dated November 8, 1920, in the cause of W. W. Irvin, Plaintiff, vs. Edwin Netter and Olga Netter, his wife, Defendants, transferring said cause to the State Water Board in accordance with the provisions of Section 5731 Oregon Laws, for determination as provided by law. That it appearing that a proper determination of said cause would require a determination of all rights to the use of the waters of a small unnamed stream flowing across the lands of said parties, which for the purpose of this proceeding was called Bachert Creek, and also the rights to the use of the waters of another small stream located a short distance in a southerly direction from said Bachert Creek, which for the purpose of this proceeding was called Netter Creek, the said Board thereupon made and entered an order that said determination be made, and that the State Engineer proceed to make the necessary surveys and examinations, and that the State Water Superintendent proceed to take and hear the testimony in support of the various claims to the waters of said streams, as provided by law.

BACHERT AND NETTER CREEKS -1-

2.

That a notice was prepared by the State Water Board setting forth the date when the State Engineer or his assistant would begin the investigation of the flow of said streams and their tributaries and the ditches diverting water therefrom, and the time and place certain when the State Water Superintendent would begin the taking of testimony as to the relative rights of the various claimants to the use of the waters of said stream, and said notice was published in two issues of the Aurora Observer, a newspaper published weekly at Aurora, Oregon, and of general circulation in the county in which said streams are situated, said two issues being those of March 10th and 17th, 1921.

3.

That on the 12th day of March, 1921, the State Water Superintendent did send by registered mail to each person, firm or corporation claiming a right to the use of the waters of said streams or any tributary thereof, and to each person, firm or corporation owning or being in possession of land bordering on or having access to said streams or their tributaries, insofar as said claimants, owners, firms or corporations could be reasonably ascertained, a similar notice to such published notice, setting forth the date when the State Engineer would commence the examination of said streams and their tributaries and the ditches diverting water therefrom, and the time and place when the said Superintendent would commence taking testimony as to the relative rights of the various claimants to the use of the waters of said streams and their tributaries. And said Superintendent did enclose with each of said notices a blank form upon which said claimants or persons in possession could prepare in writing all of the particulars necessary for the determination of their rights to the waters of said stream or tributary thereof, under oath.

That due proof of the publication of said notice and of the sending of said notice and blank form by registered mail has been made and is duly filed as a part of the record herein.

4.

That at the time specified in said notice a duly qualified assistant of the State Engineer did proceed to make an examination of said streams and their tributaries and of the ditches diverting water therefrom and of the land irrigated or susceptible of irrigation therefrom, which observations and measurements were made of record in the office of said State Engineer, together with a plat on a

scale of measurement of two inches to the mile showing with substantial accuracy the course of said streams and their tributaries and the location of the various ditches diverting water therefrom and the legal subdivisions of land irrigated or susceptible to irrigation therefrom, blue prints or copies of said maps and measurements duly certified to by the State Engineer being now on file herein and a part of the records hereof.

5.

That at the time specified in said original notice, to-wit: on Saturday, the 23rd day of April, 1921, in the Circuit Court Room of the County Court House at Oregon City, Oregon, Rhea Luper, a duly authorized representative of the State Water Superintendent, did attend and receive the claims and testimony as to the rights of all parties claiming water from said streams or their tributaries. That statements and proof of claim to the use of the waters of said streams were filed by the following named persons:

Bachert, Fred & Emma	Aurora, Ore.
Irvin, W.W., O.D.Eby, Agt.	Oregon City, Ore.
Mills, Forest E & Mary J.	Aurora, Ore.
Netter, Olga	Aurora, Ore.
Will, Jonas M & Gussie M.	Aurora, Ore.
Williams, Clarence R. & Margaret E.	Aurora, Ore.
Zimmerman, Allen J.	Aurora, Ore.
Zimmerman, Elmer M.	Aurora, Ore.

6.

That the following named persons were duly notified by registered mail and by publication of said notice as hereinbefore set forth, and that each of them, although so notified, has failed, neglected and refused to appear herein and submit proof of a right to the use of the waters of said streams, if any they have or claim, and that such parties are in default, and that such default is here and now entered against them and each of them is hereby enjoined and inhibited from using or asserting any rights to the use of the waters of said streams or their tributaries, except by, through or under the rights of such persons whose water rights are defined herein, or under and by virtue of appropriations hereafter made in accordance with law:

Bracker, Mary A	Aurora, Ore.
Kocher, Henry	Aurora, Ore.
Marks, Thos. I.	Aurora, Ore.
Fish, Laura C	Rt #4, Aurora, Ore.
Kocher, Eldon E	Aurora, Ore.
Will, L. M.	Aurora, Ore.
Will, C. C.	Aurora, Ore.
McCarthy, Florence	Aurora, Ore.

7.

That upon the completion of the taking of testimony and proofs of claim as aforesaid, the State Water Superintendent did on the 30th day of April, 1921, give notice by registered mail to each of the various claimants to the waters of said streams that at the time and place mentioned in said notice, to-wit: beginning on Wednesday, the 11th day of May, 1921, and ending on Saturday, the 21st day of May, 1921, (Sundays excepted), from 9 to 12 o'clock A. M. and from 2 to 5 o'clock P. M., at the office of the State Water Board in the Capitol Building, Salem, Oregon, all of said testimony and proofs of claim would be open to inspection by the various claimants or owners, and a duly authorized representative of said Superintendent did, in accordance with said notice, attend at said time and place and keep said evidence open to inspection for the period aforesaid. That said notice did also state therein the county in which the determination of the State Water Board would be heard by the Circuit Court, to-wit: the County of Clackamas. That due proof of the sending of said notice by registered mail and the holding of said inspection has been made and filed as a part of the record herein.

8.

That within the time fixed by law therefor, the following contests were initiated by the filing with said Superintendent of notices or statements of contest in writing:

CONTEST NO. 1.

W. W. Irvin, Contestant

v.

Olga Netter, Contestee

CONTEST No. 2

Olga Netter, Contestant

v.

W. W. Irvin, Contestee

That thereafter a stipulation was filed, between the parties to said contests above set forth, amending certain portions of the statements of contest theretofore filed, and waiving the statutory period of notice to be given of hearing of said contests. That thereupon the said State Water Superintendent did fix a time and place for the hearing of said contests, in accordance with said stipulation, and in the case of each contest, the contestant and each person whose rights were thereby contested, were duly and regularly notified of the time and place fixed for the hearing of such contest.

CONTEST No. 1 - W. W. IRVIN, Contestant, v. OLGA NETTER, Contestee, and
CONTEST NO. 2 - OLGA NETTER, Contestant, v. W. W. IRVIN, Contestee.

Contests Nos. 1 and 2 being in the nature of cross contests between the same parties, each contesting the other's claims, regularly came on for hearing before R. W. Potter, duly appointed reporter, and it was stipulated between the parties that said contests should be consolidated for the purpose of shortening the testimony.

That in filing their claims for water rights in these proceedings, both of said parties have elected to claim as appropriators of the waters of said streams, and it is therefore found that their rights should be determined as such, and that they have waived any other or further rights to said waters as riparian owners by reason of their claims of appropriation. And the rights of said parties shall therefore be determined under the doctrine of appropriation.

In passing upon the claims of these parties attention will be called to the fact that the present water code, which went into effect February 24, 1909, provided that thereafter water rights could be acquired only in a certain specific manner, that being through the filing of an application with the State Engineer and the securing of a permit to appropriate water, and compliance thereafter with the terms of said permit. (Secs. 5721 and 5765, O. L.) A claim has been made in these proceedings by Olga Netter, for a water right dating from the year 1913. It appears from the evidence herein that as early as 1912 this claimant diverted and used the waters of Netter Creek, and possibly the waters of Bachert Creek. This diversion, however, was made after February 24, 1909, and no application having been filed with the State Engineer for such water rights, the use of said water was plainly without compliance with law and does not form a basis for a water right. In the year 1920, however, this claimant filed applications and secured permits from the State Engineer. (Permits Nos. 4643 and 4792). The rights of said Olga Netter under said permits shall be completed and perfected in accordance with the terms and conditions set forth in said permits and with the laws governing same. And it is found that the rights of said Olga Netter to the waters of Bachert and Netter Creeks are limited to such rights as may hereafter be perfected by virtue of such permits.

Claim has been made by W. W. Irvin to a right to the waters of Bachert Creek, dating from 1905. After a careful examination of the evidence and testimony herein, it is found as follows: That said claimant about the year 1905 commenced the draining and clearing of his low land, or beaver dam land, preparatory to getting the land in shape for cultivation. About the same time he installed a hydraulic ram, with which the waters of a certain spring on his land were lifted up a hill to his house and barn and used for domestic purposes. In 1913 claimant began the

construction of a more extensive drainage system, for the better reclamation of said low lands. This consisted of a large tile extending from a point on the upper edge of his land near the channel of Bachert Creek, down across said low land, to Pudding River; and another smaller tile, placed at a slightly higher elevation, which carried drainage water from the hillside and from some springs near the head of said tile, down to said spring above mentioned, and was used for the purpose of augmenting the flow of said spring in the dry part of the year, for operating the ram for domestic use. About the year 1917 or 1918, the upper end of said smaller tile was connected to Bachert Creek by means of a 2 inch pipe about 30 feet in length, the water in said creek being raised by a dam sufficiently so that the same would flow through the pipe into the tile and down to said spring. This use in 1917 or 1918 appears to have been the first use of Bachert Creek water by claimant Irvin, although the end of the tile had been built to within 30 feet of the creek in 1913. That the evidence herein further shows that up to the present time said W. W. Irvin has made no use whatever of the waters of either Bachert Creek or said springs for irrigation purposes, and his intentions to use the water for irrigation appear to have been very vague. And it has not been shown that there was any intention on the part of said claimant, formulated in the year 1905 or at any time prior to February 24, 1909, when the water code became effective, to make use of the waters of Bachert Creek for any purpose. And even if such intention did exist, it is found that due diligence was not exercised in prosecuting the work necessary to enable the claimant to apply the water to beneficial use. It is therefore found that no rights have been initiated or acquired by said W. W. Irvin to the waters of Bachert Creek. The rights of said W. W. Irvin shall therefore be limited as follows: to a right to the use of the waters of the springs flowing into said small tile which have been used to operate said ram, for power, domestic and stock use. And said claimant shall be allowed a water right with priority of 1905, to the extent of one-tenth of one cubic foot of water per second from said springs, for power, domestic and stock purposes.

10.

That all claimants to the waters of said streams other than the parties to the contests hereinabove mentioned, have elected to claim as riparian proprietors on said streams, and the Board finds that the claims of said parties should be allowed as filed, and as such riparian owners said parties are entitled to a reasonable amount of water for stock and domestic purposes upon their said lands, as hereinafter tabulated.

That the name and address of each appropriator or riparian owner claiming the use of the waters of said streams, arranged in a tabulated form, together with the date of priority of such appropriation, or, in case of riparian owners, the date of patenting of the land from the United States, the use or uses to which said water is applied, the name of the stream or streams from which the water is diverted, and the description of the land upon which such water is used, the rights of each party being set opposite and following the name and post office address of such party, are as follows, to-wit:

Name and Postoffice Address of Appropriator	Date of Relative Priority	Amount Cubic Feet Per Second	Number Acres	Use	Name of Ditch	Stream	Description of Land or Place of Use
5544 1 Bachert, Fred & Emma Aurora, Oregon. (Proof #1)	Aug. 5 1875 (Riparian right)			Domestic and Stock		Bachert & Netter Creeks	A part of Section 18 T 4 S. R. 1 E. W. M. bounded and described as follows: Beginning at an iron pipe driven in the $\frac{1}{4}$ section line running East and West through Section 18 at a point North 89 degrees 27' East 1320 feet distant from the $\frac{1}{4}$ section corner on the West boundary of said Section 18; T 4 S., R 1 E. W. M., running thence North 0 degrees 08' West 716.4 feet to an iron pipe driven in the SW corner of that certain tract of land conveyed to Forest E. Mills by deed recorded in Book 151, Page 640 Record of Deeds for Clackamas County, Oregon; thence North 89 degrees 07' East tracing the South boundary of said tract 568.95 feet to an iron pipe; thence South 51 degrees 29' East 1141.25 feet to the $\frac{1}{4}$ section line, running North and South through said Section 18; thence South 0 degrees 39' East tracing the $\frac{1}{4}$ section line 92.4 feet; thence South 89 degrees 27' West 1471.4 feet to a plow share; thence North 0 degrees 07' West 92.4 feet to the place of beginning, containing 19.8 acres, more or less.
5545 2 Irvin, W. W. Aurora, Oregon O. D. Eby, Agent Oregon City, Ore. (Proof #2) (See Paragraph 9)	1905	0.1		Power, Domestic and Stock		Springs on claimants land	Place of use: SE $\frac{1}{4}$ Section 12 T 4 S. R. 1 W. W. M.
5547 3 Mills Forest E and Mary J Aurora, Oregon. (Proof #3)	Aug. 5 1875 (Riparian right)			Domestic and Stock		Bachert and Netter Creeks	Being a part of the estate of Michael Bachert in Section 18, T 4 S. R. 1 E. W. M. Beginning at an iron pipe driven in the West boundary of that certain tract of land conveyed by Michael Bachert and Judith Miller, recorded in Book 102, at Page 68 of the Record of deeds for Clackamas County, said point being 1006.1 feet South of an iron pipe driven in the North boundary of said Section 18 at a point North 89 degrees 07' East 365.2 feet distant from the NW corner of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 18; running thence South tracing the West boundary of the said Judith Miller tract 456.45 feet to an iron pipe driven in the SW corner thereof; thence South 51 degrees 29' East tracing the South boundary of said tract 1850.9 feet to an iron pipe driven at the most southerly corner of said tract and in the West boundary of the John Marks D.L.C.; thence South 0 degrees 16' East tracing the West boundary of the John Marks D.L.C. 387.93 feet to an iron pipe; thence North 51 degrees 29' West 1739.3 feet to an iron pipe; thence South 89 degrees 7' West 568.95 feet to a piece of steel buggy axle driven in the East boundary of a tract of land conveyed to Victor Berg by deed recorded in Book 120, at Page 338, Record of Deeds for Clackamas County; thence North 0 degrees 07' West tracing the East boundary of said tract and projection thereof 915.3 feet to a piece of steel buggy axle driven in the ground; thence North 89 degrees 07' East along the South boundary of land belonging to G. E. Anderson 481.65 feet to the place of beginning, containing 23 acres, more or less.

Name and Postoffice Address of Appropriator	Date of Relative Priority	Amount Cubic Feet Per Second	Number Acres	Use	Name of Ditch	Stream	Description of Land or Place of Use
							Also being a part of Section 18, T 4 S. R. 1 E. W. M., bounded and described as follows: Beginning at a wagon spindle set in the SW corner of the John Marks D.L.C. in T 4 S. R. 1 E. W. M., running thence South 89 degrees 58' 30" West tracing the section line along the South boundary of Section 18 at a distance of 447.95 feet to a stone set in the quarter section corner between Sections 18 and 19 T 4 S. R. 1 E. W. M., thence North 0 degrees 39' West tracing the quarter section line 2641.15 feet to the South boundary of that certain tract of land conveyed to Forest E. Mills by deed recorded in Book 151, Page 640, Record of Deeds for Clackamas County; thence tracing the South boundary of said tract South 51 degrees 29' East 598.06 feet to an iron pipe driven in the West boundary of the John Marks D.L.C.; thence South 0 degrees 16' East tracing the West boundary of the John Marks D. L. C. 2268.07 feet to the place of beginning, containing 25.75 acres, more or less.
Netter, Olga Aurora, Oregon (Proof #4)	June 24 1920				(See State Engineer's Permit No. 4643)		
(See Paragraph 9)	Oct. 12 1920				(See State Engineer's Permit No. 4792)		
Will, Jonas M and Gussie M. Aurora, Oregon. (Proof #5)	Aug. 5 1875 (Riparian right)			Domestic and Stock		Bachert Creek	Beginning at the NW corner of the D.L.C. of John Marks and wife; thence North 12.38 chains; thence North 50 degrees West 19.20 chains; thence West 7 chains; thence South 22.15 chains; thence South 53 degrees East 27.39 chains; thence North 15.67 chains to the place of beginning, containing 60 acres, more or less. A strip 13 feet wide, beginning in the NE corner of above described land extending therefrom along North boundary to County road leading from Aurora to Barlow is not included in this description.
Williams, Clarence R and Margaret E. Aurora, Oregon. (Proof #6)	Aug. 5 1875 (Riparian right)			Domestic and Stock		Bachert Creek	Beginning at a point 7.50 chains East of the SW corner of the NW 1/4 of Section 18, T 4 S. R. 1 E W. M., thence North 20 chains; thence E 14.57 chains; thence South 20 chains to the center line of Section 18; thence South 89 degrees 45' West 14.57 chains to the place of beginning, containing 29.14 acres, more or less, save and excepting from the above 1.53 acres theretofore deeded to Clackamas County for public road purposes, together with all and singular the tenements, hereditaments and appurtenances thereto belonging and in any wise appertaining, and also all their estate, right, title and interest in and to the same including dower and claim of dower.

Name and Postoffice Address of Appropriator	Date of Relative Priority	Amount Cubic Feet Per Second	Number Acres	Use	Name of Ditch	Stream	Description of Land or Place of Use
6 55117 Zimmerman, Allen J Aurora, Oregon. (Proof #7)	Nov. 20 1865 (Riparian right)			Domestic and Stock		Netter Creek	A part of the SW $\frac{1}{4}$ of Section 18, T 4 S. R. 1 E., Beginning at a gas pipe set in the County road leading from Aurora to Needy, which gas pipe is that set for the NW corner of a certain small tract of land deeded by Cris Zimmerman and Catherine Zimmerman, his wife to Fred Will as described in deed recorded in page 187 of Volume 102 of Records of Deeds for Clackamas County, Oregon, and running thence along said road North 14 degrees 45' East 10.03 chains to a gas pipe; thence N. 1 degree 30' West 4.59 chains to a gas pipe set for the SW corner of a tract of land owned by Leonhart Will as described on page 26 of Vol. 93 of Record of deeds; thence South 89 degrees 45' East 28.73 chains to a gas pipe; thence South 0 degrees 20' East 13.32 chains to a gas pipe; thence North 89 degrees 45' West 31.03 chains to the place of beginning, containing 39.10 acres.
7 55118 Zimmerman, Elmer M. Aurora, Oregon. (Proof #8)	Nov. 20 1865 (Riparian right)			Domestic and Stock	Elmer M. Zimmerman	Netter Creek	Being a part of Section 18 T 4 S. R. 1 E. W. M., bounded and described as follows, to-wit: Beginning at an iron pipe driven in the subdivisional line running Easterly and Westerly through the center of Section 18, T 4 S. R. 1 E. W. M., at a point that is North 89 degrees 45' E. 1320 feet distant from the $\frac{1}{4}$ section corner on the West boundary of said Section 18, T 4 S. R. 1 E. W. M., running thence S. 0 degrees 20' East 92.4 feet to an iron pipe driven at the SW corner of a certain 3 acre tract of land conveyed to Michael Bachert, by deed recorded in Book 27, at page 442, Record of deeds for Clackamas County, Oregon; thence North 89 degrees 45' East tracing the South boundary of said tract 494.05 feet to an iron pipe; thence South 0 degrees 20' East 893.55 feet to an iron pipe driven in the North boundary of that certain tract of land conveyed to Allen J. Zimmerman by deed recorded in Book 156 at page 296, Record of Deeds for Clackamas County, Oregon; thence along the North boundary of said tract N. 89 degrees 45' West 876.18 feet to an iron pipe; thence North 0 degrees 20' West 455.4 feet to an iron pipe; thence South 89 degrees 45' West 438.9 feet; thence North 7 degrees East 435.6 feet; thence North 48 degrees 45' East 132.94 feet to a stone 12 x 6 x 6 marked X on top and set in the $\frac{1}{4}$ section line; thence along the $\frac{1}{4}$ section line North 89 degrees 45' East 658.02 feet, to the place of beginning, containing 23.5 acres, more or less. Have and excepting from the execution of this deed, a strip of land 20 feet wide for road purposes, and described as follows: Beginning in the center of the County Road, known as the "Meridian County Road" at a point that is North 89 degrees 45' East 1300 feet distant from the $\frac{1}{4}$ section corner on the W boundary of Section 18 T 4 S. R. 1 E. W. M., in Clackamas County, Oregon; running thence North 89 degrees 45' East tracing the $\frac{1}{4}$ section line 20 feet to an iron pipe; thence South 0 degrees 20' East 92.4 feet to an iron pipe driven at the SW corner of a certain 3 acre tract of land conveyed to Michael Bachert by deed recorded in Book 27, Page 442, Record of deeds for Clackamas County; thence North 89 degrees 45' East tracing the S boundary of said tract 494.05 feet to an iron pipe; thence South 0 degrees 20' East 20 feet; thence South 89 degrees 45' West 514.05 feet to a point; thence N 0 degrees 20' West 112.4 feet to the place of beginning, containing 0.28 acres, more or less.

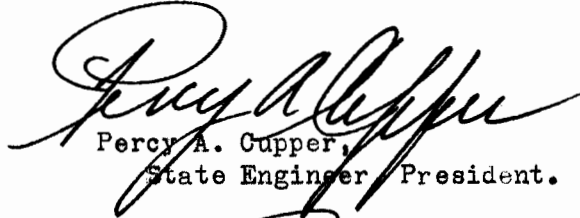
12.

And the State Water Board being fully advised in the premises, it is hereby CONSIDERED AND ORDERED that the relative rights to the use of the waters of Bachert and Netter Creeks and their tributaries are hereby adjudicated, determined and settled in accordance with and as set forth in the foregoing findings.


Dated this 30th day of November, 1921, at Salem, Oregon.

STATE WATER BOARD OF OREGON

By


Percy A. Cupper,
State Engineer / President.

(SEAL OF STATE WATER BOARD)


Geo. T. Cochran,
State Water Superintendent.

ATTEST:


R. W. Potter,
Secretary.