

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION) PC 87-16
A WATER RIGHT IN THE NAMES OF) STATEMENT, FINDINGS OF
EARL AND DORIS BOYD FOR USE OF) FACT, CONCLUSIONS OF LAW
WATER FROM WILBER WASTE FOR) OPINION AND ORDER
IRRIGATION)

STATEMENT

The Water Resources Director initiated this proceeding on his own motion pursuant to the provisions of ORS 540.610 to 540.650. Information alleging that the water right in question had been forfeited by nonuse for a period of five or more successive years of nonuse had been received and considered by the Director.

The water right in question is for the appropriation of not to exceed 0.024 cubic foot per second of water from Wilber Waste under a date of priority of September 15, 1942, for irrigation of a certain 1.2 acres of land within the SE 1/4 NE 1/4 of Section 31, Township 39 South, Range 8 West, WM, Josephine County, Oregon. The right was established under the terms of water right Permit 15382 and is a portion of the right described by the certificate issued in the names of Earl and Doris Boyd and recorded at Page 15604, Volume 13, State Record of Water Right Certificates.

Notice of initiation of this proceeding was served on Arnold and Dorothy Stohlman as the owners of record and occupants of Tax Lot 1008, which lies west of Westside Road within the SE 1/4 NE 1/4 of Section 31. The notice was served on October 22, 1987, pursuant to ORS 540.631. Arnold and Dorothy Stohlman filed a protest against the proposed cancellation on December 3, 1987.

Pursuant to notice of hearing served on the parties, the matter was brought to contested case hearing in Grants Pass, Oregon, on January 21, 1988. The hearing was before James W. Carver, Jr., an employee of the Water Resources Department authorized to preside on behalf of the Director as a finder of fact.

The proponents of cancellation, Carl Jacobson and Bob L. Jones, appeared without the services of an attorney. Protestants Arnold and Dorothy Stohlman also appeared without the services of an attorney.

During the course of the hearing, it became apparent that a portion of the subject 1.2 acres may lie within the right of way of Westside Road, which was widened by Josephine County after the water right was established. Therefore, notice of the proposed cancellation was served on William F. Ford, Chairman of the Josephine County Board of Commissions, on January 26, 1988. No protest against cancellation was received from Josephine County within the time allowed by the notice, or after that time.

On April 25, 1988, the Water Resources Director entered and served on the parties his Findings of Fact, Conclusions of Law and Proposed Order, pursuant to authority delegated to the Director by the Water Resources Commission. Notice of right to file exceptions and objections to the proposed Order within 30 days of service of the Order was provided to the parties at that time.

The Water Resources Commission has delegated to the Director the authority to issue a final Order if no exceptions or objections having been received by the Commission within the 30-day period, Conclusions of Law and Order.

FINDINGS OF FACT

A xerox copy of a map which had been accepted by the Water Resources Department in connection with taking proof of performance by the permittee under the terms of Permit 15382 was received as Stohlman Exhibit "A". A xerox copy of Stohlman Exhibit "A" is included herein as Figure 1. The map scale is 4 inches on the map to 1 mile on the ground. It shows the location of the irrigated lands in relation to both the flume used to convey water from Wilber Waste and to the county road (Westside Road) as it existed at the time the map was made. The exact date of the map's preparation is not known. However, the map would have to have been prepared and submitted to the Water Resources Department prior to March 1, 1949. This is the date the certificate of water right was issued to confirm the right established by performance under the terms of Permit 15382. (Exhibit WRD 2).

It is noted that the map (Figure 1) shows the irrigated lands west of Westside Road to be adjacent to the north side of the flume and adjacent to the west side of the county road. The map shows the irrigated lands extending to the west from the county road a distance of approximately 200 feet.

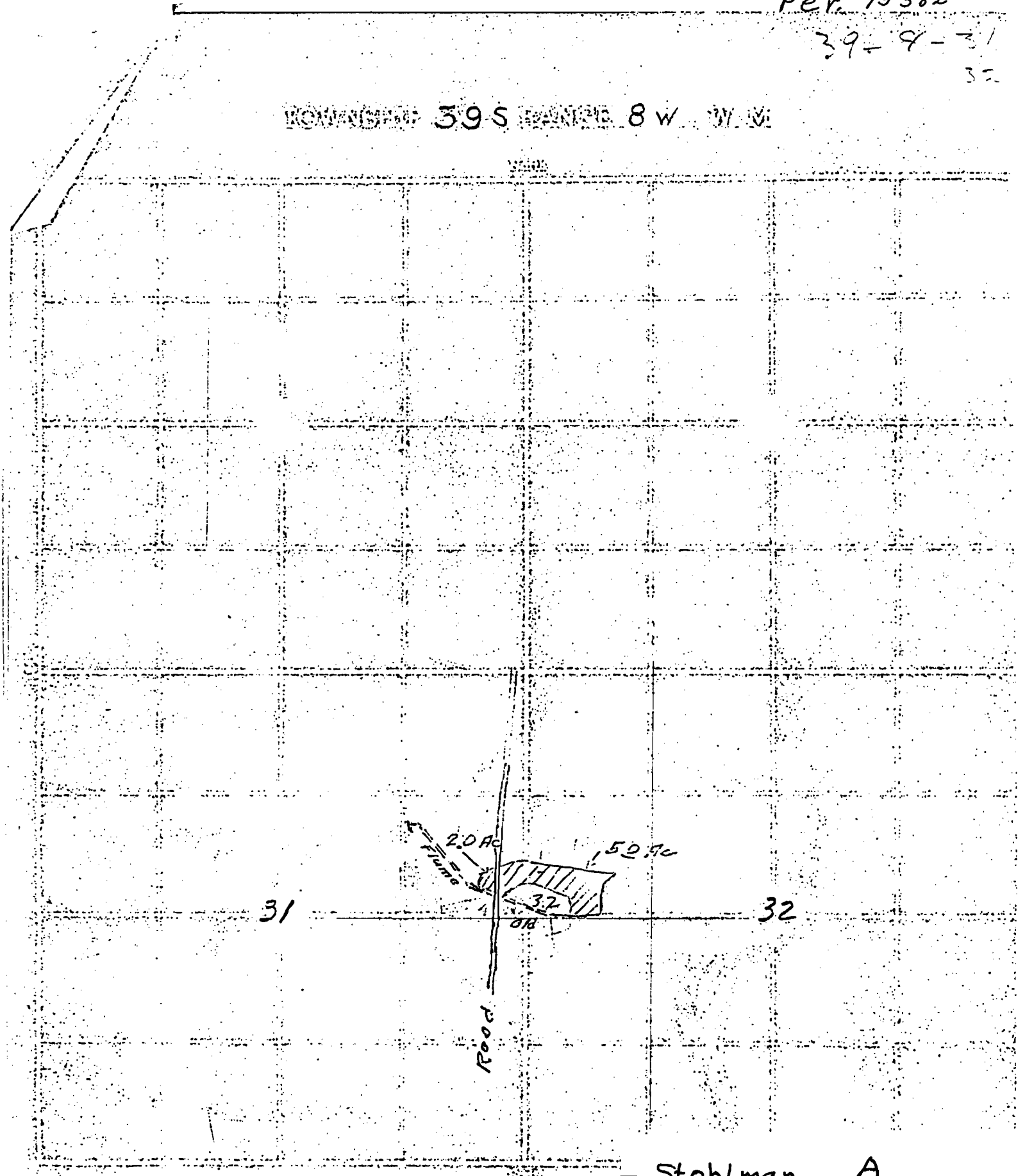
Testimony of the parties established that the actual location of the flume and the irrigated lands was to the south of the location as shown on Figure 1. The approximate true location of the flume is

Per. 15382

39-9-31

32

SECTION 39 S RANGE 8 W T14 N



31

32

Road

2.0 AC

50 AC

3.2

- Stohlman A
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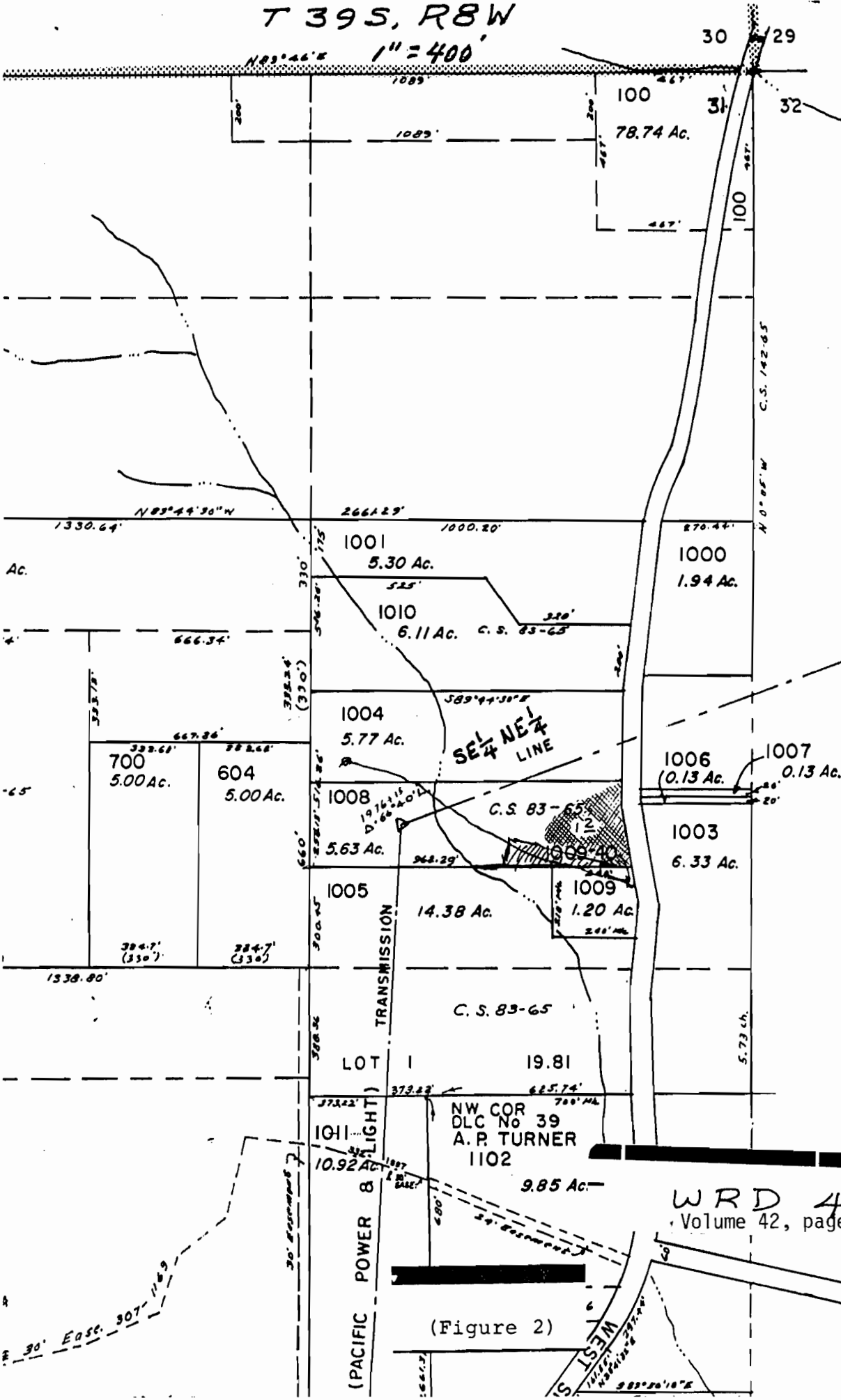
(Figure 1)

FINAL PROOF
MAP

C-15604

T 39 S, R 8 W

1" = 400'



Cancelled
 T.L. 1100
 602
 800
 900
 200
 300
 1104
 1009
 1090

SEE MAP 39 8 32

WRD 4-A
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(Figure 2)

E 30' East 307-1169

shown on Figure 2, herein, which is a xerox copy of Exhibit WRD 4-A. The location of the route followed by the flume is illustrated by the line which originates near the westerly end of Tax Lot 1004, courses in an east-southeast direction through Tax Lot 1008 (the Stohlman property), leaves the south side of Tax Lot 1008 near the northwest corner of Tax Lot 1009, and intersects the west line of Westside Road at a point approximately 100 feet south of the south line of Tax Lot 1008.

The flume has been replaced by a pipeline which follows the same route as the flume.

Testimony also established that the house on the Stohlman property is located to the west from a northerly extension of the west line of Tax Lot 1009. The Stohlman lands irrigated under the terms of the above-reference Certificate lie within that portion of Tax Lot 1008 between Westside Road and the house.

For the past 11 years or more, the Stohlmans have irrigated a triangle-shaped pasture between the driveway to the house and the south property line. This pasture widens from 0 feet at the west side of Westside Road to approximately 50 feet at the westerly end of the area to which the water right in question is appurtenant, having an east-west distance of approximately 200 feet.

For the past 10 years or more, the Stohlmans have also irrigated roses and trees in a strip adjacent to the north side of the driveway. The planting area averages approximately 20 feet in width and follows along the north side of the driveway, from Westside Road toward the house. No other portion of the Stohlman property to which the water right in question is appurtenant has been irrigated under the terms of the right within the past ten or more years. The combined areas of the said triangle-shaped pasture and the planting area adjacent to the driveway, which fall within the area on which the water right was established by performance under Permit 15382, total not more than 0.25 acre.

ULTIMATE FINDINGS OF FACT

The testimony and evidence adduced establishes that for a period of more than five successive years no water from Wilber Waste has been used for beneficial irrigation of a certain 0.95 acre of the 1.2 acres to which the water right in question is appurtenant.

The record fails to establish any period of five successive years of nonuse of water from Wilber Waste for beneficial irrigation of the remaining 0.25 acre to which the water right in question is appurtenant. The said 0.25 acre lies within the Stohlman property and its location is described in the Findings of Fact herein.

CONCLUSIONS OF LAW

Oregon Revised Statutes 540.610 provides, in part, "Beneficial use shall be the basis, the measure, and the limit of all rights to the use of water." If a portion of the lands under a perfected water right for irrigation is not irrigated under the terms of the right within a period of five successive years, the portion of the right appurtenant to those lands is forfeited by the nonuse. (See Rencken v. Young, 300 Or 352 (1985).

That portion of the water right in question, being for the appropriation of not to exceed 0.019 cubic foot per second of water from Wilber Waste for irrigation of a certain 0.95 acre located partially within the Stohlman property and partially within the county road right-of-way has been forfeited by five successive years of nonuse and should be canceled pursuant to the provisions of ORS 540.610 to 540.650.

The remaining portion of the water right in question, being for the appropriation of not to exceed 0.005 cubic foot per second of water from Wilber Waste for irrigation of the remaining 0.25 acre within the Stohlman property has not been shown to have been forfeited. This portion of the water right should be reaffirmed by a new water right certificate issued pursuant to the provisions of ORS 540.650.

OPINION

Testimony established that the Stohlmans have continued over the past ten or more years the irrigation of no more than 0.25 acre within the area to which the water right in question is appurtenant, as located by Stohlman Exhibit A.

The Stohlmans testified that it is their understanding that 0.9 acre of their lands are covered by the water right in question. They assert that in addition to their continued irrigation of the areas of pasture, roses, and fruit trees between the residence and Westside Road (totaling not more than 0.25 acre), they are using water from Wilber Waste to irrigate other areas around and to the west of the residence that are equivalent in amount to the balance of the 0.9 acre allowed under the right. These other areas are not covered by the right in question.

Pursuant to the provisions of ORS 540.510 and 540.520, a water right remains appurtenant to the place of use where the water right was

established by performance under the terms of the permit and cannot be moved to another place of use except upon approval of an application made to the Water Resources Commission for such a change.

The courts have further found that ORS 540.610 does not require an intent to abandon to work a forfeiture and cancellation of all or part of a perfected water right. All that must be shown is that there has been nonuse over five successive years. Rencken v. Young, 300 OR 352 (1985).

No application for a change in place of use of any portion of the water right in question as it pertains to the lands of the protestants has been made to the Water Resources Commission or to the Water Resources Department.

Protestants's beneficial irrigation of other areas of their lands in lieu of the lands to which the water right in question is appurtenant has not and will not serve to prevent forfeiture of the water right in question as it pertains to lands which have not been irrigated under the provisions of the right for a period of five successive years of nonuse.

ORDER

NOW, THEREFORE, it is ORDERED that the portion of the right evidenced by the Certificate found at page 15604, Volume 13 of the State Record of Water Right Certificates, for irrigation use within the SE 1/4 NE 1/4 of Section 31, Township 39 South, Range 8 West, WM, Jackson County, Oregon be and the same is hereby canceled in the amount of 0.95 acre, pursuant to ORS 540.610 to 540.650.

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

DATED THIS 31st day of May, 1988.

William H. Young
WILLIAM H. YOUNG,
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 service (date of mailing) of this Order. Judicial review is pursuant to the provisions of ORS 536.075 and 183.482.