

BEFORE THE WATER RESOURCES COMMISSION OF OREGON

IN THE MATTER OF CANCELLATION	)	PC 86-4
OF A WATER RIGHT IN THE NAME OF	)	STATEMENT, FINDINGS OF
ORLANDO GILLENWATER FOR USE OF	)	FACT, CONCLUSIONS OF
WATERS OF THOMPSON CREEK	)	LAW AND 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 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 the water under the provisions of the water right for a period of five or more successive years of nonuse.

The water right in question is for the appropriation of water from Thompson Creek under a priority date of 1903, through the Payne Ditch, for irrigation of a certain 0.8 acre in SW 1/4 NE 1/4 and 0.2 acre in NW 1/4 SE 1/4 of Section 5, Township 12 South, Range 21 East, WM. The right was allowed by the decree of the court in the Bridge Creek adjudication proceeding and is described by the certificate issued to Orlando Gillenwater, recorded at page 48206, Volume 41, State Record of Water Right Certificates.

Notice of the initiation of this proceeding was served on John Carl and Jackie Webber on July 3, 1986.

On August 25, 1986, a protest in the names of John Carl and Jackie Webber was filed by and through their attorney, Mike Kilpatrick of the law firm of Kilpatricks and Pope, Mt. Vernon, Oregon, against the proposed cancellation of the water right in question.

Pursuant to the Notice of Hearing served on the parties or their attorney of record, the matter was brought to hearing in Mitchell, Oregon, on December 9, 1986, before James W. Carver, an employee of the Water Resources Department, authorized to preside in behalf of the Director as a finder of fact.

The proponents of cancellation, Robert W. Powell and Donald Maxwell, were present at the hearing. Neither of them was represented by legal counsel. The protestants, John Carl Webber and Jackie Webber were present at the hearing and were represented by Mike Kilpatrick.

On February 18, 1987, 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.

On March 16, 1987, acting by and through their attorney, Mike Kilpatrick of the law firm of Kilpatricks and Pope, Mt. Vernon, Oregon, John Carl and Jackie Webber filed exceptions and objections to the Director's proposed order.

On June 5, 1987, the Water Resources Commission, with all members present, and on prior notice to the parties, provided opportunity for argument on the filed exceptions and objections.

On June 5, 1987, the Water Resources Commission voted to affirm the Director's proposed order.

Based on the record, the Water Resources Commission now enters the following Findings of Fact, Conclusions of Law and Order.

#### FINDINGS OF FACT

The 1.0 acre to which the water right in question is appurtenant, the relative locations of Thompson Creek, Gable Creek, an access road adjacent to the subject 1.0 acre, and the approximate location of an abandoned schoolhouse are shown on Figure 1. Figure 1 was prepared from data in the record and is not to scale.

The evidence adduced establishes that the subject 1.0 acre of land was irrigated from Thompson Creek under the provisions of the water right in question through the year of 1945.

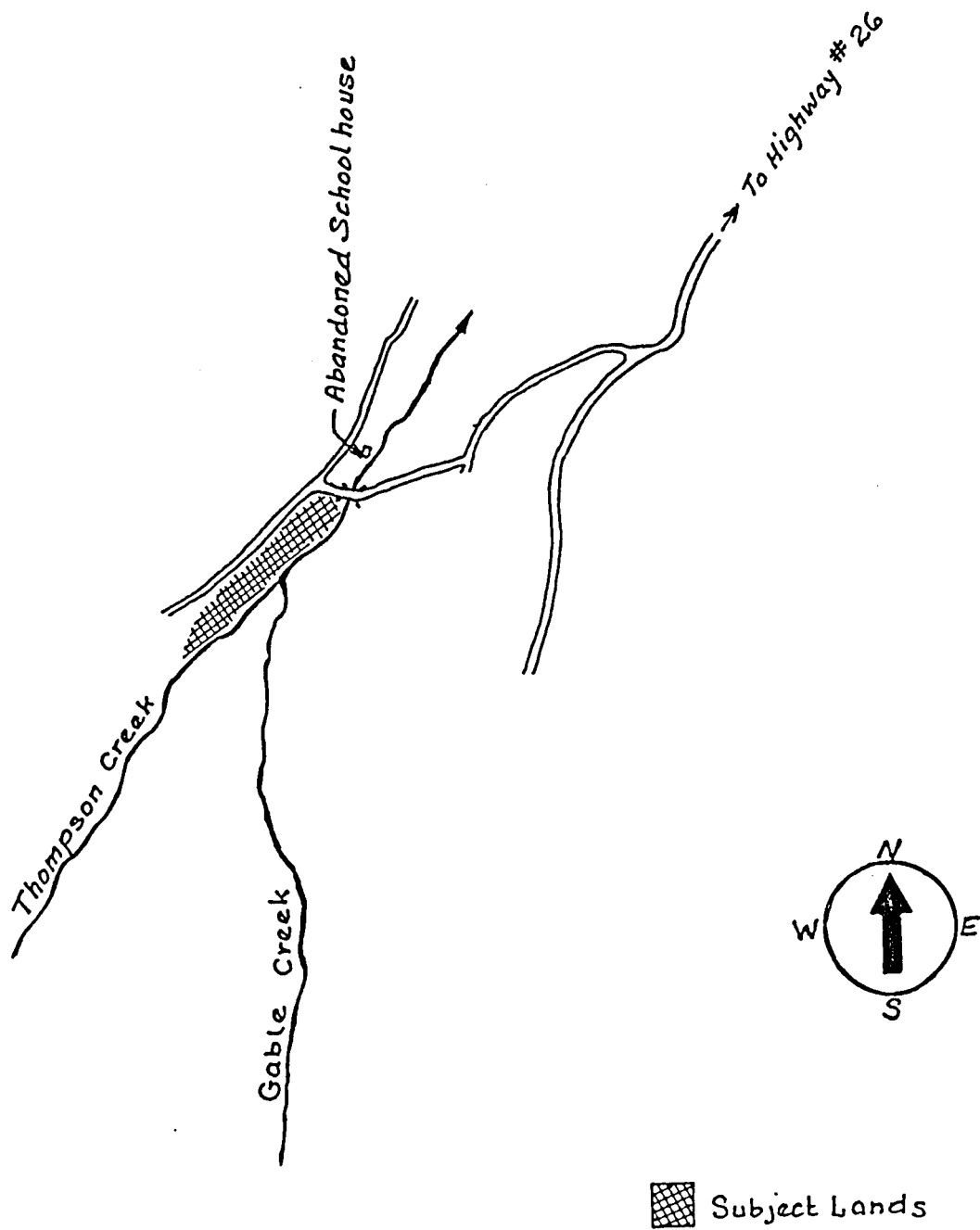
During the winter of 1945-46, the irrigation ditch used to divert water from Thompson Creek and convey it to the subject lands washed out. A dam was built downstream of the original point of diversion and a new ditch was started to convey water to the subject 1.0 acre. The project was not successful and no water from Thompson Creek was used on the subject 1.0 acre during the irrigation season of 1946.

During the winter of 1946-47, Thompson Creek carried an unusually heavy flood flow of water which deepened the channel in the reach of the stream where water had been diverted for the subject 1.0 acre.

No water was diverted from Thompson Creek for irrigation of the subject 1.0 acre of land during the period of years beginning with the year of 1946 and continuing through the year of 1960, being a period of fifteen successive years of nonuse.

Kenneth Taylor, owner of the subject lands from April of 1959 until the fall of 1982, testified that he irrigated the subject lands by means of a gasoline engine powered portable pump taking water from Gable Creek below the confluence of Thompson Creek with Gable Creek during some of the years beginning in 1961 and continuing until about the year of 1968. Mr. Taylor testified that he was gone in 1969 and did not use any water that year. He further testified that the next use of water for irrigation of the subject 1.0 acre was by means of an electrically powered pump which was installed in 1974.

The evidence establishes that no water was used for irrigation of the subject 1.0 acre under the provisions of the water right in question within the years of 1969, 1970, 1971, 1972, and 1973, being a period of five successive years of nonuse.



(Figure 1)

CONCLUSIONS OF LAW

That the question before the Water Resources Commission is one of fact concerning forfeiture, not one concerning abandonment or voluntary relinquishment of the water right, is made clear by *Withers v. Reed*, 191 OR 541 (reaffirmed by the court in *Rencken v. Young*, 300 OR 352), wherein the court states in reference to ORS 540.610(1):

"Under the statute in question failure of 'the owner of a perfected and developed water right' to use the water appropriated for a period of five successive years works a forfeiture of the right not for the benefit of any individual as in the case of an ordinary statute of limitation -- which this is not --but for the benefit of the public, to the end that the 'water right shall revert to the public and become again the subject of appropriation in the manner provided by law, . . .'"

The court also made clear in *Bausch v. Myers*, 273 OR 376 (reaffirmed by the court in *Rencken v. Young*, 300 Or 352), that the forfeiture takes place with the occurrence of five successive years of nonuse and not at some later time when proceedings are brought under the provisions of ORS 540.610 to 540.650.

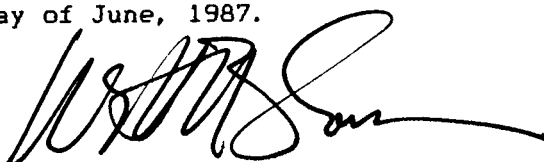
Either of the above stated periods of nonuse, by itself, would work a forfeiture of the water right. Therefore, the water right in question should be canceled pursuant to the provisions of ORS 540.641(2).

ORDER

NOW, THEREFORE, it is ORDERED that the water right in question, as described by the certificate issued to Orlando Gillenwater and recorded at page 48206, Volume 41, State Record of Water Right Certificates, be and the same hereby is canceled.

It is FURTHER ORDERED that the said certificate of water right be canceled.

Dated at Salem, Oregon this 19 day of June, 1987.



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 provisions of ORS 536.075 and 183.482.