

DEC - 1 1987

WATER RESOURCES DEPT.  
SALEM, OREGON

## BEFORE THE WATER RESOURCES COMMISSION OF OREGON

IN THE MATTER OF CANCELLATION	)	PC 86-1
OF WATER RIGHTS IN THE NAME OF	)	STATEMENT, FINDINGS OF
MRS. N.P. NELSON FOR THE USE OF	)	FACT, CONCLUSIONS OF
WATERS OF AN UNNAMED SPRING	)	LAW AND FINAL 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 certain water rights, based on information furnished to the Director alleging that the rights in question had been forfeited by failure to make beneficial use of the water under the provisions of the water rights for a period of five or more successive years of nonuse.

The water right proposed to be canceled represents a portion of the right established by performance under the provisions of Permit 9403 and described by the certificate issued to Mrs. N.P. Nelson and recorded at page 10652, Volume 10, State Record of Water Right Certificates (Nelson certificate). The Nelson rights are for the appropriation of water from an unnamed spring located within the NW 1/4 SE 1/4 of Section 34, Township 2 South, Range 3 West, W.M., with a priority date of November 26, 1929.

The Nelson certificate states that proof of use has been made for "domestic and development of 1 theoretical horsepower, under Permit No. 9403", and that the place of use is within SW 1/4 SE 1/4 and SE 1/4 SE 1/4, Section 34, Township 2 South, Range 3 West, W.M. The issue in this proceeding is whether whatever domestic use was perfected within the SE 1/4 SE 1/4 has been used since 1934 without lapse of a period of five or more years of nonuse. Neither domestic use in the SW 1/4 SE 1/4 nor use for power generation is at issue.

Water right records do not show the location of the residence, if any, within the SE 1/4 SE 1/4 of Section 34 in which domestic use was made. The proof of appropriation filed by Mrs. Nelson in 1933 recites that only one family was actually using water. It is possible that a single domestic use encompassed use in a dwelling in the SW 1/4 SE 1/4 and use in outbuildings or family garden within the SE 1/4 SE 1/4. However, lacking conclusive evidence on this point, the Water Resources Commission assumes, for purposes of this proceeding, that the vested water right evidenced by the Nelson certificate included the right to domestic use for two residences, one of which was located somewhere within the SE 1/4 SE 1/4.

Because there was no evidence available to the department as to the specific location of any residence exercising the domestic right in question, written notice of the proposed cancellation of the right to domestic use of water within the SE 1/4 SE 1/4 was served on all of the owners of record and occupants of land within the SE 1/4 SE 1/4, pursuant to ORS 540.631. Notice was given on May 23, 1986, by registered mail to:

Harry and Mabel Walters  
18430 Kings Grade Road  
Newberg, OR 97132  
(Tax Lot 600)

Rocky and Dorothy Losli  
PO Box 34  
Newberg, OR 97132  
(Tax Lot 800)

Donald J. Slaughter  
18070 Kings Grade Road  
Newberg, OR 97132  
(Tax Lot 700)

Ivan W. and Phyllis M. Miller  
18145 Kings Grade Road  
Newberg, Oregon 97132  
(Tax Lot 900)

D. Ferwalt  
18065 Kings Grade Road  
Newberg, OR 97132  
(Tax Lot 700)

On July 11, 1986, a protest in the names of Harry Walters and Mabel Walters was filed by and through their attorney, Herbert Swift of the law firm of Swift and Swift, Newberg, Oregon against the proposed cancellation.

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 parties or their attorney of record, the matter was brought to hearing in McMinnville, Oregon on December 16, 1986, before James W. Carver, an employee of the Water Resources Department, authorized to preside in behalf of the Director as a finder of fact.

The Notice of Hearing stated: "The water right in question in the matter to be heard is for the use of water from an unnamed spring located within the NW 1/4 SE 1/4 of Section 34, Township 2 South, Range 3 West, W.M., under a date of priority of November 26, 1929, for domestic use in one residence within the SE 1/4 SE 1/4 of said Section 34, as it may pertain to the Harry and Mabel Walters property, being Tax Lot 600, in said Section 34, (Walters' Property). The water right in question is a portion of the right described by the certificate issued to Mrs. N.P. Nelson and recorded at page 10652, Volume 10, State Record of Water Right Certificates.

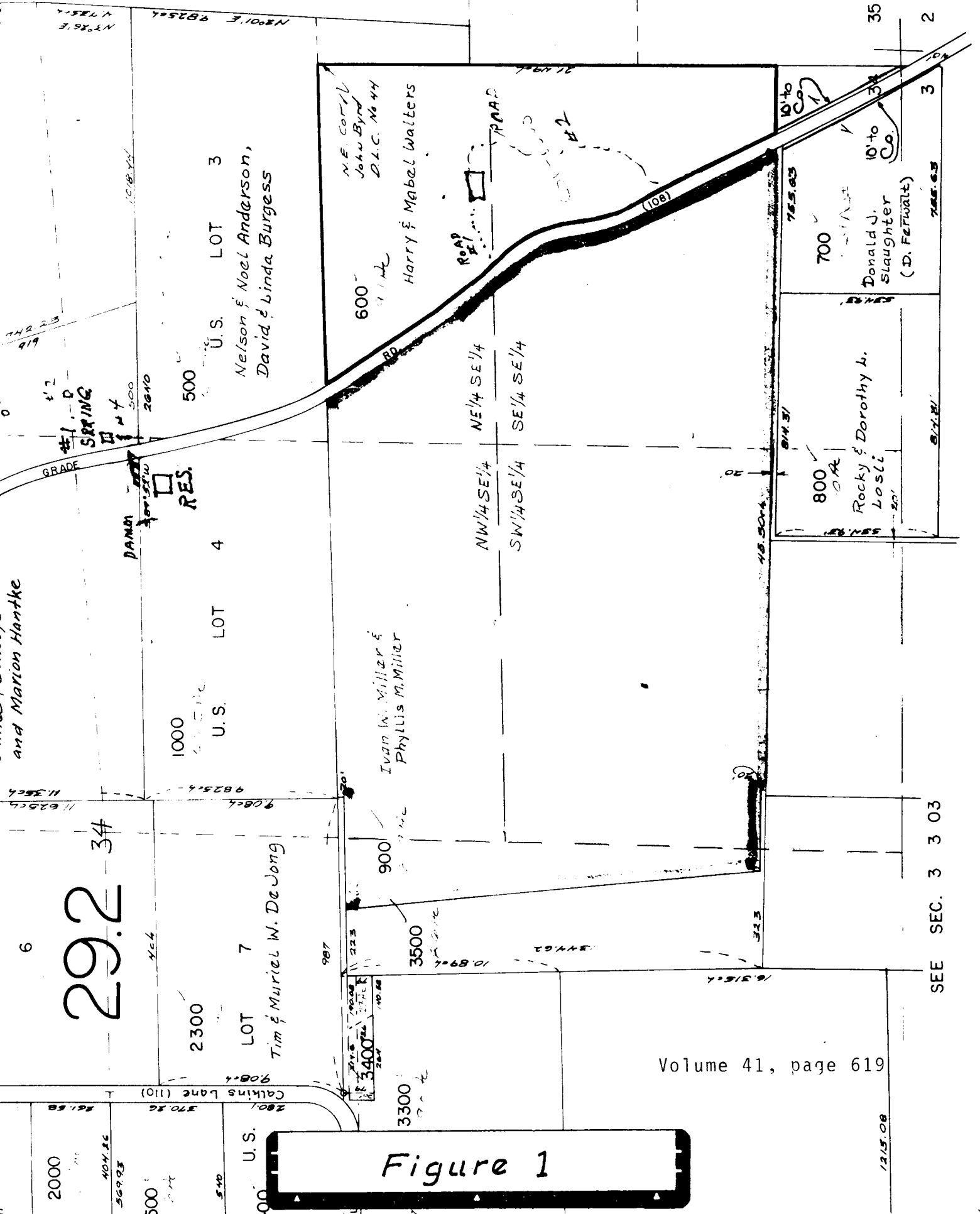
Proponents of cancellation, Ivan W. Miller, Phyllis M. Miller and Muriel de Jong, were present at the hearing and appeared without representation by legal counsel. Proponent Tim de Jong was neither present nor represented by the hearing. The protestants, Harry Walters and Mabel Walters, were present at the hearing and were represented by Robert E. Swift of the law firm of Swift and Swift, Newberg, Oregon.

The relative locations of the ownerships in the SE 1/4 SE 1/4 of said Section 34, the spring (Spring No. 1) which serves as the source of appropriation for the water right in question, Kings Grade Road, and the reservoir or cistern which receives water from Spring No. 1 are shown on Figure 1. The Walters property is further identified by hatchuring. The approximate locations of the Walters house and access roads are also shown. Figure 1 is a photocopy of Exhibit WRD 2 which is a portion of the Tax Assessor's plat for Section 34, Township 2 South, Range 3 West, W.M., Yamhill County, Oregon.

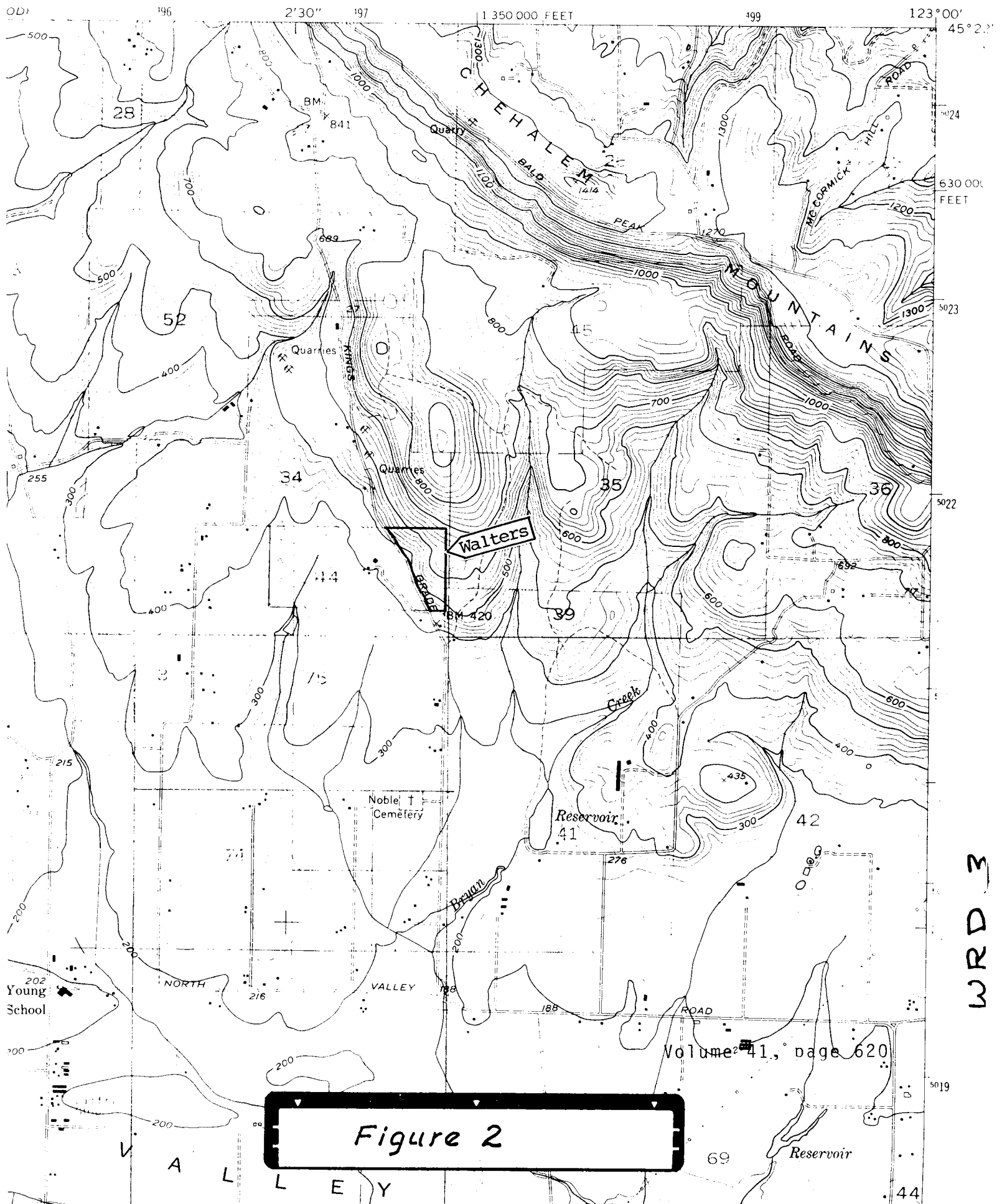
A proposed order was served on the parties on June 29, 1987. Subsequently, the former parties Tim and Muriel de Jong sold their property to Rollin and Kate Soles. At the request of the de Jongs and the Soles, the Soles have been substituted for the de Jongs as parties to the matter. The Water Resources Commission considered written and oral arguments from the parties at the Commission's regularly scheduled meeting on November 20, 1987. The Commission now makes the following:

#### FINDINGS

1. All facts set forth in the STATEMENT are hereby incorporated as findings of the Commission.
2. The only claim to domestic use within the SE 1/4 SE 1/4 under the Nelson certificate is that of Harry and Mabel Walters, who protested the proposed cancellation of that portion of the Nelson right.
3. The Walters property was a portion of a larger parcel of real property owned by Anna E. Nelson. The Walters purchased their property from Mrs. Nelson no later than 1962. Uncontroverted testimony of Harry Walters.
4. There was no house on the Walters property when purchased from Anna Nelson. Uncontroverted testimony of Harry Walters; confirmed by Exhibit WRD 3, a U.S. Geological Survey map prepared from aerial photographs taken in 1954 and field work done in 1956 (showing no buildings on what is now the Walters property). (Figure 2).



DUNDEE QUADRANGLE  
OREGON  
7.5 MINUTE SERIES (TOPOGRAPHIC)  
SE 4 YAMHILL 15' QUADRANGLE



WRD 3

Figure 2

5. Currently, there is only one residence on the Walters property. Construction of that residence was begun in 1978 or 1979. Uncontroverted testimony of Harry Walters.
6. From the time the Walters purchased their property from Anna Nelson in 1962 or earlier until construction of the Walters' current residence was commenced, there was no house on the Walters property. Uncontroverted testimony of Harry Walters.
7. Domestic water for the Walters residence is taken from the spring and reservoir that has historically served as a source of water under the Nelson certificate.
8. Installation of a pump and pipeline system to convey water from the reservoir to the vicinity of the Walters residence was commenced no earlier than 1977. Domestic use of that system to serve a travel trailer used during construction of the Walters residence was commenced no earlier than 1977. Uncontroverted testimony of Harry Walters.

#### ULTIMATE FINDINGS

There was no domestic use of water on the Walters property for a period of at least 15 years, between 1962 and 1977.

#### CONCLUSION OF LAW

Domestic use of water established within the SE 1/4 SE 1/4 of Section 34, Township 2 South, Range 3 West, W.M., and evidenced by the Nelson certificate, has been forfeited by nonuse for a period of five or more consecutive years, during the period between 1962 and 1977.

#### OPINION

Protestants Harry and Mabel Walters filed objections and exceptions to the proposed order canceling that portion of the water right represented by the Nelson certificate providing for domestic use within the SE 1/4 SE 1/4. Mr. Swift, attorney for the Walters, thereafter presented both written and oral arguments on those objections and exceptions to the Commission. The order has been corrected and clarified, where appropriate, to respond to points raised by the Walters' objections and exceptions, and this opinion covers all objections and exceptions not addressed by changes in the order.

I. The Walters incorrectly assert that there is no limitation on the number of residences in the Proof or in the Certificate.

The Proof of Appropriation submitted by Mrs. Nelson clearly stated that water was being used for domestic purposes for only one family. As discussed in the STATEMENT, it may well be that the certificate allows domestic use for only one residence and that the one residence and its associated buildings and family garden occupied portions of both quarter-quarter sections recited in the certificate and Proof. For purposes of this proceeding, however, the Commission has presumed a reading of the certificate most favorable to the Walters' position: that the Nelson certificate represents a right to domestic use for a residence within the SE 1/4 SE 1/4, as well as for the residence continuously present in the SW 1/4 SE 1/4. Although the original Nelson application and permit would have supported perfection of a right for several domestic uses, there is no basis for interpreting the Proof of Appropriation submitted by Mrs. Nelson and the certificate based on that proof as allowing more than two domestic uses.

II. The Walters argue that the water right evidenced by the Nelson certificate is a "unit"; that the full 0.15 cubic feet per second allowed by the certificate has been utilized continuously. The Walters position appears to be that the only limitations on exercise of the Nelson right are that:

- (a) water be diverted only for domestic or power generation purposes;
- (b) water be used for domestic or power generation purposes within the two quarter-quarter sections specified in the certificate; and
- (c) No more than 0.15 cubic feet per second (cfs) be diverted for those uses.

Under the Walters' theory, so long as those three limitations are observed, an individual may initiate delivery of water to any number of new residences at any time. The crux of the Walters' position is found at page 3 of the objections and exceptions filed on March 17, 1987:

"Because the required use is for domestic purposes rather than irrigation of a certain acreage, it is obvious that the application of the principle of non-use must be measured with reference to the quantity of water not used rather than any particular portion of the appurtenant land on which domestic use of water was not occurring."

Thus, under the Walters' position, a water right owner may shift water from one use to another, or from one area to another, or add additional uses (residences, in this case) so long as within the rate and area limitations of the original certificate.

The Oregon Supreme Court has held to the contrary. In Tudor v Jaca, 178 OR 126, 157-158 (1946), the court examined a decree which recited that a particular company owned particular blocks of land described by 1/2 and 1/4 sections. The specified lands total some 560 acres. The decree awarded 100 inches of water "for domestic use and irrigation of said premises, which amount of water.... in lieu of being used upon said lands under the ditches constructed prior to 1903, may be applied in the irrigation of any of the land above described....", Id. at 157. On petition for rehearing, the Tudor court responded to appellant's assertion of the right to spread the 100 miner's inches not only over the lands to which it was originally appurtenant, but over additional lands:

The law will not permit this. If, as appellant now contends, 100 miner's inches is a sufficient quantity of water to irrigate 300 acres of land, then the surplus over the amount reasonable necessary to irrigate the land for which it was originally appropriated....was not within the original appropriation. A prior appropriator cannot claim or use more water than is reasonable necessary for the purposes of his appropriation." Id at 158.

Oregon statutes defining appurtenancy, transfer [FN], and abandonment or forfeiture of water rights make no distinctions between irrigation and domestic or other uses. Hence, assuming for purposes of argument that 0.15 cfs has been continuously diverted and beneficially used for power generation and the single residence in the SW 1/4 SE 1/4, the law does not permit some portion of the "rights" to be split off and applied to an additional dwelling.

If on the other hand, less than 0.15 cfs was needed for, or applied to, the permitted beneficial purposes in the existing dwelling in the SW 1/4 SE 1/4 and the power plant, that increment of the original Nelson right, has been forfeited. Rencken v. Young, (1981)(forfeiture of that portion of the right which was not applied to beneficial use for a period of five years or longer); Hennings v Water Resources Department, 50 OR App 121 (1981)(forfeiture of right where only use made during 5 period was not within the terms of the permit).

III. The Walters additionally argue that the Millers have beneficially used the entire 0.15 cfs within the SW 1/4 SE 1/4 and that the Millers' use

"inures to the benefit of all co-tenants unless there is an ouster....Since the Millers went to Mrs. Nelson for help by conveying their one-half interest in the water right to their vendor...in order that he might convey it concurrently to them, this conduct of the Millers clearly shows an absence of any intent, much less any overt act to oust Mrs. Nelson from her remaining interest in the water right."



The question before the Commission is whether domestic use of water has continued in the SE 1/4 SE 1/4 since 1934 without a period of five successive years of nonuse. The issue is not who used the water; landowner, tenant, co-tenant; but, only whether water was beneficially used for domestic purposes within the SE 1/4 SE 1/4 without lapse of the statutory forfeiture period. Whether the Walters were led to believe at the time of purchase, or at any other time, that their property had a valid water right appurtenant to it, does not affect the outcome of this proceeding. Bausch v. Meyers, 273 OR 376 (1975). Similarly, whether in a proper case a co-tenant might be bound to transfer a valid water right to another co-tenant is simply not before the Commission.

IV. The Walters argue that the correct standard for Commission decision in this matter is that of "clear and conclusive" evidence. The Oregon Supreme Court has stated the proponent's burden to be that of proving "by reliable, probative and substantial evidence, ORS 183.450(2)", that the user has ceased or failed to use the water for a period of five successive years. Rencken v. Young, 300 OR 352, 364 (1985). Because the evidence of nonuse is substantial and uncontroverted, the Commission does not believe that the standard to be applied in evaluating a forfeiture is at issue in this case. Under any standard, the evidence in this case compels a conclusion that domestic use within the SE 1/4 SE 1/4 has been forfeited.

V. The notice of proposed cancellation proposed both cancellation of the Nelson right as to domestic use in the SE 1/4 SE 1/4 and cancellation of the portion of the Nelson right which allows development of 1 theoretical horsepower. The only protest filed was that of the Walters as to domestic use. ORS 540.641 states that if the legal owner or occupant receiving notice of proposed cancellation fails to protest that cancellation within 60 days, the Commission may order cancellation of that portion of the Nelson right which permitted development of 1 theoretical horsepower.

Under ORS 540.650, when an order of the Commission cancels in part or modifies a water right, that part not canceled or continued as modified shall be reaffirmed by a new water right certificate. Following its final order in this matter, the Commission will issue a new certificate evidencing the remaining right to domestic use within the SW 1/4 SE 1/4. The maximum amount of water to be allowed under that certificate is not at issue in this proceeding.

If the present owners of the domestic right within the SW 1/4 SE 1/4 disagree with the terms of the new certificate, they may contest the terms of that certificate. Wilber v. Wheeler, 273 OR 855, 864 (1975). The extent or terms of the remaining portion of the Nelson right are not part of this determination.

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FN: There is a statutory procedure for changing the place of use or the nature of use of a water right, if this can be accomplished without injury to existing water rights. ORS 540.510-540.530. No application for transfer has been filed as to any portion of the Nelson rights.

FINAL ORDER

NOW THEREFORE, it is ORDERED that the portion of the right evidenced by the Nelson certificate that represents a domestic use within the SE 1/4 SE 1/4 of Section 34, Township 2 South, Range 3 West, W.M., be and the same hereby is canceled.

It is FURTHER ORDERED that the portion of the right evidenced by the Nelson certificate that represents use of water to develop 1 theoretical horsepower within Section 34, Township 2 South, Range 3 West, W.M., be and the same hereby is canceled.

Dated and signed at Salem, Oregon this 27 day of Nov, 1987.

  
WILLIAM R. 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.

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