

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION OF A) FINAL ORDER
A WATER RIGHT IN THE NAME OF R.F.) PC 86-22
CLARKE FOR USE OF WATER FROM AN)
UNNAMED TRIBUTARY OF THE TUALATIN)
RIVER FOR STOCK WATER, CLEANING BARN,)
AND MILK COOLING PURPOSES)

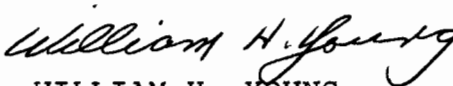
TO: John R. Peterson
PO Box 17
434 North Evans Street
McMinnville, OR 97123
for Protestants

Virginia Gustafson
2300 PacWest Center
1211 SW Fifth Avenue
Portland, OR 97204-3723
for Proponents

The attached Proposed Order was served on the parties on August 9, 1988. No objections or exceptions having been filed within the time allowed, the Water Resources Director hereby adopts the Proposed Order as the Final Order in this matter.

The date of service is the date of mailing of this order.

Dated and signed at Salem, Oregon, this 5th day of December, 1988.


WILLIAM H. YOUNG
Director

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.

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION OF A) PC 86-22
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 PROPOSED ORDER
RIVER FOR STOCK WATER, CLEANING BARN,))
AND MILK COOLING 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 is described by the certificate issued to R.F. Clarke and recorded at page 15165, Volume 12, State Record of Water Right Certificates. The right is for the appropriation of not to exceed 0.01 cubic foot per second (cfs) of water from an unnamed tributary of the Tualatin River under a date of priority of April 10, 1944, from a point of diversion located within the SW 1/4 SE 1/4 of Section 31, Township 1 South, Range 4 West, WM, for stock, cleaning barn, and cooling milk within the SW1/4 NE 1/4 of said Section 31 (Tax Lot 800).

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

On March 24, 1987, a protest in the names of Lawrence D. Warr and Alice Warr, aka Alice Lee, was filed with the Department.

No other protest against the proposed cancellation was submitted within the statutory 60 day period from service of the notice of initiation of the proceeding, or subsequent thereto.

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, James P. Strassel 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.

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. The property was owned and operated as a small commercial dairy by R.F. Clarke and Robert Clarke between the years 1944 and 1969. 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. During the lease, R.F. Clarke retained the young, non-producing dairy stock and continued 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.
4. During the course of the hearing, the protestants stipulated that after the Clarkes left the property in 1969, there were no further dairy operations on the property. (June 9, 1987 session, Tr. 105; July 7, 1987 session, Tr. 64).

5. During the July 7 session, the proponents withdrew their claim of nonuse of the right for barn cleaning. (Tr. 86).

6. At the July 7 session, the protestant agreed that there had been no water used for cooling milk since 1966. (Tr. 108).

7. During the April 27 session, proponents stipulated that no abandonment of the right for stock water or barn cleaning was alleged after January 1, 1984. (Tr. 75).

The director finds that there has been no abandonment of the water right for stock watering and barn cleaning between the years 19434 and 1984.

The director further finds that that portion of the right for use of water for milk cooling has been forfeited.

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 withdrew their claim of abandonment for that portion of the right for barn cleaning, the protestants stipulated that there had been no water used for milk cooling since 1966, and there was no evidence given that would support a finding that no stock had been watered for any 5 consecutive year period during 1944-1984.

Use of water established for milk cooling within the SW1/4 SE1/4 of Section 31, Township 1 South, Range 4 West, WM, evidenced by the Certificate of Water Right recorded at volume 12, page 15165, State Record of Water Right Certificates, has been forfeited by nonuse for a period of five or more consecutive years, during the period 1966-1984. The use of water for stock water and barn cleaning purposes established in said Certificate have not been forfeited by nonuse between 1944-1984.

The right described in said Certificate for 0.01 cfs is not further apportioned in the Certificate to these several uses.

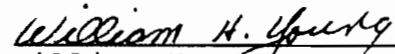
PROPOSED ORDER

NOW, THEREFORE, it is ORDERED that the portion of the right evidenced by Certificate found at page 15165, Volume 12 of the State Record of Water Right Certificates for milk cooling use within the SW1/4 NE1/4 of Section 31, Township 1 South, Range 4 West, WM, be and the same is hereby canceled.

Be it FURTHER ordered that the action for proposed cancellation of that portion of the said right for stock water and barn cleaning is dismissed, and that that portion of the right has not been forfeited by 5 consecutive years of nonuse.

Be it FURTHER ordered that the said Certificate be and the same is hereby canceled, and that a new remaining rights Certificate be issued to describe the water right as being for 0.01 for purposes of stock water and barn cleaning.

DATED THIS 9th day of August, 1988.



William H. Young
Director JWC

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, which is the 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.