

BEFORE THE STATE ENGINEER OF OREGON

Jackson County

IN THE MATTER OF THE)
CANCELATION OF A WATER)
RIGHT IN THE NAME OF)
L. A. MARTIN)

Order dismissing proceedings

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On April 26, 1967, notice was given by certified mail in accordance with provisions of ORS 540.631 to 540.650 to Morris M. and Jennie E. Jones, P. O. Box 334, Rogue River, Oregon, as owners and occupants of the lands to which a certain water right hereinafter described is appurtenant, of the initiation of a proceeding by the State Engineer to cancel said right.

The water right in question is for the use of not to exceed 0.20 cubic foot per second of the waters of Evans Creek, tributary of Rogue River, for the irrigation of 16.0 acres in the southerly part of NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 4, Township 36 South, Range 4 West, W.M., with a date of priority of April 10, 1912, and is evidenced by certificate of water right issued in the name of L. A. Martin and recorded at page 2015, Volume 3, State Record of Water Right Certificates.

That part of said water right for the use of not to exceed 0.33 cubic foot per second of the waters of Evans Creek, tributary of Rogue River, for the irrigation of 14.0 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 11.75 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 4, Township 36 South, Range 4 West, W.M., with a date of priority of April 10, 1912, as confirmed by certificate of water right recorded at page 2015, Volume 3, State Record of Water Right Certificates, is not in question in this proceeding.

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On June 7, 1967, a protest was filed with the State Engineer by A. E. Piazza, Attorney at Law, on behalf of Morris M. and Jennie E. Jones, against the proposed cancelation of the water right as described in paragraph 1 above.

Pursuant to notice dated July 3, 1967, a hearing on the matter was held in the North Conference Room, Jackson County Courthouse, Medford, Oregon, on Monday, July 24, commencing at 1:05 P.M., before Marvin B. Bennett, Assistant State Engineer. Protestants Morris M. and Jennie E. Jones appeared and were represented by Mr. A. E. Piazza, Attorney at Law, Medford, Oregon. Testifying in behalf of the protestants were Morris M. and Jennie E. Jones, Harold C. Parmlee, Jack H. Cornett and Robert Jones. Testifying in behalf of the State Engineer were the affiants Robert A. and Alma L. Shibler, David C. Hendrix, Watermaster District 13 and J. L. Diddock, Assistant Watermaster District 13. Also present was James W. Carver, Jr., Deputy State Engineer.

FINDINGS OF FACT:

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Robert A. Shibler, called and sworn as the first witness: identified an affidavit submitted by him to the State Engineer on April 5, 1967 alleging non-use of the water right in question during the period September 1961 until April 1967. Mr. Shibler testified that: his property adjoins the lands of Mr. Jones on the north; he has resided there for the past eleven years; he identified the map marked as State Engineer's Exhibit #1 as a copy of a map filed with his application for a change in point of diversion, Transfer S-145; and testified that the map marked State Engineer's Exhibit #2 correctly shows the lands owned by him and Mr. Jones and location of the two pump sites on Evans Creek. Mr. Shibler further testified that: all water diverted from Evans Creek onto the lands in question has to be pumped, as the bank on the east side is approximately 30 feet in height, and the pumped water discharges into a ditch from which the lands are irrigated by flood irrigation; he started construction of a new house near the Jones' diversion point in April of 1965; he requested Mr. Jones to change the discharge line, which is on Mr. Shibler's property, to follow along the boundary fence line so it would not interfere

with the intended site of the new house; that such request was refused and he had to change the location of the new building site; he has planted some 1700 small trees adjacent to and near the pump site of Mr. Jones; has been able to observe this diversion and the lands to be irrigated therefrom nearly every day while working on the tree farm and new house; he drives along the east side of the Jones property six days a week going to and from work and to church on Sunday; he has not observed any irrigation upon the lands in question from the waters of Evans Creek at any time from September 1961 to April 1967.

Mr. Shibler testified that the electric powered pump of Mr. Jones was setting on a slab well above water line during this period; he had not observed any other pump in operation at this point and that the power line serving his pump and that of Mr. Jones comes across the property of Harold O. Parmlee from West Evans Creek Road to a site on the Shibler property where the transformers are located, thence a power line runs to a meter base at the Jones diversion point.

Mr. Shibler presented into evidence photo copies of the power statements pertaining to the meter located at Mr. Jones pump site, these obtained from C. J. Zakrzewski, Manager of the Grants Pass office of Pacific Power & Light Company, which indicate no power was used through this meter during the stated period of non-use. Mr. A. E. Piazza, counsel for the protestants, objected to this as evidence, however, it was accepted under the rule.

Mr. Shibler also testified that the only irrigation upon the lands in question was from run-off waters which came from Savage Rapids Dam. This waste water enters the Jones property through a culvert under the private road of Shibler near the northeast corner of the lands in question, flows thence south and westerly from the irrigated lands to the east. A part of the Jones land is irrigated by placing a dam in this water course and irrigating by small ditches.

There is no right of record for such use.

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Mrs. Robert A. Shibler (Alma L.), called and sworn as next witness,

testified that: she is a housewife and is at their home most of the time; occasionally goes to the pump site of Mr. Jones on Evans Creek; has not observed a pump of any kind operating at this diversion point since 1961 to April 1967; the ditch which conveys the waters of Evans Creek from the pump to the lands in question has not been cleaned; there is no other means of getting this water onto the lands except by pumping. She confirmed the previous testimony of Mr. Shibler.

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David C. Hendrix, Watermaster District 13 for past 16 years, was called and sworn as a witness and testified that: he prepared the map marked as State Engineer's Exhibit #1 for use of Mr. Shibler in his transfer application S-145, for a change in point of diversion; he inspected the old and the new diversion points on October 20, 1961, at which time the electric powered pump of Mr. Jones was setting on the bank or on a platform well above water surface; there is a near vertical lift of some 25 or more feet at the Jones site and another 10 or 15 feet of lift to convey the waters of Evans Creek into the ditch; there was no evidence of any use of the electric pump of Mr. Jones from this inspection of 1961 until April of 1967; the ditch through the Shibler property did not appear to have been cleaned in 1967. Upon cross-examination by Mr. Piazza, Mr. Hendrix stated that it was not uncommon for the owners to remove the pumping equipment from the stream channel and place at a higher elevation due to the abrupt rise of the streams during the run-off time of year. He also stated that he has observed no other pumps at this site at the times he had been there.

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Joseph L. Diddock, Assistant Watermaster District 13 since May 1960, after being called and sworn, testified that: Evans Creek is within his territory of distribution; he checks the flows in the Old Mill Ditch which diverts from this stream some quarter-mile below the Jones pump site, almost every day during the season from about the first of June to last of September; in 1961 he

observed one electric powered pump in operation at or near the Jones diversion, which could have been Mr. Shibler's pump, but was not certain of the exact location; he did not cross the stream to inspect this pump; he usually measures the flow in the Old Mill Ditch and the flow in Evans Creek below this diversion to ascertain the amount diverted and that remaining in the stream for lower users. Upon cross-examination he testified that he had never heard or observed any gas powered pump in operation at this site but that one could have been in use during the time he was not there.

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Harold O. Parmlee was called and sworn as the first witness for the protestants. Mr. Parmlee testified that: he owns and resides upon property on the west side of Evans Creek, for past 13 or 14 years, these lands adjacent to the properties of Mr. Shibler and Mr. Jones; noted the location on the map marked as State Engineer's Exhibit #2; he has strung two strands of barb wire from the west side of the creek and tied the east end of these wires onto the suction line from Mr. Jones pump since 1961, until last year; he observed a pump in operation in 1963 and 1964, does not recall the dates and has no knowledge of the size or type, but that it was not electric; he has not been to the pump nor the ditch leading from the pump, but could tell water was being pumped; the said suction line is 4 inch pipe; he has never seen the discharge line from the pump because of brush and trees blocking his view.

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Morris M. Jones called and sworn as a witness, testified that: he had purchased the subject property in October 1955; it was in his family ownership since 1928; in 1961 he used a 7½ horsepower electric motor and pump to appropriate water under the right in question; he is not certain of any irrigation in 1962; about June 10 or 15, 1963, he acquired from his son a 7 or 7½ horse gas engine and direct connected pump which was used for about 21 days during the season of 1963 and from 3 to 7 days during 1964; this engine threw a rod through the block and became unusable some time during the 1964 season; he then attempted to use his tractor with a geared pump about three

various times, but due to the high lift required, was unable to pump sufficient flow into the ditch; this ditch was cleaned in the seasons of 1963, 1965, and 1967; at other times it was necessary to clean part of the ditch because of the cattle tromping into the ditch or causing it to sluff in. Mr. Jones claimed no irrigation from Evans Creek during the seasons of 1965 and 1966.

Mr. Jones testified that he did irrigate a part of his lands from the waste water which flows in a small channel through the westerly and south-westerly part of his land, by using a check dam in this channel and small ditches. He also claimed to have irrigated all of his land, some 16 acres, which is in pasture grass, with the Briggs-Stratton gas powered pump from Evans Creek, which he stated delivered about the same flow as the electric pump, and estimated the amount of water used as being about 20 gallons per minute and that he operated this pump whenever time permitted or on days off from work, being probably about 4 to 9 hours each time. Mr. Jones further testified that: he has no knowledge of the size and type of pump but thought it to have a $3\frac{1}{2}$ inch discharge line; the pump was set at various bases being at elevations of 5 or 6 feet to about 15 feet above water surface; some time after this Briggs-Stratton gas motor broke the block, it was sold for junk.

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Mrs. Morris M. Jones (Jennie E.), called and sworn as a witness, corroborated the testimony of Mr. Jones as to time and use of the gas powered pump during the seasons of 1963, 1964 and had no additional testimony to offer.

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Joseph H. Cornett, son-in-law of Mr. & Mrs. Jones, called and sworn as a witness, testified that: at some time prior to August of 1964, he visited with Mr. Jones who was working on the ditch and changing the water flowing onto the field; water was in the ditch and was being used for irrigation; he did not go to pump site on the bank of Evans Creek and had no knowledge of the pump, motor or exact location, but that the only way water could be put into the said ditch was by pumping from Evans Creek.

Robert M. Jones, son of Mr. & Mrs. Jones, called and sworn as a witness, testified that: he acquired the said Briggs-Stratton motor and pump which he later traded to his father; the motor had one cylinder and developed 7 horsepower or more; he had no knowledge of the size and type of pump; does not recall seeing this pump in operation from Evans Creek but saw it at his father's house after the rod had come through the block; he thought it has since been hauled off and sold for scrap.

CONSLUSIONS:

The testimony of Robert A. and Alma L. Shibler pertaining to non-use of the waters of Evans Creek by the electric motor and pump of Morris M. Jones under the water right in question does not appear to be contested by the protestants.

The question of use, or non-use, of the waters of Evans Creek under the water right in question during the period of September 1961 to April 1967, must be decided upon the use of a gasoline combustion engine and pump which is claimed to have been used for a period of about 21 days during the 1963 irrigation season and for some 3 to 7 days during the 1964 season.

The testimony of Mr. and Mrs. Shibler that there had not been a pump of any kind in operation during their stated period of non-use is in conflict with the testimony as presented by the protestants and their witnesses. Morris M. Jones testified that a Briggs-Stratton gasoline engine and pump was used for a certain time in the seasons of 1963 and 1964, such testimony being supported by the testimony of witnesses Jennie E. Jones, Harold O. Parmlee, Joseph H. Cornett and Robert M. Jones.

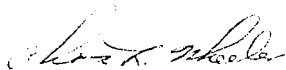
The burden of proof rests upon those proposing cancelation of the water right in question. Such proof has not been made, therefore, this proceeding should be dismissed without prejudice.

ORDER

NOW, THEREFORE it is hereby ORDERED that the proceeding now before the

State Engineer under the provisions of ORS 540.631 to 540.650 for cancelation of the water right for use of not to exceed 0.20 cubic foot per second of the waters of Evans Creek, tributary of Rogue River, for the irrigation of 16.0 acres in the southerly part of NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 4, Township 36 South, Range 4 West, W.M., with a date of priority of April 10, 1912 as evidenced by certificate of water right issued in the name of L. A. Martin and recorded at Page 2015, Volume 3, State Record of Water Right Certificates be and the same hereby is dismissed and the water right shall not be canceled.

Dated and signed at Salem, Oregon this 8th day of September, 1967.



CHRIS L. WHEELER
State Engineer