

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

HARNEY COUNTY

IN THE MATTER OF CANCELLATION)  
OF A WATER RIGHT IN THE NAME )  
OF DREWSEY RECLAMATION CO. )  
FOR USE OF WATERS OF MIDDLE )  
FORK MALHEUR RIVER )

STATEMENT, FINDINGS,  
CONCLUSIONS AND  
ORDER

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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 not to exceed 3.54 cubic feet per second of water from Middle Fork Malheur River, with a priority date of June 17, 1912, from a point of diversion located within the NE 1/4 SW 1/4 of Section 11, Township 20 South, Range 34 East, W.M., for irrigation of a certain 285.3 acres of land, being 14.8 acres in SW 1/4 NE 1/4, 40.0 acres in SE 1/4 NE 1/4, 15.4 acres in NE 1/4 SE 1/4 and 0.8 acre in SE 1/4 SE 1/4 of Section 25, Township 20 South, Range 35 East, W.M.; 34.7 acres in SW 1/4 NW 1/4, 13.6 acres in SE 1/4 NW 1/4, 31.1 acres in NE 1/4 SW 1/4, 40.7 acres in NW 1/4 SW 1/4, 33.5 acres in SW 1/4 SW 1/4 and 39.6 acres in SE 1/4 SW 1/4 of Section 30; and 19.8 acres in NE 1/4 NW 1/4 and 1.3 acres in NW 1/4 NW 1/4 of Section 31, Township 20 South, Range 36 East, W.M., as described by the certificate issued to Drewsey Reclamation Company and recorded at page 11219, Volume 10, State Record of Water Right Certificates.

Notice dated August 15, 1978, of initiation of the proceeding for cancellation of the subject water right was given pursuant to the provisions of 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 August 25, 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. McEwen 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 offer 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

The water right described by the certificate issued in the name of Drewsey Reclamation Company and recorded at page 11219, Volume 10, State Record of Water Right Certificates, for appropriation of not to exceed 11.4 cubic feet per second of water from the Middle Fork Malheur River with a priority date of June 17, 1912, for irrigation of certain lands through the Drewsey Ditch, was established through performance made within the terms of

water right permit numbered E-144 in the name of Drewsey Reclamation Company.

In connection with the Drewsey Reclamation Company submitting proof to the satisfaction of the State Engineer that performance had been made under the provisions of the said permit by the actual diversion of water from the Middle Fork Malheur River and application of the water to beneficial irrigation of the lands described by the permit, a plane table survey of the Drewsey Ditch and the irrigated lands was made by employees of the State Engineer on October 2 through 5, 1934, to determine the actual location and extent of the irrigated lands. Figure 1, herein, is a photocopy of a portion of the resulting map, which shows the lands to which the water right in question is appurtenant.

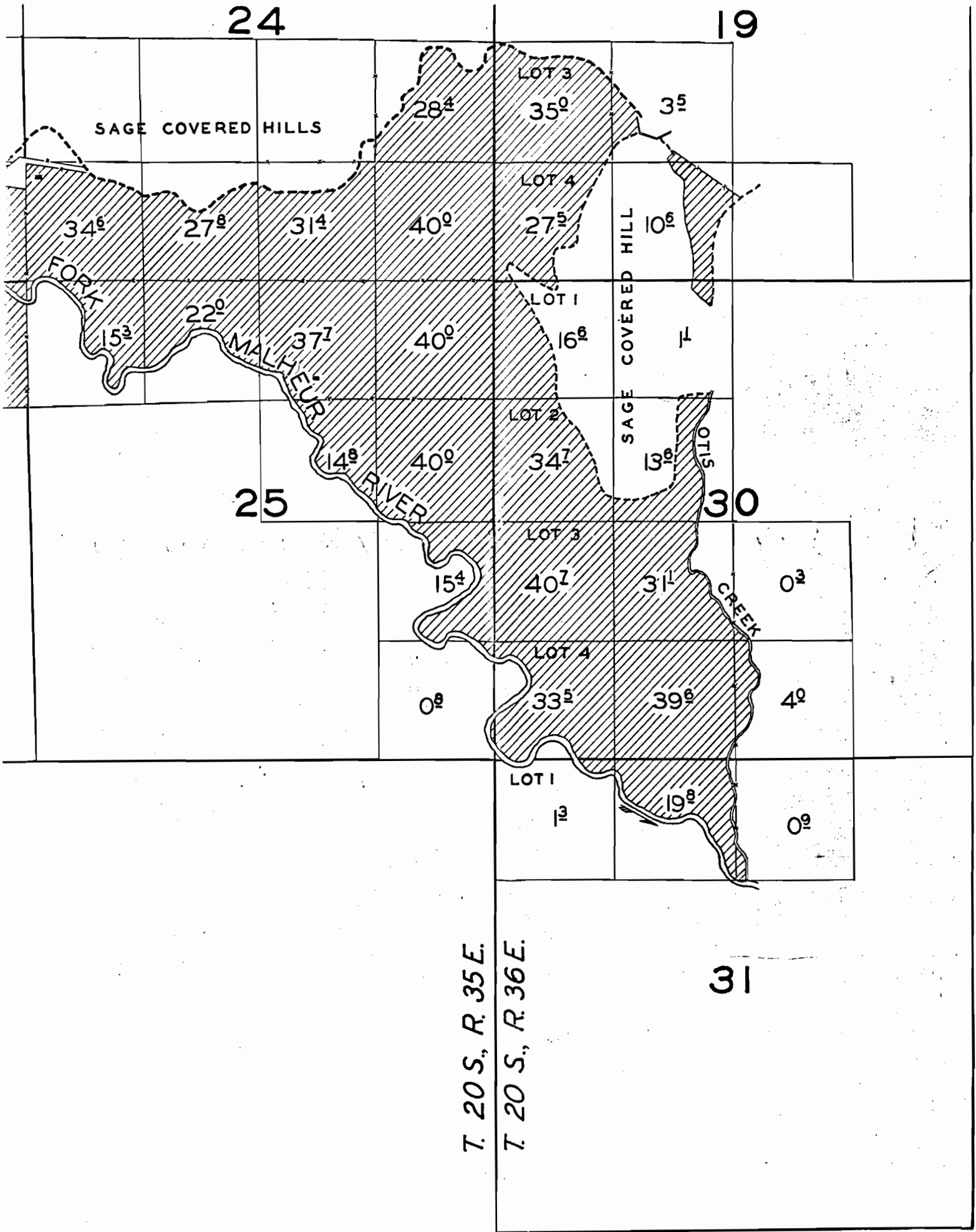
Proof of performance under the provisions of the said permit was also supported by an affidavit made by Z. Percy Davis, as Secretary and Treasurer of the Drewsey Reclamation Company, dated June 21, 1935, to the effect that the subject lands were being beneficially irrigated under the terms of the permit on or before October 1, 1933; and by a certification by the Watermaster, Chester Keoun, regarding an inspection of the works, carried out by him on June 21, 1935.

Proof of beneficial use of irrigation of the subject lands within the provisions of permit numbered E-144 having been made to the satisfaction of the State Engineer precludes any question as to the existence of a system of ditches adequate to accomplish the irrigation of the subject lands at that time.

The subject lands had continued under the ownership and operation of the Pacific Livestock Company until the spring of 1933, when they were purchased by a Mr. Charles Otley.

Harold Otley, nephew of Charles Otley, was called as a witness in this proceeding and testified that by an agreement with Charles Otley, a Mr. Oscar Newell irrigated and put up hay on at least a portion of the subject land until the Otleys moved to the area in the spring of 1936 and began operating the property themselves. Harold Otley began working on the subject lands and took part in irrigation of part of the property in 1936. There was a system of irrigation ditches in evidence on the land at that time, which ditch system was later improved by the Otleys.

During the years of 1936 and 1937 the Otleys irrigated, with waters received from the Middle Fork Malheur River through the Drewsey Ditch, portions of the property lying within the E 1/2 NE 1/4 of Section 25, Township



(Figure 1)

20 South, Range 35 East, W.M., and in addition thereto spread water over an additional portion of the subject lands to the south and east, to the extent that water was available through the Drewsey Ditch.

Mr. Lee Williams, called as a witness for the proponents of cancellation, testified that by about the year 1940 the Williams property which lies to the immediate east side of the subject lands, and the Otleys were taking turns with using the waters available to them through the Drewsey Ditch, on their respective properties, each irrigating a similar sized area, the Otleys about 300 acres and the Williams about 270 acres.

The subject lands continued under the ownership and operation of the Otleys until the spring of 1945, when they were purchased by Nelson Wilber and Eulah Wilber, parents of Wright Wilber. The Wilbers, including Wright Wilber, protestant herein, who was about 27 years of age at that time, moved onto the property and began operation of the subject lands at or about the time of purchase.

The Wilbers continued the farming and ranching practices being carried out on the subject lands by the Otleys, and continued to make improvements to the land and the system of works for the irrigation of the hay and pasture portions of the lands.

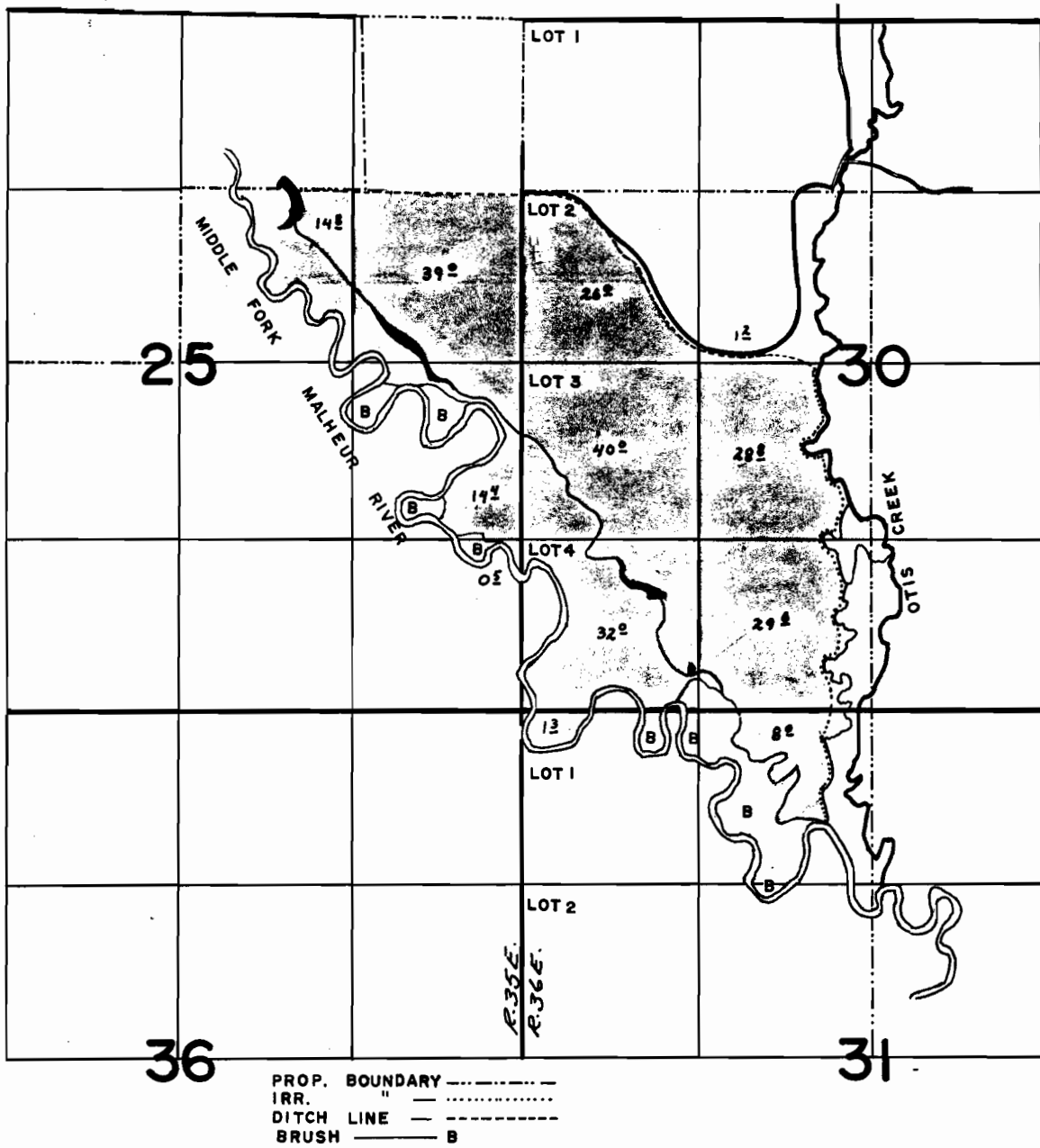
Protestants' Exhibit "V" is a print of an aerial photograph taken on July 12, 1958, being an enlargement with an approximate scale of 1 inch on the exhibit being equal to 400 feet on the ground, made from United States Department of Agriculture photo negative numbered EFI 7V-80. The area shown on exhibit "V" includes the lands to which the water right in question is appurtenant.

Mr. Wright Wilber testified that the condition of the subject lands as shown by exhibit "V", particularly with reference to the locations of stream channels, sloughs and brush areas, is substantially the same as the condition of the subject lands when the Wilbers moved onto the property in 1945.

The difference in the condition of the subject lands as shown by exhibit "V" and the condition of the lands at present is that the Wilbers have continued to make improvements to the land, having cleared some of the brush covered areas for hay and pasture production, leveling portions of the subject lands, and making further improvements in the system of works for irrigation of the lands.

Figure 2, herein, is a 4 inch on the map to 1 mile on the ground,

# T. 20S. R. 35 & 36E. W. M.



(FIGURE 2)

scale reduction made from exhibit "V", which shows the areas that were identified as being the irrigated portions of the lands in question at the time the aerial photograph was taken.

A comparison of Figure 1 and Figure 2 shows that the area within the lands in question that was being irrigated within the period of years beginning with 1945 and running to 1958 was smaller than the area upon which the water right in question was originally established. Therefore, portions of the subject lands upon which the water right in question was originally established were not irrigated with waters of the Middle Fork Malheur River under the provisions of the said water right within the years of 1945 to 1958, being a period of more than five successive years of nonuse in regard to those portions of the subject lands.

In view of the passage of up to 45 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 nonuse 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.

With regard to the subject lands shown as irrigated lands on Figure 2, the record does not establish any period of five or more successive years of nonuse of water appropriated under the provisions of the water right in question for any portion of these lands.

#### ULTIMATE FINDINGS OF FACT

No water was appropriated to beneficial use under the provisions of the water right in question for irrigation of a certain 49.7 acres of the subject lands, being a certain 1.0 acre in SE 1/4 NE 1/4, 1.0 acre in NE 1/4 SE 1/4 and 0.3 acre in SE 1/4 SE 1/4 of Section 25, Township 20 South, Range 35 East, W.M.; 8.7 acres in SW 1/4 NW 1/4, 12.4 acres in SE 1/4 NW 1/4, 2.3 acres in NE 1/4 SW 1/4, 0.7 acre in NW 1/4 SW 1/4, 1.5 acres in SW 1/4 SW 1/4 and 10.0 acres in SE 1/4 SW 1/4 of Section 30; and 11.8 acres in NE 1/4 NW 1/4 of Section 31, Township 20 South, Range 36 East, W.M., within the period of years beginning with the year 1945 and running to the year 1958, being more than five successive years.

The record does not establish any period of five successive years of nonuse in regard to any portion of the balance of the water right in question.

### 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 certain aforesaid portions of the subject lands for a period of five and more successive years of nonuse, thereby resulting in a forfeiture of that part of said water right. Therefore the pertinent part of the water right in question should now be canceled pursuant to the provisions of ORS 540.610 to 540.650.

### ORDER

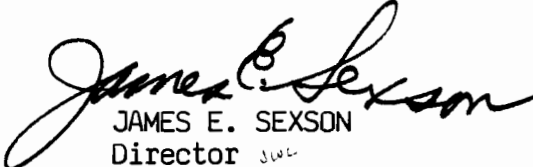
NOW, THEREFORE, it is ORDERED that the right to appropriate not to exceed 0.62 cubic foot per second of water from the Middle Fork Malheur River under a priority date of June 17, 1912, for irrigation of a certain 49.7 acres, being 1.0 acre in SE 1/4 NE 1/4, 1.0 acre in NE 1/4 SE 1/4 and 0.3 acre in SE 1/4 SE 1/4 of Section 25, Township 20 South, Range 35 East, W.M.; 8.7 acres in SW 1/4 NW 1/4, 12.4 acres in SE 1/4 NW 1/4, 2.3 acres in NE 1/4 SW 1/4, 0.7 acre in NW 1/4 SW 1/4, 1.5 acres in SW 1/4 SW 1/4 and 10.0 acres in



SE 1/4 SW 1/4 of Section 30; and 11.8 acres in NE 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 to Drewsey Reclamation Company and recorded at page 11219, Volume 10, 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 the Drewsey Reclamation Company to describe the balance of the water right NOT so canceled.

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

  
JAMES E. SEXSON  
Director JES

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.

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