

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF THE PROPOSED)
CANCELLATION OF WATER RIGHT)
CERTIFICATES 40594, 40595 AND)
44996 IN THE NAME OF PATRICK)
OGLE FOR STORAGE AND USE OF)
WATER FROM UNNAMED DRAINAGEWAY,)
TRIBUTARY TO THE LUCKIAMUTE)
RIVER, AND THE LUCKIAMUTE)
RIVER, POLK COUNTY, OREGON)

PC 91-9
RULING ON REBUTTAL AND
DISMISSAL OF CONTESTED
CASE HEARING ON PROPOSED
CANCELLATION OF CERTAIN
WATER RIGHTS

STATEMENT

Affidavits filed with the Department on October 21, 1991 and refiled on December 4, 1991 by Martyn and Dorothy Boehm, 8590 Parker Road, Independence, OR, 97351 and Richard Nibler, 8610 Parker Road, Independence, OR 97351, together with a letter dated December 10, 1991, contained allegations that the water rights described herein had been forfeited by failure to make beneficial use of the water under the terms of the rights for a period of five or more successive years, from June, 1979 through October, 1991. The affiants further asserted that they believed "the presumption of forfeiture for five or more years of nonuse can and will not be rebutted by the holder(s) of the water right because the holder(s) of the right in question cannot show" that any of the grounds for rebutting the presumption of forfeiture as set out in ORS 540.610(2) and OAR 690-17-800 applied.

Based on the information of nonuse before the Department, notice of the proposed cancellation was sent by certified mail on January 2, 1992 to the following:

J. Hofert Company
5955 South Western Ave.
Los Angeles, CA 90047
(Owner, Tax Lots 300, 900)

William & Christie Fraser
8025 Parker Road
Independence, OR 97351
(Occupant)

A protest against the proposed cancellations was filed by George Jennings, Attorney at Law, on behalf of the J. Hofert Company and received in the offices of the Water Resources Department on February 24, 1992. The necessary filing fee was subsequently received on March 2, 1992.

Notice of Contested Case Hearing in this matter was served on the proponents and protestant's counsel on March 18, 1992. On motion of counsel for protestant, the hearing was subsequently continued by Order issued June 25, 1992.

On July 2, 1992, an amended protest against the proposed cancellation was filed. The amended protest included rebuttal on the grounds of economic hardship of the previous property owner Patrick Ogle between 1979 and 1986, and of Wendell Sperling, a subsequent lessee and principle operator of the property between

1987 and 1989. The information regarding economic hardship was not known or available to protestant J. Hofert Co. or its counsel at the time the original protest was filed.

REBUTTAL

For rebuttal on grounds of economic hardship as to Patrick Ogle, owner of the lands in question between the period 1979-1986, protestant provided information regarding Mr. Ogle's farming efforts and his substantial financial difficulties during that time. In each of these years, Patrick Ogle had sizeable farm income losses ranging from a low of \$29,426 (1980) to a high of \$168,600 (1983). Mr. Ogle was attempting to raise various types of grass and vegetable seeds, crops which require irrigation. Mr. Ogle was unable to obtain the financing necessary to properly irrigate or to do any irrigation.

In 1982, 1983, 1984 and 1985, the unpaid interest on Mr. Ogle's farm loans was added to the loans and the loans rewritten by the lenders each year. In late 1985, a letter to one such creditor, U.S. National Bank, indicated that Mr. Ogle was "winding up" the financial aspects of his farming operations. A letter from the U.S. National Bank to Mr. Ogle in May of 1986 stated that he would either need to develop a more acceptable proposal for repayment of his outstanding debt of \$141,176 or the bank would move to legal avenues to collect.

A letter from another creditor, Farm Credit Services (FCS), to Mr. Ogle in June of 1986 noted that he had a pending deficiency judgment with US Bank, which indicates property had already been attached and sold and the funds therefrom were insufficient to satisfy the US Bank debt. The letter further described FCS's understanding that Mr. Ogle would be filing Chapter 7 bankruptcy in the fourth quarter of 1986 and that immediately thereafter, a deed-in-lieu of foreclosure for the lands in question would be transferred to FCS in satisfaction of his debt.

Liquidation of all farming equipment occurred in 1986, the proceeds of which were then paid to US Bank. Deeds-in-lieu of foreclosure were delivered to Farmer's Home Administration in 1986 and the Federal Land Bank of Spokane (for FCS) in February, 1987. Satisfaction of the debt to US Bank relieved Mr. Ogle of the necessity of filing for bankruptcy at that time. He has, however, since filed for bankruptcy on January 7, 1992.

Following Mr. Ogle's loss of the property, Wendell Sperling was the principle operator during the period 1987-89. Mr. Sperling filed for Chapter 12 bankruptcy on December 17, 1986, which bankruptcy was ultimately discharged in August, 1991.

Ownership of the property in question was transferred from the Farm Credit Bank of Spokane (successor by merger to the Federal Land Bank of Spokane) to the J. Hofert Co. on November 30, 1988. Wendell Sperling continued his economically unsuccessful operation of the property during 1989. The J. Hofert Co. began farming the

property in 1990. Ownership has again changed and the property was sold on June 1, 1992 to Holiday Tree Farms of Corvallis, Oregon.

RULING ON REBUTTAL

Oregon water law (ORS 540.610 to 540.650), as further defined by the Oregon Supreme Court, provides that if any portion of a water right undergoes five or more successive years of nonuse, that nonuse creates a rebuttable presumption of forfeiture. Use made after a period of five successive years of nonuse will not make the forfeited right valid again.

However, the statutory and administrative rule grounds for rebuttal of the presumption of forfeiture operate as an excuse for nonuse. In other words, nonuse may have occurred, but if satisfactory demonstration of the existence of one of the statutory or rule "excuses" is made, the nonuse will be excused for the period of time covered by the excuse.

Properly, rebuttal is made within the 60-day period following receipt of a Notice of Proposed Cancellation. However, it would be contrary to the intent of the law providing these grounds for rebuttal to deny a water right holder an opportunity to provide such rebuttal information after this 60-day period. This is particularly true when, as in this case, ownership of the property had changed and the existence of grounds for rebuttal was unknown and only later discovered, long after the 60-day period for filing had passed.

Economic hardship as defined by OAR 690-17-800(3) between the period 1979 through 1989 has been satisfactorily demonstrated by protestant. The presumption of forfeiture for nonuse during that period of time has been rebutted by demonstration of economic hardship.

ORDER OF DISMISSAL

NOW, THEREFORE, economic hardship during the period 1979 through 1989 having been established, the contested case proceeding for proposed cancellation of water right Certificates 40594, 40595 and 44996 is hereby DISMISSED and no further proceedings shall be had.

Signed and placed in the United States mail this 12th day of August, 1992.



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.