

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF THE PROPOSED PARTIAL) PC 94-2
CANCELLATION OF THE WATER RIGHT)
EVIDENCED BY CERTIFICATE 38622 FOR USE) FINAL ORDER
OF WATER FROM AN UNNAMED STREAM AND)
TWO RESERVOIRS, TRIBUTARY TO TUALATIN)
RIVER, WASHINGTON COUNTY, OREGON)

STATEMENT

This proceeding was initiated by the Water Resources Department under the provisions of ORS 540.610 to 540.650 for the proposed cancellation of a portion of the water right evidenced by Certificate 38622 alleged to have been forfeited by failure to make beneficial use of water under the provisions of the water right for irrigation purposes for a period of five or more successive years, between October, 1983 through September 21, 1993.

The entirety of the water right is evidenced and described by the certificate issued to Floyd and Dorothy Hoffman and recorded at Volume 30, page 38622, State Record of Water Right Certificates. The entirety of the right is for domestic use of 0.01 cfs and stock use of 0.01 cfs from a spring located 60 feet south and 70 feet west from the north quarter corner of Section 25, for use of 0.05 cfs for irrigation of 4 acres in the NE ¼ NW ¼, and for use of 0.01 cfs for fire protection from the south reservoir located 760 feet south and 1,210 feet west from the north quarter-corner of Section 25, all in Township 2 South, Range 3 West, WM, under a priority of February 6, 1967.

Only that portion of Certificate 38622 for irrigation and fire protection on 1.25 acres in Tax Lot 1700, 1.15 acres in Tax Lot 5800, 1.15 acres in Tax Lot 5802 and 0.45 acre in Tax Lot 5804, located in the NE ¼ NW ¼ Section 25, T2S, R3W, was proposed to be canceled. The remaining portion of the right for use of 0.01 cubic foot per second cfs) from a spring for domestic use of two families and 0.01 cfs for stock use was **not** in question in this proceeding, no information regarding nonuse having been received regarding that portion of the right.

Affidavits filed with the Department by Patricia Ann Ornduff, Robert Keith Ornduff, and Danny James Ornduff, all of Bachelor Boulevard in Hillsboro, Robert Louis Ornduff of Buckhaven Road in Hillsboro, and Danny R. Gardner of Mountain Top Road in Newberg, Oregon, alleged that the portion of the water right described above had been forfeited by failure to make beneficial use of the water under the terms of the water rights for a period of five or more consecutive years, between October, 1983 through September 21, 1993. It was on the allegations in these affidavits that this proposed partial water right cancellation was initiated.

A notice of proposed cancellation was served on the owners and occupants of the land in question, as shown in the Washington County Tax Assessor's Records, on June 20, 1994, addressed as follows:

Tax Lot 1700, 1.25 acres
Maribelle M. Hoffman
21680 NE McCormick Hill Rd.
Hillsboro OR 97123

Tax Lot 5800, 1.15 acres
Craig & Kendra Vaage
21725 NE McCormick Hill Rd.
Hillsboro OR 97123

Tax Lot 5802, 1.15 acres
Tax Lot 5804, 0.45 acre
Rex & Linda Johanson
21645 NE McCormick Hill Rd.
Hillsboro OR 97123

A timely protest against the proposed cancellation was received from Craig and Kendra Vaage on August 16, 1994. Protestants denied the alleged nonuse for 1983-1988 and after September, 1993 of that portion of the right appurtenant to 1.15 acres in tax lot 5800. No protest was filed by the owners of tax lots 5802, 5804 and 1700.

A Notice of Hearing, together with a Statement of Parties' Rights, was served on the protestants and proponents of cancellation on August 27, 1994. Pursuant to the Notice of Hearing, a contested case hearing was held October 14, 1994 at the offices of the Water Resources Department in Salem, Oregon. No protest having been filed by the owners of tax lots 1700, 5802 and 5804, testimony addressed only the question of the alleged nonuse on tax lot 5800.

Present at the hearing were Kendra and Craig Vaage, protestants against the proposed cancellation, appearing pro se and Robert L., Danny, Keith and Patricia Ornduff and Danny Gardner, proponents of cancellation, represented by Robert Stone, Attorney at Law. Called as witnesses by the protestants were Maribelle Hoffman, Andrew Hoffman, George Kendall and Anna Becker. The proponents testified but called no witnesses other than themselves.

A Proposed Order was issued January 27, 1995. No exceptions having been filed to the Proposed Order, this Final Order is now issued.

FINDINGS OF FACT

1. All facts set forth in the STATEMENT are incorporated as Findings.
2. The lands and reservoirs in question are shown on Figure 1, infra, which is a copy of WRD Exhibit 5 entered into the record at the hearing. Tax lot 5800 slopes downward from McCormick Hill Road on the south to Bachelor Boulevard on the north.

3. The lands in question were owned by Floyd Hoffman, father of Maribelle Hoffman and grandfather of Andrew Hoffman and George Kendall, or by the Hoffman estate, until the Vaage's purchased the property in July, 1987.

4. Floyd Hoffman grew a variety of berries and fruit trees on the property, with a primary focus on strawberries and blueberries. There are presently 57 blueberry bushes on the property which were planted by Mr. Hoffman. Mr. Hoffman also had 84 hybrid rhododendrons which were originally kept temporarily for a friend but which eventually became permanent fixtures on the property.

5. The irrigation system Hoffman developed involved a pipe attached to a fence post, the entirety of which was placed in the water stored in the north or lower reservoir. The fence post held one end of the pipe under water. One end of a second pipe was attached to the other end of the fence post pipe, and the other end of this second pipe to a pump located some distance away from the reservoir. Water was pumped through yet another pipe which ran under Bachelor Boulevard and then to the top of the subject property. This pipe has four risers and hosebibs fairly evenly spaced from the bottom to the top of the property. A hose and sprinkler could be attached at any of these risers.

6. Mr. Hoffman's mental and physical health began to deteriorate as he grew older. He was admitted into a care facility in 1985. A few years prior to that, he had a leg amputated. On several occasions, Mr. Hoffman's prosthesis apparently became disconnected and fell off as he was in the process of irrigating, causing memorable problems for him and for his family.

7. The health of the irrigation system also deteriorated over time, particularly the pump, which moved water from the northern reservoir up a hill to the lands in question, and the reservoir, which experienced an annual increase in the amount of silt and woody debris deposited but not removed from the reservoir and a commensurate reduction in the amount of stored water available.

8. While testimony was conflicting or less than precise on this point, the weight of the evidence establishes that 1983 was more likely than not the last year Floyd Hoffman used the system to irrigate the lands in question. This is consistent with the assertions of the proponents who alleged in their affidavits that the beginning of the period of nonuse was October, 1983. This is also consistent with the testimony of Maribelle Hoffman, who retired in 1983 and assisted her father with the strawberry harvest that year, and who observed Mr. Hoffman's irrigation activities.

9. In 1987, the first year of their ownership, the protestants attempted to use the pump and system developed by Floyd Hoffman with a limited amount of success. However, instead of connecting to the pipe attached to the fence post, protestants attached to a pipe which bisected the earth dam, with one end in the water and the other exiting the outer side of the dam. The pump was only capable of pushing water up the hill only as far as the second

SECTION 25 T.2S. R.3W. W.M.

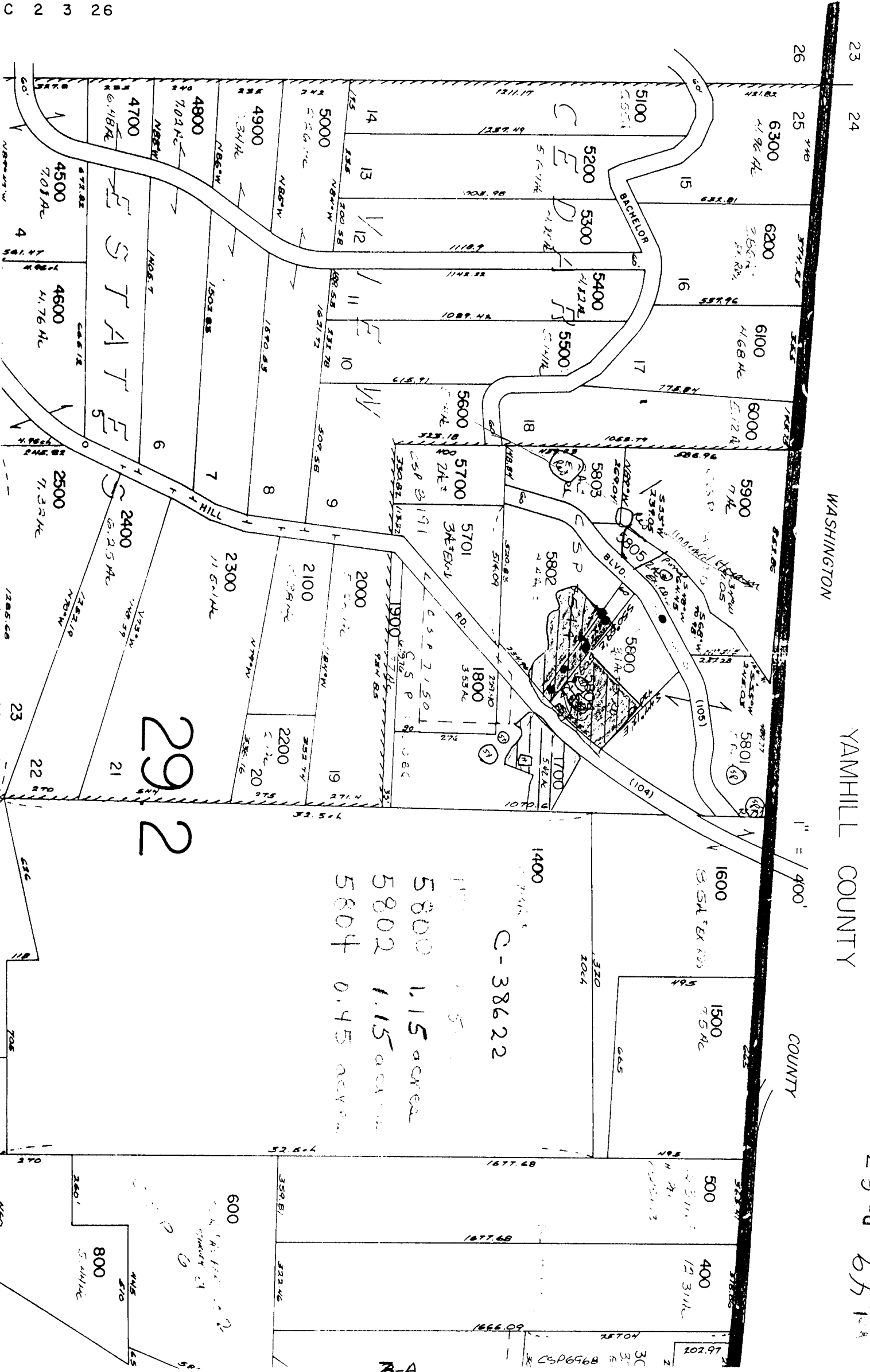
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riser from the lower part of the property nearest Bachelor Boulevard. Water was pumped from the reservoir for short periods of time, not exceeding an hour once a week, over a 6-week period in August and September, and applied to the blueberry bushes and rhododendrons. The pump then ceased functioning and the system was disconnected. The protestants' use of the pump and pipe system in 1987 was observed by Andrew Hoffman.

10. In 1988 the protestants chose not to replace the pump or improve the system and instead established a drip system for which they hauled water in 5-gallon buckets from the reservoir to a 55-gallon barrel provided by Andrew Hoffman. Protestants were unable to drive the entire length of the access road from Bachelor Boulevard to the reservoir and had to hand-carry the buckets approximately halfway up the access road. Given the difficulty in obtaining water from the reservoir in this manner, water was hauled perhaps 6 times at most during August and September, either on weekends or in the late afternoon. Protestants were assisted in this effort on one occasion by Andrew Hoffman, and observed on another occasion by Anna Becker.

11. Washington County graded and graveled Bachelor Boulevard in October of 1988. In the process, the pipe which ran under Bachelor Boulevard and through which water from the reservoir was carried to the lands in question was destroyed. It was not replaced until September, 1993.

12. No use was made of the irrigation system nor was any irrigation from the reservoir attempted in 1989, 1990, 1991 and 1992. Protestants attempted to irrigate using their domestic well, burning out two pumps in the process. A substantial investment was made in deepening the well in the hope of increasing the available water. Protestants gained only an additional 1 gallon per minute as a result of deepening their domestic well, which was insufficient to supply both their domestic, household needs and their irrigation needs.

13. Keith Ornduff purchased the reservoir property in 1990 and reconditioned the reservoirs and the access road with the assistance of Danny Gardner, also a proponent in this case.

14. In September of 1993, protestants repaired and refurbished the pump and pipe system originally established by Floyd Hoffman. On September 22, protestants irrigated the lands in question for 3 hours, during which time the reservoir level dropped between 1/2 and 3/4 of an inch. Protestants irrigated the lands in question for an additional 5-8 hours, total, between September 23 and September 30, the end of the irrigation season.

15. Protestants' irrigation of their blueberries, rhododendron, vegetable garden and lawn during the last 10 days of the 1993 irrigation season, while limited, provided a benefit to the plants and vegetation irrigated, as evidenced by the improved condition of the blueberry leaves and the lawn, which were withering and turning brown prior to the irrigation.

CONCLUSIONS OF LAW

1. The period of time with which the parties were concerned was the irrigation seasons of 1984 - 1993, inclusive. This is the period of time for which nonuse was asserted in proponents affidavits, and the period of time stated in the Notice of Proposed Cancellation. Testimony regarding use or nonuse any time prior or subsequent to the 1984 through 1993 irrigation seasons was not within the noticed scope of the proceeding and was not considered for the purpose of determining whether five or more years of nonuse occurred.
2. Proponents did not established the occurrence of five successive years of nonuse between the irrigation seasons of 1984 and 1993, inclusive, to support a determination of forfeiture. Testimony of protestants and their witnesses demonstrated that it was more likely than not that the right was exercised and a benefit obtained in 1983, 1987, 1988 and 1993.

OPINION

The primary basis on which proponents rely for their assertions of nonuse is that they did not observe any obvious connection of pipes between the reservoir and the pump between 1984 and 1993, and no change in the location of the 'fencepost pipe' or the other system pipes. On the other hand, no one testified to observing the application of water even during those times when, as both proponents and protestants' witnesses testified, Floyd Hoffman was irrigating. While proponents may have failed to observe a pipe in the reservoir, they also had little reason to remark on or remember such a connection or lack thereof until Keith Ornduff's purchase in 1990 of the property on which the reservoirs are located. Use of the reservoir prior to 1990 would have been of no consequence to the proponents as they did not own the reservoir property.

Additionally, proponents had no real occasion to observe the pond and any possible connection on a daily, physically close basis until approximately 1990. Robert Ornduff testified that he drove past the pond an average of twice a month during the irrigation seasons of 1984 through 1993, but that he never went down to the pond and did not go onto the Hoffman/Vaage property.

Danny Ornduff drove by daily, but admitted that he would not have noticed if the level of the pond dropped only an inch or two. He testified that he went to the pond area most summers in July to pick huckleberries but that he may have missed a year or more. It is as possible that the missed years were 1987 and 1988 as any other years. He knew definitely that he had been there in 1989 to check the pump, and that the pipe running under the road had been torn up in 1988, consistent with the testimony of the other parties. Danny Ornduff also testified that the pipes which went from the pond to the pump were disconnected and remained in the same location over the years. However, it is difficult to understand how this would be visible from the road, given the tendency of weeds and natural vegetation to grow up and cover objects lying on the ground.

Keith Ornduff purchased the property on which his residence is now located in 1979. This land is higher in elevation than the reservoirs, which can not be fully viewed from the Ornduff residence. The visibility of the lower or northerly reservoir from which water is pumped to the protestant's property is particularly limited, especially during the spring and summer when the surrounding and intervening vegetation is in full leaf. Mr. Ornduff testified that he was not paying particular attention to the reservoir property in 1979 and 1980, as he was more concerned with the building and completion of his house and then establishing a home there. Other than his enjoyment in walking out of doors, Keith Ornduff had no reason to be especially concerned with or to remember activities taking place on the land on which the reservoir is located, which he did not purchase until 1990.

Keith Ornduff worked during the day in 1987 and 1988, the first two years the protestants owned their property. It is not unreasonable to conclude that the few times the protestants were at the reservoir in 1987 and 1988, they were not observed by Keith Ornduff, particularly as only a portion of the lower pond is visible from Mr. Ornduff's home at any time of year. Common sense would suggest that given the amount of intervening vegetation, the view of the lower pond from Mr. Ornduff's home is even less in summer than during the non-irrigation season.

Keith Ornduff testified that he did not think irrigation occurred in 1987 because a person would not connect the system, run it for an hour, then disconnect it. Yet if the system were not working adequately, that would not be an unreasonable action. It is also possible that Mr. Ornduff simply failed to see the system connected during the 6-week period in which it was used in August and September of 1987. The proponents asserted that there was no irrigation in 1987 because the fencepost pipe remained on the bank. This is understandable, since the protestants hooked up to the pipe running through the dam, rather than using the fencepost pipe. Danny Ornduff testified that had irrigation occurred, he would have seen the reduction in water level at the reservoir as he drove by daily unless it only dropped a couple of inches. During the longest period of irrigation in 1993, a three-hour run, the reservoir dropped only 1/2 to 3/4 of an inch. It is understandable that Danny Ornduff did not observe any change in water level and thus felt confident in his conclusion that no irrigation occurred in 1987, when the pump was working at less than full capacity and was run for only an hour at a time.

Danny Gardner visited the area infrequently between 1980 and 1990 and could not say precisely or absolutely when the last year was that he had observed water being pumped from the reservoir, only that it was in the early '80's. Keith Ornduff testified that he was sure the system stopped being used four or five years prior to Bachelor Boulevard being upgraded in 1988, which establishes the last irrigation season of use as 1984 or 1983.

Robert Ornduff testified that when Floyd Hoffman had been actively irrigating, the outflow from the pond was negligible, leaving little for Mr. Ornduff's cattle which drank from the overflow as it ran down a small drawn which crossed the Ornduff property. Mr. Ornduff testified that in the late 1960's he had tapped a spring to avoid relying on this overflow and

having his cattle run short of water during the irrigation season. He also testified that from the early '80's on, the flow through the draw had been good, even in the summer.

Inexplicably, Mr. Ornduff testified that in the fall or late summer of 1983, after or near the end of the irrigation season, he didn't want to be surprised and have his cattle without water so he checked the flow of water leaving the pond to make sure that no irrigation was going to occur and saw that the pipes and pump were disconnected. The decision to check the pond in the early fall of 1983 is puzzling, since, as Mr. Ornduff had testified, as there was a good flow coming through the draw and he had previously tapped a spring to maintain adequate supplies of stock water independent of any flow from the reservoir.

Robert Ornduff also testified that while he was of the opinion that irrigation in late September would not be beneficial, blueberries, which have shallow roots, did not require lengthy, intensive watering and would benefit, and admitted that he had not personally observed the irrigation or effects of the protestants' irrigation efforts in 1987, 1988 and 1993.

It is also rather puzzling that while all proponents testified that by 1983 the pond had become rather silt-filled and full of woody debris with little useable water, it was at this same time that Keith Ornduff began stocking fish in the pond. The fact that Keith Ornduff was planting fish in this pond also tends to indicate that rather more water was available for irrigation, and the pond in less poor condition, than the proponents' testimony would suggest.

All in all, there were a number of statements which, when considered in light of the entirety of the record, either appeared questionable or had a countering and logical explanation, to the extent that the weight of protestants' testimony overbalanced that of the proponents. It is not that the proponents' testimony was unreliable or not credible. Rather, it is that the testimony of protestants and their witnesses was convincing and provided plausible countering explanations for much of proponents' assertions about what they did not observe or why something could not have occurred.

It is possible that the last irrigation prior to that which was attempted in 1987 occurred in 1980. However, given all the circumstances and in light of the testimony of Floyd Hoffman's daughter and grandsons as well as that of Keith Ornduff, and the testimony of the other proponents that nonuse began "in the early '80's," it is more probable that irrigation did occur and the protestants simply missed it or did not observe it, particularly as they had no reason to be focusing on that activity or remembering its occurrence with any specificity.

A particularly telling piece of testimony was Keith Ornduff's statements concerning the amount of time and effort he had spent on reconditioning the reservoirs after he purchased the property in 1990. It was clear that Mr. Ornduff resented the Vaage's failure to contribute either time or money or to otherwise assist in this effort, and he said as much

when questioned about his motive for filing the affidavit of nonuse. This understandable frustration was exacerbated by the Vaage's reconstruction of their appropriation and delivery system in 1993 without any apparent offer to reimburse Mr. Ornduff for past work, work which put the pond back into useable condition, and their apparent failure to demonstrate any willingness to work together to maintain the system in the future. However, this is outside the scope of the Department's authority to remedy or address.

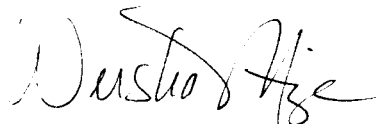
FINAL ORDER

NOW, THEREFORE, it is ORDERED that the contested case proceeding for the proposed cancellation of that portion of Certificate 38622 for irrigation of 1.15 acre in Tax Lot 5800 located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 25, T2S, R3W, WM, is DISMISSED.

It is FURTHER ORDERED that that portion of Certificate 38622 for irrigation on 1.25 acres in Tax Lot 1700, 1.15 acres in Tax Lot 5802 and 0.45 acre in Tax Lot 5804, located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 25, T2S, R3W, and that portion of the 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.

Placed in the US Mail this 2nd day of March, 1995.



WEISHA MIZE
Administrative Law Judge

NOTICE: 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 date of service (date of mailing) of this Order. Judicial review is pursuant to the provisions of ORS 536.075.