

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF THE PROPOSED PARTIAL) PC91-2
CANCELLATION OF WATER RIGHT CERTIFICATE)
29364 IN THE NAME OF HAROLD BIDDLE FOR) FINAL ORDER
USE OF WATER FROM EAST BRANCH OF LONG)
BRANCH AND EAST FORK OF EAST BRANCH AND)
RESERVOIR, JACKSON COUNTY)

STATEMENT

This proceeding was initiated by the Water Resources Department under the provisions of ORS 540.610 to 540.650 for the proposed partial cancellation of a certain water right, based on information furnished to the Director in affidavits filed by Charles Henry and Phillip Lassen alleging that the right in question had been forfeited by failure to make beneficial use of water under the provisions of the water right for a period of five or more successive years of nonuse, between April, 1985 through March, 1991 and August, 1982 through March, 1991, respectively.

The water right in question was issued to Harold Biddle and recorded at Volume 21, page 29364, State Record of Water Right Certificates. The entirety of Certificate 29364 is for irrigation of 0.8 acre in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, 1.8 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7 and 4.8 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 34 South, Range 1 West, WM.

Only that portion of the right for irrigation of 2.7 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7 was alleged to have been forfeited for nonuse for a period of five or more consecutive years, between April, 1985 through March, 1991. That portion of the right for irrigation of 0.8 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 12, 1.8 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 7 and the remaining 2.1 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 7 was not in question in this proceeding.

Notice of Proposed Cancellation in this matter was sent to Kriss Fischer, the owner of record on May 13, 1991. The Notice allowed 60 days from the date of mailing in which to file a protest against the proposed cancellation or to rebut the presumption of forfeiture by demonstration of one or more of the grounds for rebuttal set out in ORS 540.610(2)(a-g).

No rebuttal or protest having been filed within the time allowed, an Order of Cancellation was issued on July 15, 1991.

On July 16, protestant Kriss Fischer informed the Hearings Referee that a protest had been sent on June 24, 1991, and provided a copy of said protest to the Referee. Protestant was directed to show cause why the Final Order should be withdrawn and the protest and filing fee accepted after the filing deadline.

Protestant showed good cause sufficient to warrant withdrawal of the Final Order previously issued on July 15, and to set the matter for hearing.

Pursuant to the Notice of Hearing served on the protestant and proponents of cancellation on July 19, 1991, the matter was set for hearing on August 22, 1991. A Statement of Parties Rights was attached to the Hearing Notice.

Proponents of cancellation Chuck Henry and Phillip Lassen appeared at the hearing without legal counsel. Protestant Kriss Fischer was assisted by Kelly Wik. Protestant offered Rick Barker and Judy Steadman as witnesses. Watermaster Larry Mentier was also present.

A Proposed Order was issued and served on the parties on September 24, 1991. Exceptions to the Proposed Order were filed by proponent Henry on October 15, 1991. Mr. Henry presented additional argument on his exceptions to the Director by telephone on November 22, 1991.

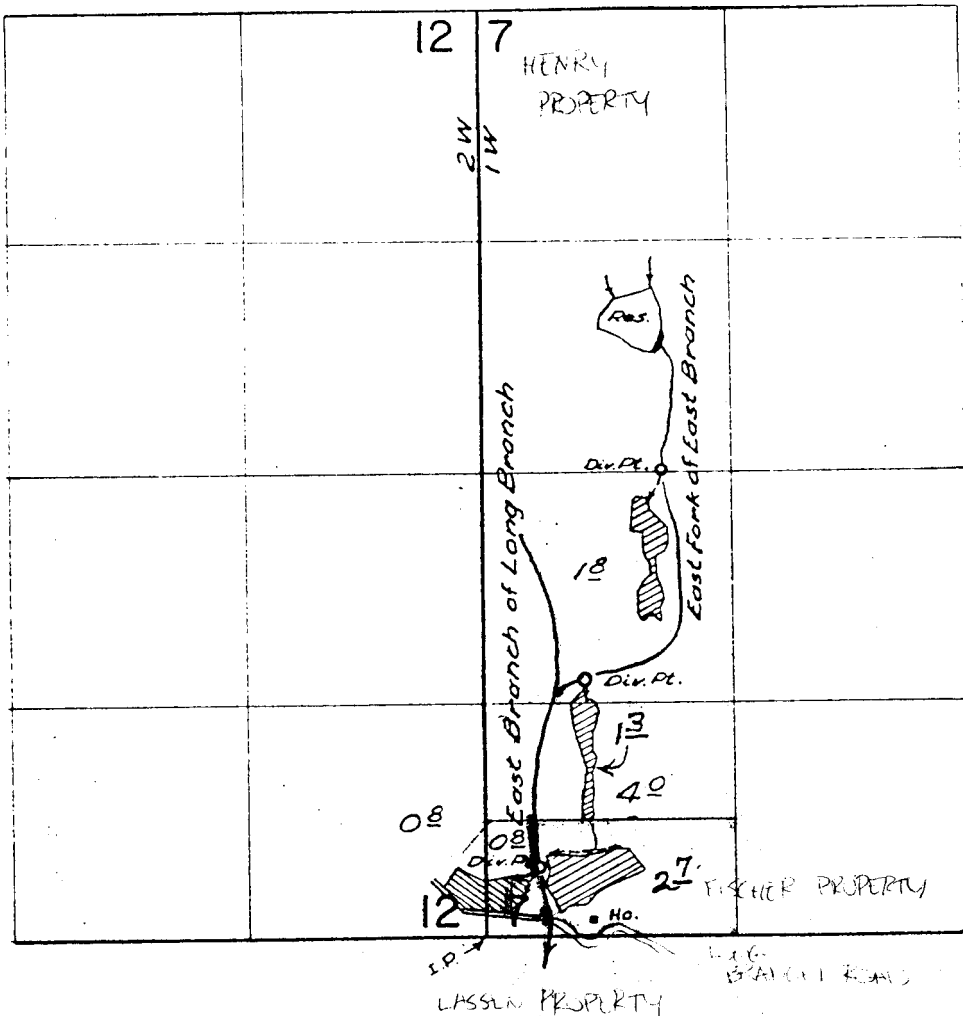
DETERMINATION ON EXCEPTIONS

Overall, I do not find that the Hearings Referee incorrectly analyzed the evidentiary record in making the Findings of Fact in the Proposed Order. I find no evidence or argument in Mr. Henry's exceptions that would support changing the Findings of Fact to which exceptions were taken or the final conclusion set out in the Proposed Order. Following oral argument, I met with the Referee and directed the drafting of discussion on the exceptions per my determination. The discussion of the exceptions set out in the Opinion portion of this Final Order is an accurate description of my determination.

FINDINGS OF FACT

1. All facts set forth in the STATEMENT are incorporated as Findings.
2. The lands in question, lands of proponent Henry, the East Fork East Branch, East Branch, and other pertinent features are shown on Figure 1, infra, which is a copy of the final proof map associated with Certificate 29364.
3. The East Fork of the East Branch joins the East Branch of Long Branch in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, north of the lands in question. The waters of these two streams are commingled by the time the water reaches the diversion point on the NW corner of the lands in question.
4. Rick Barker, the owner of the property from March, 1985, to February, 1988, irrigated the lands in question on a regular weekly basis in 1985 and 1986. Irrigation in 1987 was somewhat less than in the previous two years because witness was planning to sell property. In the early part of the irrigation season, water was

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FINAL PROOF SURVEY UNDER

Application No. 22413 Permit No. 17705
R-22412 R879
 IN NAME OF

Surveyed 14 APRIL 1960, by McBish

diverted from East Branch of Long Branch at the northwest corner of the Fischer property by means of dams, and flooded out across the property. Later, when the flows in the East Branch dwindled, water was released from the reservoir on proponent Henry's land into the East Fork of the East Branch and added to the East Branch of Long Branch, then diverted at the diversion point at the northwest corner of the Fischer property and flooded across the property from there by flood irrigation.

5. Some runoff from irrigation of the 1.3 acres on the Henry property out of the East Fork of East Branch also reaches protestant's property, either as overland flow or by subirrigation.

6. Protestant purchased the property from Richard Barker in February, 1988. The property was sold on approximately July 30, 1991. Protestant testified that she lived on the property only from February to September, 1988, and between December, 1989 through July, 1991, and that the property was rented out from July, 1989, until October, 1989. Protestant is not aware of what use renters made of water. An illegal reservoir on proponent Henry's property may have decreased water available to the Fischer property by impeding the flow of East Fork of East Branch into the East Branch of Long Branch, but no irrigation was attempted in 1990 and 1991.

7. Proponent Henry asserted in his affidavit that no water had been used on the lands in question since 1985, that being the time when he purchased the lands adjoining and to the north of protestant's property. The deed from the Jackson County Recorder for the Henry property shows that the Henry's purchased the property in September 1986.

8. Proponent Henry demonstrated in his questioning of Mr. Barker that he was aware that Mr. Barker had been irrigating the lands in question between 1985 and 1987.

CONCLUSIONS OF LAW

1. Proponents failed to meet their burden to prove by clear and convincing evidence that the portion of the water right in question was forfeited by 5 or more successive years of nonuse.

2. The portion of the water right evidenced by Certificate 29364 for irrigation of 2.7 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 34 South, Range 1 West, WM, has not been forfeited.

OPINION

Natural subirrigation or surface flow not occurring as a result of deliberate diversion and appropriation is not irrigation. Irrigation requires deliberate and intentional diversion and application of water to a beneficial purpose. Production of pasturage for animals is a beneficial purpose.

Mr. Barker was convincing in his testimony that irrigation had taken place and that efforts were made to irrigate the entire acreage during 1985, 1986 and to some degree in 1987. The discrepancies in dates between Mr. Henry's affidavit and the title for the Henry property, and his acknowledgment of Mr. Barker's irrigation efforts gave additional credence to Mr. Barker's testimony and detracted from that of Mr. Henry.

Mr. Henry argues that under the certificate, those portions of the lands in question may only take water from the middle point of diversion out of East Fork East Branch, with some portion of the water in that stream coming from the reservoir on the Henry property. Based on this premise, the primary thrust in his exceptions is that the previous owner, Mr. Barker, used water from the wrong point of diversion, or took water from the East Branch of Long Branch rather than the East Fork of the East Branch, and that therefore, the right was forfeited.

At a point between the middle and southerly diversion points shown on the final proof survey map, the East Fork East Branch joins the East Branch Long Branch. From this juncture, the East Branch Long Branch contains water from both streams. Richard Barker, the previous owner of the lands in question, testified to taking water both at this southerly diversion in the early part of the year, and by releasing water later in the season from the reservoir on the East Fork East Branch. This released water would either be used by Mr. Barker to irrigate a portion of the Henry property, allowing the runoff to reach the lands in question either by surface or sub-surface flow, or, if water from the East Fork East Branch were not diverted at the middle point of diversion, it would flow in a westerly direction and join with the East Branch Long Branch as described above, to be taken at the southerly point of diversion.

Certificate 29364 lists the 2.7 acres in question as receiving water from the East Fork East Branch. The Certificate does **not** say that the water must be taken from any particular point of diversion. While diversion would logically have to be from either the north or middle point of diversion to contain only water from East Fork East Branch, waters from East Fork East Branch are present at the southerly point of diversion due to the physical configuration and joining of these two streams.

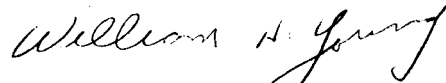
Even if water for irrigation of the 2.7 acres was required by the Certificate to be diverted from only the northern or middle points of diversion, which I do not find it to require, diversion of water from the southerly point of diversion, and irrigation of the lands in question with that water, does not mean that the portion of the right in question has been forfeited. First, the lands have only

undergone four, not five, years of nonuse. Secondly, diversion and use of water from the correct source (water from East Fork East Branch, commingled with East Branch waters) but at some point other than the original, established point of diversion, does not constitute a failure to use the water appropriated within the meaning of ORS 540.610(1). A change in the point of diversion without the approval of the Department or Director is unlawful and could be enjoined but would not, if made, result in forfeiture of the water right. See In the Matter of Cancellation of a Water Right in the Names of Clarence H. Oxman and Frank C. Oxman to Use the Waters of Willow Creek, Special Order Book Volume 32, page 544-552 (12/6/79); In the Matter of Cancellation on Grounds of Abandonment of a Water Right from Clapboard Gulch, Special Order Book Volume 9, page 363 (4/28/58).

FINAL ORDER

NOW, THEREFORE, it is ORDERED that the proceeding for cancellation of that portion of the water right evidenced by Certificate 29364 for irrigation of 2.7 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 34 South, Range 1 West, WM, is DISMISSED.

DATED this 27 day of November, 1991.



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