

THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION OF) PC 87-10
CERTAIN WATER RIGHTS IN THE NAMES)
OF GUS AND VELLA VASSIOS FOR USE OF) STATEMENT, FINDINGS OF
WATER FROM LITTLE PINE CREEK, EAST) FACT, CONCLUSIONS OF
BRANCH LITTLE PINE CREEK AND SPRING) LAW AND PROPOSED ORDER
GULCH (GRANT COUNTY))

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 certain water rights, based on information furnished to the Director in the form of affidavits alleging nonuse of the rights in question in each of five and more successive years.

The certificate recorded at Page 38668, Volume 30, State Record of Water Right Certificates, describes a portion of the rights allowed by decree of the court in the names of George Mason and Bessie Finlayson in the matter of Determination of the Relative Rights to the Waters of John Day River and its Tributaries. Certificate 38668 described rights to appropriate not to exceed 1/40 cubic foot per second (cfs) per acre irrigated to June 1 and 1/80 cfs per acre thereafter; further limited to one acre-foot per calendar month to June 1 and four acre-feet per acre during season April 1 to September 30 from Big Dog Creek, Painters Gulch, Little Pine Creek, East Branch Little Pine Creek and Spring Gulch for irrigation of a certain 88.0 acres of land and domestic use, all with a date of priority of 1865. The place of use is described in the certificate as:

10.5 acres in NE 1/4 NW 1/4	1.3 acres in SW 1/4 NE 1/4
6.1 acres in NW 1/4 NW 1/4	8.4 acres in SE 1/4 NW 1/4
4.1 acres in SW 1/4 NW 1/4	13.2 acres in NE 1/4 SE 1/4
26.7 acres in SE 1/4 NW 1/4	4.0 acres in NW 1/4 SE 1/4
13.7 acres in NE 1/4 SW 1/4	Section 6
Section 36	T 14 S, R 32 E, WM
T 13 S, R 31 E, WM	

The water rights in question in this proceeding pertain only to appropriation of water from Little Pine Creek, East Branch Little Pine Creek and Spring Gulch, as described by the said certificate.

On November 20, 1987, notice of initiation of this proceeding for cancellation of the water rights in question was served on:

District Director, Bureau of Land Management, U.S. Department of the Interior,
Donald and Robin Merrell,
Frederick and Vivian Gardner,
Ansel and Teresa Krutsinger,
Danny and Janice Ellison, and
Gregory Lynch, Attorney at Law,

as owners of record, occupants, or attorney of record for an owner of the real property to which the water rights in question are appurtenant.

Protests against the proposed cancellation of the water rights in question were filed by Ansel J. and Teresa L. Krutsinger, Frederick and Vyvyan Gardner, Danny and Janice Ellison, and by Mr. and Mrs. Donald Merrell.

Pursuant to the Notice of Hearing served on the parties' attorneys of record, the matter was brought to a contested case hearing in Canyon City, Oregon, on July 7, 1988, before James W. Carver, Jr, an employe of the Water resources Department, authorized to preside in behalf of the Director as a finder of fact.

The proponents are represented by Gregory P. Lynch of the law firm of Gray, Fancher, Holmes and Hurley, Bend, Oregon. The protestants are represented by Roy Kilpatrick of the law firm of Kilpatricks and Pope, Mt. Vernon, Oregon.

Subsequent to the hearing, upon approval of a request from Mr. Lynch, the testimony of Don Nettleton was added to the record in the form of an affidavit. Rebuttal to Mr. Nettleton's testimony was received from John R. Gardner and from Jessie V. McKay, also in the form of affidavits.

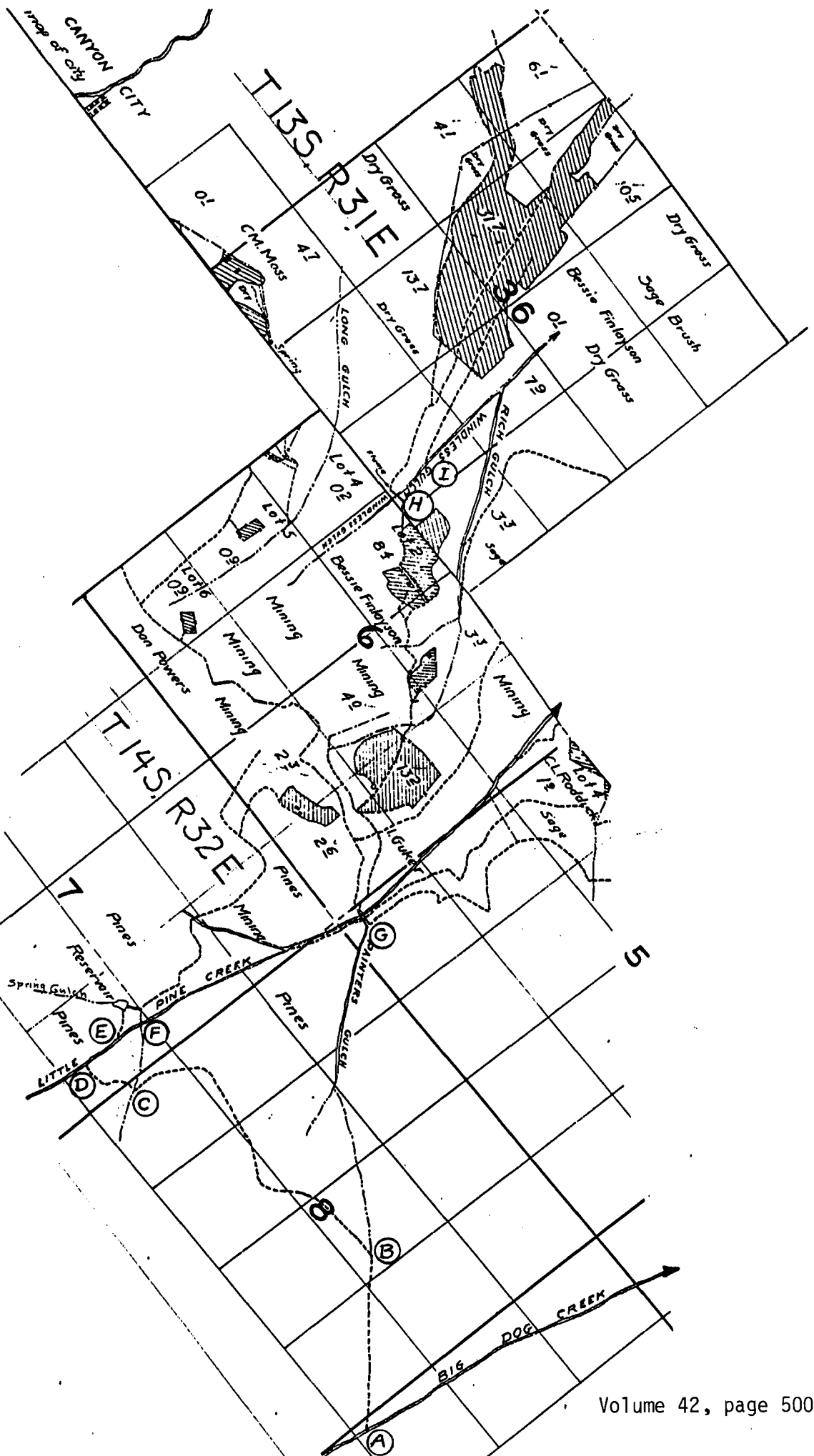
Based on the record, the Director makes the following:

FINDINGS OF FACT

Figure 1, a xerographic reduction of a portion of the map prepared by employes of the State Engineer in connection with the John Day River adjudication proceedings, shows the relative locations of Big Dog Creek, Little Pine Creek, East Branch Little Pine Creek, Spring Gulch, Painters Gulch and Windlass Gulch, the irrigated lands under Certificate 38668, and ditches used to divert and convey water from the several stream channels to the places of use.

Under the terms of the original water rights as allowed by the court, water was diverted from Big Dog Creek at point "A" (see Figure 1) and conveyed by a ditch to point "B". At point "B" a portion of the water diverted from Big Dog Creek was carried by a ditch to the channel of East Branch Little Pine Creek at point "C". The combined waters from Big Dog Creek and East Branch Little Pine Creek were conveyed by a ditch from point "C" to the channel of Little Pine Creek at point "D". The combined waters from Big Dog Creek, East Branch Little Pine Creek and natural flow in Little Pine Creek could be diverted at point "E" and conveyed to a small reservoir in the channel of Spring Gulch, or diverted at point "F" and conveyed directly to places of use for mining and/or irrigation of a certain 2.5 acres in the SW1/4 SE1/4 and 2.6 acres in the SE1/4 SE1/4 of Section 6. The small reservoir in the channel of Spring Gulch was used to accumulate water overnight, at times of reduced flows, to be used for mining purposes the next day. (See Exhibit WRD 1, Attachment A)

Certificate 38668 was issued to describe the water rights remaining after cancellation of a portion of the original water rights allowed by the court to George Mason and Bessie Finlayson. The cancellation involved the said use of water for mining purposes on certain lands within said Sections 36 and 6, and also involved the said use of water for irrigation of a certain 2.5 acres in the SW1/4 SE1/4 and 2.6 acres in the SE1/4 SE1/4 of said Section 6.



Surveyed October 2 to 5, 1925

(Figure 1)

Going back to point "B", the remaining portion of the waters diverted from Big Dog Creek were released into the channel of Painters Gulch. The released water together with any natural flow in Painters Gulch was flumed across the channel of Little Pine Creek at point "G". At point "G" the water was conveyed through the Finlayson Ditch to the places of use which included the lands as described in paragraph two of the Statement, above. Waters carried in the Finlayson Ditch were flumed across the channel of Windlass Gulch at point "H" within the SW1/4 SE1/4 of Section 36 for irrigation of certain lands included within the shaded area within the West one-half of Section 36.

No water right was allowed by the court or established by any other means for irrigation of the shaded lands within the NW1/4 SE1/4 of Section 36.

It is noted that under the water right in question the court allowed only 26.7 acres of the shaded area within the SE1/4 NW1/4 of Section 36. The other 5.0 acres which lie to the east of the ditch which diverts from Windlass Gulch at point "I" are covered by a water right described by a certificate issued to George Mason and recorded at page 2022, Volume 3, State Record of Water Right Certificates. The said certificate describes a right established by performance under Permit 1400 and is for the appropriation of not to exceed 0.16 cubic foot per second of water from Windlass Gulch under a date of priority of October 16, 1912, for irrigation of 5.0 acres within the SE1/4 NW1/4 of Section 36.

Because of the slope of the land, as shown by Exhibit WRD 11, water diverted out of the channel of Windlass Gulch at point "I" which is downstream from the Finlayson Ditch flume crossing over Windlass Gulch, could not be used to irrigate any of the lands in Section 36 which are under the water rights in question.

Testimony established that about the year 1974 water flowing in the channel of Little Pine Creek was taken into a ditch diverting from the east side of the channel a short distance upstream from the Painters Gulch flume crossing over Little Pine Creek at point "G" and was discharged into the Dog Creek and Painters Gulch waters flowing to the Finlayson Ditch.

Testimony also established that in 1975 an old ditch grade adjacent to the west side of the Little Pine Creek channel above point "G" was cleaned out and lowered by means of a small bulldozer. The reconstructed ditch was then used to divert waters flowing down the Little Pine Creek channel and discharge them into the Finlayson Ditch at the point where the flume over Little Pine Creek discharges into the Finlayson Ditch.

Proponents testified that no waters of Little Pine Creek, East Branch Little Pine Creek or Spring Gulch were diverted from the channel of Little Pine Creek in the vicinity of point "G" and discharged into the waters flowing down Painters Gulch during the period of years of 1966 through 1973, during which time period their observations were frequent and without interruption.

The testimony of the parties is not in agreement as to any operable ditch to divert water from the Little Pine Creek channel into the Finlayson Ditch in the vicinity of point "G" during the several years prior to 1974. However, we find the testimony of the proponents persuasive, that no water was diverted from the channel of Little Pine Creek into the Finlayson Ditch in the vicinity of point

"G" for irrigation of lands under the water rights in question during the period of five and more successive years prior to 1974.

Protestants' witness Loren Stout testified that his family leased the Vassios (Ellison) property from 1972, when he was 16 years old, through 1984. He stated that he personally participated in the irrigation practices carried out on the property from about 1974 until the end of the lease. His personal knowledge of a ditch on the east side of Little Pine Creek diverting water from the channel of Little Pine Creek and discharging it into the water flowing into the Finlayson Ditch near point "G" relates only to the year of 1974.

Mr. Stout further testified that water diverted from the channel of Little Pine Creek in the vicinity of points "E" and/or "F" reached their property for irrigation use only as a result of the water having been diverted and used by miners for mining purposes. The mining waste water came down Windlass Gulch. (See Tr. 138 and 140)

The testimony of protestants' witness Gaylord Lambeth provided little help in arriving at the facts of use or nonuse of water under the terms of the water rights in question. Mr. Lambeth had difficulty in clearly articulating his knowledge of the facts. As a result, in both direct and cross examination questions were posed to Mr. Lambeth in the form of statements. It is not possible to discern from the record if his answers demonstrated his knowledge of the matter, or were merely agreements with questions which he did not actually understand. Furthering questioning on some point disclosed that he had responded to the statement form of question without having understood the question.

ULTIMATE FINDING OF FACT

No water was diverted from Little Pine Creek, East Branch Little Pine Creek or Spring Gulch and used for irrigation of the lands described in paragraph two of the "Statement" above, under the terms of the water rights in question, within the period of five and more successive years immediately prior to the year of 1974.

CONCLUSIONS OF LAW

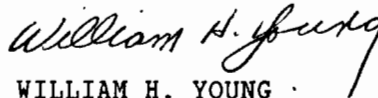
Pursuant to the provisions of ORS 540.610 to 540.650, as defined by the Supreme Court of Oregon in Rencken v. Young, 300 OR 352, the water rights in question have been forfeited by five successive years of nonuse.

PROPOSED ORDER

NOW, THEREFORE, it is ORDERED that the water rights in question, being for appropriation of water from Little Pine Creek, East Branch Little Pine Creek and Spring Gulch for irrigation of the certain 88.0 acres of land as described by the certificate issued in the names of George Mason and Bessie Finlayson and recorded at Page 38668, Volume 30, State Record of Water Right Certificates, be and the same are hereby canceled.

It is FURTHER ORDERED that the said certificate be canceled and a new certificate be issued in lieu thereof to describe the remaining water rights NOT canceled in this proceeding.

Dated at Salem, Oregon, this 14th day of December, 1988.


WILLIAM H. YOUNG
Director

NOTICE: The above proposed 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 this proceeding may file objections and exceptions to this proposed order, with the Commission, within 30 days from date of service (date of mailing) of a copy of this proposed 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 by the Commission.