Before the Oregon Water Resources Department

In the Matter of the Denial of Reconsideration Of Proposed Certificate for Water Use Permit 30789 in the Name of Stanfield Irrigation District for Use of Water in Umatilla County, Oregon.	))))	FINAL ORDER On Contested Case Hearing CC 8

Protestants Rick L. Hale
Robert and Darlene Hoskins

Request for Oral Argument Denied.

FINAL DISPOSITION: PROTEST DENIED

Procedural Background.

The Permit

On June 23, 1965, the Stanfield Irrigation District (District) submitted to the Water Resources Department (Department or WRD) an application to divert water from the Umatilla River, a tributary of the Columbia River, for the irrigation of 13,371 acres. The point of diversion from the river was the Furnish Canal located in the SW 1/4 SW 1/4, Section 31, Township 3 North, Range 30 East, W.M.; 430 feet North and 450 feet East from the SW corner of Section 31. Some lands included in the application were to receive water to supplement existing rights for appropriation of ground water. Other lands were to receive primary rights for appropriation.

In response to this application, the Department issued Permit # 30789, allowing up to 170 cubic feet per second of water to be diverted for the purpose of irrigation and supplemental irrigation. Permit 30789 included the following lands now owned by protestants Robert and Darlene Hoskins (permitted for primary irrigation):

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NE 1/4 NE 1/4        28.0 Acres
SE 1/4 NE 1/4        21.6 Acres
NE 1/4 SE 1/4        26.0 Acres
          Section 8
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Township 3 North, Range 29 East, W.M.

Permit 30789 also included the following lands, now owned by protestant Rick L. Hale (permitted for primary irrigation):

NE 1/4 SW 1/4	40.0 Acres
SE 1/4 SW 1/4	38.4 Acres
NE 1/4 SE 1/4	40.0 Acres
NW 1/4 SE 1/4	40.0 Acres
SW 1/4 SE 1/4	40.0 Acres
SE 1/4 SE 1/4	40.0 Acres

Section 9
Township 3 North, Range 29 East, W.M.

The Hoskins lands are referred to herein as the Section 8 lands. The Hale lands are called the Section 9 lands. These lands are not now, and never have been within the boundaries of the Stanfield Irrigation District.

The time limits to complete construction and to make complete application of water under Permit #30789 were last extended to December 31, 1988.

When the final proof survey was performed in 1989, the Section 8 and Section 9 lands at issue in this case were not included in the Stanfield Irrigation District's claim of irrigated land. The Proposed Certificate of Water Rights for Permit 30789, issued on November 7, 1997, did not include Protestants' lands.

The Request for Reconsideration; and Hearing.

On January 8, 1998, counsel for Protestants wrote the Department requesting that the Section 8 and Section 9 lands be included on the Proposed Certificate of Water Rights for Permit 30789. By letter dated January 23, 1998, the Department refused Protestants' request to reconsider the contents of Proposed Certificate for Permit 30789. The basis for this decision, according to the Department's letter, was that "satisfactory proof has not been made to allow the Department to determine that appropriation of water to beneficial use under the terms of the permit has been accomplished for these lands."

The Department's letter informed Protestants that if they disagreed with the Department's conclusions, they could file a protest and a contested case hearing would be scheduled. Protestants filed requests for reconsideration and protests on February 9, 1998.

A hearing was held in this matter before Ruth Crowley, Administrative Law Judge (ALJ), in Pendleton, Oregon, on October 22, 1998. The hearing was continued on November 2, 1998, in Salem, Oregon. At both days of hearing, Adam Sussman, Lay Representative, appeared for the Department; Laura Schroeder, Attorney at Law, appeared for Protestants.

Ms. Schroeder called Ralph Seibel, former owner of the Hale (Section 9) lands and lessee of the Hoskins (Section 8) lands; Robert Hale, who manages the Hale lands (owned by his brother); Scott Madison, who assists his in-laws with their Section 8 lands; and William Porfily,

former watermaster in Pendleton, manager of Stanfield Irrigation District from 1979-1993, and currently a consultant on water rights.

Mr. Sussman called Mary Grainey, water rights examiner with WRD; Vern Church, a watermaster in the Powder Basin District who conducted final proof surveys of water use in the Pendleton area for 12 years; and Steven Applegate, who worked for WRD for over 20 years, as a field engineer conducting final proof surveys, as watermaster in Pendleton, and as field survey activities manager, among other positions.

The ALJ issued a proposed order on January 22, 1999, that denied the protests. Protestants filed exceptions to the proposed order on February 19, 1999.

Consideration of Exceptions filed by Protestants.

In response to Exceptions 1 and 8, the corresponding findings of fact have been modified. As modified, the findings of fact are an accurate reflection of the record. The findings document the history of water use on the Section 8 and Section 9 lands under water right permit 30789. Exceptions 4, 6, and 7, which ask that certain facts be deleted from corresponding findings 4, 6, and 7, are denied. Exceptions 11, 12, and 13 are denied because they ask for the addition of redundant or irrelevant facts, additionally, exception 13 proposes an unsupported legal conclusion. Exception 14 asks for a finding of fact that is an unjustified legal conclusion; therefore, it is denied. Exceptions 2, 3, 5, 9, and 10 which also relate to findings of fact, are addressed further below.

Exception No. 2 - In response to exception 2, finding of fact 2 has been modified to refer to the written agreement with the Hermiston Irrigation District. To the extent that the issues raised in exception 2 are not included in the modifications, the exception is denied. Protestants' request to describe the development of the headgates on the Furnish and Hermiston Canals is irrelevant to the water use issue under consideration. Protestant's request to add a statement about "wheeling charges" is not supported by the record.

Exception No. 3 - Protestants request that Finding of Fact No. 3 be revised to state that the Section 9 lands were irrigated through the year 1984, rather than through 1980 or 1981. Finding of Fact No. 3 has been modified to demonstrate more fully that the weight of the evidence supports the finding that the Section 9 lands were irrigated through 1980 or 1981 under Permit 30789.

Exception No. 5 - Protestants ask that Finding of Fact No. 5 be deleted or replaced. This finding demonstrates the intent of the Seibel Bros. with respect to the Section 9 lands. The Seibels discontinued use of water through the Furnish Canal under permit 30789 in favor of using water through the Hermiston Canal on lands in Section 9. They made a new application in order to have this change officially recognized in the records of the Department. Permit 45836 under Application 61614 was developed and water use was surveyed by Department employee, Vernon Church, in 1982 (testimony vol. 1 pg. 227-228). The ALJ has summarized the key elements of Department exhibits 18 and 19 that led Department witness, Steve Applegate, to

testify that "The Department certainly would have viewed these two documents taken together as a voluntary cancellation of that piece of that permit (30789)," (testimony vol.2 pg. 18). The full statement of the District regarding this change has been added to the finding. No evidence was provided by the protestants that the Seibel Bros. attempted to reinstate water use under permit 30789 or through the Furnish Canal. Exception 5 is denied.

Exception No. 9 - Protestants ask that Finding of Fact No. 9 be replaced. Protestants present an alternative finding that discusses varying testimony on the Department's policy with respect to certification of water rights where the water had not been used, or use had been interrupted, and that implicitly concludes that the Department's policy is equivocal. Finding of fact 9 has been modified to demonstrate more fully that the weight of the evidence supports the ALJ's finding that the Department has a consistent policy of not issuing certificates where the water used under the permit has been interrupted significantly. Exception 9 is denied.

Exception No. 10 - Protestants ask that an additional finding of fact be made that demonstrates that the Department's policy for leaving acreage off of a final proof survey map did not rest on clear standards or guidelines for non-use during a set period of time. Both, Mr. Church and Mr. Applegate clearly testified that if a field investigator's report stated that use was developed, but had not been exercised for five or more successive years prior to the survey, the Department would not issue a certificate based upon that report (testimony vol. II pg. 27-28, vol I. pg. 251). Additionally, Mr. Applegate testified that in some instances non-use for a shorter period could also result in leaving acreage off of a final proof survey map: "In the case, for example, where a subdivision was built on the property where the (irrigation) permit was to have been developed, paved over as a parking lot, such things as that . . . based upon the fact that the land could no longer be used as the permit required it to be." (testimony vol. II pg. 28). Mr. Applegate also testified that if use had not occurred for some period of time, less than 5 years, that the inspectors were instructed to go back in a year or two, and determine if the use had been resumed (testimony vol II. pg. 30). These other factors and circumstances are not relevant to this case. Exception 10 is denied.

Exceptions 15, 16, and 17 contend, respectively, that the ALJ relied on the incorrect law, that the ALJ's legal discussion is erroneous, and that the ALJ's legal conclusion is wrong. Upon review of the relevant law, I concur in the ALJ's legal analysis and conclusion. The exceptions are denied.

The Opinion and Discussion of the Proposed Order are adopted, as modified, as part of this Final Order.

FINDINGS OF FACT

1. In 1974, Ralph Seibel and his brother, Albert Seibel, first applied water on the Section 8 and Section 9 lands under Permit 30789. The Seibel Bros. owned the Section 9 lands and leased the Section 8 lands from Bob Hoskins. Neither parcel was irrigated when the Seibel Bros.

began farming them [Seibel testimony].

2. On the Section 8 land, the Seibels changed the point of diversion from the Furnish Canal to the Hermiston Feed Canal in 1975, to obtain water earlier in the irrigation season for their alfalfa seed crop. The Seibel Bros. had a December 1973, written agreement from the Hermiston Irrigation District concerning the change in point of diversion. Mr. Seibel testified that there was an oral agreement with the Stanfield Irrigation District concerning the change. The Seibels irrigated the Hoskins' Section 8 lands through 1983 [Seibel testimony; Protestants Exhibits 11 and 14].

3. Starting in 1974, the Seibels also irrigated the Section 9 lands using the Hermiston Feed Canal, under Permit 30789. Ralph Seibel testified that the Section 9 lands were irrigated through 1984. However, Protestants were unable to provide records of power use, crop production, or other documentary evidence for the Section 9 lands. The only evidence presented was the assessment record of Hermiston Irrigation District that was stipulated to go through the year 1980. In addition, the filing of an new application in 1981, effectively canceled that portion of the water right under permit 30789 that applied to the Section 9 lands. The weight of the evidence demonstrates that the Seibels irrigated the land until 1980 or 1981, under Permit 30789 [Seibel testimony; Applegate testimony vol. 2 pg. 17-18; Protestants Exhibit 13; Department's Exhibits 18 and 19].

4. In the early 1980's, Albert Seibel suffered a heart attack and it became difficult for the brothers to continue their farming operation. They gave up their lease on the Hoskins lands and put the Section 9 lands up for sale [Seibel testimony; Department Exhibit 19; Protestants Exhibit 38].

5. In order to facilitate the sale of the Section 9 land, the Seibel Bros. submitted a water rights application (No. 61614) in 1981. In the "Remarks" section, the Seibels wrote:

> This is a new Surface water filing under Seibel Bros. This is to be the primary source underlying permit # G7920 because of change in delivery from Stanfield ID to Hermiston ID, therefore Stanfield ID permit 30789 no longer applies. We would like this to be processed as soon as possible to facilitate a sale of property as this is a requirement for buyer. We understand this permit will be required to obtain certificate under permit G 7920. [Department's Exhibit 19].

The Seibel Bros. also communicated their intention to discontinue development of permit 30789 to the Stanfield Irrigation District and the district manager, Bill Porfily replied:

> The Stanfield Irrigation District Board of Directors reviewed your application to take water through the Hermiston Irrigation District U.S. Feed Canal and cancel the 1965 permit of the Stanfield Irrigation District. The Board had no objection to your proposal. [Department's Exhibit 18.]

The Seibel Bros. took this course of action at the advice of a realtor, but they never attempted to reinstate their water usage under Permit 30789 [Seibel testimony; Protestants Exhibit 37, 38].

6. After the Section 8 land reverted to the Hoskins family, water was never applied to the Section 8 lands under Permit 30789. Mr. Madison purchased some main line irrigation pipe from the Seibel Bros. a year or so after they stopped irrigating the Section 8 lands and moved it to another property [Madison testimony].

7. Rick Hale purchased the Section 9 property in 1991. The Hales negotiated with the Stanfield Irrigation District to take water under Permit 30789. However, water was never applied to the Hale land under that agreement [Hale testimony; Protestants Exhibits 31, 32, 33].

8. The final proof survey for Permit 30789 was conducted in 1989.[1] It was determined that the Section 8 and Section 9 lands were neither being irrigated, nor being assessed by the Stanfield Irrigation District at that time. The Section 8 and Section 9 lands were not included in the 1997 proposed certificate. The Stanfield Irrigation District did not join Protestant's request for reconsideration of the proposed certificate of water right that did not list Protestants' lands [Department's Exhibits 6, 9; Grainey testimony; Church testimony].

9. Mr. Church and Mr. Applegate, each of whom has over 20 years experience with the Department, and has processed hundreds of final proof reports, testified that the Department consistently has not issued certificates where, under the permit, the water has not been used for a significant period of time. Mr. Porfily, a former Department employee testified that he had prepared two final proof reports, and submitted them to Salem (testimony vol. 2 pg. 66). He testified that he knew of instances where the Department had issued certificates despite nonuse of the water under the permit, but did not identify any specific instances. The significant and specific experience of Mr. Church and Mr. Applegate outweigh the unsubstantiated testimony of Mr. Porfily. The weight of the evidence demonstrates that the Department has a consistent policy of not issuing certificates for permits when application of water to the subject land has undergone substantial interruption [Church testimony, Applegate testimony, Porfily testimony].

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1 The term "final proof survey" is used here to refer to the actual on the ground survey. The term often is used to refer to the survey, and to the preparation of maps and proposed certificates that establish the findings of the Department regarding the claim of the permit holder. Here, the actual survey was completed in 1989, the proposed maps and certificate under consideration were completed in 1997.

OPINION

Applicable Law

ORS 537.250, which governs issuance of water rights certificates, provides in part:

> (1) After the Water Resources Department has received a request for issuance of a water right certificate accompanied by the survey required under ORS 537.230 (3) that shows, *to the satisfaction of the department,* that an appropriation has been perfected in accordance with the provisions of the Water Rights Act, the department shall issue to the applicant a certificate of the same character as that described in ORS 539.140. The certificate shall be recorded and transmitted to the applicant as provided in that section.
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> *****
>
> (3) Rights to the use of water acquired under the provisions of the Water Rights Act, as set forth in a certificate issued under subsection (1) of this section, shall continue in the owner thereof so long as the water shall be applied to a beneficial use under and in accordance with the terms of the certificate, subject only to loss:
>
> (a) By nonuse as specified and provided in ORS 540.610[.][2] (Emphasis added).

OAR 690-330-0010(1) provides:

> ORS 537.250(1) and 537.630(3) prescribe that the Director shall issue a certificate of water right upon satisfactory proof of appropriation. Satisfactory proof shall be following:
>
> (a) A determination by the Department that appropriation of water to beneficial use under the terms of the permit has been accomplished to the extent authorized;
>
> (b) A determination by the Department that appropriation of water to a beneficial use under the terms of the permit was accomplished to an extent less than authorized shall constitute proof for that portion of the appropriation.

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2 ORS 537.010 provides:

> As used in this chapter, "Water Rights Act" means and embraces ORS 536.050, 537.120, 537.130, 537.140 to 537.252, 537.390 to 537.400, 538.420, 540.010 to 540.120, 540.210 to 540.230, 540.310 to 540.430, 540.505 to 540.580 and 540.710 to 540.750.

ORS 537.260 (2), which relates to the Department's discretion in issuing certificates, provides:

> The department may determine the extent to which an appropriation has been perfected under any permit at the time of submission of final proof provided for in ORS 537.250, and shall limit the certificate provided for in that section to a description of such appropriation as has been actually perfected to the extent that the water applied for has been actually applied to the beneficial use contemplated in the permit.

ORS 540.610(1), which governs forfeiture of a water right for nonuse, provides:

> Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. Whenever the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five successive years, the failure to use shall establish a rebuttable presumption of forfeiture of all or part of the water right.

Protestants' Position

Protestants contend that the sole statutory requirement for including lands on a water right certificate is whether the appropriation of water authorized by the permit has been perfected. ORS 537.250(1). According to Protestants, ORS 537.230 sets out the acts incidental to perfection, which include construction of irrigation work within one year of the application's approval, completion of irrigation or other work within five years unless the Department grants an extension, and application of water to beneficial use within the period allowed in the permit. Protestants argue that Seibel brothers perfected the permitted use on the Section 8 and 9 lands.

Protestants maintain that WRD has offered no support for its argument that interruption of use is a valid reason to exclude Protestants' lands from the certificate. Neither statutes nor WRD rules provide for a criterion of continuous use as a requirement for perfection of water rights. According to Protestants, WRD offers only an indefinite, informal policy of excluding lands when water use is interrupted for a period. The Department policy of continuous use, according to Protestants, falls squarely within the definition of an agency rule under ORS 183.310(5)(a): "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency." ORS 536.025(2) precludes the Water Resources Commission from delegating its rulemaking authority to the Water Resources Director. In the absence of a properly adopted rule, Protestants argue, the Department's policy cannot serve as a basis for excluding Protestants' lands from the certificate.

Protestants also contend that WRD has abused its discretion in applying its unwritten policy concerning continuous use. WRD could argue that "satisfaction" is a delegative term under *Springfield Education Assn v. School Dist.,* 290 Or 217, 228, 621 P2d 547 (1980). A

delegative term is a statutory term that "express[es] non-completed legislation which the agency is given delegated authority to complete." *Id.* When the legislature uses such terms, the agency's task is to "complete the general policy decision by specifically applying it at retail to various individual fact situations." *Id.* at 228-229 (citation omitted). The agency has discretion to decide how to apply the delegative term in a particular fact situation. But the agency's action must be "within the range of discretion allowed by the more general policy of the statute." *Id.* at 229. If it is not within this range, the agency has abused its discretion.

Protestants maintain that the general policy of ORS 537.270 is to determine whether the permitted water use has been perfected. Therefore, in interpreting the statute in this case, the Department is limited to considering whether water has been applied to the land, thereby constituting beneficial use. The Department has interpreted the statute beyond this general policy in applying its informal rule. The Department has interpreted "satisfactory" to mean that there cannot be interrupted use within an indefinite period during the permitted use. According to Protestants, this interpretation exceeds the general parameters of the scheme of ORS 537.270.

Furthermore, Protestants assert that the Department has defined "satisfactory proof" by rule and is bound by that definition. Agencies are bound by their own rules "as if the legislature itself has enacted them" *Georgia Pacific Corp. V. Knight,* 126 Or App 244, 246, 868 P2d 36 (1994). OAR 690-330-0010 states that "satisfactory proof" shall be a "determination by the Department that the appropriation of water to beneficial use under the terms of the permit has been accomplished to the extent authorized."

Protestants argue that the Seibel brothers applied water to beneficial use on the Section 8 and 9 lands to the full extent authorized by Permit 30789. Therefore, protestants argue, those lands should not have been excluded from the final water right certificate.[3]

The Department's Position

WRD argues that the beneficial application of water use in this case does not meet the criterion of the satisfaction of the Department. Therefore, WRD contends, its decision to deny certification of Protestants' lands on Permit 30789 was correct and denial of reconsideration was proper.

The Department argues that its policy of not issuing certificates where water use has been interrupted significantly has been consistent. Both Vernon Church and Steven Applegate testified to Department policy over the past twenty years. Mr. Church testified that policy has been to refuse certification of land on which there has been an interruption of use of water under a permit for five or more years. Mr. Applegate testified that beneficial use, once initiated, must continue to some extent up until the time the certificate issues.

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3 Protestants also assert that they were denied an opportunity to present the facts of their case during the reconsideration process. That opportunity was provided in this proceeding, in which Protestants had a full and fair opportunity to be heard.

According to the Department, ORS 537.250(1) gives it great discretion to determine what constitutes satisfactory proof of perfection. WRD points out that ORS 540.610 (1) allows forfeiture of a certificated water right with five or more consecutive years of nonuse. WRD argues that the legislature would not have intended to grant greater protection to permits, which are not yet perfected water rights, than to certificated rights. The Department concludes that it has discretion and a legislative mandate to determine what constitutes water use to its satisfaction.

A consequence of Protestants' position, WRD argues, is that a single-day of application of water to land under a permit would constitute perfection. Under ORS 537.260, however, the Department has responsibility for determining the maximum amount of water that was applied to beneficial use under a permit to prepare a certificate of water right for that use. *See* 537.260(2) (above); *Smyth v Jenkins*, 208 Or 92, 100, 299 P2d 819 (1956), (court observed that under this statute, ORS 537.260, the state engineer is vested with wide discretion).

Finally, WRD argues that beneficial use prior to 1983 on the Section 8 and Section 9 lands does not create a vested right to a certificate for water use on the lands in question. Protestants argue that they have a vested property right to water based on beneficial use from 1974 to 1983. In *Green v. Wheeler,* 254 Or 424, 458 P2d 938 (1969), the court held that a water right vests only when the statutory requirements are met and the appropriation has been perfected to the satisfaction of the State Engineer (now the Department). The court stated:

> Prior to the water code of 1909 the appropriation of water in Oregon was recognized as a method of creating a vested interest in the waters of a stream. But the adoption of the water code introduced a new concept of establishing one's right to water. All waters in Oregon were declared to belong to the public subject to existing rights (ORS 537.110) and although such waters were declared to be subject to appropriation, they were appropriable only 'as provided in the Water Rights Act and not otherwise * * *.' (ORS 537.120.) Appropriation alone was no longer enough to establish a vested right in the waters of the state; the water code required, and still requires, the fulfillment of other conditions before a water right will vest in the appropriator. Various sections of the water code make this clear. The plan of the statute is to recognize vested rights in water not simply where there is an appropriation but when the 'appropriation has been perfected.' Thus ORS 537.250 provides that a water right certificate shall be issued upon it appearing to the satisfaction of the State Engineer [now the Department] "*that an appropriation has been perfected in accordance with the provisions of the Water Rights Act.*" *Id.* at 430-431 (emphasis in original).

At the time that full beneficial use of the project under Permit 30789 was to be measured (as of December 31, 1988), WRD contends, the lands in question were not being irrigated and had not been irrigated for at least five years prior to the completion date. Nor have they been irrigated since. The lands in question were not claimed by the District as part of their completed water use during the 1989 survey. The appropriation has not been perfected to the satisfaction of the Department because of evidence that the use stopped many years before the completion date of Permit 30789.

Discussion

Resolution of this case turns not on factual disputes, but on the reading of the phrase in ORS 537.250(1), a showing of perfect appropriation " to the satisfaction of the department * * * in accordance with the Water Rights Act." The factual record is clear that the Section 8 and Section 9 lands were irrigated under Permit 30789 from 1974 until, at the latest, 1983. After 1983, the subject lands were not irrigated under Permit 30789. From the last irrigation under that permit to the date for complete application of water under the Permit, December 31, 1988, more than five years elapsed.

ORS 537.250(1) is a prime example of a delegative term under the *Springfield* analysis, to which Protestants cite *supra*. The agency's discretion in determining what meets its satisfaction in showing perfection of a water appropriation is constrained by the general policy of the Water Rights Act and by WRD rules, if on point, but WRD has considerable discretion under the statute in making its determination.

Protestants make two arguments relating to rules. First, they contend that exercise of the discretion granted by statute constitutes an improperly adopted rule. That is incorrect. The Department's determination as to its satisfaction is not an agency directive, standard, regulation, or statement of general applicability implementing law or policy, as ORS 183.310(5)(a) defines a rule. Instead, ORS 537.250(1) allows the agency to decide whether a given showing satisfies it on a case by case basis as constrained by the Water Rights Act.

Second, Protestants maintain that OAR 690-330-0010(1)(a) defines "satisfactory proof" as the appropriation of water to beneficial use and argue that the Seibel Bros. met that criterion. As WRD correctly points out, Protestants' position would mean any application of water under a permit would compel issuance of a certificate of water right. Such a reading renders the language "to the satisfaction of the department" superfluous and would be incorrect for that reason alone. More fundamentally, the rule rests on the concept of "beneficial use," which is imbedded in the Water Rights Act. That concept includes an implicit term of duration of use.

ORS 537.120 provides that "all waters within the state may be appropriated for beneficial use[.]" ORS 540.610(1), which governs forfeiture of water rights for nonuse, begins by stating that beneficial use is the basis of all rights to use of water in this state. The subsection proceeds to discuss when nonuse is presumed to constitute forfeiture of a perfected and developed water right. Beneficial use, in other words, implies use for a duration of time. A water right owner can forfeit that right by interrupting use for a period of five years. The water right owner's use is

then no longer beneficial and no longer constitutes the basis for a right to use water in Oregon.

Although ORS 540.610(1) is not part of the Water Rights Act, the beneficial use limitations set out therein are incorporated into the Water Rights Act by cross reference. For example, ORS 537.250(3) provides that rights in water acquired under the Water Rights Act shall continue in their owner as long as water is applied to beneficial use and shall be subject to loss for nonuse as provided in ORS 540.610(1). This statute makes clear that "beneficial use," as used within the Water Rights Act, entails continued use. *See also* ORS 540.520, ORS 540.539 (statutes within the Water Rights Act that incorporate and reference the requirements of beneficial use under ORS 540.610). If beneficial use implies continued use for the owner of a water right, *a fortiori* it must imply continued use for an applicant for a water right.

Further support for the view that "beneficial use" contains a durational element as used within the Water Rights Act is found in ORS 537.260(2). ORS 537.260(2) allows the Department to "determine the extent to which an appropriation has been perfected under any permit *at the time of submission of final proof* provided for in ORS 537.250," and to issue a limited certificate "to the extent that the water applied for has been actually applied to the beneficial use contemplated in the permit." By instructing the department to evaluate the extent of perfection of the right at the time of the final proof survey, this statute implicitly requires use to continue until the survey occurs to be considered "beneficial."

As demonstrated by the above statutes, the significant interruption in use on the Section 8 and the Section 9 lands is contrary to the beneficial use limitation in the Water Rights Act. The Department acted within the discretion granted to it under ORS 537.250(1) and ORS 537.260(2) and pursuant to the general policy of the Water Rights Act when it excluded the Section 8 and 9 lands from the proposed certificate for Permit 30789.

WRD correctly argues that the Department's decision to exclude the Section 8 and 9 lands does not deprive Protestants of a vested right. The Department is clearly charged with determining whether a water right has been perfected. Before it makes that determination, the water right does not vest. *See* discussion from *Green v. Wheeler, supra.*

WRD is also correct in maintaining that the long interruption of use of water on the Section 8 and 9 lands under Permit 30789 justifies exclusion of those lands from the Stanfield Irrigation District water right certificate for that Permit. The Department has demonstrated a consistent policy of excluding lands on which a long interruption of use has taken place. It has convincingly argued that such a policy is in keeping with the statutory scheme.

CONCLUSIONS OF LAW

1. The statutory standard, under ORS 537.250, of showing that an appropriation has been perfected to the satisfaction of the Department in accordance with the Water Rights Act gives the Department considerable discretion in determining the extent of water use under a permit.

2. The Department acted within its discretion and in keeping with the Water Rights Act and legislative intent expressed therein, in determining that the perfection of water rights with respect to the Section 8 and 9 lands under Permit 30789 had not been perfected in accordance with the Water Rights Act to the Department's satisfaction.

FINAL ORDER

IT IS ORDERED that the protests of the Proposed Certificate of Water Right for Permit 30789 by Rick L. Hale and Robert and Darlene Hoskins are denied, and the attached certificate is issued.

This Final Order issued this 9th day of June, 1999.

Martha O. Pagel, Director
Water Resources Department

Appeals Procedure
Under the provisions of ORS 536.075(2), parties affected by this order may appeal by filing a petition for review in the Court of Appeals. The petition for review must be filed within 60 days after the date of this order.

Certificate of Service

I certify that on June 11, 1999, I served the attached Final Order on Contested Case Hearing, CC8, by mailing in a sealed envelope, with first class postage prepaid, a copy thereof addressed as follows:

Mary S. Grainey

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