

THE WATER RESOURCES COMMISSION OF OREGON

IN THE MATTER OF CANCELLATION OF)	PC 87-10
CERTAIN WATER RIGHTS IN THE NAMES)	
OF GUS AND VELLA VASSIOS FOR USE OF)	STATEMENT, FINDINGS
WATER FROM LITTLE PINE CREEK, EAST)	OF FACT, CONCLUSIONS
BRANCH LITTLE PINE CREEK AND SPRING)	OF LAW AND FINAL
GULCH (GRANT COUNTY))	ORDER

STATEMENT

This proceeding was initiated by the Water Resources Director under the provisions of ORS 540.610 to 540.650 for the proposed cancellation of certain water rights, based on information furnished to the Director in the form of affidavits alleging nonuse of the rights in question in each of five and more successive years.

The certificate recorded at Page 38668, Volume 30, State Record of Water Right Certificates, describes a portion of the rights allowed by decree of the court in the names of George Mason and Bessie Finlayson in the matter of Determination of the Relative Rights to the Waters of John Day River and its Tributaries. Certificate 38668 described rights to appropriate not to exceed 1/40 cubic foot per second (cfs) per acre irrigated to June 1 and 1/80 cfs per acre thereafter; further limited to one acre-foot per calendar month to June 1 and four acre-feet per acre during season April 1 to September 30 from Big Dog Creek, Painters Gulch, Little Pine Creek, East Branch Little Pine Creek and Spring Gulch for irrigation of a certain 88.0 acres of land and domestic use, all with a date of priority of 1865. The place of use is described in the certificate as:

10.5 acres in NE ¼ NW ¼	1.3 acres in SW ¼ NE ¼
6.1 acres in NW ¼ NW ¼	8.4 acres in SE ¼ NW ¼
4.1 acres in SW ¼ NW ¼	13.2 acres in NE ¼ SE ¼
26.7 acres in SE ¼ NW ¼	4.0 acres in NW ¼ SE ¼
13.7 acres in NE ¼ SW ¼	Section 6
Section 36	T 14 S, R 32 E, WM
T 13 S, R 31 E, WM	

The water rights in question in this proceeding pertain only to appropriation of water from Little Pine Creek, East Branch Little Pine Creek and Spring Gulch, as described by the said certificate.

On November 20, 1987, notice of initiation of this proceeding for cancellation of the water rights in question was served on:

District Director, Bureau of Land Management, U.S.
Department of the Interior,
Donald and Robin Merrell,
Frederick and Vivian Gardner,
Ansel and Teresa Krutsinger,
Danny and Janice Ellison, and
Gregory Lynch, Attorney at Law,

as owners of record, occupants, or attorney of record for an owner of the real property to which the water rights in question are appurtenant.

Protests against the proposed cancellation of the water rights in question were filed by Ansel J. and Teresa L. Krutsinger, Frederick and Vyvyan Gardner, Danny and Janice Ellison, and by Mr. and Mrs. Donald Merrell.

Pursuant to the Notice of Hearing served on the parties' attorneys of record, the matter was brought to a contested case hearing in Canyon City, Oregon, on July 7, 1988, before James W. Carver, Jr, an employe of the Water Resources Department, authorized to preside in behalf of the Director as a finder of fact.

The proponents are represented by Gregory P. Lynch of the law firm of Gray, Fancher, Holmes and Hurley, Bend, Oregon. The protestants are represented by Roy Kilpatrick of the law firm of Kilpatricks and Pope, Mt. Vernon, Oregon.

Subsequent to the hearing, upon approval of a request from Mr. Lynch, the testimony of Don Nettleton was added to the record in the form of an affidavit. Rebuttal to Mr. Nettleson's testimony was received from John R. Gardner and from Jessie V. McKay, also in the form of affidavits.

On December 14, 1988, the presiding officer served a proposed order on Mr. Lynch and Mr. Kilpatrick. Mr. Lynch timely filed exceptions and argument on those exceptions. Mr. Kilpatrick submitted argument in response to proponent's exceptions. On March 3, 1989, the Water Resources Commission heard oral argument on the exceptions and returned the matter to staff for analysis of the issues raised. The Commission authorized staff to reopen the hearing, to issue a new proposed order, or to return the matter to the Commission with recommendations and a proposed final order.

On March 10, 1989, the presiding officer requested additional briefs on the question whether the certificate issued in 1972 at the conclusion of a cancellation proceeding, to describe the portions of the original rights not affected by that proceeding, precludes a finding of forfeiture based on nonuse prior to 1972. Both parties filed briefs, and the Commission's disposition of the issue is explained in the Opinion section of this order.

Based on the record, the Commission makes the following:

FINDINGS OF FACT

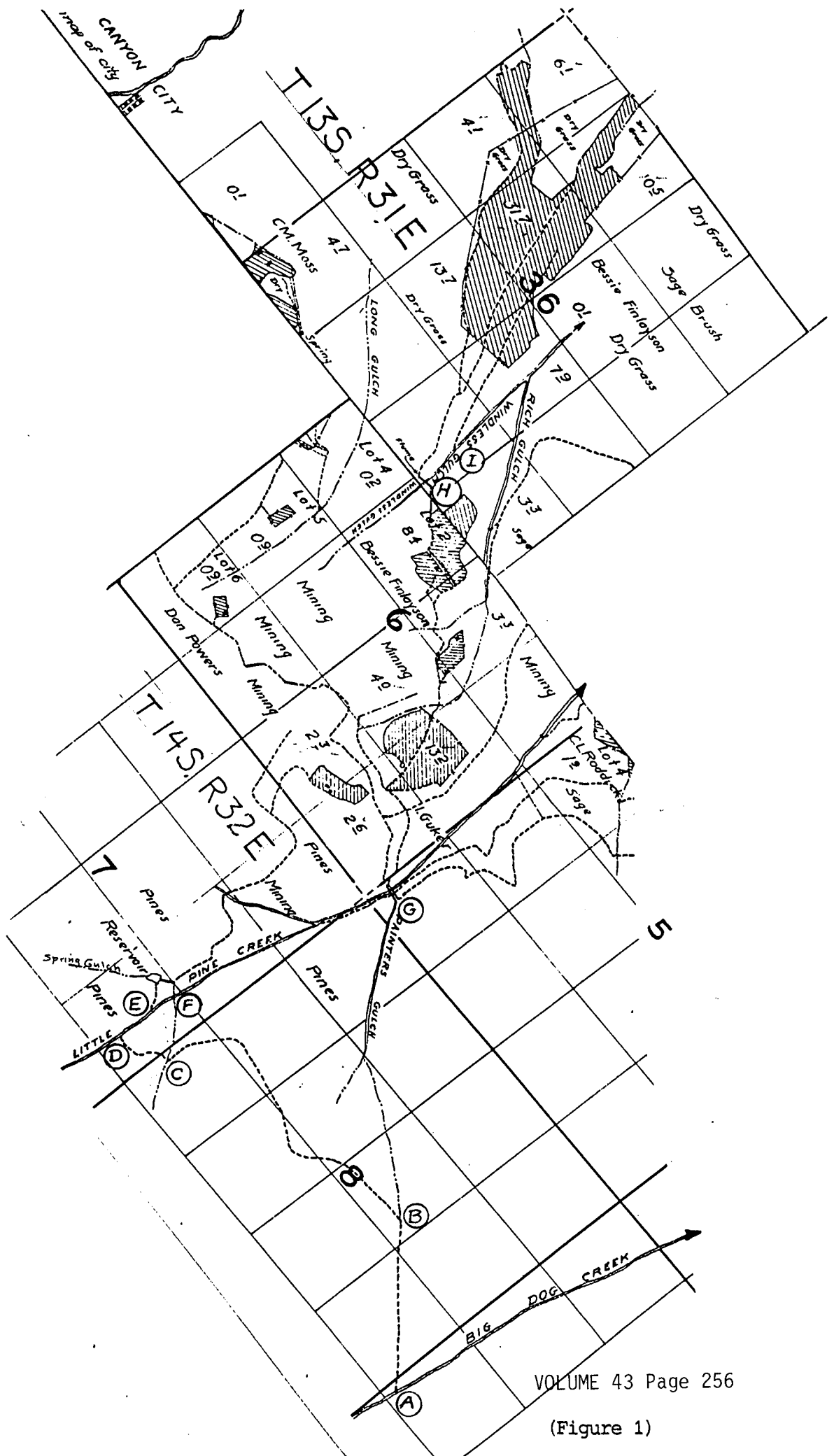
Figure 1, xerographic reduction of a portion of the map prepared by employes of the State Engineer in connection with the John Day River adjudication proceedings, shows the relative locations of Big Dog Creek, Little Pine Creek, East Branch Little Pine Creek, Spring Gulch, Painters Gulch, and Windlass Gulch, the irrigated lands under Certificate 38668, and ditches used to divert and convey water from the several stream channels to the places of use.

Under the terms of the original water rights as allowed by the court, water was diverted from Big Dog Creek at point "A" (see Figure 1) and conveyed by a ditch to point "B". At point "B" a portion of the water diverted from Big Dog Creek was carried by a ditch to the channel of East Branch Little Pine Creek at point "C". The combined waters from Big Dog Creek and East Branch Little Pine Creek were conveyed by a ditch from point "C" to the channel of Little Pine Creek at point "D". The combined waters from Big Dog Creek, East Branch Little Pine Creek and natural flow in Little Pine Creek could be diverted at point "E" and conveyed to a small reservoir in the channel of Spring Gulch, or diverted at point "F" and conveyed directly to places of use for mining and/or irrigation of a certain 2.5 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and 2.6 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6. The small reservoir in the channel of Spring Gulch was used to accumulate water overnight, at times of reduced flows, to be used for mining purposes the next day. (See Exhibit WRD 1, Attachment A)

Certificate 38668 was issued to describe the water rights remaining after cancellation of a portion of the original water rights allowed by the court to George Mason and Bessie Finlayson. The cancellation involved the said use of water for mining purposes on certain lands within said Sections 36 and 6, and also involved the said use of water for irrigation of a certain 2.5 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and 2.6 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of said Section 6.

Going back to Point "B", the remaining portion of the waters diverted from Big Dog Creek were released into the channel of Painters Gulch. The released water together with any natural flow in Painters Gulch was flumed across the channel of Little Pine Creek at point "G". At point "G" the water was conveyed through the Finlayson Ditch to the places of use which included the lands as described in paragraph two of the Statement, above. Waters carried in the Finlayson Ditch were flumed across the channel of Windlass Gulch at point "H" within the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 36 for irrigation of certain lands included within the shaded area within the West one-half of Section 36.

Surveyed October 2 to 5, 1925



(Figure 1)

No water right was allowed by the court or established by any other means for irrigation of the shaded lands within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 36.

It is noted that under the water right in question the court allowed only 26.7 acres of the shaded area within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36. The other 5.0 acres which lie to the east of the ditch which diverts from Windlass Gulch at point "I" are covered by a water right described by a certificate issued to George Mason and recorded at page 2022, Volume 3, State Record of Water Right Certificates. The said certificate describes a right established by performance under Permit 1400 and is for the appropriation of not to exceed 0.16 cubic foot per second of water from Windlass Gulch under a date of priority of October 16, 1912, for irrigation of 5.0 acres within the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 36.

Because of the slope of the land, as shown by Exhibit WRD 11, water diverted out of the channel of Windlass Gulch at point "I" which is downstream from the Finlayson Ditch flume crossing over Windlass Gulch, could not be used to irrigate any of the lands in Section 36 which are under the water rights in question.

Testimony established that about the year 1974 water flowing in the channel of Little Pine Creek was taken into a ditch diverting from the east side of the channel a short distance upstream from the Painters Gulch flume crossing over Little Pine Creek at point "G" and was discharged into the Dog Creek and Painters Gulch waters flowing to the Finlayson Ditch.

Testimony also established that in 1975 an old ditch grade adjacent to the west side of the Little Pine Creek channel above point "G" was cleaned out and lowered by means of a small bulldozer. The reconstructed ditch was then used to divert waters flowing down the Little Pine Creek channel and discharge them into the Finlayson Ditch at the point where the flume over Little Pine Creek discharges into the Finlayson Ditch.

Proponents testified that no waters of Little Pine Creek, East Branch Little Pine Creek or Spring Gulch were diverted from the channel of Little Pine Creek in the vicinity of point "G" and discharged into the waters flowing down Painters Gulch during the period of years of 1966 through 1973, during which time period their observations were frequent and without interruption.

The testimony of the parties is not in agreement as to any operable ditch to divert water from the Little Pine Creek channel into the Finlayson Ditch in the vicinity of point "G" during the several years prior to 1974. However, we find the testimony of the proponents persuasive, that no water was diverted from the channel of Little Pine Creek into the Finlayson Ditch in the

vicinity of point "G" for irrigation of lands under the water rights in question during the period of five and more successive years prior to 1974.

Protestants' witness Loren Stout testified that his family leased the Vassios (Ellison) property from 1972, when he was 16 years old, through 1984. He stated that he personally participated in the irrigation practices carried out on the property from about 1974 until the end of the lease. His personal knowledge of a ditch on the east side of Little Pine Creek diverting water from the channel of Little Pine Creek and discharging it into the water flowing into the Finlayson Ditch near point "G" relates only to the year of 1974.

Mr. Stout further testified that water diverted from the channel of Little Pine Creek in the vicinity of points "E" and/or "F" reached their property for irrigation use only as a result of the water having been diverted and used by miners for mining purposes. The mining waste water came down Windlass Gulch. (See Tr. 138 and 140)

The testimony of protestants' witness Gaylor Lambeth provided little help in arriving at the facts of use or nonuse of water under the terms of the water rights in question. Mr. Lambeth had difficulty in clearly articulating his knowledge of the facts. As a result, in both direct and cross examination questions were posed to Mr. Lambeth in the form of statements. It is not possible to discern from the record if his answers demonstrated his knowledge of the matter, or were merely agreements with questions which he did not actually understand. Further questioning on some point disclosed that he had responded to the statement form of question without having understood the question.

ULTIMATE FINDING OF FACT

No water was diverted from Little Pine Creek, East Branch Little Pine Creek or Spring Gulch and used for irrigation of the lands described in paragraph two of the "Statement" above, under the terms of the water rights in question, within the period of five and more successive years immediately prior to the year of 1974.

CONCLUSIONS OF LAW

Pursuant to the provisions of ORS 540.610 to 540.650, as defined by the Supreme Court of Oregon in Rencken v. Young, 300 OR 352, the water rights in question have been forfeited by five successive years of nonuse.

ORS 537.270 and 540.650 do not preclude basing forfeiture on nonuse that occurred in part prior to 1972.

OPINION

A water right not put to beneficial use within the terms of the right for a period of five or more successive years is forfeited. ORS 540.610, Rencken v. Young, 300 OR 352, 711 P2d 954 (1985).

The water rights proposed to be canceled in this proceeding were initially issued under ORS 539.140. In 1972, a proceeding was initiated to cancel two specific portions of the rights described in that certificate. One was a right to use water for mining purposes. The second was a right to use water for irrigation purposes on a specified 5.1 acres of land. No other portion of the decreed right was alleged to have been abandoned or forfeited. No one protested the proposed cancellation, and the mining right and the irrigation right for 5.1 acres of land were canceled. Order of the State Engineer, October 25, 1972, Exhibit WRD 5.

The State Engineer's 1972 order directed that the original certificate evidencing the 1865 water rights to be canceled and in "in lieu thereof a certificate be issued * * * covering that part of the water right not in question." (Emphasis added.) The certificate issued pursuant to that order is the certificate evidencing the rights at issue in this proceeding, recorded at Page 38668, Volume 30, State Record of Water Rights Certificates.

Protestant argues that the Commission is precluded by ORS 537.270 from considering nonuse during any period of time prior to 1972, to determine whether the rights at issue have been forfeited. ORS 537.270 states that a water right certificate issued under ORS 537.250 or 539.140

"shall be conclusive evidence of the priority and extent of the appropriation therein described in any proceeding in any court or tribunal of the state, except in those cases where the rights of appropriation thereby described have been abandoned subsequent to issuance of the certificate."

That is, when a right is adjudicated and a certificate issued under one of those two statutes, that certificate is conclusive as to the good standing of the right described.

ORS 54.650 states that a certificate issued to reaffirm the portion of a right not canceled "shall be of the same character as that described in ORS 539.140." Therefore, protestant argues, the Commission may not now consider nonuse during any time prior to 1972 in determining whether the rights described in that certificate have been forfeited.

The Commission agrees that if a water right is challenged in a forfeiture proceeding, and a portion of the challenged right is reaffirmed in a new certificate, ORS 540.650 and 537.270 make that new certificate conclusive evidence that the water right was in good standing when the certificate issued.

The later forfeiture proceeding may not be brought based on a period of nonuse prior to issuance of the certificate. However, the Commission does not find that rationale applicable to this proceeding.

The question boils down to this. Was the 1972 certificate issued under ORS 540.650, or was it issued as a clerical action to separate out water rights not challenged and not part of the 1972 proceeding from those water rights that were challenged? For the following reasons the commission believes that only the latter interpretation makes sense and conforms with the logic and language of the forfeiture statutes taken as a whole.

In many cases, a water right certificate covers rights for a variety of uses and rights appurtenant to land in many sections. Because a water right is appurtenant to the land, ORS 540.510, it passes with the land. Thus, an early issued certificate may describe water rights for lands that today are in multiple ownerships. If one of those owners ceases to use water and a forfeiture proceeding is initiated to cancel the water right on that person's property, the notice and the proceeding focus only on whether the water right appurtenant to that specific tract of land has been exercised without a five year period of nonuse. There is no basis upon which the status of other water rights that happen to be described in the same certificate could be "reaffirmed," for those rights would not be at issue.

Furthermore, reading ORS 540.650 in the context of the remainder of the forfeiture statutes makes clear that "the water right" referred to in ORS 540.650 is the water right challenged as having been forfeited, not the conglomeration of water rights that may happen to be described in a single certificate. First, ORS 540.631 states that

"Whenever it appears to the satisfaction of the Water Resources Commission * * * that a perfected and developed water right has been abandoned as provided in ORS 540.610, the commission may initiate proceedings for the cancellation of such water right by causing written notice * * *. The notice shall contain a complete description of the water right and of the lands to which the water right is appurtenant." (Emphasis added.)

As in the 1972 instance, notice of potential cancellation is given only for the challenged right, not for all rights described in a particular certificate. The State Engineer's 1972 order was explicit on this point: "The remainder of the right evidenced by the said certificate, being for domestic use and the irrigation of a certain 88.0 acres of land [describing location] is not in question in this proceeding."

ORS 540.641 provides for protest against cancellation and hearing on that protest, and concludes:

"After the hearing, the commission shall enter an order canceling the water right, canceling in part or modifying the water right, or declaring that the water right shall not be canceled or modified." (Emphasis added)

Again, these references to "the water right" can only refer to the water right described in the notice, since the Commission would have no basis for altering any other water right.

Finally, then, when ORS 540.650 directs the Commission to issue a certificate to reaffirm "that portion of the water right not canceled or continued as modified," it must refer only to "the water right" proposed to be canceled in the original notice issued under ORS 540.631. In this case, the 1972 notice described only the rights for mining and for irrigation of a specified 5.1 acre parcel. Order of the State Engineer, October 25, 1972. Those rights were canceled in whole. Therefore, no certificate was issued "reaffirming" a portion of the water right not canceled or continued as modified.

Rather, the certificate evidencing the rights challenged here was issued as a clerical matter to provide for a clear record of the remaining rights represented in the original certificate that were not part of the 1972 cancellation proceeding. In the early part of the century the State Engineer (now Water Resources Commission and Department) chose a recordkeeping scheme that

involved reissuing a certificate when some but not all of the rights listed in that certificate were canceled or modified, rather than a scheme that would leave the original certificate in place with a multitude of notations as to which rights had been canceled out, which rights were now represented in different certificates, and the like.

The fact of that choice of recordkeeping ought not to be construed today to have freed the rights evidenced by the 1972 certificate from the standard applicable to all other water rights--that the right is forfeited if at any time it has not been beneficially exercised for five or more successive years. The findings above show that water from Little Pine Creek, East Branch Little Pine Creek, and Spring Gulch were not used for irrigation of the 88 acres of land described in the 1972 certificate, for a period of five and more successive years immediately prior to 1974. Those rights to use of water have been forfeited.

FINAL ORDER

NOW, THEREFORE, it is ORDERED that the water rights in question, being for appropriation of water from Little Pine Creek, East Branch Little Pine Creek, and Spring Gulch for irrigation of the certain 88.0 acres of land as described by the certificate issued in the names of George Mason and Bessie Finlayson and recorded at Page 38668, Volume 30, State Record of Water Right Certificates, be and the same are hereby canceled.

It is FURTHER ORDERED that the said certificate be canceled and a new certificate be issued in lieu thereof to describe the remaining water rights NOT canceled in this proceeding.

Dated and signed at Salem, Oregon this 26 day of May, 1989.


WILLIAM R. BLOSSER, CHAIRMAN
WATER RESOURCES COMMISSION

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 provision of ORS 536.075 and 183.482.