

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION OF) PC 88-8
 A WATER RIGHT IN THE NAME OF R.T.) STATEMENT, FINDINGS OF FACT,
 RENNER TO APPROPRIATE WATERS OF) CONCLUSIONS OF LAW, AND
DREWS CREEK, LAKE COUNTY, OREGON) 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 portion of a certain water right, based on information furnished to the Director that a portion of the right in question had been forfeited by failure to make beneficial use of the water under the provisions of the water right in question for a period of five or more successive years of nonuse.

The water right proposed to be canceled represents a portion of the water right described in the certificate issued in the name of R.T. Renner and recorded at page 20626, Volume 15 of the State Record of Water Right Certificates.

The water right in question is for the appropriation of not to exceed 10.0 cubic feet per second of water from Drews Creek, a tributary of Goose Lake, under a priority date of 1941, for irrigation of the following lands in Township 40 South, Range 19 East, W.M., Lake County, Oregon:

<u>Section 20</u>	<u># Acres</u>	<u>Section 21</u>	<u># Acres</u>
NE $\frac{1}{4}$ NE $\frac{1}{4}$	20	SW $\frac{1}{4}$ NW $\frac{1}{4}$	34
SW $\frac{1}{4}$ NE $\frac{1}{4}$	29	SE $\frac{1}{4}$ NW $\frac{1}{4}$	38
SE $\frac{1}{4}$ NE $\frac{1}{4}$	30	NE $\frac{1}{4}$ SW $\frac{1}{4}$	36
NE $\frac{1}{4}$ NW $\frac{1}{4}$	02	NW $\frac{1}{4}$ SW $\frac{1}{4}$	32
SE $\frac{1}{4}$ NW $\frac{1}{4}$	21	SW $\frac{1}{4}$ SW $\frac{1}{4}$	28
NE $\frac{1}{4}$ SW $\frac{1}{4}$	30	SE $\frac{1}{4}$ SW $\frac{1}{4}$	28
SE $\frac{1}{4}$ SW $\frac{1}{4}$	22	NE $\frac{1}{4}$ SE $\frac{1}{4}$	34
NE $\frac{1}{4}$ SE $\frac{1}{4}$	20	NW $\frac{1}{4}$ SE $\frac{1}{4}$	40
NW $\frac{1}{4}$ SE $\frac{1}{4}$	34	SW $\frac{1}{4}$ SE $\frac{1}{4}$	27
SW $\frac{1}{4}$ SE $\frac{1}{4}$	35	SE $\frac{1}{4}$ SE $\frac{1}{4}$	30
SE $\frac{1}{4}$ SE $\frac{1}{4}$	34		

<u>Section 28</u>	<u># Acres</u>
NE $\frac{1}{4}$ NE $\frac{1}{4}$	40
NW $\frac{1}{4}$ NE $\frac{1}{4}$	30
SW $\frac{1}{4}$ NE $\frac{1}{4}$	11
SE $\frac{1}{4}$ NE $\frac{1}{4}$	28

The balance of the water right described by said certificate, being for the appropriation of water from Drews Creek Slough under dates of priority of September 8, 1941 and May 20, 1953 for irrigation of these same lands is not in question in this proceeding.

Based on the Lake County deed records and Assessor's records, written notice of the proposed cancellation was served on the owners or record and/or occupants of said real property. Notice was served on April 19, 1988, by certified mail to:

Goose Lake Ranches
1800 Sperry Road
Hughson, CA 95326

Floyd Clark
Goose Lake Ranch
HC 60
Lakeview, OR 97630

On June 8, 1988, a protest in the name of John Hancock Insurance Co., the theretofore unknown owners of the property, was filed with the Department by Richard Fairclo, Attorney at Law, Klamath Falls, Oregon.

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 attorney for protestants and on the proponents of cancellation, the matter was brought to hearing in Lakeview, Oregon on August 10, 1988 before Weisha Mize, an employee of the Water Resources Department authorized to preside on behalf of the Director as a finder of fact. The notice set out the pertinent information regarding the portion of the right proposed to be cancelled in the manner set out in paragraphs 2, 3 and 4 of the STATEMENT, above.

Proponents of cancellation Clyde Fenimore and Kay Clark appeared at the hearing without benefit of counsel. Protestant John Hancock Insurance Co. was represented at the hearing by its attorney, Richard Fairclo.

The Director's Proposed Order document was served on the parties or their attorneys of record on September 21, 1988.

On October 18, 1988, protestants, acting through their attorney, Richard Fairclo, filed objections to the Proposed Order.

At a regularly scheduled meeting in Salem, Oreogn on December 9, 1988, the Water Resources Commission considered the filing by the protestants, together with the protestants' oral argument thereon, and voted 4 to 3 to adopt the Proposed Order document, with corrections to certain acreage figures as recommended by the Director, as the Commission's final Order. Those corrections have been made as directed, and the Water Resources Commission now issues the following:

FINDINGS

1. All facts set forth in the STATEMENT are hereby incorporated as findings of the Director.
2. The water in Drews Creek Slough comes from irrigation tailwater coming off of lands north of the subject property. The water in Drews Creek comes primarily from Drews Reservoir, although it may pick up some run-off from the Lakeview Water Users District.
3. The subject lands appear generally quite flat, with a slight downward slope primarily to the east and slightly to the south. The vegetation is primarily sage and rabbit brush, with some grass interspersed. A number of cattle are currently grazed on the entirety of the lands.
4. Both the Creek and the Slough run a meandering course across most of the subject lands. Drews Creek originally had two major diversion dams, one in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ (Diversion 1) and another in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ (Diversion 2), both in Section 20. Diversion 1 has been washed out for approximately 12 years and has not been in use. The Slough has a number of channels and branches, two of which connect with the Creek in Section 20. The layout of the Creek, Slough and various diversion dams and gates, are illustrated in Figure 1, a copy of Exhibit WRD-6. The lands on which the irrigation right from Drews Creek have been forfeited are shown outlined in yellow on Figure 1.
5. Proponents were not persuasive in their argument that no water from Drews Creek had been used. Mr. Fenimore, whose property adjoins the lands in question, asserted that only water from Drews Creek Slough had been used to irrigate the subject lands, yet stated that he was unable to see Diversion 2 unless he traveled on the dirt roadway running between the Renner ranch-house, located on the north side of the property, to the southern property line, which he did at least once and perhaps as much as 3 times a year between 1980 and 1987. Mr. Fenimore further asserted that the lands had only been used for pasture during the years in question.
Mr. Clark asserted that while he did not know much about the diversion system, between 1982 and 1986 he had assisted in planting wheat in the southern half of Section 20, and that there had been no irrigation from either source anywhere on the property. Cattle had been run on the remaining portion of the lands. He indicated that while the operators of the farm had "diddled around with some water", it was never beneficially used and reasserted that none of the lands in question had been irrigated from either the Creek or the Slough.
The testimony of the proponents was inconsistent as to both use of the property and irrigation of the subject lands. Proponents have not met their burden with respect to nonuse of water from Drews Creek under the terms of the right in question.

6. Witness for the protestant, Al Daugherty, has been manager of the farming operation since 1986. He testified that in 1984, while managing a neighboring farm, he had occasion to be on a portion of the subject lands during the summer, the entire S½ of Section 21, searching for strayed cattle. At that time, the ground was quite wet and had clearly been well irrigated. Based on his present knowledge of the diversion and delivery system, he indicated that it would have been impossible to have watered much of the area he had crossed solely from the Slough, and that it would have required supplementation from Drews Creek to cover that area.

7. Witness for protestants Stephen Cox indicated that in 1982 he had been employed as a farm hand on the subject lands, and that he was unable to retrieve a tractor from lands immediately south and adjacent to Diversion 2 because the ground in that area was so wet and deep in mud. However, Mr. Cox was unable to state with certainty whether this ground was wet due to deliberate application of water or because the earth embankment on the south side of Diversion 2 was washed out. Testimony of proponent Fenimore, while incorrect in that he indicated Diversion 2 was presently washed out, was consistent with testimony of Mr. Daugherty to the extent that Diversion 2 was washed out at some time between 1980 and 1986 and replaced in 1986. Inconsistencies in or lack of testimony as to existence of the dam each year of the years in question, other than the likely existence of the dam in 1984 as testified to by Daugherty and the rebuilding of the dam again in 1986, support a finding that the earth dam at Diversion 2 was in existence in 1984 and that Drews Creek water was utilized at least in that year, and again in 1986 and 1987.

8. More of the lands in question are irrigated from Drews Creek Slough than are irrigated from Drews Creek. However, that portion of the right for irrigation from Drews Creek Slough is not in question in this proceeding.

9. Testimony from both proponents and protestants support a finding that there has been no irrigation from Drews Creek on the NE¼ SW¼, the SE¼ SW¼, the NW¼ SE¼, the SW¼ SE¼, and the SE¼ SE¼ of Section 20 and that portion of the SW¼ SW¼ of Section 21 lying south of Drews Creek. Protestant testified that there had never been any water applied to any of the subject lands lying in Section 28. Protestant further demonstrated on exhibit WRD-6B that there had been no irrigation from Drews Creek of lands under certificate in the NE¼ NW¼, the SE¼ NW¼, the SW¼ NE¼, the NE¼ NE¼, and the lands lying to the west and north of the Slough and ditch in the SE¼ NE¼ of Section 20.

9. Testimony indicates that during 1986 and 1987, using temporary dams the first year and a rebuilt dam at Diversion 2 the second, all the water available in Drews Creek was diverted for irrigation of lands lying north and east of the Creek. Testimony further established that, since 1986, there has been insufficient

water in the Creek, without utilizing the Slough also, to properly irrigate the lands on which the right in question has not been forfeited.

CONCLUSION OF LAW

Oregon Revised Statutes 540.510 provides that "beneficial use shall be the basis, the measure, and the limit of all rights to the use of water." If water is not used for five successive years on some or all of the subject lands and under the terms of that water right, the right is forfeited to the extent of the area involved in the nonuse. Here, only a portion of the lands to which the irrigation water right in question is appurtenant were irrigated without a lapse in 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 right. All that must be shown is that there has been nonuse under the terms of the right over five successive years. Rencken v. Young, 300 Or 352 1985). The evidence presented was not sufficient to support a forfeiture of the use of water from Drews Creek on all of the subject lands during the years in question. However, the evidence of forfeiture presented by proponents was confirmed by protestants to the extent of non-irrigation of certain lands under the right in question. Irrigation use of water from Drews Creek established on the following lands in Sections 20, 21 and 28 of Township 40 South, Range 19 East, Willamette Meridian, under the Certificate found at Volume 15, page 20626, State Record of Water Right Certificates, has been forfeited by nonuse for a period of five or more consecutive years during the period 1980-1987 in the amount of 354.4 acres. Specifically, rights for irrigation from Drews Creek have been forfeited as follows:

<u>Section 28</u>	<u># Acres</u>	<u>Section 20</u>	<u># Acres</u>
NE¼ NE¼	40	NE¼ NE¼	20
NW¼ NE¼	30	SW¼ NE¼	27.4
SW¼ NE¼	11	SE¼ NE¼	08.4
SE¼ NE¼	28	NE¼ NW¼	02
	109	SE¼ NW¼	21
		NE¼ SW¼	30
<u>Section 21</u>	<u># Acres</u>	SE¼ SW¼	22
SW¼ SW¼	12	NW¼ SE¼	33.6
		SW¼ SE¼	35
		SE¼ SE¼	34
			233.8

The remaining 358.6 acres of irrigation use from Drews Creek established in said Certificate have not been forfeited by nonuse within this same period of time.

ORDER

NOW, THEREFORE, it is ORDERED that the portion of the right evidenced by the Certificate found at page 20626, Volume 15, State Record of Water Right Certificates for irrigation use of waters from Drews Creek within the above-described lands found in Sections 20, 21 and 28 of Township 40 South, Range 19 East, Willamette Meridian, Lake County, Oregon, be and the same is hereby canceled in the amount of 354.4 acres pursuant to ORS 540.610 and 540.640.

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 said Certificate not canceled by this proceeding.

DATED this 9 day of December, 1988.



WILLIAM BLOSSER
Chairman, Water
Resources Commission

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.