

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION OF A) PC 86-21
A WATER RIGHT IN THE NAME OF R.F.) STATEMENT, FINDINGS OF
CLARKE FOR USE OF WATER FROM AN) FACT, CONCLUSIONS OF
UNNAMED TRIBUTARY OF THE TUALATIN) LAW AND ORDER
RIVER FOR IRRIGATION PURPOSES)

STATEMENT

This proceeding was initiated by the Water Resources Director under the provisions of ORS 540.610 for the proposed cancellation of a certain water right, 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 each year for a period of five or more successive years.

The water right proposed to be canceled represents a portion of the right described by the certificate recorded at page 15058, Volume 12, State Record of Water Right Certificates. The entirety of the right is for the appropriation of not to exceed 0.04 cubic foot per second (cfs) of water from an unnamed tributary of the Tualatin River under a date of priority of August 1, 1938, from a point of diversion located within the SW1/4 NE1/4 of Section 31, Township 1 South, Range 4 West, WM, for irrigation of a certain 2.8 acres within the said SW1/4 NE1/4 (Tax Lot 800).

At issue in this proceeding is the alleged nonuse of 0.0275 cfs on 1.8 of the 2.8 acres under the above-described right. The balance of the water right described by the said certificate, being for the appropriation of not to exceed 0.0125 cfs from the same source and diversion point for use on a certain one acre in the said Section 31 is not in question in this proceeding.

Written notice of the proposed cancellation of the water right was served on the owners of record and/or the occupants of the said lands on January 29, 1987, by certified mail to:

Mrs. Alice Warr
Route 3, Box 285
Gaston, OR 97119

H. Luenne Clarke
12450 SW 9th
Beaverton, OR 97005

Mr. Lawrence D. Warr
Route 3, Box 284-B
Gaston, OR 97119

Robert Clarke and
H. Luenne Clarke
1167 E. Palo Verde
Yuma, AZ 85365

Robert Allen Clarke
7695 SW 165th
Aloha, OR 97007

Pursuant to the Notice of Hearing served on the Warrs and on Gregorio Perez-Selsky, attorney for the proponents of cancellation, the matter was brought to hearing in Hillsboro, Oregon on June 9, 1987, before James W. Carver, Jr., an employee of the Water Resources Department authorized to preside on behalf of the Director as a finder of fact. The Notice of Hearing described the water right in question in substantially the same form and manner as is set out above.

Proponents of cancellation, John Mullholland and James D. Person appeared at the hearing and were represented by counsel, Gregorio Perez-Selsky. Proponents Chester R. Hanson (now deceased) and Freda Hanson did not appear at the hearing. Protestants Alice Warr and Larry Warr were present and represented by Gregory Hathaway, attorney.

The hearing was reconvened on July 7, 1987 and again on April 27, 1988. Following submittal of closing memoranda by the attorneys for both proponents and protestants, the record was closed on July 2, 1988.

The Director's Statement, Findings of Fact, conclusions of Law, Opinion and Proposed Order document was served on the parties' attorneys of record on August 9, 1988.

On September 8, 1988, the protestants, acting through their attorney, Virginia Gustafson, filed objections and exceptions to the Proposed Order and requested the Proposed Order be modified and proponent's claim for cancellation of the water right be dismissed.

At a regularly scheduled meeting in Salem, Oregon, on October 28, 1988, the Water Resources Commission considered the filing by the protestants, together with the parties' written and oral arguments thereon, and voted, six in favor, one against, to adopt the Proposed Order document with two amendments for the Commission's final Order. The two amendments were:

1. Correct Finding No. 5 to reflect that R.F. Clarke only was the owner of the lands in question, and that he was assisted in the operation and irrigation of said lands by his son, Robert Clarke.
2. Add a Finding to clarify how the acreage figure of 0.5 acre, on which forfeiture of the water right occurred, was calculated.

FINDINGS

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

2. Water from the unnamed tributary is diverted at a v-notched weir gate into a ditch south of protestant's property. The water so diverted flows down this ditch into a distribution pond south of the barn and house, from which water is then taken and distributed by a system of pipes, hoses and faucets.

3. Water is generally available in sufficient quantities in the spring and early summer to meet all demands. During the time that the subject lands were operated as a small commercial dairy, the supply available from the tributary was, by July, insufficient to allow for constant or widespread irrigation and operation of a dairy. Water used for cooling milk (under a separate water right) would be reused for irrigation, and the area benefitted would be reduced.

4. The ground near the sheep and loafing barns and the main barn is relatively flat for approximately 75 feet in a northerly direction, then sloping steeply downward for approximately 50 feet and leveling out again for another 50 feet or so before coming to Southside Road. These pasture lands are bounded on the west by a fence, and on the east by a natural draw, beyond which are steep, rocky grounds, heavily treed, along the road and the house and grassy lands south to the driveway. The grounds around the farm buildings and from the natural draw east are not clearly visible from the road, being either screened from view because of their height above the road, or by trees and brush along Southside Road.

5. The property was owned by R.F. Clarke and operated as a small commercial dairy by R.F. Clarke, with the assistance of his son, Robert Clarke, between the years 1944 and 1969. Between 1938 and 1944, the pasture lands in question were tilled, seeded and irrigated to develop clover and fescue pasture. R.F. Clarke died in 1969 and the dairy stock was sold by Mrs. Clarke by spring, 1970. The milk producing stock and the related portion of the dairy operation, as well as pasture lands not involved in this matter, were leased to James Person and the Alan Tornblads from June 15, 1962 through April 15, 1966. The Tornblads and Mr. Person had no responsibility or obligation for irrigation of the lands in question in this proceeding. During the lease, R.F. Clarke retained the young, non-producing dairy stock and the responsibility for irrigating the lands in question. In 1970, the property was sold and the water right in question was transferred to protestant Alice Warr. Ms. Warr put beef cattle on the property, and continues to pasture beef cattle on the property.

6. Ms. Warr put beef cattle on the property and continued to irrigate using soaker hoses. Both Ms. Warr and her farm hand Eric Rode indicated that they irrigated the entire 2.8 acres under the right, but that later in the irrigation season, July-August, irrigation efforts would be concentrated more in the

areas around the farm buildings and the house, as there was insufficient water available to beneficially irrigate the entire parcel.

7. Irrigation of less than the entire portion of the subject lands has been accomplished by means of sprinklers, soaker hoses, and by running water out of a standard ½" hose onto the ground and soaking the area near the end of the hose. These methods were first employed by the original owner of the lands and holder of the water right, R.F. Clarke, and continued by his son, Robert Clarke, and later used by the protestants.

8. Robert Clarke was the primary witness for the protestants. Mr. Clarke first testified that he understood beneficial irrigation to mean irrigation which kept the grass green and growing to provide grazing pasture to the dairy stock, and that it was on this basis that he illustrated on Protestants' CC the areas beneficially irrigated during each July-August from 1938-1969. On this understanding, Mr. Clarke estimated that from 1.125 to 1.5 acres of the 1.8 acres in question had been beneficially irrigated.

On the subsequent reconvening of the hearing some days later, he indicated that he now had a "corrected" understanding of beneficial use, and that he now understood it to mean simply an application of water, and that it didn't necessarily mean that there was sufficient water to produce growth. On that new understanding, he indicated that he had put water to beneficial use on the entire 2.8 acres at least one a year, even though the only portion that remained green were those flat areas around the farm buildings and just over the crest of the hill.

Measurement of the areas indicated by Robert Clarke on Protestants' CC as having been beneficially irrigated was done by planimetric methods. The measurement showed that 0.3 acre on the west end of the property, and 0.4 acre on the east end of the property, had not been beneficially irrigated. Given the protestants the benefit of any doubt or error which might be expected, using the map which was not precisely to scale, the director finds that of the 1.8 acres in question, a total of 1.3 acres were beneficially irrigated between the years 1938 and 1969.

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 for 5 successive years, the water right is forfeited. 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 over 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 five years nonuse on all but 0.50 of an acre.

Irrigation use of water established on a certain 2.8 acres within the SW1/4 NE1/4 of Section 31, Township 1 South, Range 4 West, WM, evidenced by the Certificate of Water Right recorded at volume 12, page 15058, State Record of Water Right Certificates, has been partially forfeited by nonuse for a period of five or more consecutive years, during the period 1938-1984, in the amount of .50 acre. The remaining 2.3 acres of irrigation use established in said Certificate have not been forfeited by nonuse within this same period of time.

OPINION

Testimony of proponents and their witnesses consisted primarily of what they had observed from Southside Road as they passed the subject property. Witnesses were either unable to address with specificity times when they had been on the subject property, or had made, at best, infrequent visits which would have enabled them to see areas not visible from the road, such as the flat areas around the house and farm buildings. Proponents and their witnesses, for the most part, asserted that no irrigation whatsoever had taken place, except for around the house and garden which are not completely visible from Southside Road, and some runoff down the natural draw.

One witness asserted that during 1968 when he had worked as a hired hand for proponent on lands directly north of the subject property, the entire 1.8 acres in question were barren and brown, containing not dairy cattle but only dead weeds, dead grass, and rocks.

Proponent Mullholland admitted that he would not have been able to see hoses being used in the areas indicated by Protestant unless they had been placed far enough down over the crest of the hill north of the barn, and that there were some portions of the property not visible from Southside Road. Those non-observable areas were, with the exception of the natural draw, the areas on which protestants indicated beneficial irrigation had taken place.

The uncertainties, vagueness and inconsistencies in the testimony

of proponents and their witnesses raise sufficient doubt that it is not possible to find an absolute forfeiture of the water right in question. There was insufficient reliable, probative or substantial evidence to establish a complete forfeiture.

The Protestants and their witness, Robert Clarke, provided a clear, simple and persuasive description of their irrigation practices and the extent of their irrigation. Robert Clarke, although somehow becoming confused in the period between the second and third sessions of the hearing, did have a correct understanding of the meaning of irrigation and beneficial use at the second session, and testified to the extent of his irrigation based on that understanding during the second session.

Marking on Protestants' CC, which is a not-to-scale depiction of the lands in question, Mr. Clarke indicated where irrigation, using hoses, sprinklers and dairy wastewater, had been done in July and August with resulting benefit to the grass. Irrigation in July and August was done to the extent that water was available, and the areas marked on Protestants' CC were those areas that benefitted from irrigation during this period of reduced availability. It appears that approximately 0.25 acre on the east end of the property and another 0.25 acre on the west side of the property fall outside of the area that was beneficially irrigated under the terms of the water right.

Mr. Clarke indicated that during the early part of the irrigation season, irrigation would be done on the entire acreage, but that after early July, irrigation would be concentrated on the flat areas around the farm buildings, the land between the barn and house, and the lawn and garden around the house where there would be some benefit out of it. The remaining lands, of necessity, would not be irrigated and the grass would become brown and dormant.

Beneficial irrigation has previously been defined by this Department as "[I]n agriculture, the operation of causing water to flow through lands for nourishing plants" (emphasis added). See, e.g., In the Matter of Water Right Permits Nos. R-5397 & 34049, 31 Special Order Volume 397 (1978). This definition has been adopted by the Oregon Courts as well. Hennings v. WRD, 15 Or App 121 (1981). It was with this understanding that the Protestants' witness Robert Clarke indicated which lands he had, and had not, beneficially irrigated between 1938 and 1969.

Contrary to Mr. Clarke's revised understanding of beneficial irrigation which he stated at the third hearing session, simply spreading water around once a year in order to maintain the water rights is not considered beneficial use of the water, but rather a token application. Mere application of water to the land without reaping any benefit thereof would not meet the test of an

appropriation. According to Webster, beneficial means "contributing a valuable end, conferring benefit; profitable". Use means "to employ; to act with or by means of". Putting the two together we have beneficial use: contributing to a valuable end by means of water.

Although Mr. Clarke testified at the third hearing session that water had been applied at least once in a year to every inch of the subject property because R.F. Clarke had directed him to do so "to maintain the water right", beneficial irrigation of the entire 1.8 acres was not had. It is only for those lands that received some benefit that the water right was not lost.

The Warrs stated that they had irrigated the entire 1.8 acres after they purchased the farm in 1969, and there is no reason to disbelieve them. However, as the right to irrigate a portion of the 1.8 acres in question had been lost by nonuse under the terms of the water right by Mr. Clarke, it could not later be restored by the Warr's irrigation of lands not previously benefitted by irrigation.

ORDER

NOW, THEREFORE, it is ORDERED that the portion of the right evidenced by Certificate found at page 15058, State Record of Water Right Certificates for irrigation use within the SW1/4 NE1/4 of Section 31, Township 1 South, Range 4 West, WM, be and the same is hereby canceled in the amount of 0.5 acre.

Be it 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 15058 not canceled by this proceeding.

DATED THIS 28 day of October, 1988.



William R. Blosser
Chairman

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 service (date of mailing) of this Order. Judicial review is pursuant to the provisions of ORS 536.075 and 183.482.