

BEFORE THE WATER RESOURCES DEPARTMENT OF OREGON

IN THE MATTER OF CANCELLATION)	PC 86-1
OF WATER RIGHTS IN THE NAME OF)	STATEMENT, FINDINGS OF
MRS. N.P. NELSON FOR USE OF)	FACT, CONCLUSIONS OF
WATERS OF AN UNNAMED SPRING)	LAW AND PROPOSED ORDER

STATEMENT

This proceeding was initiated by the Water Resources Director under the provisions of ORS 540.610 to 540.650 for the proposed cancellation of certain water rights, based on information furnished to the Director alleging that the rights in question had been forfeited by failure to make beneficial use of the water under the provisions of the water rights for a period of five or more successive years of nonuse.

The water rights in question are for the appropriation of water from an unnamed spring located within the NW 1/4 SE 1/4 of Section 34, Township 2 South, Range 3 West, WM, under a priority date of November 26, 1929, for development of 1 theoretical horsepower (electrical) within the SW 1/4 SE 1/4 of said Section 34 and for domestic use in one residence within the SE 1/4 SE 1/4 of said Section 34. The water rights in question are portions of the rights established by performance under the provisions of Permit 9403 and described by the certificate issued to Mrs. N.P. Nelson and recorded at page 10652, Volume 10, State Record of Water Right Certificates.

The right to use water from the said spring, under the said date of priority, for domestic use in a single family residence within the SW 1/4 SE 1/4 of Section 34 (Tax Lot 900), also described by the said certificate of water right, is not in question in this proceeding.

The water right records do not show the specific location of the residence within the SE 1/4 SE 1/4 of Section 34 to which the domestic water right in question became appurtenant by use under the provisions of Permit 9403. Therefore, notice of initiation of this proceeding was given to all persons having ownership interest in and/or occupancy of properties within the said SE 1/4 SE 1/4 of Section 34.

Notice of initiation of this proceeding was served on the following persons, on May 23, 1986:

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

Rocky and Dorothy Losli
PO Box 34
Yamhill, OR 97148
(Tax Lot 800)

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

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

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

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

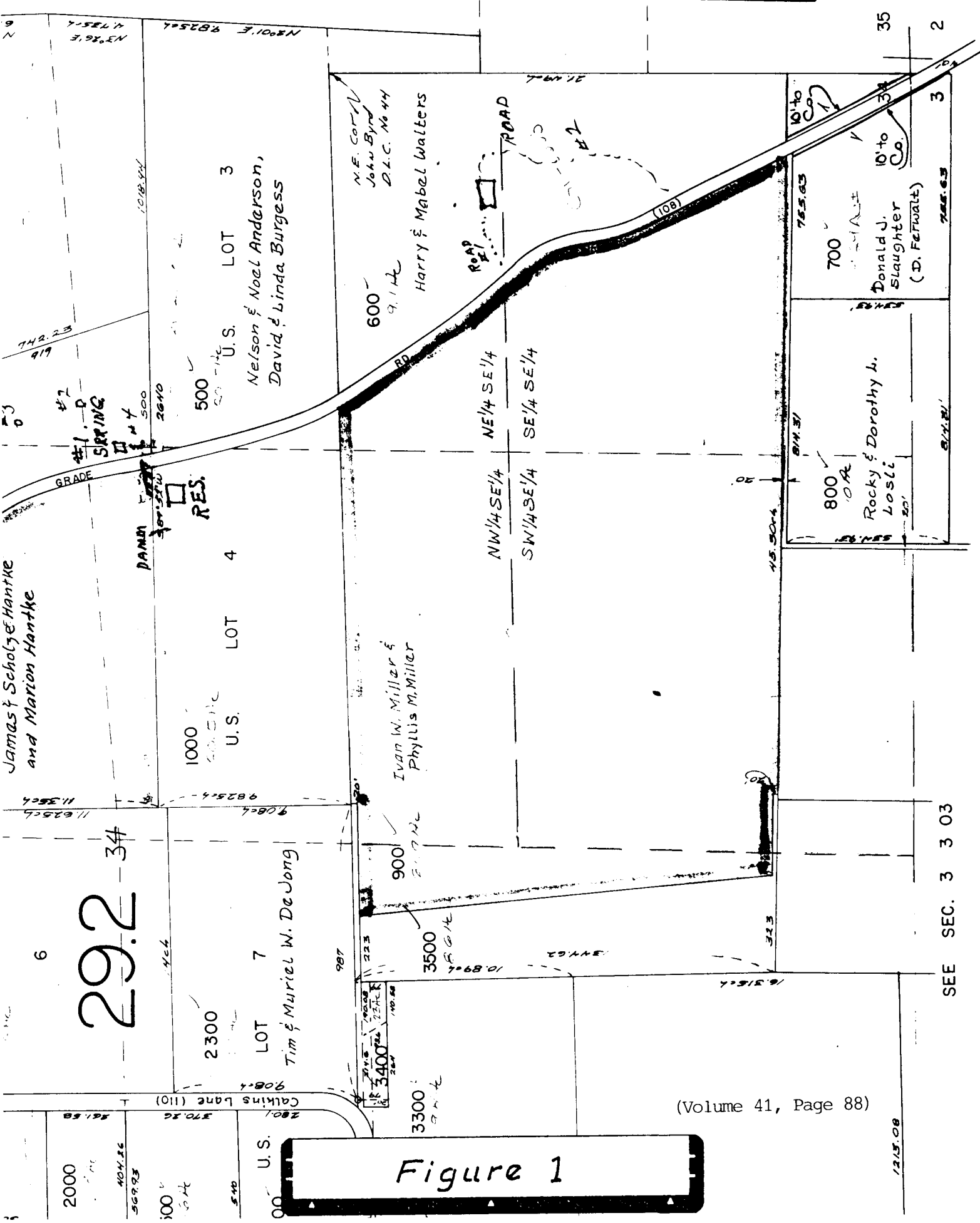
No other protest against the proposed cancellation of the water rights in question was submitted within the statutory 60-day period from service of the notice of initiation of this proceeding, or subsequent thereto.

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

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

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

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



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FINDINGS OF FACT

The evidence adduced establishes that there is one residence on the Walters property and that construction of the residence was begun in 1978 or 1979.

Domestic water for the Walters residence is pumped from the reservoir shown on Figure 1 and is conveyed to the residence by means of a pipeline which passes under Kings Grade Road, continues up the hill to the east, to storage tanks, and continues on to the residence. Installation of the pump and pipeline system was initiated in 1977.

Approximately nine months prior to beginning of construction of the Walters residence, a travel trailer was used as a temporary residence near the site where the house was built, and was supplied with domestic water by means of the above described pump and pipeline system. The beginning of use of water from Spring No. 1 for domestic use in the travel trailer was made in 1977 or 1978.

Harry Walters testified that the property identified herein as the "Walters property" (Tax Lot 600), was a portion of a larger parcel of real property purchased from Anna E. Nelson approximately 17 or 18 years prior to beginning of construction of the Walters residence. He further testified that there was no house on the property at the time of purchase and there continued to be none until construction of his existing residence. Mr. Walter's testimony is confirmed by Exhibit WRD 3, a copy of the Dundee, Oregon Quadrangle Map published in 1956 by the U. S. Geological Survey. The said map which was prepared from aerial photographs taken in 1954 and field work done in 1956, indicates no buildings of any kind on what is now the Walters property. The pertinent portion of Exhibit WRD 3 is included herein as Figure 2. The Walters property (Tax Lot 600) is identified by yellow shading.

OPINION

Protestants Harry and Mabel Walters, in their "Protestant's Trial Memorandum" received at the hearing, contend that they became owners of the subject water right in question by assignment of interest from Anna E. Nelson (Mrs. N. P. Nelson). The record does not establish whether the water right in question for domestic use within the SE 1/4 SE 1/4 of Section 34, Township 2 South Range 3 West, WM, was, in fact, made appurtenant to the Walters property (Tax Lot 600).

The Oregon Supreme Court stated in *Wilber v. Wheeler*, 273 Or 855, at page 862: "Under our statute, it is clear that water rights are appurtenant to the land, and not to ownership of the land which changes hands frequently. See ORS 540.510."

ORS 540.510 provides, "All water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530. However, the owner of any water right may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use theretofore made of the water in all cases without losing priority of the right theretofore established."

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

1474 IV. 1
(SCHO)

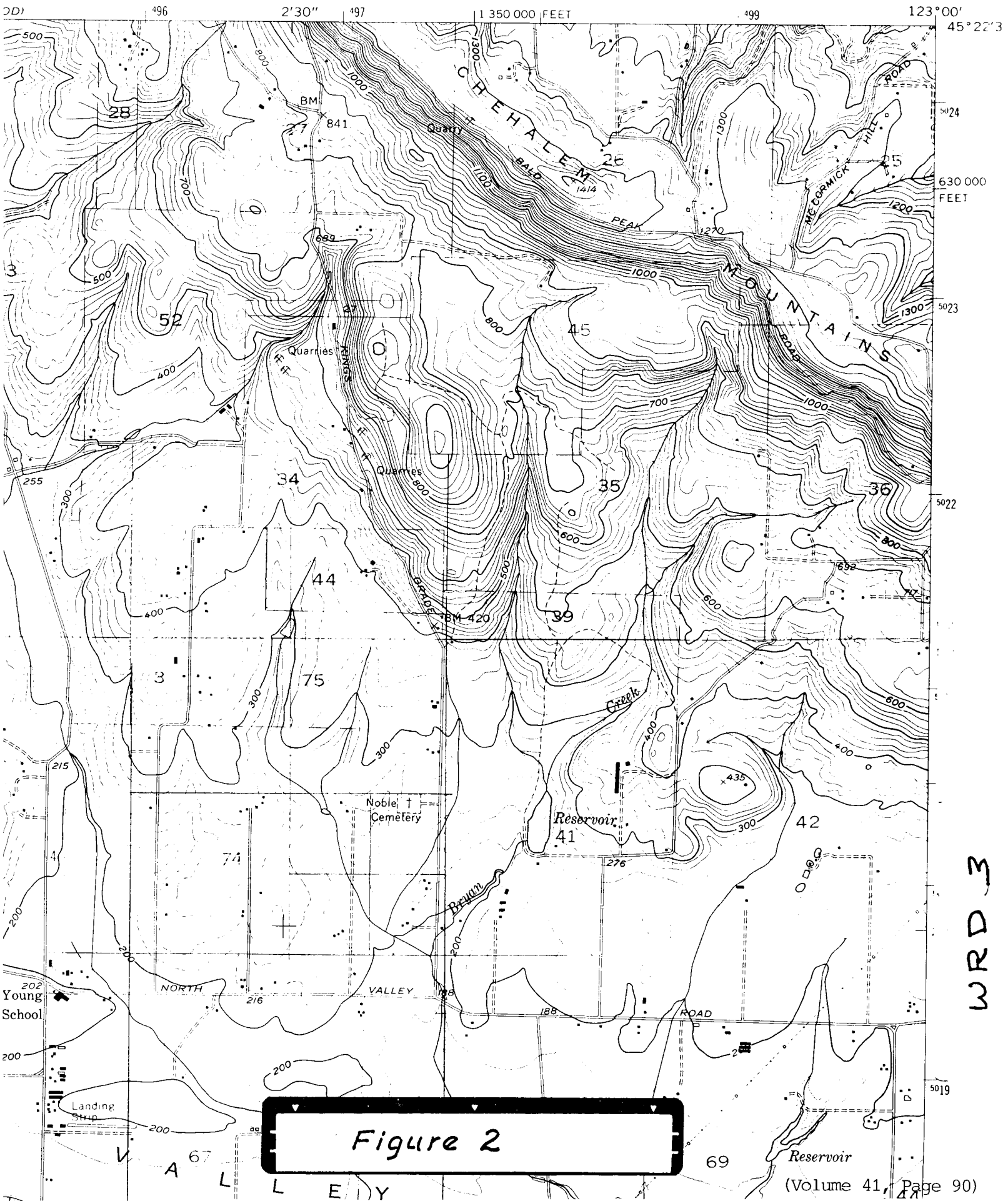


Figure 2

WRD 3

ORS 540.530 states, in part, "Whenever the owner of a water right for . . . domestic use . . . , for any reason desires to change the place of use . . . an application to make such change . . . shall be filed with the Water Resources Commission."

No application for transfer of the subject water right in question has been filed. Therefore, unless the subject water right in question was made appurtenant to what is now the Walters property (Tax Lot 600) by performance under the provisions of Permit 9403, the protestants could not have aquired the right by contract or deed.

Protestants further contend that the Millers continued use of water for domestic purposes under a portion of the water rights established under Permit 9403 and described by the certificate in the name of Mrs. N. P. Nelson, recorded at page 10652, Volume 10, State Record of Water Right Certificates, has served to maintain the entirety of the rights described by the said certificate.

It is clear from *Crandall v. Water Resources Department*, 290 Or 771 (1981), on review of *Crandall v. Water Resources Department*, 45 Or App 791, that nonuse of a specific portion of a water right for five successive years of nonuse works a forfeiture of that portion of the water right.

ULTIMATE FINDINGS OF FACT

The water right in question for appropriation of water for domestic use within the SE 1/4 SE 1/4 of Section 34, Township 2 South, Range 3 West, WM, to the extent it may have been appurtenant to the Walters property (Tax Lot 600), has gone without use for a period of five and more successive years of nonuse prior to the year of 1977.

CONCLUSIONS OF LAW

That the question before the Water Resources Commission is one of fact concerning forfeiture, not one concerning abandonment or voluntary relinquishment of the water right, is made clear by *Withers v. Reed*, 191 Or 541 (reaffirmed by the court in *Rencken v. Young*, 300 Or 352), wherein the court states in reference to ORS 540.610(1):

"Under the statute in question failure of 'the owner of a perfected and developed water right' to use the water appropriated for a period of five successive years works a forfeiture of the right not for the benefit of any individual as in the case of an ordinary statute of limitation -- which this is not -- but for the benefit of the public, to the end that the 'water right shall revert to the public and become again the subject of appropriation in the manner provided by law, . . .'"

The court also made clear in *Bausch v. Myers*, 273 Or 376 (reaffirmed by the court in *Rencken v. Young*, 300 Or 352), that the forfeiture takes place with the occurrence of five successive years of nonuse and not at some later time when proceedings are brought under the provisions of ORS 540.610 to 540.650.

The water right in question for the appropriation of water for domestic use within the SE 1/4 SE 1/4 of Section 34, Township 2 South, Range 3 West, WM, as described by the certificate issued to Mrs. N. P. Nelson and recorded at page 10652, Volume 10, State Record of Water Right Certificates, as it may pertain to the Walters property (Tax Lot 600), has been forfeited by nonuse for a period of five and more successive years of nonuse.

ORS 540.641(1) provides, "If the legal owner or occupant receiving notice as provided in ORS 540.631 fails to protest the proposed cancellation of the water right within the 60-day period prescribed in the notice, the Water Resources Commission may enter an order canceling the water right."

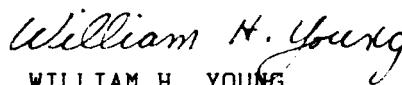
Harry and Mabel Walters were the only owners and/or occupants who filed a protest against cancellation of any portion of the water rights in question as described in paragraph 2 on Page 1, herein. Therefore, the entirety of the water rights in question as described in paragraph 2 on Page 1, herein, should be canceled pursuant to the provisions of ORS 540.610 to 540.650.

PROPOSED ORDER

NOW, THEREFORE, it is ORDERED that the water rights in question, as described by the certificate issued to Mrs. N. P. Nelson and recorded at page 10652, Volume 10, State Record of Water Right Certificates, be and the same hereby are canceled.

It is FURTHER ORDERED that the said certificate of water right be canceled and in lieu thereof a new certificate be issued for that portion of the original right not canceled by this proceeding.

Dated at Salem, Oregon this 18th day of February, 1987.


WILLIAM H. YOUNG
Director

Notice: The above order is issued by the Director pursuant to authority delegated by the Water Resources Commission (Commission) pursuant to ORS 536.025(2). A party to the proceeding may file objections and exceptions to this proposed order, with the Commission, within 30 days from the date of service (date of mailing) of a copy of this order on that party. If objections and exceptions are filed, opportunity will be provided for argument to the Commission, and the final order will be issued by the Commission.

If objections and exceptions are not filed within the said 30-day period, a final order will be issued by the Director under authority delegated by the Commission.