

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

YAMHILL COUNTY

IN THE MATTER OF CANCELLATION OF A)
WATER RIGHT IN THE NAME OF R. L. WALKER)
FOR USE OF WATERS OF AN UNNAMED STREAM)
AND STORED WATER)

PC 80-17
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER CANCELING

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

The water rights in questions are as follows:

(a) For the appropriation of not to exceed 0.06 cubic foot per second of water from an unnamed stream under a priority date of May 15, 1939, for irrigation of a certain 3.2 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 1.2 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2, Township 3 South, Range 3 West, WM, as described by the certificate issued to R. L. Walker and recorded at page 22261, Volume 16, State Record of Water Right Certificates.

(b) For the appropriation of not to exceed 1.26 cubic feet per second of water from an unnamed creek and reservoir, under a priority date of December 21, 1954, for irrigation of a certain 101.3 acres of land, being primary irrigation of 10.4 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 33.2 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$, 1.4 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$, 0.4 acre in NE $\frac{1}{4}$ SW $\frac{1}{4}$, 32.4 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 7.7 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 2; 2.3 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$, 3.6 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$, 3.6 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 1.9 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 3, Township 3 South, Range 3 West, WM; and supplemental irrigation of 3.2 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 1.2 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 2, all being a portion of the right described by the certificate issued to R. L. Walker and recorded at page 29000, Volume 21, State Record of Water Right Certificates.

Notice dated February 27, 1981 of initiation of the proceeding for cancellation of the water rights in question was given pursuant to ORS 540.631, to Bailey Nurseries, Incorporated, owner of record of the real property to which the water rights are appurtenant.

On April 27, 1981 a protest against the proposed cancellation of the water rights in question was filed in the name of Bailey Nurseries, Inc., by and through Walter R. Gowell of the firm of Haugeberg and Rueter, P.C., Attorneys at Law, McMinnville, Oregon.

Pursuant to the Director's Notice of Hearing dated July 13, 1981, the matter was brought to hearing before James W. Carver, Jr., an employee of the Water Resources Department, authorized to preside in behalf of the Director, on October 6, 1981 in McMinnville, Oregon.

Proponents of cancellation were represented in the hearing by William J. Keys, Attorney at Law, Portland, Oregon. Protestant was represented in the hearing by Walter R. Gowell, Attorney at Law, McMinnville, Oregon.

At the conclusion of the hearing, Mr. Gowell requested time in which to submit a brief on the matter and was allowed until October 27, 1981 to file the brief. Mr. Keys was allowed until November 17, 1981 to file a reply brief.

On October 23, 1981, Mr. Gowell advised the hearings officer, by telephone, that no brief would be filed by protestant and that he would so advise proponents.

Based on the record, the Water Resources Director makes the following findings of fact, ultimate finding of fact, conclusions of law and order.

FINDINGS OF FACT

The testimony and evidence adduced in the hearing clearly established that no water was used from the unnamed stream or stored water in the reservoir for irrigation of any of the lands described above within the period of years of 1973 through 1978, inclusive.

ULTIMATE FINDING OF FACT

No water was appropriated to beneficial use under the provisions of either of the water rights in question within a period of five and more successive years of nonuse.

CONCLUSIONS OF LAW

That the question before the Water Resources Director is one of fact concerning forfeiture of the water right, not concerning abandonment, or voluntary relinquishment, of the water right, is made clear by Withers v. Reed, 194 Or 541 (p 558) 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 limitations -- 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 further commented in Bausch v. Myers, 273 Or 376:

"Urbanites might not know that the water rights are conclusively presumed abandoned for failure to use for five successive years. This law, however, is common knowledge among all in Oregon who are dependent upon an adequate supply of water for irrigation. We believe it is equally well known that five years of nonuse is a conclusive abandonment whether

proceedings before the State Engineer are brought immediately after the five years of nonuse or 10 or 15 years later ...".

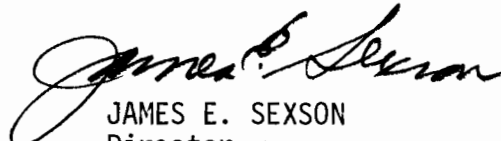
Water appropriated under the provisions of the water rights in question was not used for irrigation of the subject lands for a period of five and more successive years of nonuse, thereby resulting in a forfeiture of said water rights. Therefore, the said water rights should be canceled pursuant to the provisions of ORS 540.610 to 540.650.

ORDER

NOW, THEREFORE, it is ORDERED that the water rights in question, as described by the certificates issued to R. L. Walker and recorded at page 22261, Volume 16, and at page 29000, Volume 21, State Record of Water Right Certificates, be and the same hereby are canceled.

It is FURTHER ORDERED that said certificates of water right be canceled and in lieu of the certificate recorded at page 29000, Volume 21, State Record of Water Right Certificates, a new certificate be issued to Bailey Nurseries, Inc., to describe the balance of the water right NOT involved in this proceeding.

Dated at Salem, Oregon this 13th day of November, 1981.


JAMES E. SEXSON
Director

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within sixty days from the service of this Order. Judicial review is pursuant to the provisions of ORS 183.482.