

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION OF A) PC 88-14
WATER RIGHT IN THE NAME OF HENRY)
PEARSON FOR USE OF WATER FROM THE) STATEMENT, FINDINGS OF FACT,
NORTH POWDER RIVER, TRIBUTARY TO) CONCLUSIONS OF LAW, OPINION &
POWDER RIVER, UNION COUNTY, OR.) FINAL ORDER

STATEMENT

This proceeding was initiated by the Water Resources Director under the provisions of ORS 540.610 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 water under the provisions of the water right for a period of five or more successive years of nonuse, from October, 1982 to April 28, 1988.

The water right proposed to be cancelled represents a portion of the right described by the Certificate issued to Henry Pearson, recorded at Volume 2, page 1508, State Record of Water Right Certificates.

The entire right is for appropriation of water from the North Powder River under priorities of 1893 for irrigation of 35 acres and 1900 for irrigation of 160 acres in Section 28, Township 6 South, Range 39 East, WM. The lands to which the portion of the right in question is appurtenant are:

37 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ (TL 3700)
16 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ (TL 3204)

The balance of the right evidenced by Certificate 1508 is not in question in this proceeding.

Written notice of the proposed cancellation of the irrigation right was served on the owners of record and/or occupants of the lands in question. Notice was given on August 17, 1988, by certified mail to:

Earl and Edna Tucker
c/o J.C. Williams
PO Box 981
La Grande, OR 97850
(TL 3700)

J.C. Williams
PO Box 981
La Grande, OR 97850

On October 14, 1988, a protest in the names of J.C. Williams estate and John Williams, son of the decedent, was filed with the Department on behalf of those named by Jesse Himmelsbach, Attorney at Law, Baker, Oregon.

No other protest against the proposed cancellation was submitted within the statutory 60 day period from service of the notice of initiation of these proceedings, nor subsequent thereto.

Pursuant to the Amended Notice of Hearing served on the parties on January 19, 1989, the matter was brought to hearing in La Grande, Oregon on February 22, 1989, before Weisha Mize, an employee of the Water Resources Department, authorized to preside on behalf of the Director as a finder of fact. The notice set out the pertinent information regarding the right proposed to be cancelled in the manner set out in paragraphs 2 and 3 of the STATEMENT, above. The hearing involved the proposed partial cancellation of Certificate 1508 and the proposed cancellation, in whole or in part, of Certificates 1464, 1465, 1467 and 1503, the protestants and proponents of cancellation being the same parties involved in each proposed cancellation.

Proponents of cancellation John Wilson and William Lewis appeared at the hearing and represented themselves, without benefit of legal counsel. Protestants J.C. Williams' Estate and John Williams appeared at the hearing and were represented by Jesse Himmelsbach, Attorney at Law.

The Director's Proposed Order was served on the parties on April 14, 1989. On May 15, 1989, counsel for protestants filed Exceptions to portions of the Director's Proposed Order. The primary argument presented was that the Department had the obligation to prove the non-existence of the Pearson and Pearson-Town ditches, that it had not done so, and that the ditches therefore still existed and the irrigation right for the lands here in question had not been forfeited. Proponents filed responsive argument on July 14, 1989.

At their regular meeting held on August 17, 1989 in Bend, Oregon, the Commission heard oral argument by protestants' counsel on the Exceptions. The Commission voted unanimously to make certain amendments to Findings of Fact #8 and paragraph 2 of #9 and to delete Finding #6 and Ultimate Finding of Fact #2 the proposed Order, and to adopt the proposed order as amended as the Commission's Final Order in this matter. The amendments having been made, the Water Resources Commission now enters the following:

FINDINGS OF FACT

1. The lands in question, the Sunnyslope and Davis-Kelsey ditches, the North Powder River Road, aka Anthony Lakes Road, the ONRC railroad tracks, and portions of the lands owned by proponents are shown on Figure 1. Figure 1 is a photocopy of WRD Exhibit 6, which shows appurtenant certificate numbers and names indicating property ownership, with the entirety of the Protestant's property outlined in yellow, and the portion to which the water right here in question is appurtenant colored solidly in yellow. Proponent Lewis' property is outlined in pink, and Proponent Wilson's property is outlined in orange. Added to and also indicated on Figure 1 are arrows showing the direction the Sunnyslope and Davis-Kelsey Ditches would flow if unimpeded, the dam first installed in 1978 on the Sunnyslope ditch, and the Wolf Creek Reservoir pipeline, in blue, as established by testimony at the hearing. The Sunnyslope and Davis-Kelsey Ditches follow the contours of the land.
2. Lands belonging to the Protestant lying to the north and west of the North Powder River Road are higher in elevation than those lying to the south and east (Tr. 196, 198).
3. The North Powder River adjudication on which the certificate in question is based authorized appropriation through the Sunnyslope, Davis-Kelsey, Pearson and Pearson-Town ditches. The Pearson and Pearson-Town ditches are no longer in existence, and have not been in existence for at least 13 years (Tr. 46, 48)
4. The Davis-Kelsey ditch ends on Proponent Lewis' land and has not carried water beyond the SW $\frac{1}{4}$ of Section 20 since 1978. Any tailwater stops at the dam, runs out of the ditch into a natural draw and joins the waters in the Sunnyslope ditch at approximately the quarter-line of the SW $\frac{1}{4}$ of Section 20 (Tr. 157-8)
5. A dam was installed on the Sunnyslope ditch in 1978. It is unclear whether the dam was removed and replaced between 1979 and 1981. The dam was in existence from 1981 to 1988. The Sunnyslope ditch was filled in for some distance on either side of the dam on both Protestant's and Proponent Wilson's lands in May of 1983.
6. The Sunnyslope ditch was reopened at the Protestant's property, and water delivered at the headgate by the Watermaster, in 1988, and some portion of Protestant's lands were irrigated with North Powder River water through the Sunnyslope ditch in late April, 1988.
7. Tax Lot 3203 and that portion of Tax Lot 3700 lying to the north of the North Powder River Road have been irrigated with water from the Wolf Creek Reservoir, conveyed through a pipeline, since 1978 (Tr. 180, 185, 187, 195).

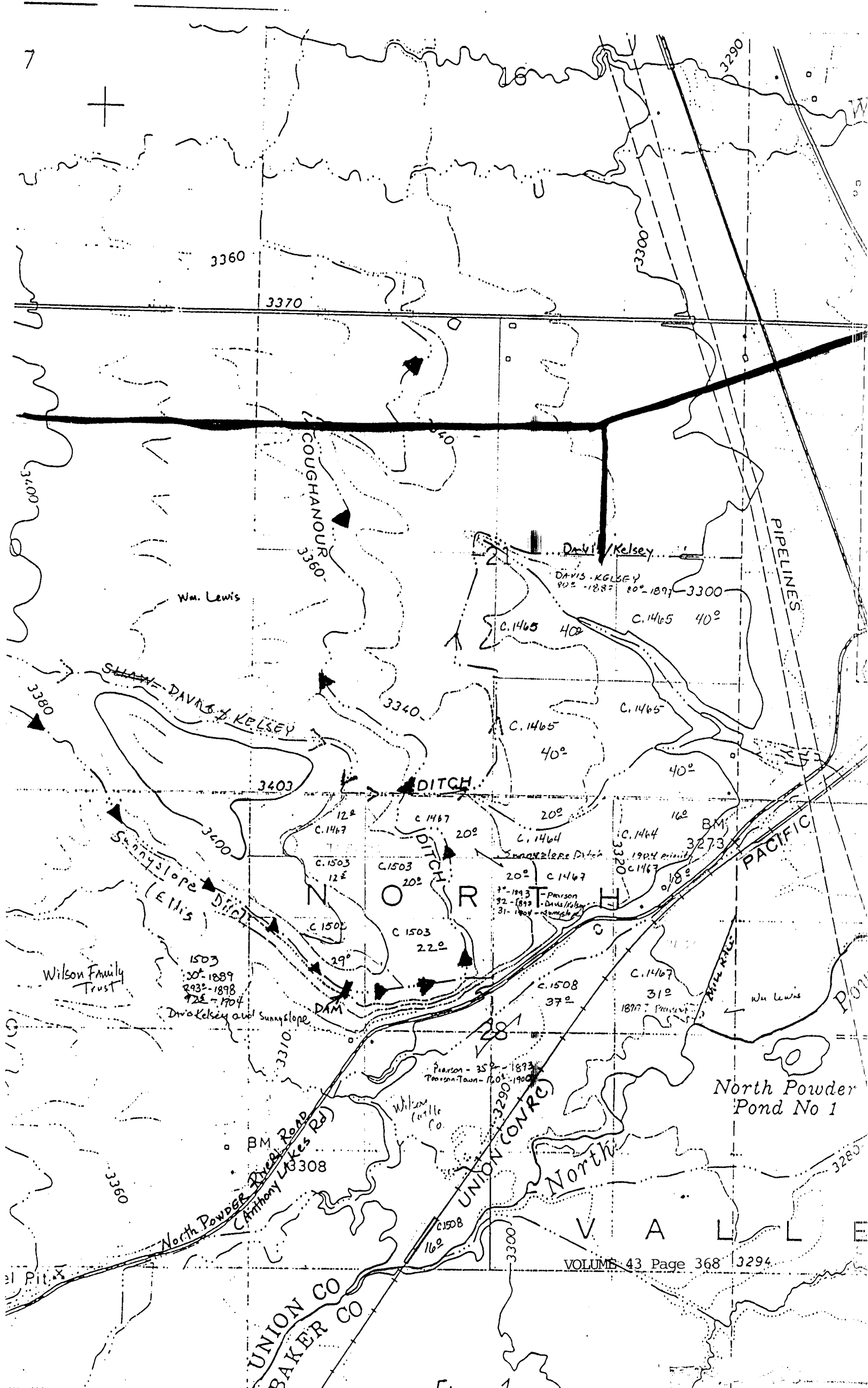


Figure 1

8. Protestant could not recall if the dam was in place in 1979, and testified that he "had no idea, no knowledge" of the dam being there in 1980. He testified that his father, J.C. Williams, did not witness any of the irrigation. He further testified that protestants took no water from the Sunnyslope in 1983, and that he had no knowledge of any irrigation of the lands lying north of the Powder River Road out of the Davis Kelsey ditch, as those lands were irrigated out of Wolf Creek Reservoir (Tr. 184-186).

Any irrigation of lands that lie to the south of the Powder River Road was done with runoff from the Sunnyslope ditch after its use on Proponent Wilson's property (Tr. 197).

ULTIMATE FINDING OF FACT

There has been no irrigation of the lands in question from the North Powder River during the period of years 1981 to 1987, inclusive.

CONCLUSION OF LAW

The right in question as evidenced by that portion of Certificate 1508 here in question has been forfeited by nonuse for a period of five or more successive years of nonuse.

OPINION

The proponents in a cancellation proceeding have the burden to show by reliable, substantive and probative evidence that the right sought to be canceled has been lost by five successive years of nonuse.

Proponents were quite familiar with the ditches involved here and with the ability or non-ability of water to flow down those ditches to a point where it could be appropriated by Protestants for use on the lands in question. Proponents credibly demonstrated that no water was available to the Protestants for appropriation through the Davis-Kelsey and Sunnyslope ditches since 1981, until the Sunnyslope was reopened in 1988.

Protestants' Exhibit C, consisting of letters written in 1982 and 1984 by J.C. Williams (now deceased) from his residence in Arizona are not persuasive as to the question of fact of use of the water rights at issue. The expectations or beliefs of the author as to use of water from the Sunnyslope ditch were not substantially supported by Protestant's testimony, and were contradicted by substantial testimony of the Proponents.


Protestant further testified that he had only managed the lands to the north of the Powder River Road until 1980, and that after that date, he had no responsibility for management or irrigation of those lands. Management of lands to the north of the Powder River Road was taken by his sister, Sallie Williams, who leased the lands out and likewise had no personal knowledge of irrigation of those lands.

ORDER

NOW, THEREFORE, it is hereby ORDERED that the right evidenced by Certificate 1508 for irrigation use on those lands described by paragraph 3, supra, be and the same is hereby cancelled pursuant to ORS 540.610 to 540.650.

It is FURTHER ORDERED that said Certificate be cancelled and that a new Certificate be issued to describe the balance of the water right not cancelled by this proceeding.

DATED this **3** day of September, 1989



WILLIAM R. BLOSSER
Chairman

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 536.073 and 183.482.