

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

Grant County

IN THE MATTER OF CANCELLATION)
OF A WATER RIGHT IN THE NAME OF)
BLUE MOUNTAIN DITCH COMPANY)
FOR WATERS OF JOHN DAY RIVER)

PC 80-11
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, based on information furnished to the Director in the form of affidavits alleging nonuse of the said water right in question over a period of five and more successive years of nonuse.

The water right in question is a portion of the right described by the certificate issued to Blue Mountain Ditch Company and recorded at page 46261, Volume 38, State Record of Water Right Certificates, and is for the appropriation of not to exceed 1.12 cubic feet per second of water from the John Day River, under a priority date of October 23, 1916, for irrigation of a certain 89.7 acres as follows:

13.6 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$
1.4 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 21
0.6 acre NE $\frac{1}{4}$ NE $\frac{1}{4}$
28.3 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
30.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
15.8 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 28,

Township 13 South, Range 29 East, W.M.

Notice dated July 31, 1980 of initiation of the proceeding for cancellation of the subject water right was given pursuant to the provisions of ORS 540.631 to James W. Duke and Audrey M. Duke, as owners of record and occupants of the real property to which the water right is appurtenant.

On September 29, 1980 a protest against the proposed cancellation of the aforesaid water right was filed in the office of the Water Resources Director by James W. Duke.

Pursuant to the Director's notice of hearing dated October 24, 1980, the matter was brought to hearing in the Grant County Courthouse in Canyon City, Oregon on November 18, 1980 before James W. Carver, Jr., an employee of the Water Resources Department, authorized to preside in behalf of the Water Resources Director

The proponents of cancellation appeared without the services of legal counsel. The protestant, James Duke, also appeared without the services of legal counsel.

The relative locations of the land to which the water right in question is appurtenant, the channel of the John Day River, the John Day Highway (Oregon Highway No. 26), portions of the Blue Mountain Ditch, and certain other features are shown on Figure 1, herein, which is a photocopy of exhibit WRD #3. The subject lands are identified by diagonal hatching.

FINDINGS OF FACT

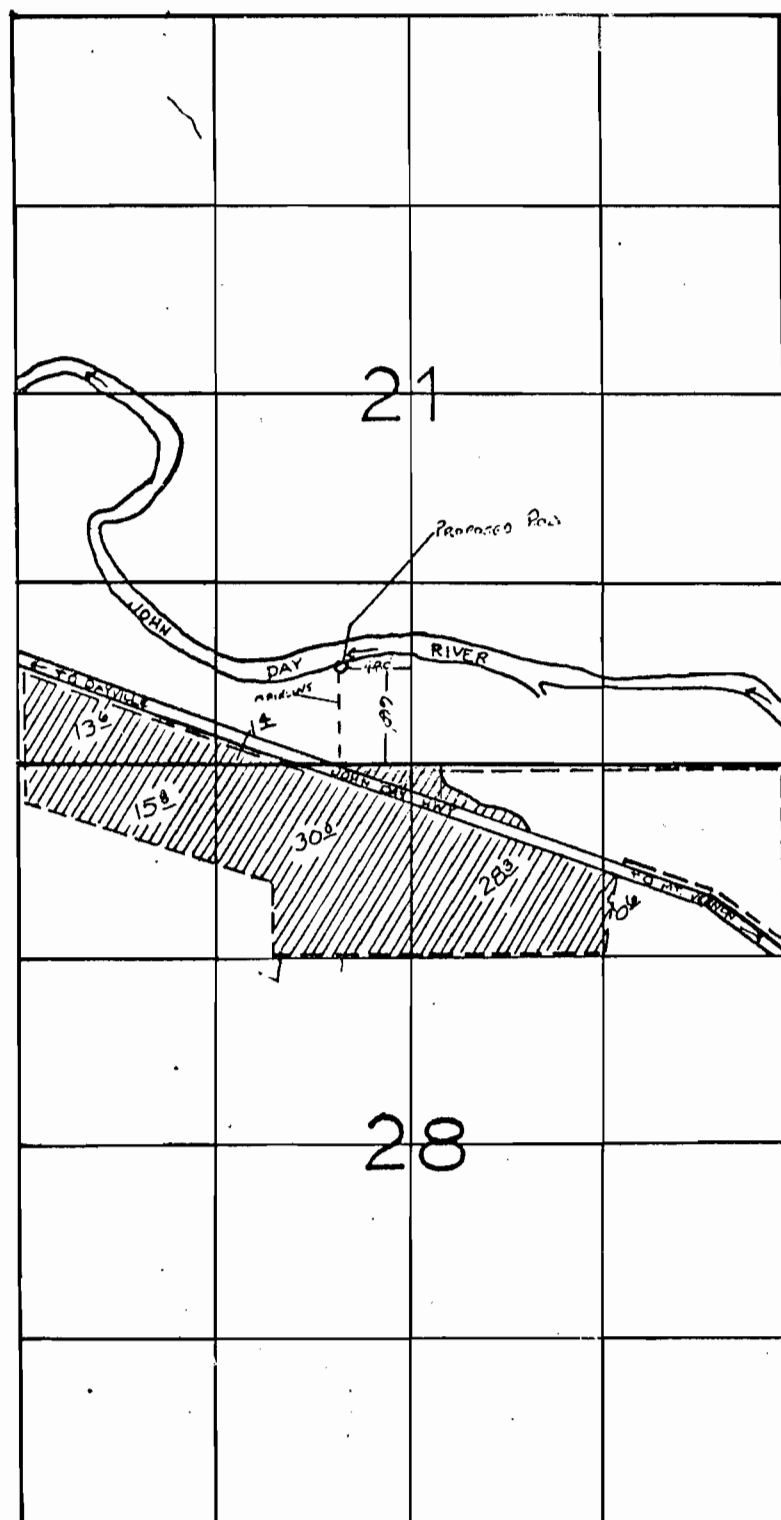
With reference to the subject land to which the water right in question is appurtenant, and with specific reference to that portion of the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28 which lies north of the John Day Highway, being 0.8 acre in area, and to the most westerly 216 feet of that portion of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28 which lies north of the John Day Highway, being 1.0 acre in area, testimony did not establish any period of five successive years within which water from the John Day River was not used for beneficial irrigation under the provisions of the water right in question.

Testimony was in agreement that water taken from the John Day River for irrigation of the aforesaid 1.8 acres north of the John Day Highway was diverted from the river channel by means of a pump located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 13 South, Range 29 East, W.M., and not at the authorized point of diversion located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29, Township 13 South, Range 30 East, W.M.

With reference to the balance of the subject land within that portion of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 28 which lies north of the John Day Highway, and with reference to all of the subject lands which lie south of the John Day Highway, testimony was clear that no water from the John Day River was appropriated to beneficial use of irrigation of

T. 13 S. R. 29 E. W.M.
Sec. 21&28

RECEIVED
JUL 1 1990
WATER RESOURCES DEPT
SALT CREEK

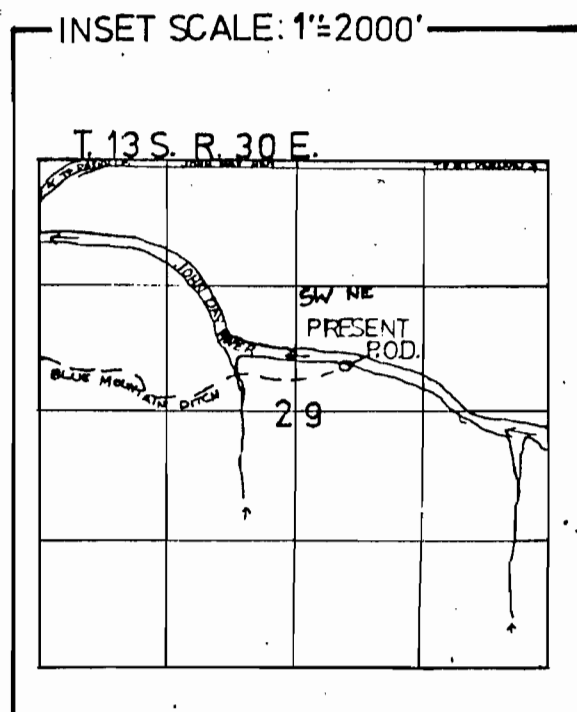


TRANSFER APPLICATION MAP FOR
JAMES DUKE

Approved _____

SCALE: 4"=1 mile

WRD #3



(Figure 1)

any of these lands within the period of years beginning with the start of the irrigation season of 1975 and continuing through the irrigation season of 1980.

ULTIMATE FINDINGS OF FACT

No water was appropriated from the John Day River under the provisions of the water right in question, from any point of diversion, for irrigation of a certain 87.9 acres of the subject lands as follows:

13.6 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$
1.4 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 21
0.6 acre NE $\frac{1}{4}$ NE $\frac{1}{4}$
27.3 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
29.2 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
15.8 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 28,
Township 13, South, Range 29 East, W.M.,

within a period of five and more successive years which began with the irrigation season of 1975.

OPINION

It is noted that beginning with the year of 1973 any water used from the John Day River for irrigation of the 1.0 acre in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and the 0.8 acre in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of said Section 28, identified by yellow shading on Figure 1, has been diverted by means of a pump located within the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 21, Township 13 South, Range 29 East, W.M., and not at the authorized point of diversion located within the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 29, Township 13 South, Range 30 East, W.M.

The Supreme Court of Oregon in Huff v Bretz, 285 Or 507, discussed 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 diver-sion 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 com-plies 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 unau-

thorized 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 speak to what effect the diversion of water by pumping at some point other than the authorized point of diversion would have had on the continuing validity of the water right.

There is agreement among the parties to the matter now before the Water Resources Director, as evidenced by a pending application by the protestant for approval of a change in point of diversion for the water right in question, that the termination of the use of the authorized point of diversion into the head of the Blue Mountain Ditch and subsequent use of an unauthorized point of diversion did not serve to overcome the necessity to comply with the provisions of ORS 540.510 to 540.530.

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

"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, p 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 proceeding.

From 1909 to 1913 the provisions of the section of the law that is now ORS 540.610(1) could not have been construed to conclude that diversion of water from the channel of the John Day River 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 to another water user.

The diversion of water from the channel of John Day River at some point other than the original established point of diversion for irrigation of a certain portion of lands described by the water right in question does not constitute a failure to "use the water appropriated" within the meaning of ORS 540.610(1) on those certain lands.

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 P 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 an 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 now know that the 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...."

Therefore, with the exception of that portion of the water right in question for the appropriation of not to exceed 0.02 cubic foot per second of water from the John Day River, under a priority date of October 23, 1916, for irrigation of a certain 1.0 acre in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and 0.8 acre in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 28, Township 13 South, Range 29 East, W.M. (the land identified by yellow shading on Figure 1) the water right in question 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 not to exceed 1.10 cubic feet per second of water from the John Day River, under a priority date of October 23, 1916, for irrigation of a certain 87.9 acres of land as follows:

13.6 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$
1.4 acres SE $\frac{1}{4}$ SW $\frac{1}{4}$, Section 21
0.6 acre NE $\frac{1}{4}$ NE $\frac{1}{4}$
27.3 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$
29.2 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$
15.8 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 28,

Township 13 South, Range 29 East, W.M.,
being a portion of the right described by the certificate issued to Blue Mountain Ditch Company and recorded at page 46261, Volume 38, State Record of Water Right Certificates, be and the same is hereby canceled.

It is FURTHER ORDERED that the aforesaid certificate of water right be canceled and in lieu thereof a new certificate be issued in the name of Blue Mountain Ditch Company to describe the balance of the water right NOT canceled by the provisions of this order.

Dated at Salem, Oregon this 18th day of December 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 60 days from the date of this order. Judicial review is pursuant to the provisions of ORS 183.482.