

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION OF)	PC 86-10
A WATER RIGHT IN THE NAME OF)	FINDINGS OF FACT
AUBREY A. LOGAN FOR USE OF WATER)	CONCLUSIONS OF LAW
FROM AN UNNAMED STREAM)	AND 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 a certain water right, based on information furnished to the Director. The information alleges that the water right in question has been forfeited by failure to make beneficial use of the water under the provisions of the water right for a period of five or more successive years of nonuse.

The water right in question is for the appropriation of not to exceed 0.12 cubic foot per second of water from an unnamed stream under a date of priority of August 5, 1965, for irrigation of a certain 5.2 acres and supplemental irrigation of a certain 0.8 acre within the SW 1/4 NE 1/4 of Section 31, Township 39 South, Range 8 West, WM. The water right was established under the provisions of Permit 30805 and is described by the Certificate issued to Aubrey A. Logan and recorded at page 38963, Volume 30, State Record of Water Right Certificates. The final proof survey map prepared by employees of the Water Resources Department in connection with taking proof of performance under Permit 30805 further locates the water right in question as being appurtenant to lands within the E 1/2 SE 1/4 SW 1/4 NE 1/4 of Section 31 (Tax Lot 604 - Johnston-Beadling property) and within the S 1/2 NE 1/4 SW 1/4 NE 1/4 of Section 31 (Tax Lot 601 - Logan property). (Exhibit WRD 5)

Notice of initiation of this proceeding was served on Martha Dell Logan, James R. and Ann Johnston, Almeta Watson, Robert L. and Ilene Wilson on September 26, 1986.

On October 10, 1986 and November 24, 1986, respectively, Martha D. Logan and Ann Johnston filed protests against the proposed cancellation as prescribed by ORS 540.641.

On January 12, 1987, notice of this proceeding was also given to Robert T. and Jeannie Beadling who succeeded to ownership of the Johnston property (Tax Lot 604) by warranty deed recorded in Josephine County on December 19, 1986.

Pursuant to the Notice of Hearing served on the parties, the matter was brought to hearing in Grants Pass, Oregon, on February 23, 1987. The hearing was conducted under the provisions of OAR chapter 137, section 03, by 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 hearing was held concurrently with two other hearings on related matters involving some or all of the same parties.

The proponents of the cancellation, Bob L. Jones and Carl B. Jacobson, represented themselves at the hearing. The protestants, Martha D. Logan and James and Ann Johnston; and Robert and Jeannie Beadling also represented themselves at the hearing.

FINDINGS OF FACT

The proponents of the cancellation allege that the water right established under the provisions of Permit 30805, described in Certificate 38963. Volume 30, State Record of Water Rights (Exhibit WRD 5 and 5A), has not been applied to all of the land described in Certificate 38963 in at least the five years from 1980 through 1986.

The certificate indicates that water for 0.8 acres from Logan's point of diversion was supplemental to the primary right from Second Gulch (Woodcock Creek) described in Certificate 9126.

A 5-acre parcel of the Logan property (Tax Lot 604, Exhibit WRD 1) was sold to the Johnstons in 1980. Johnstons already owned an adjacent 5 acre parcel (Tax Lot 700). Not all of the 5 acres purchased from Mrs. Logan was under water rights. WRD Exhibit 2A shows that perhaps only 2 acres of the purchased property had water rights.

With reference to the Logan property, within the S 1/2 NE 1/4 SW 1/4 NE 1/4 of Section 31, only the yard, garden and fruit trees have been irrigated from the source described in Certificate 38963 during the last five years. The area irrigated was established by testimony to be not more than one-half of an acre.

Protestant James Johnston stated that permission to use the water from the Logan property on the land purchased from Mrs. Logan was obtained and an easement was granted. Protestant Johnston stated that, in 1981, water from the diversion on the Logan property was used to irrigate a cornfield and some lawn around the cornfield, an area of perhaps one-half acre next to a volleyball court (Beadling Exh. B, and C). Testimony indicates that garlic was grown in the same area as the cornfield in 1983 and corn was again planted there in 1986.

Although other areas of the property may have been watered, by the admission of protestant Ann Johnston, some areas are watered "without purpose" to maintain the water right.

Protestant Robert Beadling presented a statement from the present occupant of the Johnston-Beadling property, Almeta Watson, indicating that she had spread and watered alfalfa seed during the spring of 1986 for feeding calves and had raised a garden. The evidence presented does not show clearly enough the location in which these crops were allegedly grown to determine if the area is covered under the primary or supplemental water rights in question.

With reference to the Johnston-Beadling property within the E 1/2 SE 1/4 SW 1/4 NE 1/4 of Section 13 (Tax Lot 604), the testimony established that not more than one-half acre was beneficially irrigated within the period of years from 1980 through 1986 under the water right in question.

The domestic use of water under Certificate 38963 at the Logan house is not disputed. The domestic use of water for the Johnston house is from a different source and is not at issue.

ULTIMATE FINDINGS OF FACT

Some water use occurred under the provisions of Certificate 38963. Two areas of land were irrigated within the past five years from the source described. On the lands described under the primary right in Certificate 38963 not more than one-half acre of area was beneficially irrigated around the Logan house including fruit trees (Tax Lot 601), and not more than one-half acre of garden and lawn area was beneficially irrigated on the Johnston property (Tax Lot 604) with water from the described source. Domestic use occurred and continues to occur at the Logan house. No lands were irrigated using the supplemental right described in the certificate.

CONCLUSIONS OF LAW

That the question before the Water Resources Commission is one of fact concerning forfeiture, not one concerning abandonment or voluntary relinquishment of the water right, is made clear by *Withers v. Reed*, 191 Or 541 (reaffirmed by the court in *Rencken v. Young*, 300 Or 352), wherein the court state in reference to ORS 540.61(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 also made clear in *Bausch v. Myers*, 273 Or 376 (reaffirmed by the court in *Rencken v. Young*, 300 Or 352), that the forfeiture takes place with the occurrence of five successive years of nonuse and not at some later time when proceedings are brought under the provisions of ORS 540.610 to 540.650.

The above period of nonuse works a forfeiture of the water right on certain portions of the lands described in the certificate. Therefore, the unused portion of the water right in question should be canceled pursuant to the provisions of ORS 540.641(2). A new water right should be issued to describe that portion of the water right not cancelled according to the provisions of 540.650.

PROPOSED ORDER

NOW, THEREFORE, it is ORDERED that the unused portion of the water right in question, being for the appropriation of not to exceed 0.10 cubic foot per second of water from an unnamed stream under a date of priority of August 5, 1965, for irrigation of a certain 4.2 acres and for supplemental irrigation of a certain 0.8 acre, all within the SW 1/4 NE 1/4 of Section 31, Township 39 South, Range 8 West, WM, being a portion of the right described by the certificate issued to Aubrey A. Logan and recorded at page 39863, Volume 30, Water Rights Certificates, be and the same is hereby cancelled.

It is FURTHER ORDERED that the said certificate be canceled and a new certificate be issued for the uncanceled portion of the water right being for 0.005 cfs of water for domestic use and 0.02 cfs of water from the diversion point indicated in Certificate 38963 to irrigate up to one half acre of land around the Logan house, and one-half acre of land on the Johnston property, both being within the SW 1/4 NE 1/4 Section 31, Township 39 South, Range 8 West, WM, Josephine County.

Dated at Salem, Oregon, this 8th day of September, 1987.

William H. Young

WILLIAM H. YOUNG, Director
Water Resources Department

NOTICE: The above order is issued by the Director pursuant to authority delegated by the Water Resources Commission (Commission) pursuant to 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 (date of mailing) of a copy of this 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 objections and exceptions 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 an action of the Commission at its regular meeting on October 25, 1985.

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