

BEFORE THE STATE ENGINEER OF OREGON

Umatilla County

IN THE MATTER OF THE)
CANCELANON OF A WATER)
RIGHT IN THE NAME OF)
B. F. BREWER)
- - - - -)

FINDINGS, CONCLUSIONS
AND ORDER
CANCELING WATER RIGHT

On May 14, 1962, affidavits of Casper Hohn and Mabel Knosp, alleging that a certain water right had not been used for the past five successive years and requesting action under the provisions of ORS 540.610 to 540.650 to determine whether or not said rights has been forfeited, were filed in the office of the State Engineer.

On May 29, 1962, notice was given to Key Brothers, Inc., owners and occupants of the property, of the State Engineer's intention to cancel the water right on grounds of abandonment. The right in question is for the use of the waters of Dry Creek for the irrigation of, among other lands, 9.2 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 1.5 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and 9 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 5, with a date of priority of 1891, and 19 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and 5 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, said Section 5, with a date of priority of 1900, all of these lands being in Township 5 North, Range 35 East, W. M. Said right is a part of the right established in the name of B. F. Brewer by decree of the Circuit Court for Umatilla County, entered May 17, 1924, In the Matter of the Determination of the Relative Rights of the Various Claimants to the Use of the Waters of Pine Creek and its Tributaries, and is evidenced by certificate recorded at page 5513, Volume 6, State Record of Water Right Certificates.

That part of the water right evidenced by said certificate for the use of the waters of Dry Creek for the irrigation of the following lands, with a date of priority of 1891,

1.3 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$
5.3 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$
2.2 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$
8.5 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$
Section 4,

4 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$
Section 9,
Township 5 North,
Range 35 East, W.M.

is not in question.

On July 18, 1962, Key Brothers, Inc. and Mrs. Nellie M. Murray filed with the State Engineer a protest against the proposed cancelation of said water right.

In accordance with due notice given, a hearing was held before Chris L. Wheeler, State Engineer, in the City Hall, Milton-Freewater, Oregon, on August 30, 1962, commencing at 9:00 a.m. The protestant appeared represented by his Attorney, Henry L. Hess of Pendleton, Oregon, and Mabel Knosp and Casper Hohn, interested witnesses, appeared accompanied by their Attorney, William Galbreath, Milton-Freewater, Oregon.

At the commencement of the hearing, it was stipulated by the protestant that the water had not been applied to beneficial use by irrigation of the described land for more than the past five years. Counsel for the protestants asserted that the right must be reaffirmed since those interested failed to file a timely protest on the application for change in point of diversion for use of the water involved in these proceedings and, therefore, the abandonment, if such had occurred, could not now be considered.

Careful consideration has been given to the proposition and counsel's supporting brief. Cases cited and the essence of counsel's argument refer to instances wherein the subsequent point could properly have been considered in the initial action. In this proceeding this is not the case. ORS 540.510, governing changes in points of diversion, place of use or character of use, and the Courts have clearly set forth the law that the owner of a perfected and developed right may make such changes upon compliance with the statutory procedure if such change does not injure subsequent rights. The determination of injury, however, must be on the basis of the change and not on the validity of the right. If the right has been lost, then there is no right subject to change, but is not subject to protest against the proposed change in point of diversion on that ground. There is a separate statutory proceeding for determining whether or not a right has been abandoned. Said statutes provide for

specific notice, hearing, rights of appeal and other matters which must be followed by the State Engineer.

It may be noted that when the notice of the proposed change in point of diversion of the water right herein involved was published, the interested water users who would be injured if said right was reactivated did attempt to protest within the published time. They were advised by the State Engineer that a protest on the grounds that the right had been abandoned could not be accepted on the proposed transfer and under these circumstances, they should submit affidavits setting forth those facts of non-use and the State Engineer would proceed under the statutory provisions for determination of abandonment. The affidavits were submitted and have culminated in this proceeding.

The statute does not set forth any time limit for bringing proceedings for abandonment. A careful reading of the statute indicates that the loss of right is a forfeiture rather than an abandonment in its normal sense and if so, passage of the statutory period of non-use and question of its non-use could be raised at any time. The question is not pertinent in this case since the issue was raised prior to any resumption of use of water.

Since the water has not been applied to beneficial use for more than the past five successive years as provided in ORS 540.610, it appears that the water right should be canceled.

NOW, THEREFORE, it hereby is ORDERED that the water right for the use of the waters of Dry Creek for the irrigation of 9.2 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 1.5 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and 9 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 5, Township 5 North, Range 35 East, W. M., with a date of priority of 1891, and 19 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ and 5 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, said Section 5, with a date of priority of 1900, is canceled.

It is FURTHER ORDERED that the certificate of water right recorded at page 5513, Volume 6, State Record of Water Right Certificates, is canceled, and in lieu thereof a new certificate be issued to B. F. Brewer, or his successor in interest, covering that part of the water right not in question

which is for the use of the waters of Dry Creek for the irrigation of the following lands, with a date of priority of 1891.

1.3 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$
5.3 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$
2.2 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$
8.5 acres in the SE $\frac{1}{4}$ SW $\frac{1}{4}$
Section 4,

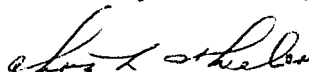
4 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$
Section 9,
Township 5 North,
Range 35 East, W.M.

Dated at Salem, Oregon, this 10th day of October, 1963.

Noted on Record

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Cert. # 5513



CHRIS L. WHEELER
State Engineer

Superseded by

Cert. No. 31336