

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

UMATILLA COUNTY

IN THE MATTER OF CANCELLATION) PC 84-1
OF A WATER RIGHT IN THE NAME)
OF G. RENCKEN FOR USE OF WATER) STATEMENT, FINDINGS,
FROM EAST BRANCH OF MUD CREEK) CONCLUSIONS & ORDER

STATEMENT

This proceeding was initiated by the Water Resources Director under the provisions of ORS 540.610 to 540.650 for the 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 the water under the provisions of the water right for a period of five successive years of nonuse.

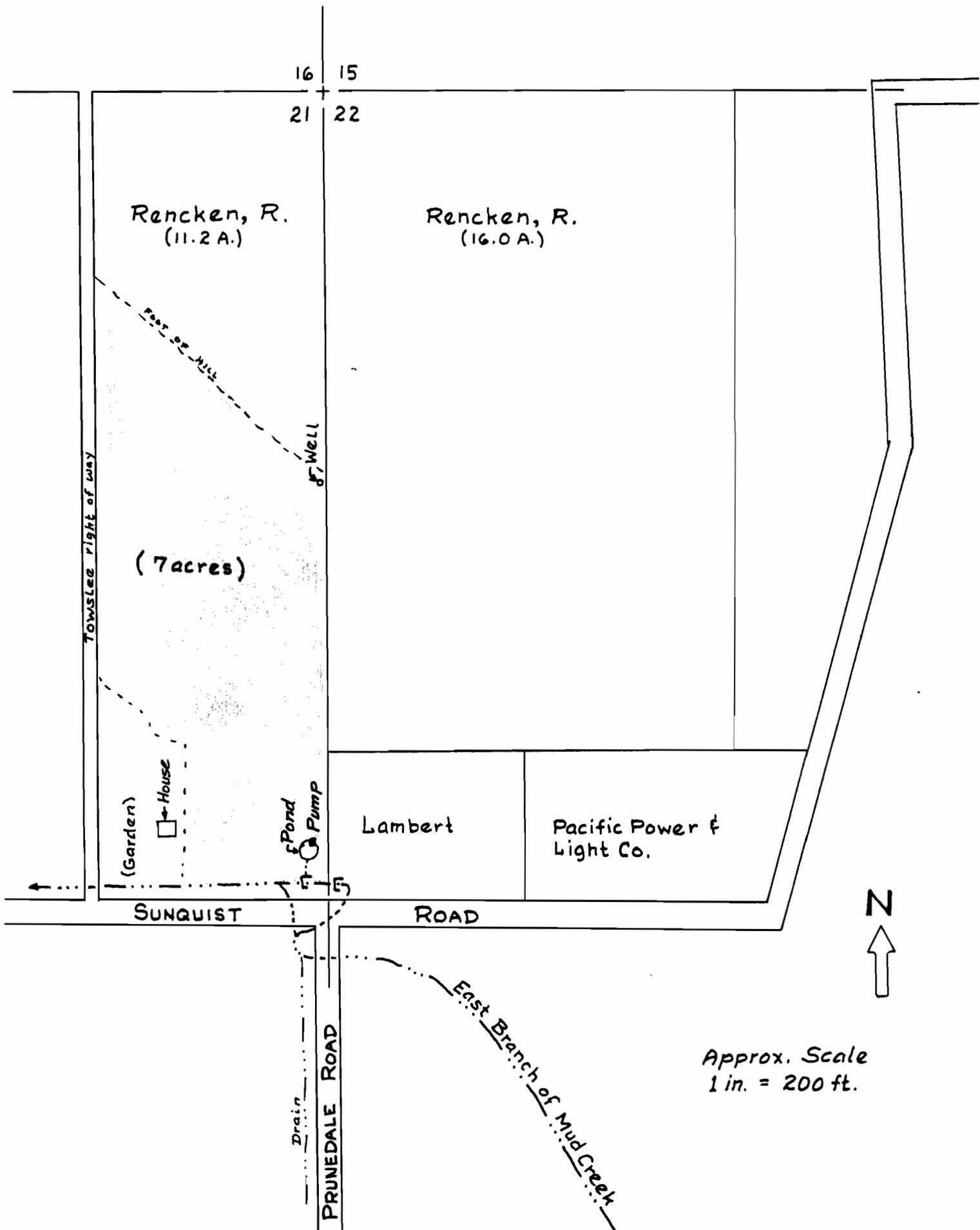
The water right in question is for the appropriation of not to exceed 0.18 cubic foot per second of water from East Branch of Mud Creek under a priority date of 1888, for domestic and stock water and irrigation of a certain 10 acres in the NE 1/4 NE 1/4 of Section 21, Township 6 North, Range 35 East, WM, within the irrigation season of "March to October" of each year, being a portion of the rights allowed by decree of the court in the Matter of the Determination of the Relative Rights to the Waters of the East Branch of Mud Creek, in the name of G. Rencken, and described by the certificate issued to G. Rencken and recorded at page 29, Volume 1, State Record of Water Right Certificates.

On March 6, 1984, pursuant to the provisions of ORS 540.631, notice of initiation of the proceeding for cancellation of the water right in question was given to Rudolph and Margaret Rencken as the owners of record of the real property to which the subject water right is appurtenant.

On May 2, 1983, a protest against the proposed cancellation of the water right in question was filed in the office of the Water Resources Director in the name of R.G. Rencken.

Pursuant to the Director's Notice of Hearing dated May 9, 1984, the matter was brought to hearing in Milton-Freewater, Oregon on June 7, 1984, before James W. Carver, Jr., an employe of the Water Resources Department, authorized to preside in behalf of the Director. Protestant Rudolph G. Rencken was present at the hearing and was represented by William A. Galbreath, Attorney at Law, Milton-Freewater, Oregon. The proponents of cancellation were not represented by legal counsel.

The relative locations of the Rencken property, the channel of East Branch of Mud Creek, Sundquist Road, Prunedale Road and other features referred to in the testimony received in the hearing are shown in Figure 1, herein. The 10 acre area to which the water right in question is appurtenant is within the 11.2 acre tract of Rencken lands, west of the line between Sections 21 and 22.



Approx. Scale
1 in. = 200 ft.

(Figure 1)

FINDINGS OF FACT

Testimony was in agreement that during the years of 1979, 1980, 1981 and 1982, the only use of water from East Branch of Mud Creek on the subject 10 acre area was for irrigation of a garden area of approximately 0.1 acre located to the west and south of the house.

Testimony established that during the irrigation season of 1978, in addition to the aforesaid garden area, water from East Branch of Mud Creek was used to irrigate a corn crop growing on a portion of the subject 10 acre area. The water from East Branch of Mud Creek was distributed by means of gravity flow through rills (small ditches) along the rows of corn, over the area of approximately 7 acres identified by shading in Figure 1.

During the year of 1983, that portion of the subject 10 acres which is open farm land to the east and north of the house, including the area shaded on Figure 1, was used for growing alfalfa which was harvested for hay. Three successive cuttings of alfalfa hay were harvested from the land during the growing season of 1983. Until after the third cutting of hay was harvested from the land, the alfalfa was irrigated with ground water pumped from the well (located at the northeast corner of the shaded area) and distributed over the land by means of a sprinkler irrigation system.

During the fall season of 1983, Mr. Rencken excavated a small pond near the southeasterly corner of the subject 10 acres, to receive water from East Branch of Mud Creek through a gravity flow ditch from his weir box in the channel of the creek. Mr. Rencken purchased and installed an electrically powered pump to pump water from the small pond and into the pipeline system serving his sprinkler irrigation system. It appears that the pump was purchased in September of 1983, and that a permit was obtained from the State of Oregon, Department of Commerce, Building Codes Division, on October 4, 1983, to authorize connection of electrical service to the pump.

Mr. Rencken testified that after the said pump was installed and connected to the electrical service, all of the subject land used for growing alfalfa in 1983 was irrigated with water from East Branch of Mud Creek, at least one time over.

Fall irrigation of alfalfa land after the final cutting for that year has been harvested is a common practice of the area and is recognized as a beneficial use of water in that area of the state. Therefore, the pivotal question as to whether the water right in question, except for that portion appurtenant to the garden area, has been forfeited by nonuse for a period of five successive years is, "Was the use of water from East Branch of Mud Creek for irrigation of the subject lands made under the terms of the water right in question?"

The water right in question, allowed by decree of the court in the Matter of the Determination of the Relative Rights to the Waters of the East Branch of Mud Creek, authorizes the appropriation of water to beneficial use for the purpose of irrigation within the irrigation season of "March to October" of each year. While use of water outside of the irrigation season established by the decree might result in benefit to the users, such use would not be under the terms of the decreed water right.

Thomas Banek and Roy Wilkinson, proponents of cancellation, testified that irrigation of the subject 10 acres with water from East Branch of Mud Creek in the fall of 1983 did not commence until after the end of October.

Larry Powers, Assistant Watermaster for the Milton-Freewater area, testified that on November 21, 1983, at the request of Mr. Rencken, he was at the Rencken property and observed East Branch of Mud Creek water being pumped from the pond and into an operating sprinkler system with 25 sprinkler heads distributing the water onto a portion of the subject land. Mr. Powers has no other knowledge as to the use of water on the subject 10 acres during the year of 1983.

Protestant was aware that the irrigation season for use of water under the water right in question was established of record as being "March to October". It is noted that Protestant, in his brief, acknowledged that it was his purpose in the fall of 1983 to resume use of water under the water right in question. However, neither Mr. Rencken nor any of his witnesses could testify as to the date he commenced irrigation of the subject 10 acres with water from East Branch of Mud Creek in the fall of 1983 or the date he completed such irrigation in 1983, only that the irrigation was carried out sometime in late October or November of 1983.

The initial burden is on the proponents of cancellation to show that a period of five successive years of nonuse of water under the terms of the water right in question has occurred. With the exception of that portion of the water right in question appurtenant to the 0.1 acre garden area, proponents did meet that burden in regard to the use of water for irrigation.

The burden of proof then shifted to the protestant to refute the showing made by proponents. Protestant did not meet that burden.

ULTIMATE FINDINGS OF FACT

With the exception of the continued use of water from the East Branch of Mud Creek for irrigation of a garden area of approximately 0.1 acre in area, water from the East Branch of Mud Creek was not diverted and used for irrigation under the provisions of the water right in question during the years of 1979, 1980, 1981, 1982 and 1983, being a period of five successive years of nonuse.

The testimony adduced does not establish the question of fact as to use or nonuse of water from the East Branch of Mud Creek for the purposes of domestic and stock water.

CONCLUSIONS OF LAW

That the question before the Water Resources Director is one of fact concerning forfeiture of the water right, not one 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 limitation -- 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...."

Therefore, the right to appropriate water from the East Branch of Mud Creek under a priority date of 1888, for irrigation of a certain 9.9 acres in the NE 1/4 NE 1/4 of Section 21, Township 6 North, Range 35 East, WM, has been forfeited by nonuse for a period of five successive years of nonuse under the provisions of the water right in question, and should be canceled.

This proceeding should be dismissed without prejudice as to the remainder of the water right in question.

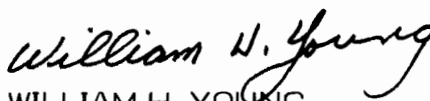
ORDER

NOW, THEREFORE, it is ORDERED that the right to appropriate not to exceed 0.17 cubic foot per second of water from East Branch of Mud Creek under the priority date of 1888, for irrigation of a certain 9.9 acres in the NE 1/4 NE 1/4 of Section 21, Township 6 North, Range 35 East, WM, being a portion of the right described by the certificate issued to G. Rencken and recorded at page 29, Volume 1, State Record of Water Right Certificates, be and the same hereby is canceled.

It is FURTHER ORDERED that this proceeding be and the same hereby is dismissed without prejudice as to the remainder of the water right in question, for the appropriation of not to exceed 0.01 cubic foot per second of water from the East Branch of Mud Creek under a priority date of 1888, for domestic and stock water and irrigation of a certain 0.1 acre in the NE 1/4 NE 1/4 of Section 21, Township 6 North, Range 35 East, WM, within the irrigation season of "March to October" of each year, as allowed by decree of the court in the Matter of the Determination of the Relative Rights to the Waters of the East Branch of Mud Creek.

It is FURTHER ORDERED that the certificate issued in the name of G. Rencken and recorded at page 29, Volume 1, State Record of Water Right Certificates, be canceled and in lieu thereof a new certificate be issued in the name of G. Rencken to describe the remainder of the water right in question and the balance of the water rights described by the prior certificate and not involved in this proceeding.

Dated at Salem, Oregon this 16th day of August, 1984.


WILLIAM H. YOUNG
Director

NOTE: 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.