

BEFORE THE STATE ENGINEER OF OREGON

Douglas County

IN THE MATTER OF)  
THE CANCELATION )  
OF A WATER RIGHT)

FINDINGS OF FACT  
CONCLUSIONS AND ORDER

-1-

This proceeding was initiated by the State Engineer under the provisions of ORS 540.631 to 540.650, for cancelation of the following described water rights.

The water rights in question are:

(a) for the use of not to exceed 3.0 cubic feet per second of the waters of Pass Creek, Unnamed Tributary, Springs and Reservoir, tributaries of Elk Creek and Umpqua River, for development of 25 theoretical horsepower and irrigation of 5.0 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , 10.0 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , 5.0 acres in the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 5.0 acres in the NW $\frac{1}{4}$  SW $\frac{1}{4}$  and 5.0 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 35, Township 21 South, Range 5 West, W.M., with a date of priority of August 8, 1922, and is evidenced by certificate of water right issued in the name of Theodore Jemison and recorded at page 7385, Volume 7, State Record of Water Right Certificates;

(b) for the use of not to exceed 5.0 acre feet of the waters of a spring, a tributary of Pass Creek, to be stored in a reservoir within Section 35, Township 21 South, Range 5 West, W.M., for domestic use, development of 25 theoretical horsepower and irrigation to be appropriated under Permit No. 5605, with a date of priority of September 1, 1922, and is evidenced by certificate of water right issued in the name of Theodore Jemison and recorded at page 7386, Volume 7, State Record of Water Right Certificates.

The right for the development of 25 theoretical horsepower under Power Claim No. 550 expired August 8, 1962, and is no longer in force or effect.

That part of the water right as confirmed by certificate of water right recorded at page 7385, Volume 7, State Record of Water Right Certificates, for domestic use, is not in question in this proceeding.

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On October 13, 1966, a notice under the provisions of ORS 540.631 was sent by certified mail to R. L. and Fern Bridges, as owners of record, and to J. Q. and Naomi Carlile, as occupants and contract purchasers, of the lands described in paragraph 1, that the State Engineer was initiating proceedings to cancel these water rights on grounds of abandonment.

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On November 21, 1966, a protest was filed in the office of the State Engineer by Jack B. Lively, Attorney at Law, in behalf of J. Q. and Naomi Carlile, against the proposed cancelation of the water rights described in paragraph 1 above.

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Pursuant to notice dated February 15, 1967, a hearing on the matter was held in the County Court Auditorium of the Douglas County Courthouse in Roseburg, Oregon, commencing at 10:45 A.M. before Marvin B. Bennett, Assistant State Engineer. Protestants J. Q. and Naomi Carlile were represented by Mr. Jack B. Lively, Attorney at Law, Springfield, Oregon. Testifying in behalf of the protestants was Mr. J. Q. Carlile. Testifying in behalf of the State Engineer were R. L. Bridges, M. Victor Hargan and Lester M. Hamacher, all of Drain, Oregon. Also present at the hearing were M. John Youngquist, Watermaster of District 15, and James W. Carver, Jr., Deputy State Engineer.

FINDINGS OF FACT:

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Mr. R. L. Bridges was called and sworn as the first witness; he identified and confirmed his affidavit pertaining to the nonuse of the subject

water right from 1944 to 1959. He is still the legal owner of the lands in question, Mr. Carlile being under contract to purchase; he purchased the property in September, 1944 and sold to Mr. Carlile in April, 1959, who took possession May 23, 1959. A map, received by the State Engineer from Mr. Jack Lively with the protest filed on behalf of J. Q. and Naomi Carlile, was marked as State Engineer's Exhibit No. 1. Mr. Bridges identified the lands from this map, but did not have any knowledge of the exact location of the irrigated lands within each forty acre tract. Mr. Bridges testified that he did not irrigate any of the lands in question from Pass Creek, except for one time in 1945, and this for about one hour from a small pump onto a little garden; that the domestic supply is from two springs at the head of a draw, back of the barn, which are noted on Exhibit No. 1; and that he used this water for domestic and household use, also for lawn and garden area, the lawn area being near the house, and the garden area near the barn. He stated that a cement tank was located at the junction of the two springs, the location of which he noted on the map. A one inch buried pipe-line extends from the storage tank to a point past the barn then a  $\frac{1}{2}$  inch pipe continues to the house. Mr. Bridges also located the approximate location of the buildings, these being north of the highway. He knows of the lands being irrigated in 1926, when in the ownership of Theodore Jemison. He stated that he does not have knowledge of any use of the waters of Pass Creek during the season of 1959.

Mr. Bridges testified that the area of lawn and garden near the house as irrigated from the spring supply was about  $\frac{1}{4}$  acre and the other garden area was about  $\frac{1}{4}$  acre, or a total of  $\frac{1}{2}$  acre in all; the main garden area was located about 100 yards from the house and near the barn.

When cross-examined by Mr. Lively as to any filings with the State Engineer to withdraw any of the waters for irrigation, Mr. Bridges' answer was no; nor did he, at any time, sign any declaration indicating abandonment.

He does not recall any conversation with Mr. Carlile, nor did he give any information to Mr. Carlile as to the water rights being abandoned. Also stated that he is not now using any of the waters of Pass Creek upon the lands he occupies, other than the supply being from springs which are tributary to Rock Creek, a tributary of Pass Creek.

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Mr. M. Victor Hargan was called as a witness, sworn and identified his affidavit of nonuse of the subject lands in question; he requested that his affidavit regarding nonuse be corrected from the years 1945 to 1966 to the years 1945 to 1962. He resides on and owns, with his father, the lands east of and adjacent to the lands in question; has lived there since August, 1945; and has observed the lands in question from his place. The only time he recalls as being upon any of these lands was one time when hay was being cut or stacked; no date stated. To his knowledge there was no use of water from Pass Creek for irrigation of the lands now occupied by Mr. Carlile from the year 1945 until Mr. Carlile took possession. His testimony is in regard to the nonuse of the waters of Pass Creek upon the farm lands and those in pasture; the lawn and garden near the buildings has been irrigated.

Upon cross-examination by Mr. Lively, Mr. Hargan stated that a part of the lands were subject to overflow from Pass Creek each winter, or at time of high flows of the creek, especially on the low lands below and south of the railroad tracks. He had observed the lands in question from his own place and from driving by on the highway; he has never observed any controlled flood irrigation upon the lands. The only irrigation he has observed was in 1963, when Mr. Carlile irrigated by a sprinkler system. He did not testify regarding any use of the waters after the year 1963.

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Mr. Lester M. Hamacher was called as a witness, sworn and identified his affidavit of nonuse of the waters upon the lands in question. He requested

that this affidavit be corrected to refer to the years 1946 to 1962. He resides and owns the property west of and adjacent to the lands in question; has lived here for the past 12 years and prior to that time on other lands adjacent to those of Mr. Hargan, for three years. He testified that he had observed no irrigation from Pass Creek upon the subject lands during the time of 1946 to 1962; had observed no irrigation from Pass Creek until Mr. Carlile took possession.

Mr. Hamacher recalls the lawn and garden tracts as being irrigated by Mr. Bridges; has no knowledge of the domestic supply from the springs, as he never had occasion to be up there.

Mr. Lively did not cross-examine.

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Mr. Lively requested that Mr. R. L. Bridges be recalled for further questions.

Upon cross-examination, Mr. Bridges testified that all the irrigation he had done around the buildings was from the spring supply; when asked if this source was insufficient for domestic use, he replied, "We did very well with it." He also testified that a well upon the place was used at times by him for domestic, lawn and garden use; also confirmed his past testimony of nonuse of the waters of Pass Creek for irrigation upon the lands in question.

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Mr. J. C. Carlile was called and sworn as a witness in his behalf; stated that he contracted to purchase the lands in question in April, 1959, that his wife's folks moved onto the property in May and resided there until February, 1960. The springs and buildings as previously located on State Engineer's Exhibit No. 1 are located approximately as indicated on the map.

He testified that the springs are about 800 to 900 feet from the house and about 500 feet from the barn; there is an abundance of water from the springs until about June of each year, however sometime during July or August, the domestic supply becomes very low. He replaced the old pipe-line leading from one spring to the concrete storage tank with a 1 inch plastic pipe and the pipe-line leading from the other spring to the tank with a  $\frac{1}{2}$  inch plastic pipe. This concrete storage tank is approximately four feet by eight feet, and 3.5 feet or 4 feet in depth, this being outside dimensions; the walls being about five inches thick. He does not know of the size of pipe leading from this storage supply to the buildings, however he thought it to be three-quarter inch at one place where he uncovered the line. At times during July and August, he has had to take the laundry out and the past three years has had to haul water for domestic use because of insufficient supply.

Sometime in 1961, he purchased a pump and sprinkler system, the initial cost being \$1,880; the cost of installation of a power line to the pump was \$1,560.89, which is to be paid for at the rate of \$156.09 per year for a period of ten years; signed a contract to use this power for at least five years. In addition to the above costs, he paid \$25.00 for placing the water line under the railroad tracks and \$100.00 for placing the power line above the railroad tracks. This equipment being a ten horse pump, 460 feet of four inch aluminum main line and 26 sections of lateral lines, one of which is 20 feet in length and the remainder being 40 feet lengths. He does not irrigate the lawn or garden from the domestic supply, but from the sprinkler system from Pass Creek. He started using the sprinkler irrigation system in August, 1963 and has used it continuously each irrigation season since. Mr. Carlile stated that the first year he farmed the place he put up 10 tons of hay and the last two years he had about 70 tons each.

Mr. Carlile has no personal knowledge of any irrigation upon the subject lands in question prior to the time he took possession. He states that about 98 per cent of the lands below the railroad tracks floods some years during the winter months, this flooding being from natural overflow and not from any controlled structures or diversion; this area being between the hill and the railroad tracks; no estimate of this area was stated; he claims no actual beneficial use to this flooding. He does not use any ditches upon the lands, all being irrigated from sprinklers; claims to irrigate about 30 acres in this manner.

Mr. Carlile stated that prior to the time of signing the contract to purchase, Mr. Bridges had told him that he had not signed any cancelation of the water rights appurtenant to the lands in question. He also testified that in either the month of November or December of 1962, he made inquiry in the State Engineer's Office as to the water rights of record and was shown the rights of record, but was not given any information regarding the status of the rights. Upon cross-examination he testified that he had knowledge that the water rights had not been used for a number of years. Mr. Carlile stated that he was of the understanding that if he re-established use under the right of record without someone contesting his action he could rely upon the right and that upon this basis he purchased the pump, sprinkler equipment and had the power line installed.

#### CONCLUSIONS:

James W. Carver, Jr., Deputy State Engineer, stated for the record that the initiation of the cancelation proceedings was initiated by the State Engineer acting upon the information by the received affidavits of the period of nonuse. He read ORS 540.610, Subsection (1), Abandonment of Water Rights; also referred to the Oregon Supreme Court decision in Day vs. Hill, (241 Or. 507), which holds that, although the statute uses the word abandonment, five or more successive years of nonuse constitutes a forfeiture.

From the uncontroverted testimony of R. L. Bridges, M. Victor Hargan and Lester M. Hamacher, it appears that the lands in question in this proceeding have not been irrigated from the waters of Pass Creek, nor from any stored waters under Permit No. R-533, for a period of more than five successive years, and that these water rights have, therefore, been lost through nonuse as provided by ORS 540.610. The testimony of J. Q. Carlile concurs that he had knowledge that the water rights had not been used for a period of years.

The water rights not being used for the period of time from about 1944, 1945, or 1946 until 1962, was forfeited and any subsequent use of these waters in question would be an illegal use. The right when forfeited reverts to the public and the statutes provide an exclusive way to obtain a new water right on the land, namely by issuance of a permit by the State Engineer.

It appears that the water rights in question have been forfeited by nonuse for a period of five or more successive years and should be canceled.

The testimony presented indicated that the use of the waters of two springs for domestic use, including the irrigation of about  $\frac{1}{2}$  acre of lawn and garden, has been continuous. The right for said use as evidenced by certificate recorded at page 7385, Volume 7, State Record of Water Right Certificates, is not in question in this proceedings.

ORDER:

NOW, THEREFORE, it is hereby ORDERED that the right (a) to the use of not to exceed 3.0 cubic feet per second of the waters of Pass Creek, Unnamed Tributary, Springs and Reservoir, tributaries of Elk Creek and Umpqua River, for development of 25 theoretical horsepower and irrigation of 5.0 acres in  $SE\frac{1}{4} NW\frac{1}{4}$ , 10.0 acres in  $SW\frac{1}{4} NW\frac{1}{4}$ , 5.0 acres in  $NE\frac{1}{4} SW\frac{1}{4}$ , 5.0 acres in  $NW\frac{1}{4} SW\frac{1}{4}$  and 5.0 acres in  $SW\frac{1}{4} SW\frac{1}{4}$ , Section 35, Township 21. South, Range 5 West, W.M., with a date of priority of August 8, 1922, as evidenced by certificate

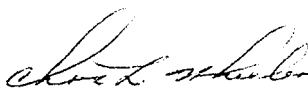


of water right issued in the name of Theodore Jemison and recorded at page 7385, Volume 7, State Record of Water Right Certificates; and (b) for the use of not to exceed 5.0 acre feet of the waters of a spring, a tributary of Pass Creek, to be stored in a reservoir within Section 35, Township 21 South, Range 5 West, W.M., for development of 25 theoretical horsepower and irrigation appropriated under Permit No. 5605, with a date of priority of September 1, 1922, as evidenced by certificate of water right issued in the name of Theodore Jemison and recorded at page 7386, Volume 7, State Record of Water Right Certificates, are canceled.

The right for the development of 25 theoretical horsepower under Power Claim No. 550, expired August 8, 1962, and is not a part of these proceedings.

It is FURTHER ORDERED that certificate of water right recorded at page 7385, Volume 7, State Record of Water Right Certificates is canceled and in lieu thereof a certificate be issued in the name of J. Q. and Naomi Carlile covering that part of the water right not in question which is for the use of not to exceed 0.01 cubic foot per second of the waters of two springs, located within  $SE\frac{1}{4}NW\frac{1}{4}$ , Section 35, Township 21 South, Range 5 West, W.M., for domestic use including irrigation of not to exceed  $\frac{1}{2}$  acre of lawn and garden within said  $SE\frac{1}{4}NW\frac{1}{4}$ , Section 35, with a date of priority of August 8, 1922.

Dated at Salem, Oregon this 23rd day of March, 1967.



CHRIS L. WHEELER  
State Engineer