

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

HARNEY COUNTY

IN THE MATTER OF CANCELLATION )  
OF A WATER RIGHT IN THE NAME OF )  
PACIFIC LIVESTOCK COMPANY FOR )  
USE OF WATERS OF MIDDLE FORK )  
MALHEUR RIVER )  
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STATEMENT, FINDINGS  
CONCLUSIONS AND  
ORDER

STATEMENT

This proceeding was initiated by the Water Resources Director under the provisions of ORS 540.610 to 540.650 for the cancellation of a certain water right.

The water right in question is for the appropriation of water from the Middle Fork Malheur River, with a priority date of 1889, for irrigation of 40 acres in NE 1/4 NE 1/4, 15 acres in SW 1/4 NE 1/4, 40 acres in SE 1/4 NE 1/4, 17 acres in NE 1/4 SE 1/4, 6 acres in SE 1/4 SE 1/4, Section 25, Township 20 South, Range 35 East, W.M.; 28 acres in SW 1/4 NW 1/4, 2.7 acres in SE 1/4 NW 1/4, 29 acres in NE 1/4 SW 1/4, 40 acres in NW 1/4 SW 1/4, 36.4 acres in SW 1/4 SW 1/4, 38.7 acres in SE 1/4 SW 1/4, Section 30; 28 acres in NE 1/4 NW 1/4, 3 acres in NW 1/4 NW 1/4, Section 31, Township 20 South, Range 36 East, W.M., described by the certificate recorded at page 6989, Volume 7, State Record of Water Right Certificates, in the name of Pacific Livestock Company.

Notice dated March 8, 1978, of initiation of the proceeding for cancellation of the subject water right was given pursuant to ORS 540.631 to Wright Wilber and Kathleen Wilber as owners and occupants of the real property to which the said water right is appurtenant.

On May 1, 1978 a protest against the proposed cancellation of the subject water right was filed by Wright Wilber and Kathleen Wilber through their attorney, Mr. Donald W. McEwen, Attorney at Law, Portland, Oregon.

Pursuant to notice of hearing dated June 14, 1979, the matter was brought to hearing before James W. Carver, Jr., Water Resources Department, in the Courtroom of the Harney County Courthouse in Burns, Oregon, on August 15 and 16, 1979. Pursuant to prior agreement of the parties, the hearing in this matter and the hearing in a similar matter involving the same parties were held concurrently.

The proponents of cancellation were represented by H. Clifford Looney and Charles W. Swan of the firm Swan, Butler & Looney, P.C., Vale, Oregon. The protestants were represented by Donald W. McEwan of the firm Hardy, McEwen, Newman, Faust & Hanna, Portland, Oregon, and by Forrest E. Cooper, Attorney at Law, Lakeview, Oregon.

### EVIDENTIARY RULINGS

Protestants offer as their Exhibit "L" a letter by Charles W. Swan, Swan, Butler & Looney, P.C., dated December 20, 1977, to Mr. Drex Williams. Proponents object on the grounds that the said letter is not relevant to the question before the Water Resources Director in this proceeding.

The offered Exhibit "L" does not relate to the question of use or nonuse of the water appropriated under the provisions of the water right in question. Therefore, the proponents objection is sustained.

Protestants offer as their Exhibit "O" a multi-page document titled "Case History, Wright Wilber Privileges". Proponents object on the grounds that the said document is not relevant to the question before the Water Resources Director in this proceeding.

While the document is not specific in regard to the lands to which the water right in question is appurtenant, it tabulates information as to the cattle carrying capacity of the Wright Wilber lands during the portion of the year the cattle cannot be left on federally owned lands being grazed under the provisions of the Taylor Grazing Act, and is offered in support of the protestants' position that at least a portion of the subject lands were irrigated in order to provide the indicated cattle carrying capacities. The proponents' objection is overruled. Therefore, Exhibit "O" is a part of the record in this matter.

### FINDINGS OF FACT

Originally, the water right in question was part of a right allowed by decree of the Circuit Court of the State of Oregon for Malheur County in the matter of the Determination of the Relative Rights of the Various Claimants to the Use of the Waters of the Malheur River, and Its Tributaries, being for the appropriation of waters of the Middle Fork Malheur River under a priority date of 1889 for irrigation of certain lands within Sections 14, 23, 24, 25 and 36 of Township 22 South, Range 36 East, W.M.; Section 31 of Township 22 South, Range 37 East, W.M.; and Section 1 of Township 23 South, Range 36 East, W.M.

The owner of the said water right, Pacific Livestock Company, filed water right transfer application numbered P-3 on May 2, 1921 for approval of changes in place of use of the water from these lands to other lands not then specifically identified. Paragraph 5 of the transfer application contained the statement: "It (Pacific Livestock Company) wishes to transfer one-half of the said waters to . . . the Drewsey Ranch of the said Pacific Live Stock Company, and to divert the same either at the head of the Drewsey Ditch or to divert the same from said river into

an extension of the said Drewsey Ditch crossing the Malheur River at the town of Drewsey, and to apply the same to the irrigation of lands under the said Drewsey Ditch and the proposed extension thereof across the said Malheur River."

By provisions of an administrative order of the State Engineer entered on May 18, 1926, and recorded at pages 272 and 273, Volume 1, Special Order Record of the State Engineer, the said water right became appurtenant to, among other lands, the lands described in paragraph 2 above, as confirmed by the issuance of the certificate recorded at page 6989, Volume, 7, State Record of Water Right Certificates, in the name of Pacific Livestock Company, on February 1, 1927.

The lands to which the water right in question is appurtenant remained under the ownership and control of the Pacific Livestock Company until the spring of the year 1933. Since sometime prior to 1927 and continuing through 1932 that portion of the said lands lying within the NE 1/4 NE 1/4 of Section 25, Township 20 South, Range 35 East, W.M. and an additional 20 acres lying within the SE 1/4 NE 1/4 of said Section 25 were used for the growing of hay. Testimony established that the said approximately 60 acres were irrigated with waters of the Middle Fork Malheur River delivered through the Drewsey Ditch each year, to the extent that water was available, and that the resultant hay crops were harvested by cutting, raking and stacking the hay.

The subject lands were owned and operated by Charles Otley, Henry and Mary Otley from the spring of 1933 until the spring of 1945. Testimony established that during the Otley's ownership the said approximately 60 acres within the NE 1/4 NE 1/4 and SE 1/4 NE 1/4 of Section 25 were irrigated each year, to the extent water was available from the Middle Fork Malheur River through the Drewsey Ditch, for the production of hay crops.

In the spring of 1945, ownership of the subject lands passed from the Otleys to Nelson and Eulah Wilber, parents of protestant Wright Wilber, and have remained under the ownership of the Wilber family to the present time. Testimony established that the Wilbers have continued to irrigate and produce hay crops on the said approximately 60 acres within the NE 1/4 NE 1/4 and SE 1/4 NE 1/4 of Section 25, without the occurrence of a period of five successive years of non-use of the waters appropriated from the Middle Fork Malheur River for said lands.

Several of the witnesses testified that beginning with the year of 1927 and continuing up until the mid 1930's the aforesaid approximately 60 acres within the NE 1/4 NE 1/4 and SE 1/4 NE 1/4 of Section 25 was the full extent of lands beneficially irrigated out of the entire area to which the water right in question is appurtenant. Other witnesses testified that they recalled ditches running from

the vicinity of the NE 1/4 NE 1/4 of Section 25, out into the fields lying to the south and southeast. However, they were unable to describe the location or length of such ditches so as to establish whether the ditches did, in fact, extend beyond the approximately 20 acres of hay land within the SE 1/4 NE 1/4 of Section 25.

In view of the passage of 45 and more years between the occurrence of matters upon which testimony was taken and the taking of the testimony from the several witnesses as to their recollection of the matters, and the proponents having the initial burden to prove the occurrence of a statutory period of non-use of waters appropriated under the water right in question, it is particularly appropriate that any conflict of testimony and evidence adduced be resolved in favor of the protestants. However, giving careful consideration to the testimony of each witness and to the age of the witness and the witness' relationship to farming and ranching practices of the area during the period of years about which the witness testified, the record shows that the diversion of the waters of the Middle Fork Malheur River to beneficial irrigation under the provisions of the water right in question, for a period of five or more successive years beginning with the irrigation season of 1927, was restricted to lands lying with the NE 1/4 NE 1/4 of Section 25, Township 20 South, Range 35 East, W.M.; and within the northerly 20 acres of the SE 1/4 NE 1/4 of said Section 25.

#### ULTIMATE FINDINGS OF FACT

With the exception of the lands lying within the NE 1/4 NE 1/4 and 20 acres within the northerly portion of the SE 1/4 NE 1/4 of Section 25, Township 20 South, Range 35 East, W.M., water was not appropriated to beneficial use under the provisions of the water right in question for irrigation of the lands described in paragraph 2, above, within a period of five and more successive years beginning no later than the irrigation season of the year 1927.

#### CONCLUSIONS OF LAW

That the question before the Water Resources Director is one of fact concerning forfeiture of the water right, not one concerning abandonment, or voluntary relinquishment, of the water right, is made clear by *Withers v. Reed*, 194 Or. 541 (page 558) wherein the court states, in reference to ORS 540.610(1):

"Under the statute in question failure of the 'owner of a perfected and developed water right' to use the water appropriated for a period of five successive years works a forfeiture of the right not for the benefit of any individual as in the case of an ordinary statute of limitations--which this is

not--but for the benefit of the public, to the end that the 'water right shall revert to the public and become again the subject of appropriation in the manner provided by law'".

The court further commented in *Bausch v. Myers*, 273 Or. 376: "Urbanites might not know that water rights are conclusively presumed abandoned for failure to use for five successive years. This law, however, is common knowledge among all in Oregon who are dependent upon an adequate supply of water for irrigation. We believe it is equally well known that five years of nonuse is a conclusive abandonment whether proceedings before the State Engineer are brought immediately after the five years of nonuse or 10 or 15 years later. ..."

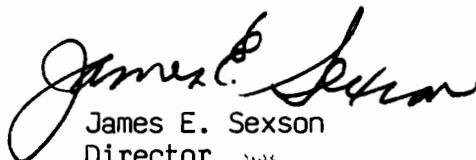
Water appropriated under the provisions of the water right in question was not used for irrigation of the subject lands for a period of five and more successive years of nonuse, thereby resulting in a forfeiture of said right. Therefore, the said water right should be canceled pursuant to the provisions of ORS 540.610 to 540.650.

ORDER

NOW, THEREFORE, it is ORDERED that the right to appropriate waters of Middle Fork Malheur River with a priority date of 1889 for irrigation of 15 acres in SW 1/4 NE 1/4, 20 acres in SE 1/4 NE 1/4, 17 acres in NE 1/4 SE 1/4 and 6 acres in SE 1/4 SE 1/4 of Section 25, Township 20 South, Range 35 East, W.M.; 28 acres in SW 1/4 NW 1/4, 2.7 acres in SE 1/4 NW 1/4, 29 acres in NE 1/4 SW 1/4, 40 acres in NW 1/4 SW 1/4, 36.4 acres in SW 1/4 SW 1/4 and 38.7 acres in SE 1/4 SW 1/4 of Section 30; 28 acres in NE 1/4 NW 1/4 and 3 acres in NW 1/4 NW 1/4 of Section 31, Township 20 South, Range 36 East, W.M., being a portion of the right described by the certificate issued in the name of Pacific Livestock Company and recorded at page 6989, Volume 7, State Record of Water Right Certificates, be and the same hereby is canceled.

It is FURTHER ORDERED that the said certificate of water right is canceled, and in lieu thereof a new certificate be issued to describe the balance of the water right NOT involved in this proceeding.

Dated at Salem, Oregon this 14th day of April, 1980.

  
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 184.482.

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