

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION OF 12 WATER ) PC 91-1  
RIGHTS, CERTIFICATE NUMBERS 3981, 4096, 4187,) )  
4191, 4286, 4286, 4502, 4505, 4565, 4580, ) )  
10679 AND 10680, AND THE PARTIAL CANCELLATION) )  
OF 7 WATER RIGHTS, CERTIFICATES 4048, 4097, ) Order  
4162, 4234, 4269, 4270, and 4474 FOR ) SUPERCEDING  
IRRIGATION, SUPPLEMENTAL IRRIGATION, ) Dismissal Order  
DOMESTIC, AND STOCK USE FROM DEER CREEK, ) at  
SMITH CREEK, UNION CREEK, BRIDGE CREEK, ) Special Order  
SPRING GULCH, WASTEWATERS, UNNAMED SPRING, ) Volume 45 Page 311  
SPRING CREEK, TRIBUTARY TO CLEAR CREEK, AND )  
THE POWDER RIVER, BAKER COUNTY, OREGON )

Introduction

By Notice of Hearing sent April 19, 1991, a contested case hearing in the above-entitled matter was set to convene at 9:00 am, June 12, 1991, at the Baker County Courthouse, Baker City, Oregon, before Weisha Mize, Hearings Referee for the Water Resources Department.

On June 11, 1991, Holly McClean, counsel for protestant United States Forest Service, served on the Hearings Referee a withdrawal of all protests against cancellation of the above-enumerated water right certificates. Withdrawal of the protests was based on discussions with V. Kent Searles, Regional Manager, and Vern Church, Watermaster for District 8.

The Order of Dismissal entered in this matter on June 14, 1991, contained a number of scrivener's errors which resulted in the cancellation of several certificates in their entirety where only a portion of those water rights had been forfeited for nonuse and only a portion of those certificates should properly have been cancelled. This Correcting Order supercedes that June 14, 1991 order of dismissal and corrects those scriveners errors.

Findings of Fact

1. All protests against the proposed cancellation or partial cancellation of the above-enumerated water rights have been withdrawn.

Conclusions of Law

1. The contested case hearing in this matter should be dismissed.
2. The water right certificates which are the subject of this contested case should be canceled in part or in whole, as described in the affidavits of nonuse on which this proceeding was initiated and as further set out below.

Opinion

The uses authorized in the rights or portions of the rights to be canceled are irrigation, supplemental irrigation, domestic, and stock use. The sources for the water under the rights or portions

of the rights to be canceled are Deer Creek, Smith Creek, Union Creek, Bridge Creek, Spring Gulch, wastewater, an unnamed spring, Spring Creek, which is tributary to Clear Creek, and the Powder River.

In the protest filed by the USFS, it was asserted that water has been used from some sources on some of the lands, and on other lands not covered by the rights in question, for camping, livestock, wildlife and wildlife habitat, fire control, road construction, and possibly wetlands irrigation, and that the USFS should be allowed to transfer a certain portion of the water under these rights to existing uses.

Although this matter was addressed in both the original and the 2nd notice of hearing I feel, after reviewing again the protest filed by the USFS, that a further iteration of the law should be made, for the benefit of both the USFS and the Department.

A water right involves a number of specifics, all of which must be present for the water right to be valid. 1st, a water right is issued for a specific use or uses on specific lands. If a water right is issued to irrigate 20 acres in the NE $\frac{1}{2}$  NE $\frac{1}{4}$ , and the holder of the right instead uses it to irrigate 20 acres in the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , and does so annually for 5 years but does not legally transfer the right to the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , it is forfeited, and cannot be later transferred.

The same would be true if the holder of the right used it on the correct lands but used it for something other than irrigation. Although water may have been used, if it is used in a location or for a purpose other than that authorized in the water right, that water right has undergone 5 years of nonuse and the right is forfeited. Once a water right has undergone 5 years of nonuse, it can't be transferred or revalidated by beginning use or transferring it, because there is no valid right to transfer.

The question of wetlands is one of particular interest. The Forest Service suggested it be allowed to transfer a portion of the irrigation right on certain lands from irrigation and stockwater use to use for wetlands. The action suggested by the USFS is prohibited for two reasons.

The first is that irrigation requires both a deliberate diversion and application of water, and that the water be put to beneficial use in growing some sort of crop which is harvested either by humans or by grazing. (See, e.g., Hennings v. Water Resources Dept., 50 Or App 121 (1098)).

Secondly, stockwater is defined as water for domesticated animals or wild animals held in captivity as pets or for profit. If there was neither a deliberate diversion and application of water nor use by domesticated or penned wild animals for a period of 5 successive years, forfeiture occurred and some portion of the right can not now be transferred to a wetlands use. However, the USFS has the option of filing for new water rights for the specific purpose of establishing or maintaining wetlands if that use is not otherwise prohibited by Commission rules.

The only element of a water right that receives somewhat different treatment is the point of diversion. Assuming that water is being diverted from the authorized source, and is being used on the lands and for the purpose specified in the right, but that the water is being diverted at a point different than that allowed in the right. In that case, as long as the source, type and place of use is as allowed in the right, the court has found that the right is not forfeited, but has directed the user to go through the process of legally changing the point of diversion through the Water Resources Department's administrative process.

Order of Dismissal

NOW, THEREFORE, it is ORDERED that the contested case and protests in the above-entitled matter are DISMISSED.

It is FURTHER ORDERED that water right certificates 3981, 4048, 4096, 4097, 4162, 4187, 4191, 4234, 4269, 4270, 4286, 4286, 4474, 4502, 4505, 4565, 4580, 10679 and 10680 be and the same are hereby canceled in part or in their entirety as set out herein, and new certificates be issued for those portions of the rights NOT canceled in this proceeding:

<u>Cert.</u>	<u>Source</u>	<u>Location</u>	<u>Use</u>	<u>Priority Date</u>
3981	Deer Creek	40 Acres NW $\frac{1}{4}$ NE $\frac{1}{4}$ 40 Acres SW $\frac{1}{4}$ NE $\frac{1}{4}$ 40 Acres NE $\frac{1}{4}$ NW $\frac{1}{4}$ 40 Acres SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 21 T 10 S, R 38 E, WM	Domestic, Irrigation & Stock	1886

Issued to: J. E Bacon. This certificate is cancelled in its entirety.

4048	Powder River	22 Acres NE $\frac{1}{4}$ SW $\frac{1}{4}$ 36 Acres NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 20 T 10 S, R 38 E, WM	Domestic, Irrigation & Stock	1888
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Issued to: J.D. and J.H. Calhoun.

NOTE: Nonuse was asserted only on that portion of Cert. 4048 described above. Nonuse was **not** asserted against that portion of Cert. 4048 for use of waters from Clear Creek under a priority of December 8, 1885 and Powder River under a priority of 1888 for irrigation of the following lands:

3 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$	8.5 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$
8.5 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$	Section 30
Section 19	T 10 S, R 38 E, WM
T 10 S, R 38 E, WM	

14 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$   
Section 20  
T 10 S, R 38 E, WM

and a new certificate shall be issued for that portion of Certificate 4048 which was **not** in question.

4096 Deer Creek 35 Acres NE  $\frac{1}{4}$  NE  $\frac{1}{4}$  Domestic, 1885  
 36 Acres SE  $\frac{1}{4}$  NE  $\frac{1}{4}$  Irrigation &  
 20 Acres NE  $\frac{1}{4}$  SE  $\frac{1}{4}$  Stock  
 23 Acres NW  $\frac{1}{4}$  SE  $\frac{1}{4}$   
 12 Acres SW  $\frac{1}{4}$  SE  $\frac{1}{4}$   
 20 Acres SE  $\frac{1}{4}$  SE  $\frac{1}{4}$   
 Section 21  
 6 Acres SW  $\frac{1}{4}$  SW  $\frac{1}{4}$   
 Section 22  
 T 10 S, R 38 E, WM

Issued to: Mary E. Cronin. This certificate is cancelled in its entirety.

4097 Union Creek 40 Acres SE  $\frac{1}{4}$  NE  $\frac{1}{4}$  Domestic, 1885  
 Section 22 Irrigation &  
 40 Acres SW  $\frac{1}{4}$  NE  $\frac{1}{4}$  Stock  
 40 Acres SW  $\frac{1}{4}$  NW  $\frac{1}{4}$   
 40 Acres SE  $\frac{1}{4}$  NW  $\frac{1}{4}$   
 Section 23  
 T 10 S, R 38 E, WM

Issued to: L.P Curry

NOTE: Nonuse was asserted only on that portion of Cert. 4097 described above and only that portion of C.4097 described above is cancelled. Nonuse was **not** asserted against that portion of Cert. 4097 for use of waters from the Powder River, Shaffner Creek and Currey Spring under a priority of 1871 for irrigation, domestic and stock use on the following lands:

30 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$	40 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$
40 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$	25 acres NW $\frac{1}{4}$ SE $\frac{1}{4}$
40 acres SW $\frac{1}{4}$ NE $\frac{1}{4}$	38 acres SW $\frac{1}{4}$ SE $\frac{1}{4}$
20 acres SE $\frac{1}{4}$ NE $\frac{1}{4}$	35 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$
Section 8	Section 5

all in T. 10 S., R. 40 E., WM, and a new certificate shall be issued for that portion of Certificate 4097 which was **not** in question.

4162 Deer Creek 20 Acres SE  $\frac{1}{4}$  SE  $\frac{1}{4}$  Domestic, 1882  
 Section 17 Irrigation &  
 40 Acres NE  $\frac{1}{4}$  NE  $\frac{1}{4}$  Stock  
 40 Acres SE  $\frac{1}{4}$  NE  $\frac{1}{4}$   
 Section 20  
 Powder River 38 Acres NE  $\frac{1}{4}$  SE  $\frac{1}{4}$  1888  
 Section 20  
 T 10 S, R 38 E, WM

Issued to: G. F. Gardner

NOTE: Nonuse was asserted only on that portion of Cert. 4162 described above. Nonuse was **not** asserted against that portion of Cert. 4162 for use of waters

from Washington Gulch under priorities of 1864, 1867 and 1896, from Deer Creek under a priority of 1882 and the Powder River under a priority of 1888 for domestic, irrigation and stock use on the following lands:

40 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$	40 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$
40 acres SW $\frac{1}{4}$ SW $\frac{1}{4}$	Section 19
Section 18	

T 10 S R 38 E

5 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$	2.0 acres NE $\frac{1}{4}$ SE $\frac{1}{4}$
6.5 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$	14.5 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$
9.5 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$	1.3 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$
Section 15	Section 10

25.5 acres NW $\frac{1}{4}$  SW $\frac{1}{4}$   
 8.5 acres SW $\frac{1}{4}$  SW $\frac{1}{4}$   
 Section 11

T 9 S R 39 E

and a new certificate shall be issued for that portion of Certificate 4162 which was **not** in question.

4187	Smith Creek	15.95 Acres NW $\frac{1}{4}$ SE $\frac{1}{4}$	Domestic,	1885
		23.13 Acres SW $\frac{1}{4}$ SE $\frac{1}{4}$	Irrigation &	
		15.59 Acres SE $\frac{1}{4}$ SE $\frac{1}{4}$	Stock	
		Section 16		
		T 10 S, R 38 E, WM		

Issued to: Edward V. and Nellie S. Hall. This certificate is cancelled in its entirety.

4191	Powder River	5 Acres SE $\frac{1}{4}$ SE $\frac{1}{4}$	Domestic,	1907
		Section 20	Irrigation &	
		13 Acres SW $\frac{1}{4}$ SW $\frac{1}{4}$	Stock	
		Section 21		
		T 10 S, R 38 E, WM		

Issued to: Andrew Hansen. This certificate is cancelled in its entirety.

4234	Powder River	40 Acres NE $\frac{1}{4}$ NE $\frac{1}{4}$	Domestic,	1888
		32 Acres SE $\frac{1}{4}$ NE $\frac{1}{4}$	Irrigation &	
		7.5 Acres E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$	Stock	
		12.5 Acres E $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$		1887
		Section 19		
		T 10 S, R 38 E, WM		

Issued to: Josephine Hudspeath

NOTE: Nonuse was asserted **only** on that portion of Cert. 4234 described above. Nonuse was **not** asserted against that portion of Cert. 4234 for use of waters from Cook and Edeson Gulch under a priority of 1907 and from the Powder River under priorities of 1887, 1888 and 1909, for domestic, irrigation and stock use on the following lands:

20	acres	$W\frac{1}{2}$	$NW\frac{1}{4}$	$NE\frac{1}{4}$	3.1	NE	NW
14.6	acres	$SW\frac{1}{4}$	$NE\frac{1}{4}$		Section 30		
20	acres	$NE\frac{1}{4}$	$SW\frac{1}{4}$				
25	acres	$SE\frac{1}{4}$	$SW\frac{1}{4}$				
7.2	acres	$SE\frac{1}{4}$	$SW\frac{1}{4}$		Section 19		

T 10 S R 38 E

and a new certificate shall be issued for that portion of Certificate 4234 which was **not** in question.

4269	Powder River	40	Acres	$SE\frac{1}{4}$	$SE\frac{1}{4}$	Domestic,	1897
		5.5	Acres	$SW\frac{1}{4}$	$NE\frac{1}{4}$	Irrigation &	
				Section 18		Stock	
		4.5	Acres	$SW\frac{1}{4}$	$NE\frac{1}{4}$		1887
				Section 18			
				T 10 S, R 38 E, WM			

Issued to: Martha J. Jennings

NOTE: Nonuse was asserted **only** on that portion of Cert. 4269 described above. Nonuse was **not** asserted against that portion of Cert. 4269 for use of waters from the Powder River under priorities of 1887, and 1897 for domestic, irrigation and stock use on the following lands:

30	acres	$NE\frac{1}{4}$	$SE\frac{1}{4}$	20.5	acres	$SW\frac{1}{4}$	$SE\frac{1}{4}$
40	acres	$NW\frac{1}{4}$	$SE\frac{1}{4}$				
Section 18							
T 10 S, R 38 E, WM							

and a new certificate shall be issued for that portion of Certificate 4269 which was **not** in question.

4270	Spring Creek	7.7	Acres	$NW\frac{1}{4}$	$NE\frac{1}{4}$	Domestic,	1894
	and			Section 29		Irrigation &	
	Clear Creek	9.8	Acres	$SW\frac{1}{4}$	$SE\frac{1}{4}$	Stock	
				Section 20			
				T 10 S, R 38 E, WM			

Issued to: Martha J. Jennings, R.H. Williams and L.R. Williams

NOTE: Nonuse was asserted **only** on that portion of Cert. 4270 described above. Nonuse was **not** asserted against that portion of Cert. 4270 for use of waters from Spring and Clear Creeks under a priority of 1894 for domestic, irrigation and stock use on the following lands:

2.5	acres	$NW\frac{1}{4}$	$NE\frac{1}{4}$	2.4	acres	$NW\frac{1}{4}$	$NW\frac{1}{4}$
8.0	acres	$SW\frac{1}{4}$	$NE\frac{1}{4}$	5.0	acres	$SW\frac{1}{4}$	$NW\frac{1}{4}$
Section 29							
T 10 S, R 38 E, WM							

and a new certificate shall be issued for that portion of Certificate 4270 which was **not** in question.

4286 Powder River 40 Acres NE  $\frac{1}{4}$  SE  $\frac{1}{4}$  Domestic, 1884  
 40 Acres NW  $\frac{1}{4}$  SE  $\frac{1}{4}$  Irrigation &  
 Section 22 Stock  
 T 10 S, R 38 E, WM

Issued to: Luella Kissel. This certificate is cancelled in its entirety.

4474 Smith Creek, 10 Acres NE  $\frac{1}{4}$  SW  $\frac{1}{4}$  Domestic, 1887  
 Bridge Creek, 20 Acres NW  $\frac{1}{4}$  SE  $\frac{1}{4}$  Irrigation &  
 Spring Gulch 20 Acres SW  $\frac{1}{4}$  SE  $\frac{1}{4}$  Stock  
 Section 15  
 T 10 S, R 38 E, WM

Issued to: Derk J. Steadman

NOTE: Nonuse was asserted **only** on that portion of Cert. 4474 described above. Nonuse was **not** asserted against that portion of Cert. 4474 for use of waters from Smith and Bridge Creeks and Spring Gulch under a priority of 1887 for domestic, irrigation and stock use on the following lands:

20 acres NW $\frac{1}{4}$  NE $\frac{1}{4}$  4 acres SW $\frac{1}{4}$  SE $\frac{1}{4}$   
 10 acres SW $\frac{1}{4}$  NE $\frac{1}{4}$  Section 10  
 10 acres SE $\frac{1}{4}$  NW $\frac{1}{4}$   
 Section 15  
 T 10 S, R 38 E, WM

and a new certificate shall be issued for that portion of Certificate 4474 which was **not** in question.

4502 Deer Creek 15 Acres NE  $\frac{1}{4}$  NW  $\frac{1}{4}$  Domestic 1888  
 35 Acres NW  $\frac{1}{4}$  NW  $\frac{1}{4}$  Irrigation  
 32 Acres SW  $\frac{1}{4}$  NW  $\frac{1}{4}$  Stock 1902  
 30 Acres SE  $\frac{1}{4}$  NW  $\frac{1}{4}$   
 Section 22  
 T 10 S, R 38 E, WM

Issued to: T. B. Taylor. This certificate is cancelled in its entirety.

4505 Deer Creek 39 Acres SW  $\frac{1}{4}$  SW  $\frac{1}{4}$  Irrigation 1886  
 36 Acres SE  $\frac{1}{4}$  SW  $\frac{1}{4}$   
 Section 16  
 40 Acres NW  $\frac{1}{4}$  NW  $\frac{1}{4}$   
 39 Acres SW  $\frac{1}{4}$  NW  $\frac{1}{4}$   
 14 Acres NE  $\frac{1}{4}$  SW  $\frac{1}{4}$   
 5 Acres NW  $\frac{1}{4}$  SW  $\frac{1}{4}$   
 Section 21  
 Powder River 9 Acres NE  $\frac{1}{4}$  SW  $\frac{1}{4}$  1888  
 27 Acres NW  $\frac{1}{4}$  SW  $\frac{1}{4}$   
 Section 21  
 T 10 S, R 38 E, WM

Issued to: Charles A. Tibbs. This certificate is cancelled in its entirety.

4565	Powder River	36.3 Acres NE $\frac{1}{4}$ NW $\frac{1}{4}$	Domestic	1897
		32.2 Acres NW $\frac{1}{4}$ NW $\frac{1}{4}$	Irrigation	1888
		20.7 Acres SE $\frac{1}{4}$ NW $\frac{1}{4}$	Stock	
		28.5 Acres SW $\frac{1}{4}$ NW $\frac{1}{4}$		
		Section 20		
		T 10 S, R 38 E, WM		

Issued to: L.R. and L.L. Williams. This certificate is cancelled in its entirety.

4580	Deer Creek	40 Acres NW $\frac{1}{4}$ NE $\frac{1}{4}$	Domestic	1879
		40 Acres SW $\frac{1}{4}$ NE $\frac{1}{4}$	Irrigation	1887
		Section 20	Stock	
		5.1 Acres NE $\frac{1}{4}$ SW $\frac{1}{4}$		
		10.4 Acres NW $\frac{1}{4}$ SW $\frac{1}{4}$		
		38.7 Acres SE $\frac{1}{4}$ SW $\frac{1}{4}$		
		40 Acres SW $\frac{1}{4}$ SW $\frac{1}{4}$		
		20 Acres SW $\frac{1}{4}$ SE $\frac{1}{4}$		
		Section 17		
		T 10 S, R 38 E, WM		

Issued to: J.L. Yantis. This certificate is cancelled in its entirety.

10679	Unnamed Springs	40 Acres SE $\frac{1}{4}$ NE $\frac{1}{4}$	Domestic and	1931
		Section 22	Supp. Irrig.	
		40 Acres SW $\frac{1}{4}$ NE $\frac{1}{4}$		
		80 Acres S $\frac{1}{2}$ NW $\frac{1}{4}$		
		Section 23		
		T 10 S, R 38 E, WM		

Issued to: Baker Loan and Trust Company. This certificate is cancelled in its entirety.

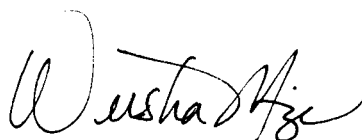
10680	Waste Waters from the NW $\frac{1}{4}$ NE $\frac{1}{4}$ S.22	40 Acres SE $\frac{1}{4}$ NE $\frac{1}{4}$	Supplemental	1931
		Section 22	Irrigation	
		40 Acres SW $\frac{1}{4}$ NE $\frac{1}{4}$		
		80 Acres S $\frac{1}{2}$ NW $\frac{1}{4}$		
		Section 23		
		T 10 S, R 38 E, WM		

Issued to: Baker Loan and Trust Company. This certificate is cancelled in its entirety.

It is FURTHER ORDERED that the water rights evidenced by the above-described certificates are CANCELLED to the extent described above.

It is FURTHER ORDER that the Order entered at Special Order Volume 45 page 311 is rescinded and superceded by this ORDER.

DATED this 12th day of January, 1993.



WEISHA MIZE  
Hearings Referee