

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION OF A )	PC 87-11
WATER RIGHT IN THE NAME OF CHARLES )	STATEMENT, FINDINGS OF
H. RETZLOFF, RICHARD W. & VIVIAN C.)	FACT, CONCLUSIONS OF
LATHAN & RONDEL C. BRIDGES FOR USE )	LAW, OPINION AND
<u>OF WATERS OF WEST FORK WILLIAMS CR.)</u>	PROPOSED ORDER

STATEMENT

This proceeding was initiated by the Water Resources Director under the provisions of ORS 540.610 to 540.650 for the proposed cancellation of certain water rights, based on information furnished to the Director alleging that the rights 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.

The water right proposed to be canceled is a portion of the right allowed by decree of the court in the Rogue River adjudication proceedings and described by the certificate issued in the names of Charles H. Retzloff, Richard W. and Vivian C. Lathan and Rondel C. Bridges, and recorded at Page 49703, Volume 43, State Record of Water Right Certificates.

The lands to which the water right in question are appurtenant are 3.1 acres in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  (Tax Lot 612), and 3.5 acres within the NW $\frac{1}{4}$  NW $\frac{1}{4}$  (Tax Lot 619) of Section 3, Township 39 South, Range 5 West, WM. The water right in question is for the appropriation of not to exceed 0.11 cubic foot per second of water from West Fork Williams Creek through the Chapman Ditch, under a priority of 1875, for irrigation of the above-described lands.

Written notice of the proposed cancellation of the irrigation right was served on the owners of record and/or occupants of certain real property in Section 3, Township 39 South, Range 5 West, WM, Josephine County, Oregon. Notice was served on February 26, 1988, by certified mail to:

Lynn R. and Lorraine S. Levitt  
571 Cedar Flat Road  
Williams, OR 97544  
(for Tax Lot 612)

John and Bertha Lucas  
730 Meadow View Drive  
Williams, OR 97544  
(for Tax Lot 619)

On April 21, 1988, a protest in the name of Lynn Levitt was filed with the Department against cancellation of the water right on Tax Lot 612. No protest against the proposed cancellation on Tax Lot 619 was filed with the Department, and no other protest against the proposed cancellation was submitted within the statutory 60 day period from service of the notice of initiation of this proceeding, or subsequent thereto.

Pursuant to the Notice of Hearing served on the parties, the matter was brought to hearing in Grants Pass, Oregon on August 9, 1988, before James W. Carver, Jr., an employee of the Water Resources Department, authorized to preside in behalf of the Director as a finder of fact. The notice set out the pertinent information regarding the right proposed to be cancelled on Tax Lot 612 in the manner set out in paragraph 3 of the STATEMENT, above.

Proponents of cancellation Ernest Smith and Richard Lathan appeared at the hearing and were not represented by counsel. Protestants Lynn and Lorraine Levitt appeared at the hearing and were not represented by counsel.

#### FINDINGS

1. All facts set forth in the STATEMENT are hereby incorporated as findings of the Director.

2. The layout of the Chapman Ditch, the locations of the protestants, proponents and witnesses properties, and other geographical features are shown on Figure 1, which is a xerox of WRD Exhibit 6. The portion of Tax Lot 612 to which the water right in question is appurtenant is shown by red diagonal lines. The area indicated by protestant as having been irrigated under the terms of the water right is colored with green highlighter. The large dark shape in the south half of Tax Lot 611, also owned by the protestants, is a pond.

3. Water flows from the West Fork of Williams Creek into Chapman Ditch, though the Smith and Davis properties, across the easterly end of the Sabransky property and on into the feature identified on Figure 1 as the Moses sump. Overflow from the Moses sump flows in a southeasterly direction into a small pond at the southwestern corner of TL 611, and from there through pipes into the larger pond on TL 611.

4. The source of water in the pond on T.L. 611 is from Chapman Ditch, and also from rain water and winter ground-to-surface water flow entering Chapman Ditch in T.L. 601. Tax Lot 601 is owned by Mr. Sabransky, who was called as a witness by the proponents. The lands which protestant indicated he had irrigated were irrigated by pump and pipe from the pond on T.L. 611.

5. Water flowing from the West Fork Williams Creek through the Chapman Ditch is sporadic and has not been as great in quantity in the past 3-4 years as it was in earlier years. Flows are better and more consistent when the ditch has been cleaned. However, Mr. Sabransky testified that even though the flows from West Fork Williams Creek were small and sporadic, when present, the flows continued through and beyond his property toward the Moses sump.

75  
24  
4



FIGURE 1

6. Testimony and photographic evidence provided by protestant indicated that on a walk of the ditch in May of 1988, following cleaning of the ditch earlier in the spring, water from West Fork Williams Creek was present in Chapman Ditch to Moses Sump and flowing from the sump in a small ditch to the small pond on TL 611, and thence through pipes to the larger pond on TL 611.

7. No testimony or evidence was offered that would definitively show that water from West Fork Williams Creek did not flow through the Chapman Ditch to the Moses sump and thence to TL 611 and into the pond on TL 611 for irrigation use on TL 612. The proponents of cancellation did not meet their burden of proof and failed to show by reliable, probative and substantial evidence that water from West Fork Williams Creek through the Chapman Ditch had not been used on Tax Lot 612 under the terms of the right in question.

8. The protestant indicated on WRD 6 the lands he had irrigated under the terms of the water right in question. Testimony was also given that indicated some irrigation of lands in Tax Lot 611, but lands in Tax Lot 611 are not under the right in question. The lands irrigated by protestant under the right are less than the entire 3.1 acres in question. Using a scale measure to determine the area shown by the protestant as having been irrigated, and giving the protestant the benefit of any margin for error that may exist in measurement, the finding is made that 2.6 acres of the 3.1 acres were beneficially irrigated under the right in question. Of the 3.1 acres in question, a total of 0.5 acre has not been irrigated under the terms of the right in question and the right to irrigation of 0.5 acre under the right in question has been forfeited by 5 years nonuse between May 1979 and May 1987.

#### CONCLUSIONS OF LAW

Oregon Revised Statutes 540.610 provides that "beneficial use shall be the basis, the measure, and the limit of all rights to the use of water." If water available under a perfected right is not used under the terms of the water right for 5 successive years, the water right is forfeited. Here, less than the entire 3.1 acres of the land to which the irrigation water right is appurtenant were beneficially irrigated. Thus, only a portion of the water was put to beneficial use.

The courts have definitively found ORS 540.610 to be a forfeiture statute. An intent to abandon is not required, nor need it be proven, to work a forfeiture and cancellation of all or part of a perfected water right. All that must be shown is that there has been non-use of 5 successive years. Rencken v. Young, 300 Or 352 (1985).

The burden is on the proponent of cancellation to prove this by reliable, probative, and substantial evidence. Id. at 364. Here, the proponents failed to meet their burden, and failed to show 5 years nonuse on all but 0.5 acre.

#### OPINION

Testimony of proponent Smith was contradicted by that of his witness, Mr. Sabransky, concerning whether or not water flowed in Chapman ditch through and beyond Sabransky's property north to Moses' sump. Proponent Lathan stated that while he knew water flowed through and past his property, he had no personal knowledge whether water continued flowing in the ditch and reach the lands in question.

Protestants' testimony indicated that the water did flow through Chapman Ditch to the lands in question, and that water from West Fork Williams Creek, delivered via Chapman Ditch, was used on most of the lands in question. There was no reliable, probative and substantial evidence that would contradict protestants' testimony.

Protestant did testify, however, that less than the entirety of the lands in question were irrigated under the terms of the water right. This is substantiated by the clear evidence of cultivated fields on WRD-6, reproduced as Figure 1, on which the protestant highlighted the lands which he had irrigated.

The phrase "under the terms of the water right" encompasses several components. For a water right for irrigation, it involves not only diversion of a certain amount of water from a certain source at a certain place, delivered through a certain system, but also application of the water appropriated to all those certain lands to which the right is appurtenant. Protestant's own testimony established that not all the lands to be irrigated under the terms of the water right in question had, in fact, been irrigated.

The finder of fact has an obligation to "insure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer in the case." Berwick v. AFSD, 74 Or App 460. The failure of a party who has the burden of presenting evidence to come forward with that evidence may not be held to relieve the hearings officer from the duty of eliciting that evidence.

Protestants had no obligation or burden to prove they had used the water under the terms of the right in question. They did, however, have the right to offer testimony or evidence to refute that presented by the proponent, and protestants chose to

exercise that right. In testifying, the protestants presented testimony as to the use and nonuse of water on their lands under the terms of the water right in question.

When the protestants exercised their right to add their testimony and evidence to the hearing record, the finder of fact was obligated by the law to consider the entire record, including the protestants' testimony and evidence on the question of fact as to the occurrence of five of five successive years of nonuse of all or a part of the water right in question.

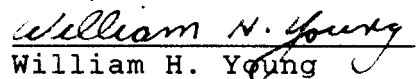
#### PROPOSED ORDER

NOW, THEREFORE, it is ORDERED that the portion of the right evidenced by Certificate found at page 49703, Volume 43 of the State Record of Water Right Certificates for irrigation use on 3.5 acres in the NW¼ NW¼ of Section 3 (Tax Lot 619 - Lucas), Township 39 South, Range 5 West, WM, be and the same is hereby canceled.

BE IT FURTHER ORDERED that the portion of the right evidenced by Certificate found at page 49703, Volume 43 of the State Record of Water Right Certificates for irrigation use on 3.1 acres in the NE¼ NW¼ of Section 3 (Tax Lot 612 - Levitt), Township 39 South, Range 5 West, WM, be and the same is hereby canceled in the amount of 0.5 acre.

It is FURTHER ORDERED that said Certificate be canceled and that a new Certificate be issued to describe the balance of the water right described by Certificate 49703 not canceled by this proceeding.

DATED this 10th day of October, 1988.

  
William H. Young  
Director

NOTICE: The above proposed Order is issued by the Director pursuant to authority delegated by the Water Resources Commission (Commission) under ORS 536.025(2). A party to the proceeding may file objections and exceptions to this proposed final order with the Commission within 30 days from the date of service, which is the date of mailing of a copy of this proposed Order on that party. If objections and exceptions are filed, opportunity will be provided for argument to the Commission, and the final Order will be issued by the Commission.

If exceptions and objections are not filed within the said 30-day period, a final Order will be issued by the Director pursuant to authority delegated to the Director by the Commission.