

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF THE PROPOSED PARTIAL) Case No. PC 93-1
CANCELLATION OF WATER RIGHT CERTIFICATES))
37425 IN THE NAME OF R.T. RENNER, 37427))
IN THE NAME OF PACIFIC AMERICAN DEVELOP-))
MENT COMPANY (PADC), AND 37426 AND 37428))
IN THE NAMES OF R.T. RENNER AND PADC FOR))
STORAGE AND IRRIGATION USE OF WATERS OF))
DRY CREEK AND RENNER RESERVOIR,))
TRIBUTARY TO GOOSE LAKE, LAKE COUNTY, OR)

On review of the entirety of the record and after consideration of the exceptions filed by protestant against the Proposed Order, this FINAL ORDER is now issued.

HISTORY OF PROCEEDINGS

This proceeding involves the proposed partial cancellation of those portions of Certificates 37425 and 37427 for storage of 1,357 acre feet of waters of Dry Creek in Renner Reservoir and those portions of Certificates 37426 and 37428 for use of live flow from Dry Creek and waters of Dry Creek stored in Renner Reservoir for irrigation of 538.8 acres located in Sections 4, 5, 8 and 9, Township 41 South, Range 19 East, Willamette Meridian.

The proposed partial cancellation of these water rights was initiated on receipt of affidavits on January 15, 1993 by Edlin Gage, Glen Martin, and Dale Friday, all of Lakeview, Oregon, as supplemented by the addenda submitted by said affiants on February 4, 1993. The affidavits and addenda contained allegations that the portions of the water rights for storage of 1,347 acre feet and irrigation and supplemental irrigation of 538.8 acres had been forfeited by failure to make beneficial use of the water under the terms of the water right for a period of five or more consecutive years. Edlin Gage stated that his knowledge of the alleged nonuse covered the period from October 5, 1975 to August 1, 1989. Glen Martin stated that his knowledge of the alleged nonuse covered the period from March, 1978 to March, 1985. Dale Friday stated that his knowledge of the alleged nonuse covered the period from March, 1973 to August 1, 1992. The period of alleged nonuse on which at least two of the affiants asserted nonuse was from October 5, 1975 through August 1, 1989.

The water rights in question are portions of those rights evidenced by the following water right certificates:

Certificate 37425 issued to R.T. Renner for storage of water from Dry Creek, tributary of Goose lake, in Renner Reservoir (originally constructed under Application R-30867, Permit No. R-1878), for irrigation of those lands described in Certificate 37426, below. Storage of water is under a date of priority of May 16, 1956. The amount of water entitled to be stored each year may not exceed 3,270 acre feet.

Certificate 37427, (Application 34028, Permit R-2462, enlargement of Renner Reservoir originally constructed under Permit No. R-1878), issued to Pacific American Development Company for a right to store waters of Dry Creek, tributary of Goose Lake, for irrigation of those lands described in Certificate 37428, below. Storage of water is under a date of priority of June 17, 1960. The amount of water entitled to be stored each year may not exceed 4,140 acre feet.

As described in Certificates 37425 and 37427, Renner Reservoir is located on the following lands:

<p>S$\frac{1}{2}$ SE$\frac{1}{4}$ Section 18</p> <p>NE$\frac{1}{4}$ E$\frac{1}{2}$ NW$\frac{1}{4}$ Lot 1 (NW$\frac{1}{4}$ NW$\frac{1}{4}$) Lot 2 (SW$\frac{1}{4}$ NW$\frac{1}{4}$) Lot 4 (NE$\frac{1}{4}$ SW$\frac{1}{4}$) Lot 6 (NE$\frac{1}{4}$ SE$\frac{1}{4}$) Lot 5 (NW$\frac{1}{4}$ SE$\frac{1}{4}$) Section 19</p>	<p>S$\frac{1}{2}$ SW$\frac{1}{4}$ SW$\frac{1}{4}$ SE$\frac{1}{4}$ Section 17</p> <p>W$\frac{1}{2}$ NE$\frac{1}{4}$ NW$\frac{1}{4}$ Lot 2 (NE$\frac{1}{4}$ SW$\frac{1}{4}$) Lot 1 (NW$\frac{1}{4}$ SW$\frac{1}{4}$) Lot 3 (NW$\frac{1}{4}$ SE$\frac{1}{4}$) Section 20</p>
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all in T. 41 S., R. 18 E., W.M.

Certificate 37426, (Application 27031, Permit No. 24208), issued to R.T. Renner and Pacific American Development Company for use of water from Dry Creek and from Renner Reservoir (constructed under Application R-30867, Permit No. R-1878,) for primary irrigation of 764.1 acres and supplemental irrigation of 648.3 acres as described below:

<p><u>Primary</u> 20.2 ac</p>	<p><u>Supplemental</u> Section 13 T. 41 S., R 18 E., WM</p>	<p><u>$\frac{1}{4}$ $\frac{1}{4}$</u> NE$\frac{1}{4}$ SE$\frac{1}{4}$</p>
<p><u>Primary</u> 0.3 ac 0.5 ac 36.2 ac 21.8 ac 7.2 ac 35.6 ac 0.7 ac</p>	<p><u>Supplemental</u> 1.6 ac 5.0 ac Section 4</p>	<p>SW$\frac{1}{4}$ NE$\frac{1}{4}$ SW$\frac{1}{4}$ NW$\frac{1}{4}$ (lot 3) SE$\frac{1}{4}$ NW$\frac{1}{4}$ NE$\frac{1}{4}$ SW$\frac{1}{4}$ NW$\frac{1}{4}$ SW$\frac{1}{4}$ (lot 2) SW$\frac{1}{4}$ SW$\frac{1}{4}$ SE$\frac{1}{4}$ SW$\frac{1}{4}$ NW$\frac{1}{4}$ SE$\frac{1}{4}$</p>

<u>Primary</u>	<u>Supplemental</u>	
	40.0	SW $\frac{1}{4}$ NE $\frac{1}{4}$
	35.0 ac	SE $\frac{1}{4}$ NE $\frac{1}{4}$ (lot 1)
	35.4 ac	NE $\frac{1}{4}$ SW $\frac{1}{4}$
<u>Primary</u>	<u>Supplemental</u>	
	25.4 ac	NW $\frac{1}{4}$ SW $\frac{1}{4}$
	40.0 ac	SW $\frac{1}{4}$ SW $\frac{1}{4}$
	40.0 ac	SE $\frac{1}{4}$ SW $\frac{1}{4}$
	18.5 ac	NE $\frac{1}{4}$ SE $\frac{1}{4}$ (lots 2, 6)
	34.2 ac	NW $\frac{1}{4}$ SE $\frac{1}{4}$ (lot 3)
	39.7 ac	SW $\frac{1}{4}$ SE $\frac{1}{4}$ (lots 4, 5)
	8.0 ac	SE $\frac{1}{4}$ SE $\frac{1}{4}$ (lot 5)
	Section 5	
<u>Primary</u>	<u>Supplemental</u>	
36.0 ac		NE $\frac{1}{4}$ NE $\frac{1}{4}$ (lot 13)
2.5 ac		SE $\frac{1}{4}$ NE $\frac{1}{4}$ (lot 12)
	Section 8	
<u>Primary</u>	<u>Supplemental</u>	
30.8 ac		NE $\frac{1}{4}$ NW $\frac{1}{4}$
39.5 ac		NW $\frac{1}{4}$ NW $\frac{1}{4}$
3.9 ac		SW $\frac{1}{4}$ NW $\frac{1}{4}$
1.0 ac		SE $\frac{1}{4}$ NW $\frac{1}{4}$
	Section 9	
<u>Primary</u>	<u>Supplemental</u>	
6.4 ac		NW $\frac{1}{4}$ NE $\frac{1}{4}$
6.2 ac		SW $\frac{1}{4}$ NE $\frac{1}{4}$
39.6 ac		NE $\frac{1}{4}$ NW $\frac{1}{4}$
7.0 ac		NW $\frac{1}{4}$ NW $\frac{1}{4}$
	23.6 ac	SW $\frac{1}{4}$ NW $\frac{1}{4}$ (lot 2)
3.5 ac		SE $\frac{1}{4}$ NW $\frac{1}{4}$ (lot 2)
35.0 ac		SE $\frac{1}{4}$ NW $\frac{1}{4}$
25.8 ac		NE $\frac{1}{4}$ SW $\frac{1}{4}$
0.8 ac	13.0 ac	NE $\frac{1}{4}$ SW $\frac{1}{4}$ (lot 3)
	37.2 ac	NW $\frac{1}{4}$ SW $\frac{1}{4}$
8.0 ac	30.0 ac	SW $\frac{1}{4}$ SW $\frac{1}{4}$
	23.5 ac	SE $\frac{1}{4}$ SW $\frac{1}{4}$ (lot 4)
14.8 ac		SE $\frac{1}{4}$ SW $\frac{1}{4}$
	16.6 ac	NW $\frac{1}{4}$ SE $\frac{1}{4}$
	36.4 ac	SW $\frac{1}{4}$ SE $\frac{1}{4}$
2.6 ac		SE $\frac{1}{4}$ SE $\frac{1}{4}$
	Section 17	
<u>Primary</u>	<u>Supplemental</u>	
	3.8 ac	NE $\frac{1}{4}$ NE $\frac{1}{4}$
	10.0 ac	NW $\frac{1}{4}$ NE $\frac{1}{4}$
7.0 ac	33.0 ac	SW $\frac{1}{4}$ NE $\frac{1}{4}$
	34.6 ac	SE $\frac{1}{4}$ NE $\frac{1}{4}$
30.6 ac		SW $\frac{1}{4}$ NW $\frac{1}{4}$ (lot 2)
36.2 ac		SE $\frac{1}{4}$ NW $\frac{1}{4}$

<u>Primary</u>	<u>Supplemental</u>	
38.4 ac		NE $\frac{1}{4}$ SW $\frac{1}{4}$
39.4 ac		NW $\frac{1}{4}$ SW $\frac{1}{4}$ (lot 3)
15.2 ac		SW $\frac{1}{4}$ SW $\frac{1}{4}$ (lot 4)
37.2 ac		SE $\frac{1}{4}$ SW $\frac{1}{4}$
	34.8 ac	NE $\frac{1}{4}$ SE $\frac{1}{4}$
14.2 ac	13.0 ac	NW $\frac{1}{4}$ SE $\frac{1}{4}$
33.2 ac		SW $\frac{1}{4}$ SE $\frac{1}{4}$
15.4 ac	6.0 ac	SE $\frac{1}{4}$ SE $\frac{1}{4}$
	Section 18	

<u>Primary</u>	<u>Supplemental</u>	
3.8 ac		NE $\frac{1}{4}$ NE $\frac{1}{4}$
	Section 19	

<u>Primary</u>	<u>Supplemental</u>	
24.4 ac		NE $\frac{1}{4}$ NE $\frac{1}{4}$
40.0 ac		NW $\frac{1}{4}$ NE $\frac{1}{4}$
30.4 ac	9.0 ac	NE $\frac{1}{4}$ NW $\frac{1}{4}$ (lot 1)
12.0 ac	1.0 ac	NW $\frac{1}{4}$ NW $\frac{1}{4}$
	Section 20	

<u>Primary</u>	<u>Supplemental</u>	
0.8 ac		NW $\frac{1}{4}$ NW $\frac{1}{4}$
	Section 21	

T. 41 S., R 19 E., WM

Use of water is limited to not to exceed 35.31 cubic feet per second (cfs), at a diversion rate of one-fortieth of one cfs for each acre irrigated and is further limited to a diversion of not to exceed 2 $\frac{1}{2}$ acre feet per acre for each acre irrigated during the irrigation season of each year. The priority for use under this right is May 16, 1956.

Certificate 37428, (Application 34260, Permit No. 26920), issued to R.T. Renner and Pacific American Development Company for use of water from Renner Reservoir as enlarged under Cert. 37427 for supplemental irrigation of 1,412.4 acres as described below:

0.3 ac SW $\frac{1}{4}$ NE $\frac{1}{4}$	40.0 ac SW $\frac{1}{4}$ NE $\frac{1}{4}$
1.6 ac SW $\frac{1}{4}$ NW $\frac{1}{4}$	35.0 ac SE $\frac{1}{4}$ NE $\frac{1}{4}$
0.5 ac SE $\frac{1}{4}$ NW $\frac{1}{4}$	35.4 ac NE $\frac{1}{4}$ SW $\frac{1}{4}$
36.2 ac NE $\frac{1}{4}$ SW $\frac{1}{4}$	25.4 ac NW $\frac{1}{4}$ SW $\frac{1}{4}$
26.8 ac NW $\frac{1}{4}$ SW $\frac{1}{4}$	40.0 ac SW $\frac{1}{4}$ SW $\frac{1}{4}$
7.2 ac SW $\frac{1}{4}$ SW $\frac{1}{4}$	40.0 ac SE $\frac{1}{4}$ SW $\frac{1}{4}$
35.6 ac SE $\frac{1}{4}$ SW $\frac{1}{4}$	18.5 ac NE $\frac{1}{4}$ SE $\frac{1}{4}$
0.7 ac NW $\frac{1}{4}$ SE $\frac{1}{4}$	34.2 ac NW $\frac{1}{4}$ SE $\frac{1}{4}$
Sec. 4, T41S R19E	39.7 ac SW $\frac{1}{4}$ SE $\frac{1}{4}$
	8.0 ac SE $\frac{1}{4}$ SE $\frac{1}{4}$
	Sec. 5, T41S R19E

36.0 ac NE $\frac{1}{4}$ NE $\frac{1}{4}$
2.5 ac SE $\frac{1}{4}$ NE $\frac{1}{4}$
Sec. 8, T41S R19E

30.8 ac NE $\frac{1}{4}$ NW $\frac{1}{4}$
39.5 ac NW $\frac{1}{4}$ NW $\frac{1}{4}$
3.9 ac SW $\frac{1}{4}$ NW $\frac{1}{4}$
1.0 ac SE $\frac{1}{4}$ NW $\frac{1}{4}$
Sec. 9, T41S R19E

20.2 ac NE $\frac{1}{4}$ SE $\frac{1}{4}$
Sec. 13, T41S R18E

6.4 ac NW $\frac{1}{4}$ NE $\frac{1}{4}$
6.2 ac SW $\frac{1}{4}$ NE $\frac{1}{4}$
39.6 ac NE $\frac{1}{4}$ NW $\frac{1}{4}$
7.0 ac NW $\frac{1}{4}$ NW $\frac{1}{4}$
23.6 ac SW $\frac{1}{4}$ NW $\frac{1}{4}$
38.5 ac SE $\frac{1}{4}$ NW $\frac{1}{4}$
39.6 ac NE $\frac{1}{4}$ SW $\frac{1}{4}$
37.2 ac NW $\frac{1}{4}$ SW $\frac{1}{4}$
38.0 ac SW $\frac{1}{4}$ SW $\frac{1}{4}$
38.3 ac SE $\frac{1}{4}$ SW $\frac{1}{4}$
16.6 ac NW $\frac{1}{4}$ SE $\frac{1}{4}$
36.4 ac SW $\frac{1}{4}$ SE $\frac{1}{4}$
2.6 ac SE $\frac{1}{4}$ SE $\frac{1}{4}$
Sec. 17, T19S R41E

3.8 ac NE $\frac{1}{4}$ NE $\frac{1}{4}$
10.0 ac NW $\frac{1}{4}$ NE $\frac{1}{4}$
40.0 ac SW $\frac{1}{4}$ NE $\frac{1}{4}$
34.6 ac SE $\frac{1}{4}$ NE $\frac{1}{4}$
30.6 ac SW $\frac{1}{4}$ NW $\frac{1}{4}$
36.2 ac SE $\frac{1}{4}$ NW $\frac{1}{4}$
38.4 ac NE $\frac{1}{4}$ SW $\frac{1}{4}$
39.4 ac NW $\frac{1}{4}$ SW $\frac{1}{4}$
15.2 ac SW $\frac{1}{4}$ SW $\frac{1}{4}$
37.2 ac SE $\frac{1}{4}$ SW $\frac{1}{4}$
34.8 ac NE $\frac{1}{4}$ SE $\frac{1}{4}$
27.2 ac NW $\frac{1}{4}$ SE $\frac{1}{4}$
33.2 ac SW $\frac{1}{4}$ SE $\frac{1}{4}$
21.4 ac SE $\frac{1}{4}$ SE $\frac{1}{4}$
Sec. 18, T19S R41E

3.8 ac NE $\frac{1}{4}$ NE $\frac{1}{4}$
Sec. 19, T19S R41E

24.4 ac NE $\frac{1}{4}$ NE $\frac{1}{4}$
40.0 ac NW $\frac{1}{4}$ NE $\frac{1}{4}$
39.4 ac NE $\frac{1}{4}$ NW $\frac{1}{4}$
13.0 ac NW $\frac{1}{4}$ NW $\frac{1}{4}$
Sec. 20, T19S R41E

0.8 ac NW $\frac{1}{4}$ NW $\frac{1}{4}$
Sec. 21, T19S R41 E

Use of water is limited to a diversion of the water stored in Renner Reservoir of 2 $\frac{1}{2}$ acre feet per each acre irrigated, and is further limited to a total diversion of not to exceed 3,531 acre feet per year. The priority for use under this right is August 17, 1960.

Only those portions of Cert. 37425 and 37427 for storage of 1,347 acre feet of water from Dry Creek in Renner Reservoir for primary and supplemental irrigation of lands in Sections 4, 5, 8 and 9, T41S R19E were in question in this proceeding. No assertion of failure to store water for use on lands in Section 13, T41S R18E and Sections 17, 18, 19, 20 and 21, T41S R19E was made and those portions of the rights to store for use on those lands were not in question in this proceeding.

Only that portion of Cert. 37426 for primary and supplemental irrigation of lands in Sections 4, 5, 8 and 9, T41S R19E was in question in this proceeding. No assertion of nonuse on lands in Section 13, T41S R18E and Sections 17, 18, 19, 20 and 21, T41S R19E was made and those lands were not in question in this proceeding.

Only that portion of Cert. 37428 for supplemental irrigation of lands in Sections 4, 5, 8 and 9, T41S R19E was in question in this proceeding. No assertion of nonuse on lands in Section 13, T41S R18E and Sections 17, 18, 19, 20 and 21, T41S R19E was made and those lands were not in question in this proceeding.

Notice of proposed partial cancellation of the water rights as described above was served on the owner of the lands in question, Mike McFarland, and on the manager of the lands in question, on March 4, 1993. A timely protest and rebuttal against the proposed partial cancellation was received on April 30, 1993 from Richard Fairclo, attorney at law, on behalf of Mr. McFarland, owner, and Larry Hansen, Manager, of McFarland Ranch and Refuge.

As grounds for rebuttal, the protestant asserted that any nonuse occurring between November 11, 1977 to December 20, 1979 was excused for economic hardship under OAR 690-17-800(1) and (3)(a), being the period during which a bankruptcy action initiated by the record owner at that time occurred, and that any nonuse occurring between December 27, 1985 through May 5, 1988 was excused under OAR 690-17-800(1) and (3)(b), being the period during which a foreclosure on the real and personal property of the record owner occurred.

As grounds for protest, protestant asserted that for all times during which nonuse was not excused because of the foregoing bankruptcy and forfeiture proceedings, water was stored in Renner Reservoir and used on the subject lands in accordance with the terms of the water rights in question.

Notice of hearing and information on the parties' rights in this proceeding were served on counsel for the parties on June 4, 1993. Counsel for protestants was directed to submit additional evidence on the assertions of economic hardship at the hearing.

Hearing was held in Lakeview, Oregon on August 17, 1993 before Weisha Mize, ALJ for the Water Resources Department and Commission. Counsel for the proponents and protestants, the proponents and protestants, and the parties' witnesses were present and testified under oath. The record was held open for receipt of counsel's written closing argument, received from Albert Monaco for proponents on October 1, 1993 and from Richard Fairclo for protestants on October 4, 1993. The record was then closed and a Proposed Order issued by the Referee on October 21, 1993.

Exceptions were filed by the protestant and responsive comments to the exceptions were submitted by proponents.

DETERMINATION ON EXCEPTIONS

Protestant excepted to those portions of Findings of Fact 6, 9 and 10 discussing the non-existence of the flume and other portions of the originally-developed internal system for serving Section 5 lands. Protestant asserted that the internal system had been modified and is not essential to be in place to protect water rights. Protestant argued that there should be a Finding that the proponents submitted no credible testimony that irrigation did not take place in the bulk of the section 5 areas.

A review of the record in its entirety, including the testimony cited by Protestant, revealed the following:

Protestant is correct in his assertion that the portion of the delivery ditch running northward along the west boundary of Section 5 from the southwest corner of Section 5 to Dry Creek is in existence. However, other portions of the original system are no longer in existence, and that has affected the ability to irrigate all the lands in question.

Lands on the north of Dry Creek in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ were originally served by taking water down the delivery ditch on the west side of Section 5, fluming it over Dry Creek and into a continuation of that ditch which turned eastward and paralleled the creek, as shown by a dashed line on Figure 1. The flume is no longer in existence. Without the flume in place, that water goes directly into Dry Creek. Without the flume, water cannot be put from the delivery ditch on the west side of Section 5 into the continuation of that ditch on the north side of and paralleling Dry Creek. One witness testified that the flume had been gone since the mid- to late '70's and not replaced, another said it was last present in about 1984.

Lands on the south of Dry Creek in the SW and SE quarters of Section 5 were served by diverting water at the SW corner of Section 5 out of the above-described delivery ditch and into a ditch running along the south boundary of Section 5. The ditch running along the south boundary of Section 5 no longer exists.

The testimony was that on those occasions when irrigation of Section 5 was attempted, efforts were made to put water from Dry Creek out onto the land via a dam in the center of section 5. The ditches on the north end of the flume paralleling Dry Creek and along the south boundary of Section 5 were not used nor any attempt made to use them. Given the vertical distance from the creek bank to the creek bed and the slope of the land on either side of the creek downward toward the creek bed, without the flume and the ditches described above, it would have been, and apparently was, virtually impossible to get water to the lands in most of Section 5 by putting a dam in the creek in the middle of Section 5, particularly those lands lying south of Dry Creek and those lands lying north of Dry Creek and west of the center of Section 5.

The watermaster's testimony did not confirm that the entirety of the original delivery system was in place, only that there were facilities available to distribute water. It did not address whether the entirety of the lands in section 5 could be irrigated by the present system he observed.

There was no testimony that any irrigation was done of the land to the west of the center of Section 5 and, as discussed, it does not appear that it was possible to do so with the present system. In the years since protestant purchased the property in 1990 there has apparently been some attempt to reestablish that portion of the ditch on the north side of Dry Creek which runs north along the center section line, and to back Dry creek up and into that ditch, but there were at least 6 years prior where that did not occur.

Protestant excepted to Findings 12 and 13, and stated that while protestant agreed efforts were made from the dam in the creek channel at the center of Section 5, reference to having a different internal system to the ranch was irrelevant and indicated that irrigation did, rather than didn't, occur. Protestant asserted that most of the Section 5 rights are served by this dam.

A review of the record in its entirety, including the testimony cited by Protestant, revealed the following:

Warner testified that in 1985 and 1986, he saw some water in the south half of the NE $\frac{1}{4}$ of Section 5, but nowhere else in Section 5, contrary to protestant's assertion. As to 1987, Warner first said he observed water being diverted north from the dam in the center of section 5 and spreading out towards the east, but later said he did not see irrigation, just that he knew the dams were in and so supposed they were irrigating. He was unwilling to say irrigation was occurring and did not know whether the water observed was from Dry Creek or some other source.

Robinson testified that in 1988, during the bankruptcy, his attempts to irrigate a small bit of land south of Dry Creek in Section 5 were futile, and that efforts were concentrated on the lakefront property, that a little water was put on the south part of the NE $\frac{1}{4}$ of Section 5, and that most of the irrigation efforts were made early in the season. No water was put on the west half of section 5.

Riggs testified that the lands in Section 5 did not appear irrigated except for some subirrigation of the lands on the north side of the creek near where the flume previously was. The plant species he observed were not typical of what would be found on irrigated lands. Approximately 60% of the ground on the south side of Dry Creek in Section 5 was compacted, bare ground, about 10% was annual plants and weeds, 10% was in grasses and 20% was in sagebrush and rabbit brush ranging from about 4 feet to four inches high. This was in distinct comparison to the land in Sections 4 and 9, which has sandy soil with typical flood-irrigated meadow grass.

Glender testified that the lands north of Dry Creek had some subirrigation and tailwater from the Lakeview Water Users Ditch, that it did not appear that the lands in Section 5 south of Dry Creek had been irrigated for some time, and that the SE $\frac{1}{4}$ of Section 5 was all sagebrush. Again, this was in contrast to the eastern portion of these lands in Sections 4, 8 and 9, where there was irrigation and a dam and delivery system was in place.

Utley's involvement with the property after 1978 was as a real estate agent, and his testimony came from notes he had made relating to showing the property. In 1979, he noted in his diary "irrigated water to beneficial use." In 1981 he noted there was a small release of water from the reservoir to the property. In 1985, he noted some delivery of water but not a full irrigation season. There was no indication of whether, or where, the water so delivered was applied. He had no record of whether the land was irrigated in 1986.

In 1988, he noted some water was delivered and used in Sections 4 and 5, with no water after July 1. In 1989, he noted irrigation water was released and used, most of being in ponds in Dry Creek, and said that while there was quite a bit of water in Section 5 north of Dry Creek, most of it was tail water from other sources.

Utley testified on cross-examination that between 1973 and June, 1978, his primary contact with the property was to help arrange cattle grazing and to hunt in the fall after the irrigation season. The only time he would be on during irrigation season would be to inspect cattle. Utley testified he had nothing to do with the irrigation, although he would say that it was irrigated early in the season every year between 1973 and 1978, which would include one year of the bankruptcy period. After 1978, he said could not state specific years he saw water being diverted at either the center of section 5 or the lower dam, just that it occurred at various times.

Utley also later testified that since 1985, he thought water was spread, but as far as putting in dams and actually irrigating he couldn't say. When asked if he was saying that when it was being irrigated, it wasn't being done by any action of the owners, it was just happening, he replied "It was natural probably as could be."

Utley further noted that for Braden Farms the primary uses of the property were cattle grazing and use as a hunt club, and that it was important to them, after or near the end of the irrigation season, to get the ponds full for duck hunting, although if the pond was full then they could also use it for irrigation.

When asked what he meant by used to beneficial use, Utley said he meant that if the property owners got the water, depending on what the flow was, even if they left an amount in Dry Creek for duck hunting ponds or fish, it was to beneficial use.

The watermaster testified that he regulated release of water from the Reservoir for the lands in question in 1981 and 1982 and in 1991. Releasing water at a reservoir is not the same as testifying that the released water was used on all or even a portion of the land in question, and he had no knowledge whether the water had been used or if it reached protestant's lands.

The aerial photos showed some evidence of irrigation of the lands in Sections 4, 8 and 9, in definite contrast to the lands in Section 5 which show no evidence of application of water.

It was clear that since 1990, when McFarland purchased the lands in question and Hansen started managing, efforts had been made to irrigate the lands in question to a greater extent than had previously been done. Testimony was consistent that the lands on the east side of the sandbar are much better and that due to shortness of water for whatever reason efforts were concentrated there. It did not appear that the entirety of these lands were irrigated but there was no specific acreage information given in testimony and the amount of land covered varied from season to season. It appears that at least in 1987 and since 1991, when the

ditch running north from the dam in the center of section 5 was repaired, there have been efforts to put Dry Creek water on the lands lying north of Dry Creek in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, the SE $\frac{1}{4}$ NE $\frac{1}{4}$, the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5. It was also clear that there is a good deal of tailwater running onto that property from the north.

Ultimately, there is nothing in the testimony to support protestant's assertion that most of the lands in Section 5 were irrigated without a five-year period of nonuse between 1975 and 1989. Testimony from both proponents and protestant's witnesses was consistent that very little of the lands in Section 5 were irrigated during this period, and even that not without a five year period of nonuse. It was fairly apparent that regardless of the annual or biannual replacement of the dam in the center of Section 5, the majority of any irrigation of these lands was a result of tailwater from other sources and subirrigation occurring due to rodent holes in the creek bank and the "sponge" effect of the soil rather than any intentional efforts on the part of the owners.

It was also apparent that even if there was irrigation of some portion of the land in 1977 and 1978, and some irrigation near the center of Section 5 lands in 1985 and after, there were seven years of unexcused nonuse between 1978 and 1985. The fact that water was released from the reservoir in 1981, as the watermaster testified, or in other years, does not demonstrate that it was used on the lands in question, particularly on those lands in Section 5, and especially where the bulk of the testimony strongly suggests that the property was run more for a hunt club in the fall than for irrigating pasture for cattle. In addition, Utley's testimony from his written notes was not as precise or informative as protestant argues. His testimony that leaving water in the stream to attract fish and birds for a hunt club, and that the water running across the east part of the land appeared to be doing so naturally rather than by act of the owners, further reduced the strength of his testimony regarding irrigation.

While testimony taken at the hearing demonstrated that proponents' assertions in their affidavits went beyond their actual knowledge, it was clear that for those period about which they did have actual knowledge, their observations were that there was no water applied to the lands in Section 5 and that there was a distinct difference in the vegetation and appearance of the lands in Section 5 and the lands in Sections 4, 8 and 9. There was no evidence of irrigation in the Section 5 lands, as contrasted to those lands east of the sandbar.

Protestant excepted to Findings of Fact 15 - 17 regarding economic hardship. For Findings 15 and 16, protestant argued that testimony showed that there was no testimony that the limited partnership was not in economic trouble, and asserts that the Referee's statement that the partners themselves were not in financial difficulty is misapplied. Protestant compared the limited partnership with a corporation where the owners are stockholders and argued that where a corporation is bankrupt, it does not matter if the stockholders are economically healthy.

As to Finding of Fact 17, protestant argued that it was conclusive that economic hard times existed as regards foreclosure, and that a manager who fails to irrigate does not contradict economic hardship which is established by the bankruptcy and foreclosure.

Protestant also objected to the Referee's requirement that they state, prior to hearing or discovery possibilities, whether protestant was claiming economic hardship or use, and for what periods of time. In addition, protestant claims, the election was made only as to years where economic hardship prevented use of water.

A review of the record in its entirety, including the testimony cited by Protestant, revealed the following:

Between 1973 through June 1978, the lands in question were part of a larger ranch owned by a limited partnership, with around 30 limited partners. The limited partnership was apparently formed under the name Big Valley Land & Cattle Co, which was organized by Russell Downey. Mr. Downey sold the limited partnerships in the Big Valley Land & Cattle Co. to the partners, including Mr. Utley.

Downey and Big Valley Land and Cattle filed Chapter 12 bankruptcy petitions in November of 1977, sold the ranch to Braden Farms in 1978 under court order entered in November, 1978, and a Trust Deed was issued in December of 1979. Utley testified that the partnership itself, or the individual limited partners, had no financial problems, but that Downey did not register with the SEC and as a result was foreclosed on for violations of the Securities and Exchange Act. Downey, certainly, had financial problems, or at least he had problems with the SEC which would require a substantial amount of money to resolve if the bankruptcy proceeding was not filed.

Braden Farms was one of several general partners owning the land in question. A complaint for foreclosure of mortgage and security agreement was filed against the general partnership in December 1985. An estoppel deed in lieu of foreclosure was signed in November 1987 and recorded May 5, 1988.

ORS 540.610 provides that on a showing of failure to use beneficially for 5 successive years, the appropriator has the burden of rebutting the presumption of forfeiture by showing...that the owner of the right was unable to use the water because of economic hardship as defined by rule. OAR 690-17-800 defines economic hardship as a bankruptcy action initiated by or for the record owner or principal farm operator, or during a foreclosure of real or personal property of the record owner or principal farm operator. A foreclosure on personal property must directly affect the ability to use water.

Under OAR 690-17-800, the bankruptcy proceeding commenced with the filing of the petition in November, 1977 (post-irrigation season) and ended with the issuance of the trust deed in December, 1979, covering the irrigation seasons of 1978 and 1979. The foreclosure action covered the irrigation seasons of 1986-1987 and the first month and 5 days of the 1988 season.

There was testimony that irrigation to some extent occurred in 1978 and 1979, during the period when the limited partnership was in bankruptcy. While Mr. Downey himself was in some trouble with the SEC, there was no testimony establishing that the bankruptcy **prevented** the use of water or that the Big Valley Land and Cattle Co. was **unable** to use water during that period.

There was testimony by Warner that water was used to some extent in 1986 and 1987. There was also testimony by Robinson of irrigation efforts in 1988 undertaken because the ranch manager, Floyd Clark, physically could not do it, and by Utley of irrigation observed in 1988. There was no testimony establishing that the foreclosure **prevented** the use of water or that the owners were **unable** to use water during that period.

As to the objection to electing on which theory and for which periods of time protestant wished to proceed, it appeared that protestant had originally wanted to plead that water had been used continuously throughout the alleged period of nonuse and there was economic hardship. However, as the Assistant AG advised and as the protestant was informed on May 7, under OAR 690-17-800 a party cannot claim both that the water was used and was not used because of economic hardship during the same period of time.

The protestant indicated by letter of June 4 that economic hardship was claimed for certain periods and use for others, and that more information on economic hardship would be submitted as it was discovered. The hearing was held in mid-August. No additional materials regarding economic hardship were submitted. Testimony and documents filed did not demonstrate that either the bankruptcy or foreclosure proceedings prevented the use of water or rendered the owner or principal farm operator unable to use water. The testimony was that water was used during those periods where economic hardship was claimed, albeit to a somewhat limited and vague degree.

Protestant excepted to Finding of Fact 20 and asserted that proponents did not meet their burden of proof because there was no testimony that stored water was not used on the lands lying east of the sand bar. Protestant points to testimony from Robinson about irrigating, from Utley regarding his observations, and from Warner, who said he saw water on that portion of Section 5 lying north of Dry Creek.

A review of the record in its entirety, including the testimony cited by Protestant, revealed the following:

There was little or no live-flow water in the Creek after mid-June. What use there was occurred east of the sandbar early in the season. In the latter part of the season, the focus was on getting the ponds up for hunting season rather than on irrigation. While it appeared that water was stored every year, the evidence was inconclusive as to whether there was stored water used on those lands, or if the irrigation was from live flow only. The Director agrees that as to the lands lying east of the sandbar, proponents did not meet their burden. The rights to use stored and live flow water on the lands in Sections 4, 8 and 9 and on 4 acres in the south half of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5, all lying east of the sandbar are not found to have been forfeited and are NOT cancelled.

In contrast, it appeared that the lands in Section 5 north of the creek, both prior to 1987 and after, were irrigated primarily if not solely by tailwater from other sources, rather than by either live flow or stored water from Dry Creek.

Protestant excepted to Finding of Fact 21 and argued that the aerial photographs are only relevant to the day they were taken, not to the entire irrigation season for that year or even one month before or after they were taken.

Evidence of irrigation does not disappear the moment the diversion stops. If the plants are nourished and green from irrigation, they stand in obvious contrast to land and plants not getting any water, and that will remain evident longer than a day. The flow patterns in the photographs show that the plants east of the sandbar were benefitting from water being diverted out onto the land from the lower dam at in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ section 5, and that water was reaching some portions of land the east of the sandbar by flowing across the land in a delta pattern. The photographs also show that there was no plant life receiving any benefit of irrigation in the lands lying west of the sandbar. There were no other aerial photos available for other years.

Protestant excepted to Finding of Fact 23, arguing that in most years there was irrigation from the dam at the center of Section 5, which would require water to run onto the lands lying north and, as Robinson testified to, south of Dry Creek. Protestant acknowledged that it was unclear where the water north of Dry Creek was coming from, that it could have been tailwater, stored water, or live flow, but it was on that property. In the event it was tailwater, protestant asserts that under ORS 540.610(2)(h), the ranch cannot lose its right for failure to use Renner Reservoir water.

Protestant mischaracterizes the nature of reclaimed water. Reclaimed water is water that is used under a right, recaptured before it leaves the property of the right holder, and is used again. See Jones v. Warm Springs Irrigation District. If it is not recaptured by the original user before it leaves the property, tailwater from a different source going on to another property which is not entitled to original use of water from the tailwater source does not become reclaimed water.

The source of water for Lakeview Water Users is Drews Creek, a completely different source than Dry Creek. Tailwater from Lakeview Water Users entering the lands north of Dry Creek from other lands lying north of the property in question would enter Dry Creek between the dam in the center of Section 5 and the lower dam at the sandbar. The tailwater that entered Dry Creek at that point was not be applied to any of the lands west of the sandbar, only to those east and downstream of the lower "sandbar" dam.

For the Lakeview Water Users tailwater entering from the west, if it entered Dry Creek it would "become" Dry Creek water and could then be used as Dry Creek water on the lands in question. However, even if that occurred, water was not diverted from Dry Creek onto the lands in the NE $\frac{1}{4}$ or those lying west of the center of Section 5 between 1978 and 1985.

Protestant excepted to Conclusions of Law 1 and 4 - 6 based on the exceptions and arguments made to the Findings of Fact. As to Conclusion of Law 4, protestant asserted that there was no discussion of ORS 540.610(2)(h) which, protestant claimed, does not allow forfeiture of right by utilizing tailwater and subirrigation water. Protestant further objected to Conclusion of Law 6 on the basis that it was irrelevant to the present procedure.

The Director finds that the facts to which Conclusions of Law 1 and 4, and 5 are related have been extensively discussed and will not reiterate those discussions here.

As to Conclusion of Law 6, the Director notes that protestant's counsel spent some time addressing the question of access to the Reservoir, in the context of the proponents' motive for initiating this cancellation action, both at page 7 of his Closing Argument and at the hearing, at which he discussed the law as he understood it regarding access by a water right holder to the source of water. There was also discussion about whether stored water was released, how it got released, and whether the proponents did it without being asked or whether the watermaster had to be called in. The Director has determined this Conclusion is pertinent to the proceeding and is a proper statement of the law.

Protestant disagreed with the conclusion in the Opinion that water could not be delivered to lands south of Dry Creek. Protestant asserts that the testimony was that water could be delivered to that area from both the older existing system to the southwest corner of Section 5 and from the dam in the Creek, and that there was testimony that water was delivered south of Dry Creek in or near that portion of Section 5.

Proponents further argues that the concluding paragraph immediately following the above should not be considered to say that irrigation didn't occur, as Hansen and Riggs indicated those annual grasses and other grasses in that section have beneficial grazing and would benefit by spring irrigation. Consequently, protestant asserts, proponents failed have to have credible testimony that spring irrigation didn't take place.

Having reviewed the record, the Director determines that the proponents made assertions about nonuse in their affidavits that were shown in testimony to go beyond their actual knowledge, but they did have credible testimony for those areas within their knowledge, and that testimony was corroborated by testimony from protestant's witnesses.

That there may be grazing on some vegetation other than sage brush in the lands in Section 5 does not refute the testimony that those lands were not irrigated. From the record as a whole, it was apparent that there was no irrigation of the lands in Section 5 south of Dry Creek for five and more successive years, whether in the spring or at any other time.

Although protestant agreed with the statement in the last paragraph of the Opinion regarding the watermaster's regulation and release of water from the reservoir, protestant asserted that it was misapplied in reaching a conclusion and argued that there was no credible testimony in the record regarding nonuse.

In the Proposed Order, there was no forfeiture found of the right for those lands east of the sandbar. The basis for canceling those lands west of the sandbar was that the evidence was that those lands had not been irrigated for five and more successive years.

Protestant has alleged throughout his exceptions that the proponents of cancellation did not meet their burden to prove nonuse.

ORS 183.450(2) provides: "All evidence shall be offered and made a part of the record in the case, and except for matters stipulated to..[or taken judicial or official notice of].. no other factual information or evidence shall be considered in the determination of the case. ...The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position."

ORS 183.450(5) provides: "No sanction shall be imposed or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party, and as supported by, and in accordance with, reliable, probative and substantial evidence." (emphasis supplied)

Pursuant to ORS 183.482(7), judicial review of a contested case shall be confined to the record. The court must set aside or remand the agency decision if it is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. ORS 183.482(8)(c) (emphasis added). The court is required

"..to look at the whole record with respect to the issue being decided, rather than at one piece of evidence in isolation. If an agency's finding is reasonable, keeping in mind the evidence against the finding as well as the evidence supporting it, there is substantial evidence....The difference between the 'any evidence' rule and the substantial evidence test *** will be decisive only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the Board finds the other without giving a persuasive explanation." Armstrong v. Asten-Hill Co., 90 Or App 200 (1988)

In this case, proponents made assertions in their affidavits that subsequent testimony contradicted or showed that those assertions went beyond their actual knowledge. However, the testimony of protestant's witnesses demonstrated that while there had been water used to some extent on Section 4, 8 and 9, only from 1987 on had water been put on lands in Section 5.

A reviewing court may not ignore testimony on a factual issue regardless of who had the burden on that issue. The Department is similarly restricted. While the proponents have the burden to prove nonuse, the testimony of protestant's witnesses cannot be ignored; the bell cannot be unrung, and the decision must ultimately be made on the record as a whole.

The Final Order is amended to reflect the Director's conclusion that the proponents made assertions about nonuse in their affidavits that were shown in testimony to go beyond their actual knowledge, but that the proponents did have credible testimony for those areas within their knowledge, and that testimony was corroborated by testimony from protestant's witnesses.

Findings of Fact 10, 11 and 12 are corrected to reflect the Director's determination as set out above under the exception to Finding 10.

Protestant's remaining exceptions are DENIED.

FINDINGS OF FACT

1. The final proof survey map entered into evidence as WRD Ex. 5 (Figure 1, *infra*) clearly shows the subject lands and delivery system for the rights in question, as developed under the underlying permits. Primary and lateral ditches and the direction of the flow of water across the land when turned out from those ditches, and the lands which were irrigated at the time the final proof survey was completed on August 24 and 25, 1967, are illustrated.

2. The lands in question are traversed by Dry Creek which enters the property at the west line of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 5, running generally east and the southeast across the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5. Dry Creek continues in a southeasterly direction across the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 4 and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 9 until reaching Goose Lake on the eastern edge of the lands. A ridge described as a sandbar and shown as a white strip on WRD Ex. 5 traverses the property in a north-south direction, intersected by Dry Creek in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5.

3. The channel of Dry Creek is between three and five feet below the creek banks.



4. As shown on Figure 1, a ditch runs from the diversion dam in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 7 to the west section line of Sections 8 and 5. At the corner where Sections 5 and 8 come together, the primary delivery ditch splits, with one branch running north and the other east.

5. The east-running branch of this ditch would allow water to be diverted to the east through a ditch running primarily along the section line dividing Sections 5 and 8, with some meanders north into Section 5 and then turning south at the south section line of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5 and running into the NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 8. Water diverted into this ditch would be used to irrigate those lands in Section 5 lying south of Dry Creek, as shown by the directional arrows on those acreages showing water running north towards Dry Creek. A pick-up ditch in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5 would catch and shunt any excess flow towards those lands in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5.

T. 41 S. R. 19 E. W.M.



FINAL PROOF SURVEY
UNDER

 Supplemental p. 24208 ³⁷⁴²⁶
 Primary
 All Supplemental permit 26920
 c 37428

Application No. ²⁷⁰³¹ 34260 Permit No. ²⁴²⁰⁸ 26920
 IN NAME OF

R. T. RENNER

Surveyed Aug. 24th 25 1967, by W. Ruppert...

CHZ-56-A-174
PTS-1967-0

FIGURE 1

6. The north-running ditch runs along the west section line of Section 5 to a flume, which is shown as fluming water across Dry Creek and into the continuation of that ditch which runs in a northeasterly direction parallel to Dry Creek to a point at approximately the northeast corner of the NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, thence directly east along the northern boundary of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 5, then turning directly north at the center of Section 5 and running along the west line of the SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 5. Water would be put in this ditch to irrigate all the lands in Section 5 lying north of Dry Creek and would flow generally in an easterly direction.

7. A dam is located in Dry Creek in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5 and diversion ditches from that dam run north and south along the east edge of the sandbar. Water may be impounded and diverted into these ditches for irrigation of the lands in Sections 4, 8, 9 and approximately four acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5.

8. Testimony given at the hearing and Figure 1 indicate that the lands in Section 5 lying south of Dry Creek slope downward to the north toward Dry Creek, and the lands lying north of Dry Creek slope downward to the south toward Dry Creek and east toward Goose Lake.

9. It does not appear from the witnesses' testimony and photographic exhibits introduced at the hearing that the ditch shown on the final proof survey map running east along the section line between Sections 5 and 8 is in existence or that it has been in existence for many years.

10. The portion of the delivery ditch running northward along the west boundary of Section 5 from the southwest corner of Section 5 to Dry Creek is in existence. Lands on the north of Dry Creek in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and the NW $\frac{1}{4}$ SW $\frac{1}{4}$ were originally served by taking water down the delivery ditch on the west side of Section 5, fluming it over Dry Creek and into a continuation of that ditch which turned eastward and paralleled the creek, as shown by a dashed line on Figure 1.

11. The flume is no longer in existence. Without the flume in place, that water goes directly into Dry Creek. Without the flume, water cannot be put from the delivery ditch on the west side of Section 5 into the continuation of that ditch on the north side of and paralleling Dry Creek. Water cannot be, and was not, diverted from Dry Creek into that parallel ditch. Testimony was inconclusive on the point in time at which the flume had last been in place, being between the mid-late '70's and about 1984.

12. Irrigation efforts testified to were made from a dam placed in the channel of Dry Creek at the center of Section 5 and from the dam shown in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 5. It did not appear that the ditch shown on the final proof survey map running east along the section line between Sections 5 and 8 have been used for many years or that any use was made of this ditch during the period of time in question. It did not appear that the ditch running north on the quarter section line between the SW $\frac{1}{4}$ NE $\frac{1}{4}$ and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ had been used or in useable condition until after protestant purchased the lands in question.

13. High winter flows in Dry Creek frequently, if not annually, washed out the dirt dam placed in the channel of Dry Creek in the center of Section 5. This dam was replaced nearly every year.

14. In an average water year, little or no live flow is left in Dry Creek by mid-June. If tail-water from other irrigation users from other sources reached the channel of Dry Creek via percolation or overland flow, it will be considered live flow once it enters the Dry Creek channel, and would then be available for diversion from Dry Creek by water right holders with rights to divert Dry Creek live flow. With the exception of testimony relating to 1993, however, no testimony was given that would clearly establish that tail-water from other sources reaches the channel of Dry Creek and was subsequently used on the lands in question.

15. During the irrigation seasons of 1978 and 1979 and for some years prior, the lands in question were owned by a group of approximately 30 limited partners, who purchased limited partnerships from a Russell Downey in an operation called Big Valley Land and Cattle Company, Ltd., which included the lands in question. Mr. Downey apparently was in some trouble with the Securities and Exchange Commission regarding the sale of the limited partnerships in Big Valley Land and Cattle Company, Ltd., and was subsequently foreclosed on for violations of the Securities and Exchange Act. The owners of the partnership shares, however, were not themselves in financial difficulties and were apparently not called upon to fund the operations of the ranch on the lands in question in this contested case proceeding or to otherwise step in to cover Mr. Downey's financial problems as related to the ranch.

16. Testimony did not establish that the bankruptcy proceeding during the April 1 - September 30 irrigation seasons of 1978 and 1979 or the events leading to the bankruptcy proceeding prevented the use of water from live flow or stored water under the portions of the rights in question.

17. Testimony was inconclusive on whether the foreclosure action covering the irrigation seasons of 1986 and 1987 and from April 1 to May 5, 1988 prevented the use of water from live flow or stored water under the portions of the rights in question. While there was some testimony that the owners of the subject lands were in financial difficulties and not providing sufficient operating capital to fund irrigation activities, there was also testimony that the ranch manager was not personally handling the irrigation due to physical disability and that the lessees of the property did irrigate, or attempt to irrigate, the lands in Sections 4, 8 and 9 near the lakefront in 1988.

18. Water was stored every year in Renner Reservoir. No evidence was given about the quantity of water stored or the amount released or carried over in storage to the next year.

19. Testimony established that during the alleged period of nonuse, stored water was released from Renner Reservoir on request under the rights in question in 1981, 1982, 1983, 1988 and 1989, and was applied to the lands in question.

20. Testimony established that during the later part of the irrigation season, a small amount of water was present in the channel of Dry Creek as it crossed the lands in question. The owners of the subject lands made some effort to retain this water in ponds in the channel of Dry Creek, primarily to attract game birds for hunting. Game bird hunting season opens annually August 1. With the natural flow of Dry Creek drying up annually by mid-June, and with water being stored every year in Renner Reservoir, it is reasonable to infer from testimony given that water was released from storage without request in 1980, 1984, 1985, 1986, and 1987. However, with the exception of 1985, evidence was inconclusive as to the use or nonuse of stored water in those years on the lands lying east of the sandbar.

21. The aerial photographs entered into evidence and identified as WRD 7 - 8 are conclusive as to the extent of the irrigation and benefit therefrom in the years the photographs were taken, being 1979 and 1989, but not as to any irrigation occurring in any other year.

22. Testimony established that in the early part of the irrigation season, water was beneficially applied in 1979, 1981, 1982, 1983, 1985, 1988 and 1989 to the lands lying east of the sandbar. The amount of acreage irrigated varied depending on the amount of live flow and stored water available and the condition of the delivery system but was generally focused on four acres in the south half of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5, and those lands lying to the east of the sandbar in Sections 4, 8 and 9, which lands were served by water taken at the dam in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5 and diverted into lateral ditches running north and south from that dam, thence east toward Goose Lake.

23. With the exception of efforts made at irrigation from Dry Creek in 1987 and subsequent years, any irrigation of lands in Section 5 lying north of Dry Creek was a result of tailwater from other sources flowing onto the property from lands lying to the north and west of the lands in question.

24. The Lakeview Water Users Irrigation Company (Company) claimed the subject lands in Section 5 and 6.6 acres in Section 4, as well as lands in Section 17, 18 and 20, as being within their project in the Goose and Summer Lake adjudication initiated in 1923. The adjudication was completed in 1980. The subject lands were never developed as a part of the Company's system. The application on which Certificate 37426 was eventually issued was filed prior to completion of the adjudication, in 1956.

25. As the Company's claim was of record for some of these lands when the applications were filed in 1956 and 1960, Certificate 37426 was issued for primary irrigation of 764.1 acres and supplemental irrigation of 648.3 acres. In fact, with the exception of those portions of Certificate 47469 issued to the Company for 36 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 24 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 17, and 25 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 18, no primary right for the lands presently covered by the supplemental irrigation portion of Certificate 37426 exists.

CONCLUSIONS OF LAW

1. The rights to the use of live flow from Dry Creek and water stored in Renner Reservoir for supplemental irrigation of 311.75 acres lying west of the sandbar in Section 5, T 41 S, R 19 E under Certificates 37426 and 37428 have been forfeited for five and more years of nonuse between 1976 and 1988.
2. The rights to the use of live flow from Dry Creek and water stored in Renner Reservoir for irrigation of four acres in the south half of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5 and those lands lying to the east of the sandbar in Sections 4, 8 and 9, all in T 41 S, R 19 E, under Certificates 37426 and 37428 have not been forfeited for five and more years of nonuse between 1976 and 1988.
3. The right to store up to 1,347 acre feet of water from Dry Creek in Renner Reservoir has not been forfeited for five and more years of nonuse between 1976 and 1988.
4. Irrigation of the lands in Section 5 resulting from the flow of tailwater onto the lands from other users irrigating from sources other than Dry Creek, where the water comes on the land from overland flow and not from entry into and subsequent diversion out of Dry Creek, the authorized source under the rights in question, does not constitute use as authorized under Certificates 37246 and 37248 and will not serve to preserve that portion of those water rights from forfeiture.
5. With the exception of 36 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 24 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 17, and 25 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 18, as allowed in Certificate 47469, those portions of Certificate 37426 issued for supplemental irrigation are, by law, rights for primary irrigation from Dry Creek and waters of Dry Creek stored in Renner Reservoir, there being no prior rights developed as appurtenant to these lands. On issuance of a new certificate to confirm the remainder of the right not found forfeited, all portions of Certificate 37426 now improperly designated as for supplemental irrigation should be correctly identified as being for primary irrigation.
6. ORS 540.440 imposes an obligation on all persons owning or controlling any ditches to keep their right of way along their ditch clean and free from any weeds or obnoxious grasses. There is no similar statutory provision to allow water right holders access to the headgate, controlling works or storage facilities where such works are located on lands owned by another and no easement for such access exists. Grant of a water right does not also grant a corresponding easement across the property of another.

OPINION

Testimony showed that proponents made assertions of nonuse in their affidavits that went beyond their actual knowledge in some areas. A fair portion of proponents' testimony dealt with observations made near the end or after the irrigation season, and particularly in Mr. Martin's case, did not involve the entirety of the lands in question.

Dale Friday averred in his affidavit that his knowledge of the alleged nonuse extended from March of 1973 to August 1, 1992. However, he had been on the property most frequently during the period of time in which R.T. Renner owned the property, prior to 1973, outside the period of alleged nonuse. He also testified that he in fact had little familiarity with the lands south of Dry Creek beyond what he could see from the neighboring property. Mr. Friday further testified that he did not now drive by the property, that all that could be seen of the property from the County road running a quarter of a mile to the east of the lands was sagebrush, but not the ground, Dry Creek or the delivery system or even the entirety of the property. He did testify, however, that he had been on the property annually until protestant purchased it and that it had not been irrigated.

Mr. Friday testified that while he had seen the ditch system on the lands, he had never seen water in the ditches and that he knew it was impossible to get water from Dry Creek into those ditches because the creek bed was so much lower than the land. Mr. Friday's far-reaching statement of "impossibility" was contradicted to some degree by testimony from several other witnesses who in more recent times had observed or participated in re-installing washed-out dams and backing water up to the level of the ditches, and diverting water out into the ditches.

Mr. Martin averred in his affidavit that his knowledge of alleged nonuse extended from March 1978 through March, 1985, which would cover the irrigation seasons of 1978 through 1984, inclusive. However, during the years 1978-1980, Mr. Martin ran a hunt club on lands unrelated to the lands in question. For the hunting season of 1980 and the next three years, Mr. Martin ran his hunt club on the lands in question, but was not on the property before August and did not hunt on the lands south of Dry Creek. His primary observations were of the lands along the north bank of Dry Creek and downstream to Goose Lake. From August 1 on, he did observe a small flow of water in Dry Creek, and did observe the ponds in Dry Creek and the diversion ditches although he saw no irrigation taking place. He also observed cattle grazing on the entirety of the property, and testified, consistent with other witnesses, that the best grazing was on the eastern portion of the lands in question, near the lake front.

Edlin Gage averred in his affidavit that his knowledge of the alleged nonuse extended from October, 1975 through October 1, 1989, which would cover the irrigation seasons of 1976 through 1989, inclusive. However, this proponent's familiarity with the lands in question came through his assistance in gathering cattle off the property in the fall and taking cattle to the property in May between 1979 and 1989, activities which did not occur on an annual basis and which did not involve the entirety of the lands. Moreover, Mr. Gage testified that there had in fact been irrigation of at least some of the lands in Sections 4, 8 and 9 through the delivery system described above, testimony which was contrary to statements in his affidavit that none of the lands in question had been irrigated.

In addition, the proponents had submitted sworn affidavits on which the proposed cancellation was initiated but, when questioned, either denied or could not account for their sworn statement regarding the loss of 1,347 acre feet of storage for nonuse. However, Mr. Friday admitted that there was some stored water released from Renner Reservoir for the property during the period of time the lands were owned by Braden Farms, from approximately 1980 until its sale in 1989.

In general, then, the proponents' testimony was in several instances inconsistent with their sworn affidavits on which this proceeding was initiated.

It was clear, however, from testimony of both proponents and protestant's witnesses, that during the period in question, the subject lands south of Dry Creek in Section 5 and located upstream from the main or lower diversion dam in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5 were not irrigated and were not capable of being irrigated by diverting water out of Dry Creek itself as it crossed Section 5. This is further supported by the Final Proof Survey Map entered as WRD Ex. 5 and the aerial photos entered as WRD Ex. 6-8.

It was also clear that lands upstream from the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5 consist primarily of sagebrush, annual grasses and compacted alkali-type soil. During the period of time in question, these lands received water from subirrigation and tailwater from other users rather than from deliberate irrigation from live flow or stored water, while the lands near the lakefront in Sections 4, 8 and 9 are sandy soil producing substantially better quality forage, and as a result, the greater part of any irrigation effort was focused on those lands as opposed to the less productive lands in Section 5.

Testimony supports the conclusion that with the exception of 1981 - 1983 (Felder), 1988 and 1989 (Robinson), no release of stored water was requested. It is possible that water was released without a request first being made during other years. In light of the preponderance of the testimony regarding the irrigation occurring early in the season and the live flow in Dry Creek being dried up by mid-June at the latest, it is reasonable to infer that any irrigation of the subject lands lying east of the sandbar in other than those five years was most probably from live flow available early in the irrigation season. However, evidence was insufficient to establish conclusively that stored water was not used on these eastern lands in other than these five years when it was released on request.

FINAL ORDER

NOW, THEREFORE, it is ORDERED that that portion of Certificate 37426 for use of the live flow waters of Dry Creek and waters of Dry Creek stored in Renner Reservoir for supplemental irrigation of 311.75 acres lying west of the sandbar in Section 5, T. 41 S., R. 19 E., WM, as more particularly described below:

40.0	SW $\frac{1}{4}$ NE $\frac{1}{4}$
35.0 ac	SE $\frac{1}{4}$ NE $\frac{1}{4}$ (lot 1)
35.4 ac	NE $\frac{1}{4}$ SW $\frac{1}{4}$
25.4 ac	NW $\frac{1}{4}$ SW $\frac{1}{4}$
40.0 ac	SW $\frac{1}{4}$ SW $\frac{1}{4}$
40.0 ac	SE $\frac{1}{4}$ SW $\frac{1}{4}$
18.5 ac	NE $\frac{1}{4}$ SE $\frac{1}{4}$ (lots 2, 6)
34.2 ac	NW $\frac{1}{4}$ SE $\frac{1}{4}$ (lot 3)
39.7 ac	SW $\frac{1}{4}$ SE $\frac{1}{4}$ (lots 4, 5)
4.0 ac	SE $\frac{1}{4}$ SE $\frac{1}{4}$ (lot 5)

and that portion of the water right evidenced by said Certificate, be and the same is hereby canceled.

It is FURTHER ORDERED that a new certificate be issued confirming the remainder of the right not canceled in this proceeding, being the right to the use of live flow from Dry Creek and water stored in Renner Reservoir for **primary** irrigation of four acres in the south half of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5, those lands lying to the east of the sandbar in Sections 4, 8 and 9, all in T 41 S, R 19 E, WM, and those portions of the right NOT in question in this proceeding.

It is FURTHER ORDERED that that portion of Certificate 37428 for use of the Dry Creek stored in Renner Reservoir for supplemental irrigation of 311.75 acres lying west of the sandbar in Section 5, T. 41 S., R. 19 E., WM, as more particularly described below:

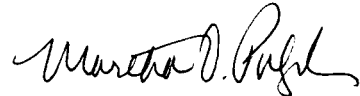
40.0	SW $\frac{1}{4}$ NE $\frac{1}{4}$
35.0 ac	SE $\frac{1}{4}$ NE $\frac{1}{4}$ (lot 1)
35.4 ac	NE $\frac{1}{4}$ SW $\frac{1}{4}$
25.4 ac	NW $\frac{1}{4}$ SW $\frac{1}{4}$
40.0 ac	SW $\frac{1}{4}$ SW $\frac{1}{4}$
40.0 ac	SE $\frac{1}{4}$ SW $\frac{1}{4}$
18.5 ac	NE $\frac{1}{4}$ SE $\frac{1}{4}$ (lots 2, 6)
34.2 ac	NW $\frac{1}{4}$ SE $\frac{1}{4}$ (lot 3)
39.7 ac	SW $\frac{1}{4}$ SE $\frac{1}{4}$ (lots 4, 5)
4.0 ac	SE $\frac{1}{4}$ SE $\frac{1}{4}$ (lot 5)

and that portion of the water right evidenced by said Certificate, be and the same is hereby canceled.

It is FURTHER ORDERED that a new certificate be issued confirming the remainder of the right not canceled in this proceeding, being the right to the use of waters of Dry Creek stored in Renner Reservoir for **supplemental** irrigation of four acres in the south half of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 5 and those lands lying to the east of the sandbar in Sections 4, 8 and 9, all in T 41 S, R 19 E, WM, and those portions of the right NOT in question in this proceeding.

It is FURTHER ORDERED that the right to store up to 1,347 acre feet of water from Dry Creek in Renner Reservoir under Certificate 37425 and 37427 has not been forfeited for five and more years of nonuse and the portion of this proceeding regarding the alleged forfeiture of that portion of said Certificates is DISMISSED.

The FINAL ORDER in this matter, PC 93-1, was signed this 24th day of January, 1994 and placed in the U.S. Postal Service this 24th day of January, 1994.



Martha O. Pagel
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 date of service (date of mailing) of this Order. Judicial review is pursuant to the provisions of ORS 536.075.