

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF PARTIAL CANCELLATION)	PC 87-10
OF WATER RIGHT CERTIFICATE 38668 IN THE)	
NAME OF GUS AND VELLA VASSIOS FOR USE OF) Statement, Findings	
WATER FROM LITTLE PINE CREEK, EAST) of Fact, Conclusions	
BRANCH LITTLE PINE CREEK, AND SPRING) of Law, Opinion and	
<u>GULCH, GRANT COUNTY, OREGON)</u> Final Order of Dismissal	

STATEMENT

This proceeding was initiated by the Water Resources Director under the provisions of former ORS 540.610 to 540.650 for the proposed partial cancellation of a certain water right, based on information furnished to the Director in the form of affidavits alleging nonuse of the right in question for a period of five or more consecutive years.

The Certificate recorded at Page 38668, Volume 30, State Record of Water Right Certificates, describes a portion of the rights allowed by decree of the court in the names of George Mason and Bessie Finlayson in the Determination of the Relative Rights to the Waters of the John Day River and its Tributaries. Certificate 38668 was issued in 1972 as a remaining rights certificate superseding Certificate 25502. The right to appropriate water from Little Pine Creek for mining and irrigation of a certain 5.6 acres was canceled without protest or challenge in 1972, and remaining rights Certificate 38668 was issued for those rights not at issue and not canceled.

Certificate 38668 describes rights to appropriate not to exceed 1/40 cubic foot per second (cfs) per acre irrigated to June 1 and 1/80 cfs per acre thereafter, further limited to one acre-foot per calendar month to June 1 and four acre-feet per acre during the irrigation season April 1 to September 30. Under this right, water may be appropriated from Big Dog Creek, Painters Gulch, Little Pine Creek, East Branch Little Pine Creek and Spring Gulch for irrigation of a certain 88.0 acres of land and for domestic use, all with a date of priority of 1865. The place of use is described in the certificate as:

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

The water rights in question in the proceeding pertain only to appropriation of water from Little Pine Creek, East Branch Little Pine Creek and Spring Gulch, as described by the said certificate. The portion of the right for use of waters from Big Dog Creek and Painters Gulch is not in question in this proceeding.

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

District Director, Bureau of Land Management, USDO
Donald and Robin Merrell
Frederick and Vyvyan Gardner
Ansel and Teresa Krutsinger
Danny and Janice Ellison, and
Gregory Lynch, Attorney at Law

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

Protests against the proposed cancellation of the water right in question were filed by the Merrells, Gardners, Krutsingers and Ellisons.

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

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

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

On December 14, 1988, the presiding officer served a proposed order on Messrs. Lynch and Kilpatrick. Mr. Lynch timely filed exceptions and argument on those exceptions. Mr. Kilpatrick submitted argument in response to proponent's exceptions. On March 3, 1989, the Water Resources Commission heard oral argument on the exceptions and returned the matter to staff for analysis of the issues raised. The Commission authorized staff to select one of three options for further action: reopen the hearing, issue a new proposed order, or return the matter to the Commission with recommendations and a proposed final Order.

On March 10, 1989, the presiding officer requested additional briefs on the question of whether the certificate issued in 1972 at the conclusion of a cancellation proceeding, which certificate describes the portions of the original rights not challenged, in question or affected by that proceeding, precludes a finding of forfeiture based on nonuse prior to 1972. Both parties filed briefs, and the Commission's disposition of the issue is explained in the Opinion.

A Final Order was served on the parties on May 26, 1989. Counsel for protestants appealed the final Order to the Oregon Court of Appeals. On advice of the Assistant Attorney General, the Final Order was withdrawn by the Water Resources Commission on August 3, 1990. The Commission directed the hearing record be reopened for the purpose of taking additional testimony on the following issues:

1. Was water from Little Pine Creek diverted at the southerly or upper point of diversion near Spring Gulch, transported through Windless Gulch, and taken from there into the Finlayson Ditch or otherwise applied to the lands in question.

2. The existence and location of a takeout on the east side of Little Pine Creek by which water could be diverted from Little Pine Creek and added to the water from Dog Creek/Painters Gulch before it is flumed across Little Pine Creek into the Finlayson Ditch.

The parties were sent a Notice of the withdrawal and of hearing on August 23, 1990. The hearing was set for October 17, 1990 in Canyon City, Oregon.

The record was reopened and hearing held on October 17, 1990 before Weisha Mize, Hearings Referee for the Water Resources Department. Most of the witnesses appearing at the first hearing also testified at the second, with the exception of Jessie McKay and Brian Gardner. Two additional witnesses for the protestants, Merle Brown and James Thomason, also testified. Additional exhibits of diagrams, maps and photographs, and the affidavit of Sherry Skinner, were accepted into the record at the second hearing.

Following review of the record on rehearing, and of the record made at the previous hearing, a Proposed Order was served on the parties on December 3, 1990.

Exceptions to the Proposed Order were timely filed by Roy Kilpatrick, counsel for the proponents of cancellation on December 28, 1990. The record, Proposed Order and exceptions now having been reviewed and considered by the Water Resources Director, the following Final Order, including the Statement, Explanation of Diversion and Delivery System, Determination on Exceptions, Findings of Fact, Conclusions of Law, Opinion and Order, is hereby issued.

DETERMINATION ON EXCEPTIONS

Counsel made exception to all seven Findings of Fact. In the exceptions, counsel asserts that finding 1 is not a finding but somehow an incorporation of personal opinion, interpretation and hearsay opinion, findings 2 and 4 are not findings but conclusions of law, findings 3 and 7 were facts agreed on or stipulated to at the 1990 hearing, and that findings 5 and 6 are, in fact, findings, but not supported by the evidence.

Finding 1 incorporates as a finding of fact the Statement and Explanation. The Statement is a chronological and factual discussion of the procedural events leading up to the issuance of the Proposed Order. The Explanation describes the delivery system based on the final proof map for the water right in question and on facts attested to by the parties at both hearings. Proponents have failed to identify any opinion, hearsay, or interpretation included in this finding.

Whether Findings 3 and 7 were facts agreed to at the hearing does not reduce either the appropriateness or adequacy of these findings. Counsel for proponents has failed to explain why facts agreed to may not be found as facts, and no harm has been suffered by proponents by including such agreed-on facts in the Findings.

Proponents have argued that Findings 2 and 4 are Conclusions of Law, rather than findings of fact. I agree. Findings 2 and 4 are more correctly termed Conclusions of Law and have been moved to the Conclusions of Law section of this Order.

Proponents have failed to point to anything in the record to support their assertions regarding Findings 5 and 6 as not being supported by the evidence, and have, in fact, deliberately omitted any discussion of testimony contradictory to their assertions on this point.

As to Finding 5 specifically, whether protestants or their predecessors diverted water from Little Pine Creek without any intervening use by mining interests, or whether the miners were allowed to use the diversion and waters from Little Pine Creek prior to said waters reaching the lands is question, the fact is, as was found by the Hearings Referee, water was diverted from the southerly point of diversion and beneficially used on the lands in question. From my review of the record, it does not appear that the owners or operators of the lands in question looked upon the waters diverted from Little Pine Creek at the upper or southerly diversion and ultimately reaching their lands as a surprise, a gift of nature, or some sort of bonus derived from owning lands lower in elevation than lands used in mining operations using water. Whether the diversion was accomplished by the land owners or by the miners with the owners' permission, the facts of diversion and source were known, and the water deliberately put to beneficial use.

As to Finding 6, my review of the record shows that the evidence claimed by the proponents on the issue of an eastside takeout was contradicted by both Stout and Lambeth at the first and second hearings, and additionally by Brian Gardner at the first hearing.

Overall, on review of the record I find that the proponents failed to meet their burden to prove nonuse. Moreover, the testimony given by both proponents and protestants and their witnesses was inconclusive, inconsistent and at times confusing. In such a case deference must be given to the Hearings Referee who presided at the hearing and thus had an opportunity to observe the witnesses and develop a more complete frame of reference when reviewing the record and preparing the Proposed Order.

EXPLANATION OF DIVERSION AND DELIVERY SYSTEM

Figure 1, a reduction of a portion of the map prepared in 1925 by employees of the State Engineer in connection with the John Day River adjudication proceedings, shows the relative locations of Big Dog Creek, Little Pine Creek, East Branch Little Pine Creek, Spring Gulch, Painters Gulch, and Windless Gulch, the irrigated lands under Certificate 38668, and ditches used to divert and convey water from the several stream channels to the places of use.

Under the terms of the original water rights as allowed by the court, water was diverted from Big Dog Creek at point "A" and conveyed by ditch to point "B". At point "B", a portion of the water diverted from Big Dog Creek was carried by a ditch to the channel of East Branch Little Pine Creek at point "C". The combined waters from Big Dog Creek, East Branch Little Pine Creek and natural flow in Little Pine Creek could be diverted at point "E" and conveyed to a small reservoir in the channel of Spring Gulch, or diverted at point "G" and conveyed directly to places of use for mining and/or irrigation of a certain 2.5 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ and 2.6 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6. The small reservoir in the channel of Spring Gulch was used to accumulate water overnight, at times of reduced flows, to be used for mining purposes the next day.

At point "B", the remaining portion of the waters diverted from Big Dog Creek were released into the channel of Painters Gulch. The released water together with any natural flow in Painters Gulch was flumed across the channel of Little Pine Creek at point "G". From point "G", the water was conveyed through the Finlayson Ditch to the places of use described in Paragraph 3 of the STATEMENT, above.

Waters carried in the Finlayson Ditch were originally flumed across the channel of Windlass Gulch at point "H" for irrigation of certain lands included within the shaded area within the west $\frac{1}{2}$ of Section 36. The flume originally located at point "H" no longer exists. The time of its removal or demise is not clear.

FINDINGS OF FACT

1. All facts set forth in the STATEMENT and EXPLANATION are incorporated herein as findings of fact.
2. The period in question during which nonuse is alleged is from the years 1964 through 1974.
3. Water was diverted from the southerly point of diversion shown at point F each year and used for beneficial irrigation of that portion of the lands in question located in Section 36.
4. Through 1974, water was diverted each year from Little Pine Creek through an east-side takeout, added to waters from Dog Creek and Painters Gulch, and flumed back across Little Pine Creek into the Finlayson Ditch, from whence these waters were transported through the lands in question and used for beneficial irrigation thereon.

5. In 1975, an old ditch grade adjacent to the west side of Little Pine Creek above point "G" was cleaned out and lowered by means of a small bulldozer. The reconstructed ditch was then used to divert waters from Little Pine Creek and discharge them into the Finlayson Ditch at the west end of the flume carrying Dog Creek/Painters Gulch water over Little Pine Creek and into the Finlayson Ditch.

6. Water has been diverted each year from 1964 through 1974 from Little Pine Creek and use on the lands in question.

CONCLUSIONS OF LAW

1. The determination of the Commission finding nonuse is reversed.
2. The proponents failed to meet their burden to prove the occurrence of 5 or more consecutive years of nonuse of water from Little Pine Creek, East Branch Little Pine Creek, and Spring Gulch on the lands in question.
3. There was no 5-year period of nonuse of the water right under Certificate 36686 during the period 1964-1974, inclusive, and no forfeiture of the water right in question occurred.

OPINION

Although the proponents' affidavits had, with the exception of Kenneth Evans, asserted nonuse between 1972 and 1982, testimony at the first hearing had been taken concerning years prior to the alleged period of nonuse. However, a prior cancellation proceeding had been dismissed in 1964 for failure of proof.

At the second hearing, it was generally agreed by the parties and the participants that since testimony had been taken for time prior to that alleged in the affidavits, the period of nonuse with which testimony would be concerned at the second hearing would be the period 1964-1974.

The watermaster testified that the location of most of the ditches shown on the 1925 adjudication map, as well as others not shown in Sections 6 and 7, changes frequently due to mining activity in the area. As the mining activity moves, so does the precise location of the various ditches. One thing that does not change, however, is the general topography and direction of water flow. Lands in Section 7 are higher in elevation than those in Section 6, and lands in section 6 higher than those in section 36. The lands on the east side of Little Pine Creek are also generally higher in elevation than the lands on west side.

However, the Watermaster further testified that it is possible to transport water from a lower to a higher elevation if sufficient head can be developed, and that if such a system ceased to be used, a creek bed could be eroded to a lower level due to a larger quantity of water flowing down it. In the watermaster's expert opinion, it was possible that the alleged east-side takeout existed at one time and was used, although he has observed no evidence of such a ditch.

Carl Sheedy changed his mind several times on some points and appeared somewhat inconsistent in his testimony. At the second hearing, he first denied making any reference to a 50/50 sharing agreement until his testimony was pointed out to him in the transcript. He later denied having any agreement and stated that "we just did it" (split the water). Alternatively, Mr. Sheedy stated that the watermaster would divide the water.

Mr. Sheedy continually asserted that the lands in question could not have diverted water from Little Pine Creek because "we used it all." The alternative impressions the Hearings Officer received from this testimony were that the lands in question may not have been able to appropriate any water from Little Pine Creek due to Mr. Sheedy's unilateral efforts to appropriate all available flow, or that water was diverted from at least the southerly point of diversion and Mr. Sheedy was simply unaware of it.

Mr. Sheedy admitted that he had never walked the full length of Windless Gulch to the southerly diversion, and that while he had purchased a mining claim on which the reservoir associated with the southerly diversion is located, he could remember neither the size of the reservoir nor a headgate. He further testified that he did not know if Merle Brown, one of protestant's witnesses, diverted water out of Little Pine Creek at the southerly or upper point of diversion into miner's ditches, which water would eventually work its way into the Finlayson ditch.

Mr. Sheedy also changed his testimony about the location of the ditch the miners would move to once they were shut off after high flows, around mid-May. In his prior testimony, he stated that the miners would move to a ditch between the southerly diversion and the flume across Little Pine Creek. In the 2nd hearing, he stated that he was wrong and that it was approximately $\frac{1}{4}$ mile downstream from the flume.

Another item weighing heavily against Mr. Sheedy's credibility was that, when questioned about his affidavit, Mr. Sheedy stated that he meant there was one year of nonuse in 1962, and 14 years from 1972 to 1986. However, Mr. Sheedy and all the other proponents readily agreed at both hearings that the westside takeout from Little Pine Creek to the lands in question had been opened in 1974. When questioned at the 2nd hearing about this obvious misstatement, Mr. Sheedy testified that he was in error to say there was nonuse from Little Pine Creek after 1974.

Mr. Sheedy went on to say that when approached by a renter of the lands in question, Hillary Stout, about opening up the westside takeout, he told Mr. Stout "I don't have anything to do with [you] opening the ditch or using water, but that in the spring like always we would share," an arrangement that apparently existed only in Mr. Sheedy's mind.

He had further argued in the 1st hearing that since Mr. Stout had sold him the Stout Ranch, which has rights from Little Pine Creek junior to those of the lands in question, he was sure that Mr. Stout would not exercise the senior rights on the Vassios property over the junior rights of property he once owned. In the Director's experience, friendship and sentimentality take a back seat to water rights.

In light of the above, the Hearings Referee was inclined to give less weight to Carl Sheedy's testimony and found that his testimony did not demonstrate nonuse for any 5-year period between 1964 and 1974. I agree with this assessment and determination.

John Gardner testified that he was not involved with the sources of water or lands in question between 1964 and 1971. This leaves only 3 years of the period in question on which Mr. Gardner could offer testimony based on his first-hand knowledge. He also admitted that the westside takeout had been opened in 1975, although in his affidavit he set the period of nonuse as 1972 to 1982. Mr. Gardner stated that after 1975, water was taken at the west side takeout only through May, at which time the Watermaster would cut the lands in question off from further diversion from Little Pine Creek.

Mr. Gardner's demeanor additionally detracted from his credibility; he appeared nervous, uncomfortable and hostile to questioning both by the Referee and protestants' counsel. Overall, the Referee found that Mr. Gardner only had knowledge for that period of time between 1972 and 1974, that he did not offer substantial evidence that nonuse had occurred even in that period of time, and that his testimony was not particularly credible.

David Sheedy was away from the area between 1964 and 1966. Questioning was somewhat hampered at the second hearing as Mr. Sheedy was questioned over the telephone, without benefit of seeing any maps or the Referee being able to see precisely where Mr. Sheedy was discussing.

David Sheedy testified in both hearings that water from Little Pine Creek that went through the Marysville Placer Mine could, and on occasion did, get into the Finlayson ditch from which the lands in question are irrigated. Mr. Sheedy did assert with some conviction that there was no east-side takeout from Little Pine Creek located between the diversion for the ditch transporting water to the Gardner Ranch (called the Eastside or Gardner Ditch) and the point where Dog Creek water was flumed over Little Pine Creek into Finlayson Ditch. Mr. Sheedy's testimony regarding the period in question was generally inconclusive as to nonuse.

Jessie Mckay testified at the 1st hearing that she did not have information about use or nonuse of water on the lands in question during the years 1972 through 1982, although she signed a sworn affidavit alleging nonuse during that period of time. In fact, Ms. McKay testified that they had sold their property in 1963, and, apparently, moved out of the area at that time, as she stated at the first hearing that she did not live in the area during the period of nonuse alleged on her affidavit.

Overall, all proponent's witnesses filed affidavits alleging nonuse between 1972 and 1985, and all testified that the 'west-side takeout' from Little Pine Creek had been opened in 1974 and used in 1975. This alone casts a substantial shadow on the credibility of the testimony of proponent's witnesses.

On review of the records of both hearings, and taken in the light most favorable to the protestants, the Hearings Referee found that the proponents did not meet their burden to prove the occurrence of five or more consecutive years of nonuse of water from Little Pine Creek, East Branch Little Pine Creek and Spring Gulch on the lands in question during the period 1964 through 1974. I find that the record supports this determination.

The proponents of cancellation have the burden to prove nonuse. Under the law, the protestants have no legal obligation to rebut or otherwise demonstrate that use in fact occurred. Nevertheless, protestants did choose to present witnesses. This being the case, the Referee was obligated to consider the testimony of protestants' witnesses in review of the entire record.

Protestants' witness **James Thomason** was inconsistent and inconclusive in his testimony that water had been used from Little Pine Creek on the lands in question.

Merle Brown was more believable in his testimony. Mr. Brown testified that he diverted water from Little Pine Creek for mining purposes from 1965 through 1972, using the portion of the mining rights under Certificate 25502. These mining rights were canceled without protest in late 1972, after the Vassios' purchased the property, and remaining right Certificate 38668 was issued.

Mr. Brown testified that he had an agreement with Milo Phillips, the owner of the lands in question from 1968-1972, to use water from Little Pine Creek which would then make its way through mining ditches into the Finlayson ditch, from which Phillips irrigated.

Sherry Skinner nee Phillips, daughter of Milo Phillips, testified by affidavit entered on stipulation of counsel that she had participated in the irrigation of the property in question each year during the time her father owned the property, using water from both Little Pine Creek and Dog Creek. She further testified that with her father's permission, miners diverted water from Little Pine Creek for their mining operations, which water ultimately entered the Finlayson ditch and came onto the lands in question.

Don Nettleton also testified by stipulated affidavit. However, his testimony concerned use of water outside the period of time with which this contested case hearing was concerned.

Galord Lambeth testified at both hearings that he had assisted previous owners Thompson, Phillips and Vassios in irrigation of the lands in question by cleaning and maintaining ditches from 1964 to 1984, and that prior to 1975, both the upper diversion and a lower eastside takeout were used each year. He also offered

uncontroverted testimony that there were a number of springs below both the upper diversion and the flume which contributed flow to the Gardner ditch diversion from Little Pine Creek. This casts additional doubt on the claim of Carl Sheedy and Jessie McKay that the Vassios property could not have taken water from an east-side takeout because the Gardner ditch had "taken it all."

Loren Stout testified that during the first 3 years that his father leased lands in question, from 1972 to 1974, water was diverted each year from Little Pine Creek at the upper diversion during the high-flow period, until around May 15, and at the east-side takeout after that. Loren Stout himself actually participated in irrigation in 1974 and perhaps in 1973.

Mr. Stout testified at both hearings that miners used the water from the upper diversion until May 15, at which point diversion from Little Pine Creek for irrigation of the lands in question would be moved to the lower east-side takeout. He further testified that after the water was used by the miners, it would run into Windless Gulch and eventually reach the lands in question, where it would be used for irrigation.

Mr. Stout seemed to be confused when asked to illustrate the location of the east-side takeout on Proponents Ex. 2-2. Whether due to his unfamiliarity with this exhibit, or that it showed the Gardner Ditch as it is currently located, diverting from Little Pine Creek some 835 feet upstream from the flume, rather than immediately at or below the flume, Mr. Stout drew his recollection of the location of the east-side takeout in such a manner as to require levitation to transport the water over the Gardner ditch and into the Painter's Gulch ditch at the east end of the flume over Little Pine Creek.

Lambeth and McKay both testified that the point of diversion for the Gardner or Eastside ditch was north of the flume. Mr. Lambeth indicated that the point at which the east-side takeout diverted water from Little Pine Creek was originally above (upstream) from the Gardner Ditch. At the previous hearing, Brian Gardner (no relation to McKay or John Gardner) testified, interestingly enough, that the east-side takeout described by witnesses Stout and Lambeth was now part of the Gardner or Eastside ditch. John Gardner, Ms. McKay's son, however, testified that the diversion for the Gardner ditch had not been moved and is now as it always has been, several hundred feet south of the flume across Little Pine Creek.

Taking the record as a whole, the Hearings Referee found the testimony regarding an east-side takeout to be reliable and probative regarding the existence and use of such a take-out prior to 1974. I find that the record supports this determination.

Counsel for protestants has argued before the Commission, on appeal, and in his motion to dismiss made at the 2nd hearing that, because the remaining right certificate 36686 was issued in 1972 following cancellation of a portion of the right under certificate 25502, consideration of allegations of nonuse during any period of

time prior to 1972 is precluded by ORS 537.270. Although the earlier decision canceling the Certificate 36686 is reversed by this Order, this issue should not now be left without discussion.

ORS 537.270 provides that certificate for new water rights issued through the application and permit process (ORS 537.250) which have not been challenged or otherwise canceled for failure to comply with the terms of the permit regarding times for completion or application of water under ORS 537.260, and certificates issued following an adjudication of the relative rights on a particular river or stream system pursuant to ORS 549.140

shall be conclusive evidence of the priority and extent of the appropriation therein described in any proceeding in any court or tribunal of the state, except in those cases where the rights of the appropriation thereby described have been abandoned subsequent to the issuance of the certificate.

That is, that a certificate so issued under these conditions is conclusive as to the good standing of the right described.

ORS 540.650 provides that a certificate issued to reaffirm the portion of the right not canceled for forfeiture, i.e. a remaining rights certificate superseding the old certificate from which some rights were canceled, shall be of the same character as that described in ORS 539.140. Therefore, protestants argue, nonuse alleged to have occurred in the years prior to 1972 may not now be considered in determining whether the rights described in remaining rights certificate 38668 have been forfeited for nonuse.

The Department and Commission agree that if all or part of a water right is challenged in a forfeiture proceeding, and a portion of the challenged right is not found to have been lost through nonuse, the remaining right certificate issued is conclusive evidence that the water right was in good standing when the superseding certificate issued. In this case, a later forfeiture proceeding may not be brought based on a period of nonuse prior to issuance of the certificate which evidences rights either not challenged, or on which nonuse was not proven. However, protestants' argument is not applicable to this proceeding.

In many cases, a water right certificate covers rights for a variety of uses and rights appurtenant to land in many sections. Because a water right is appurtenant to land, ORS 540.510, it passes with the land. Thus, a certificate issued to one landowner in earlier in this century may describe water rights for lands that today are in multiple ownerships.

If one of those multiple owners ceases to use water and a forfeiture proceeding is initiated to cancel the water right on that person's property, the notice of proposed cancellation and the proceeding focus only on whether the water right appurtenant to that specific tract of land has been exercised without a five-year

period of nonuse. There is no basis upon which the status of other water rights described in the same certificate could be "reaffirmed", for those rights were never at issue and no information or testimony is taken regarding them.

Furthermore, reading ORS 540.650 in the context of the remainder of the forfeiture statutes makes it clear that "the water right" referred to in ORS 540.650 is the water right challenged as having been forfeited, not the conglomeration of water rights that may happen to be described in a single certificate. First, ORS 540.631 states

Whenever it appears to the satisfaction of the Water Resources Commission....that a perfected and developed water right has been abandoned as provided in ORS 540.610, the commission may initiate proceedings for the cancellation of such water right by causing written notice....The notice shall contain a complete description of the water right and of the lands to which the water right is appurtenant (emphasis added).

As in the 1972 cancellation of Certificate 25502 and a portion of the rights established therein, notice of proposed cancellation is given only for the challenged right, not for all rights described in a particular certificate. The State Engineer's 1972 order in this case was explicit on this point: "The remainder of the right evidenced by the said certificate, being for domestic use and the irrigation of a certain 88.0 acres of land [location described] is not in question in this proceeding" (emphasis added).

ORS 540.641 provides for protest against cancellation and hearing on that protest, and concludes:

After the hearing, the Commission shall enter an order canceling the water right, canceling in part or modifying the water right, or declaring that the water right shall not be canceled or modified (emphasis added).

Again, these references to "the water right" can only refer to the water right described in the notice of proposed cancellation, since the Commission would have no basis for altering any other water right.

Finally, then, when ORS 540.650 directs the issuance of a certificate to reaffirm "that portion of the water right not canceled or continued as modified," it can refer only to "the water right" proposed to be canceled in the original notice issued under ORS 540.631.

Here, the 1972 notice of proposed cancellation described only those portions of the rights for mining and for irrigation of a specified 5.1 acres. Those rights were canceled in their entirety. Certificate 38668 issued under ORS 540.650 describes rights which were not in question in the forfeiture proceeding, on which no

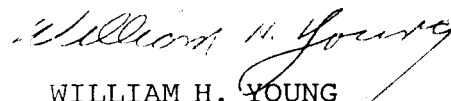
testimony or evidence was offered or taken, and for which no nonuse was claimed. Issuance of the remaining right certificate 38668 was done as a clerical action to show what rights remained and had not been canceled, and in this case, not challenged.

ORDER

NOW, THEREFORE, it is ORDERED that the water rights in question, being for appropriation of water from Little Pine Creek, East Branch Little Pine Creek, and Spring Gulch for irrigation of 88. acres of land as described by Certificate 38668 have not been forfeited for any 5-year period of nonuse between the years 1964 and 1974, inclusive, and Certificate 38668 shall not be canceled.

It is FURTHER ORDERED that the proceeding for cancellation of the rights described in Certificate 38668 is DISMISSED with prejudice.

Dated this 5th day of February, 1991.


WILLIAM H. YOUNG
Director

NOTICE: The above Final Order is issued by the Director pursuant to OAR 690-01-041. You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals within 60 days from the service of this Order. Judicial review is pursuant to the provisions of ORS 183.482 and 536.075.