

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION OF 17 WATER )  
RIGHTS, CERTIFICATE NUMBERS 3981, 4048, 4096,) )  
4162, 4187, 4191, 4234, 4269, 4270, ) )  
4286, 4474, 4502, 4505, 4565, 4580, 10679 AND) ) PC 91-1  
10680, AND THE PARTIAL CANCELLATION OF CERTI-) )  
FICATE 4097, FOR IRRIGATION, SUPPLEMENTAL ) ) ORDER OF  
IRRIGATION, DOMESTIC, AND STOCK USE FROM DEER) )  
CREEK, SMITH CREEK, UNION CREEK, BRIDGE ) ) DISMISSAL  
CREEK, SPRING GULCH, WASTEWATERS, UNNAMED ) )  
SPRING, SPRING CREEK, TRIBUTARY TO CLEAR ) )  
CREEK, AND POWDER RIVER, BAKER COUNTY ) )

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 Watermaster, and Vern Church, Watermaster for District 8.

Findings of Fact

1. All protests against the proposed cancellation or partial cancellation of the above-enumerated water rights have been withdrawn.
2. No allegation of forfeiture was made by either affiant regarding that portion of Certificate 4097 for use of water for irrigation from the Powder River, Shaffner Creek, or Currey Spring of lands in Sections 5 and 8, T10S, R40E, to which certificate 4097 is appurtenant.

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 their entirety, with the exception of certificate 4097, which should be canceled only to the extent of 40 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  Section 22 and 40 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 40 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , and 40 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 23, Township 10 South, Range 38 East, WM.

Rescinded by  
Sp Ord Vol 47 pp 18-28  
45 311  
Sp. Ord. 45 P. 311

## Opinion

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

Although I addressed this matter 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 $\frac{1}{2}$  SE $\frac{1}{4}$ , and does so annually for 5 years but does not legally transfer the right to the SE $\frac{1}{2}$  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 nothing 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. There are two stumbling blocks which prohibit the action suggested by the USFS.

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)).

The second stumbling block is that 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.

The only element of a water right that receives somewhat different treatment is the point of diversion. Assume 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

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, 4162, 4187, 4191, 4234, 4269, 4270, 4286, 4286, 4474, 4502, 4505, 4565, 4580, 10679 and 10680 be and the same are hereby canceled in their entirety.

It is FURTHER ORDERED that that portion of Certificate 4097 for use of water from Union Creek for irrigation, domestic and stockwater use on 40 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  Section 22 and 40 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 40 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , and 40 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 23, Township 10 South, Range 38 East, WM, be and the same is hereby canceled, and that a remaining rights certificate be issued for that portion of the right NOT canceled in this proceeding.

DATED this 14th day of June, 1991.



WEISHA MIZE  
Hearings Referee

**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 date of service (date of mailing) of this Order. Judicial review is pursuant to the provisions of ORS 536.075.

*Rescinded by  
Sp. Or. Vol. 43, pg. 18*