BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION OF A WATER RIGHT IN THE NAME OF CHRIS PETERSON FOR USE OF WATER FROM THE NORTH POWDER RIVER, TRIBUTARY TO POWDER RIVER, UNION COUNTY, OR.	PC 88-13 STATEMENT, FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION & PROPOSED ORDER

STATEMENT

This proceeding was initiated by the Water Resources Director under the provisions of ORS 540.610 for the proposed cancellation of a certain water right, based on information furnished to the Director alleging that the right in question had been forfeited by failure to make beneficial use of water under the provisions of the water right for a period of five or more successive years of nonuse, from October, 1982 to April 28, 1988.

The water right proposed to be cancelled represents a portion of the right described by the Certificate issued to Chris Peterson, recorded at Volume 2, page 1503, State Record of Water Right Certificates.

The entire right is for appropriation of water from the North Powder River under priorities of 1889 for irrigation of 30 acres, 1898 for irrigation of 293 acres, and 1904 for irrigation of 92.5 acres in said Section 28. The lands to which the portion of the right in question is appurtenant are:

20 acres in the NE¼ NW¼	(TL 3203)
12.5 acres in the NW¼ NW¼	(TL 3203)
22 acres in the SE¼ NW¼	(TL 3203)
10 acres in the SW¼ NW¼	(TL 3203)

The balance of the right evidenced by Certificate 1503 is <u>not</u> in question in this proceeding.

Written notice of the proposed cancellation of the irrigation right was served on the owners of record and/or occupants of the lands in question. Notice was given on August 17, 1988, by certified mail to:

Earl and Edna Tucker
c/o J.C. Williams
PO Box 981
La Grande, OR 97850
(TL 3700)

J.C. Williams
PO Box 981
La Grande, OR 97850

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On October 14, 1988, a protest in the names of J.C. Williams estate and John Williams, son of the decedent, was filed with the Department on behalf of those named by Jesse Himmelsbach, Attorney at Law, Baker, Oregon.

No other protest against the proposed cancellation was submitted within the statutory 60 day period from service of the notice of initiation of these proceedings, nor subsequent thereto.

Pursuant to the Amended Notice of Hearing served on the parties on January 19, 1989, the matter was brought to hearing in La Grande, Oregon on February 22, 1989, before Weisha Mize, an employee of the Water Resources Department, authorized to preside on behalf of the Director as a finder of fact. The notice set out the pertinent information regarding the right proposed to be cancelled in the manner set out in paragraphs 2 and 3 of the STATEMENT, above. The hearing involved the proposed partial cancellation of Certificate 1503 and the proposed cancellation, in whole or in part, of Certificates 1464, 1465, 1467 and 1508, the protestants and proponents of cancellation being the same parties involved in each proposed cancellation.

Proponents of cancellation John Wilson and William Lewis appeared at the hearing and represented themselves, without benefit of legal counsel. Protestants J.C. Williams' Estate and John Williams appeared at the hearing and were represented by Jesse Himmelsbach, Attorney at Law.

FINDINGS OF FACT

1. The lands in question, the Sunnyslope and Davis-Kelsey ditches, the North Powder River Road, aka Anthony Lakes Road, the ONRC railroad tracks, and portions of the lands owned by proponents are shown on Figure 1. Figure 1 is a photocopy of WRD Exhibit 6, which shows appurtenant certificate numbers and names indicating property ownership, with the entirety of the Protestant's property outlined in yellow, and the portion to which the water right here in question is appurtenant colored solidly in yellow. Proponent Lewis' property is outlined in pink, and Proponent Wilson's property is outlined in orange. Added to and also indicated on Figure 1 are arrows showing the direction the Sunnyslope and Davis-Kelsey Ditches would flow if unimpeded, the dam first installed in 1978 on the Sunnyslope ditch, and the Wolf Creek Reservoir pipeline, in blue, as established by testimony at the hearing. The Sunnyslope and Davis-Kelsey Ditches follow the contours of the land.

2. Lands belonging to the Protestant lying to the north and west of the North Powder River Road are higher in elevation than those lying to the south and east (Tr. 196, 198).

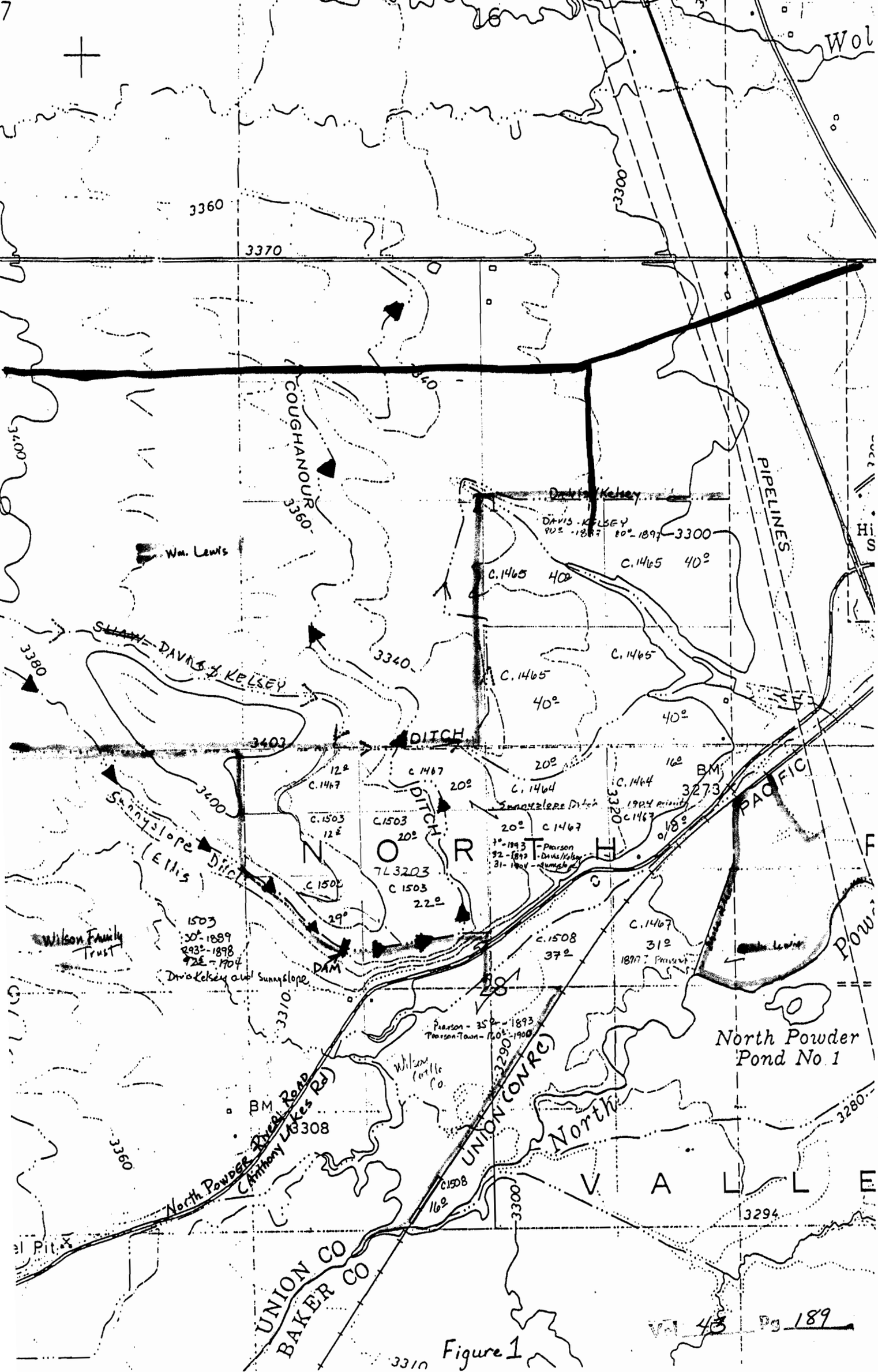
3360
3370
3300
COUGHANOUR
3360
3340
3380
3400
Wm. Lewis
SWAMP - DAVIS & KELSEY
DITCH
3403
PIPELINES
DAVIS - KELSEY
80° - 1897
3300
C.1465 40°
C.1465
40°
C.1467
12°
20°
C.1464
16°
BM
3273
PACIFIC
Sunnyslope Ditch
(Ellis)
C.1503
12°
C1503
20°
NORTH
7L3203
C.1503
22°
C.1467
18°
C.1508
29°
37°
C.1467
31°
1503
30° - 1889
893° - 1898
92E - 1904
Davis Kelsey and Sunnyslope
Wilson Family Trust
DAM
28
Pearson - 35 Pr - 1893
Pearson-Town - 10.0 - 1900
Wilson Cattle Co.
North Powder Pond No 1
BM
3308
North Powder River Road
(Anthony Lakes Rd)
UNION (CONRC)
3290
3280
3310
3360
3300
3294
VALLEY
UNION CO
BAKER CO
Pit
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Figure 1

3. The North Powder River adjudication on which the certificate in question as based authorized appropriation through the Sunnyslope, Davis-Kelsey, Pearson and Pearson-Town ditches. The Pearson and Pearson-Town ditches are no longer in existence, and have not been in existence for at least 13 years (Tr. 46, 48)

4. The Davis-Kelsey ditch ends on Proponent Lewis' land and has not carried water beyond the SW¼ of Section 20 since 1978. Any tailwater stops at the dam, runs out of the ditch into a natural draw and joins the waters in the Sunnyslope ditch at approximately the quarter-line of the SW¼ of Section 20 (Tr. 157-8)

5. A dam was installed on the Sunnyslope ditch in 1978. It is unclear whether the dam was removed and replaced between 1979 and 1981. The dam was in existence from 1981 to 1988. The Sunnyslope ditch was filled in for some distance on either side of the dam on both Protestant's and Proponent Wilson's lands in May of 1983.

6. Proponent of cancellation Wilson had assumed responsibility for billing the several users of the Sunnyslope Ditch for annual repairs running between $1,500 and $1,800. Protestant's had not been billed for any ditch work since 1981, as they were not receiving or using water from the Sunnyslope Ditch since that time (Tr. 169-171).

7. The Sunnyslope ditch was reopened at the Protestant's property, and water delivered at the headgate by the Watermaster, in 1988, and some portion of Protestant's lands were irrigated with North Powder River water through the Sunnyslope ditch in late April, 1988.

8. Protestant's lands have been irrigated with water from the Wolf Creek Reservoir, conveyed through a pipeline, since 1978 (Tr. 187).

9. Protestant could not recall if the dam was in place in 1979, and testified that he "had no idea, no knowledge" of the dam being there in 1980. He testified that his father, J.C. Williams, did not witness any of the irrigation. He further testified that protestants took no water from the Sunnyslope in 1983, and that he had no knowledge of any irrigation of the lands lying north of the Powder River Road out of the Davis Kelsey ditch, as those lands were irrigated out of Wolf Creek Reservoir (Tr. 184-186).

Any irrigation of lands that lie to the south of the Powder River Road was done with waste water or runoff from the Wolf Creek Reservoir and runoff from the Sunnyslope ditch after its use on Proponent Wilson's property (Tr. 197).

ULTIMATE FINDINGS OF FACT

1. There has been no irrigation of the lands in question from the North Powder River during the period of years 1981 to 1987, inclusive.

2. Irrigation of the lands in question has occurred through use of water from Wolf Creek Reservoir.

CONCLUSION OF LAW

The right in question as evidenced by that portion of Certificate 1503 here in question has been forfeited by nonuse for a period of five or more successive years of nonuse.

OPINION

The proponents in a cancellation proceeding have the burden to show by reliable, substantive and probative evidence that the right sought to be canceled has been lost by five successive years of nonuse.

Proponents were quite familiar with the ditches involved here and with the ability or non-ability of water to flow down those ditches to a point where it could be appropriated by Protestants for use on the lands in question. Proponents credibly demonstrated that no water was available to the Protestants for appropriation through the Davis-Kelsey and Sunnyslope ditches since 1981, until the Sunnyslope was reopened in 1988.

Protestants' Exhibit C, consisting of letters written in 1982 and 1984 by J.C. Williams (now deceased) from his residence in Arizona are not persuasive as to the question of fact of use of the water rights at issue. The expectations or beliefs of the author as to use of water from the Sunnyslope ditch were not substantially supported by Protestant's testimony, and were contradicted by substantial testimony of the Proponents.

Protestant further testified that he had only managed the lands to the north of the Powder River Road until 1980, and that after that date, he had no responsibility for management or irrigation of those lands. Management of lands to the north of the Powder River Road was taken by his sister, Sallie Williams, who leased the lands out and likewise had no personal knowledge of irrigation of those lands.

PROPOSED ORDER

NOW, THEREFORE, it is hereby ORDERED that the right evidenced by Certificate 1503 for irrigation use on those lands described by paragraph 3, supra, be and the same is hereby cancelled pursuant to ORS 540.610 to 540.650.

It is FURTHER ORDERED that said Certificate be cancelled and that a new Certificate be issued to describe the balance of the water right not cancelled by this proceeding.

DATED this 14th day of April, 1989

William H. Young

WILLIAM H. YOUNG
Director

NOTICE: The above Proposed Order is issued by the Director pursuant to authority delegated by the Water Resources Commission (Commission) pursuant to ORS 536.025(2). A party to the proceeding may file exceptions to this proposed final order, with the commission, within 30 days from the date of service (date of mailing) of a copy of this order on that party.

Exceptions are legal or factual arguments illustrating legal or factual errors in the proposed Order, as demonstrated by the record. Evidence not in the record may not be offered in exceptions.

If exceptions are filed, opportunity will be provided for argument to the Commission, and the final Order will be issued by the Commission.

If exceptions are not filed within the said 30-day period, a Final Order will be issued by the Director pursuant to authority delegated to the Direct by an action of the Commission at its regular meeting on October 25, 1985.