

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF THE PROPOSED PARTIAL) PC 96-3
CANCELLATION OF WATER RIGHT CERTIFICATE)
29364 IN THE NAME OF HAROLD BIDDLE FOR) FINAL ORDER
USE OF WATER FROM EAST BRANCH OF LONG)
BRANCH AND EAST FORK OF EAST BRANCH AND)
RESERVOIR, JACKSON COUNTY)

HISTORY OF PROCEEDINGS

This proceeding was initiated by the Water Resources Department under the provisions of ORS 540.610 to 540.650 for the proposed partial cancellation of a portion of Certificate 29364. The action was based on information furnished to the Director in affidavits filed by Charles Henry and Ralph Gysin alleging that the right in question had been forfeited by failure to make beneficial use of water under the provisions of the water right for a period of five or more successive years of nonuse, from 1988 through 1995.

The water right in question was issued to Harold Biddle and recorded at Volume 21, page 29364, State Record of Water Right Certificates. The entirety of Certificate 29364 is for irrigation of 0.8 acre in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 12, 1.8 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7 and 4.8 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 34 South, Range 1 West, WM.

Only that portion of the right for irrigation of 2.7 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7 was alleged to have been forfeited for nonuse for a period of five or more consecutive years, between April, 1988 through 1995. This portion of this right had previously been found to have not been exercised for 4 years, 1988 through 1991, in case number PC 91-2. The portion of the right for irrigation of 0.8 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 12, 1.8 acres in the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 7 and the remaining 2.1 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 7 were not in question in this proceeding.

Notice of Proposed Cancellation in this matter was sent to Michael and Lisa Smiley, the owners of record, on April 1, 1996. Protest against the proposed cancellation was submitted by Kip Lombard, attorney at law, on behalf of the Smileys on May 24, 1996. Protestants asserted as grounds for the protest that water was used from the proper source, but not from the authorized points of diversion from 1992, 1993, and 1995, and that they were ready, willing and able to use the water, but that water was not always available, in part because of drought and in part because proponent Henry refused to release water from the reservoir when requested, and to which they are legally entitled, to satisfy the right.

Pursuant to the Notice of Hearing served on the protestant and proponents of cancellation on June 19, 1996, the matter was set for hearing on August 1, 1996. A Statement of Parties Rights was attached to the Hearing Notice. At the joint request of the parties, the hearing was postponed and reset for January 7, 1997. The hearing was held by telephone before Weisha Mize, Administrative Law Judge. The hearing was conducted pursuant to the provisions of the Oregon Administrative Procedures Act, ORS 183.310 *et seq*, and the procedural rules found at

OAR 690-01-005 and OAR Ch. 690 Div. 2. Applicable substantive laws are in ORS 540.610 *et seq.*, OAR Chapter 690 Division 17, and relevant case law.

Proponents of cancellation Chuck Henry and Ralph Gysin appeared at the hearing and were represented by Robert Bluth, attorney at law. Vicki Henry was called as a rebuttal witness. Protestants Michael and Lisa Smiley were represented by Kip Lombard, attorney at law. Protestants offered Toni Kimple, Watermaster Bruce Sund and Assistant Watermaster Larry Menteer as witnesses.

Exceptions were timely filed to the Proposed Order by the Smileys on February 18, 1997. Pursuant to OAR 690-02-170, the matter was referred to the Director for a final decision. Having reviewed the record, the exceptions and argument on the exceptions, this Final Order is now issued,

DETERMINATION ON EXCEPTIONS

The parties stipulated that there had been four years of nonuse, from 1988 through 1991. Had no use occurred in 1992, that would have been the fifth consecutive year of nonuse. The ALJ found that limited use had been made in 1992 for irrigation of a 50' x 50' garden plot and of fruit trees, and that use had been made on a slightly expanding basis from 1992 through 1996. However, much of the use had been made from an unauthorized source. Even if water had been available in greater quantity and for a longer period of time in 1992 from the authorized source, the protestant was not ready or able to apply it to the entire 2.7 acres. The ALJ found that all but 0.07 acre, the amount of ground irrigated in 1992, had been forfeited for nonuse, and proposed to cancel the forfeited portion of the right.

Protestants excepted to Findings and Conclusions 7 and 9 and Ultimate Finding #1 of the proposed order. The thrust of protestants' argument was that they are being penalized for the drought conditions in 1992. The protestants say they irrigated as much as they could with the water that was available in 1992, but there was not enough water to irrigate the entire 2.7 acres to which the right is appurtenant. The protestants further assert that contrary to the findings, they were ready; willing and able to irrigate the entire 2.7 acres, but drought conditions prevented it.

The diagram entered into evidence as protestants' exhibit 103 is not to scale, thus the level of accuracy in the actual extent of ditching shown is unknown. Assuming for the purpose of this order that the extent of the ditching shown is accurate, the ditching in 1992 went only to the middle of the property. The protestant testified that he ditched approximately to the middle of the field, and did not go beyond that to the east half of the 2.7 acres. The ditching was not extended beyond that in subsequent years. The ground is lowest at the middle of the property running north and south, and rises to east and west. While the protestant speculated that if water had been abundant in 1992, it would have covered the entire 2.7 acres, the ALJ concluded that even if water had been run in this ditch out to the middle of the field, it would not have made it up hill to the east unless the ditch went beyond middle of the field.

In reviewing the hearing record, I find that the ALJ mis-heard Mr. Smiley at one point, and contrary to the third sentence in Finding 9, Mr. Smiley in fact stated that had water been abundant in 1992, it would have flowed out over the entire field. Nevertheless, it is my conclusion that protestant was not ready or able to apply water to the entire 2.7 acres in 1992, regardless of availability. Moreover, the statement that the ditches were successfully used in 1996 to cover the entire 2.7 acres is outside the period of concern and is in conflict with Mr. Smiley's testimony that in 1996, the system was changed from gravity flow to pump and sprinkler.

The fact that the property is fenced and that Ms. Smiley's parents wanted the Smileys to raise cattle is not evidence that the water right was exercised or even that it could have been used to irrigate the 2.7 acres to which this right is appurtenant.

I also appreciate that the protestants expressly requested that Mr. Henry release stored water late in the 1995 irrigation season -- unfortunately, as the watermaster testified, by waiting to request release of the stored water long after the authorized source had ceased flowing and the creek bed dried up, the protestants would and could not have received the quantity of stored water to which they were entitled. It would have sunk into the ground before it reached them at their unauthorized point of diversion. More importantly, the protestants were unprepared to take water from the authorized point of diversion. As Mr. Smiley testified, no attempts to divert water from the authorized point were made, and his property could not be irrigated efficiently from his authorized point of diversion without piping, which had not been installed or used by his predecessor or himself.

The Smileys claim that they are being penalized for the drought. It is undisputed that the East Fork, the authorized source for this 2.7 acres, dries up every year, and that it always dries up earlier than the East Branch, the unauthorized source from which the protestants were diverting water. This lack of water availability cannot solely be blamed on drought, since it is an annually-occurring event.

However, it does not appear from the record that the protestants would have been able to apply water to their entire 2.7 acre parcel even if water had been plentiful, which it was in 1993 and 1995, given the topography of their property, the less-than-complete coverage offered by the ditching system, and the use of pump and pipe/hose rather than pump and sprinkler until 1996. I concur with the determination that the protestants did not demonstrate that they were ready, willing and able to make full beneficial use of the water, had it been available at their authorized point of diversion.

FINDINGS AND CONCLUSIONS

1. All facts set forth in the HISTORY OF PROCEEDINGS are incorporated as Findings.
2. The lands in question, lands of proponent Henry, the East Fork East Branch, East Branch, and other pertinent features are shown on Figure 1, infra, which is a copy of the final proof map associated with Certificate 29364.

3. The portion of the water right appurtenant to the 2.7 acre parcel of protestants' property had not been exercised in 1988, 1989, 1990 and 1991.
4. The East Fork of the East Branch joins the East Branch of Long Branch in the NW¼ SW¼ of Section 7, north of the lands in question. The waters of these two streams are commingled by the time the water reaches the diversion point on the NW corner of the lands in question.
5. The East Branch of Long Branch has generally ceased to flow by the latter part of June. In wetter years, the stream may continue to flow into August, as it did in 1995 and 1996. The East Fork dries up between two and six weeks prior to the East Branch.
6. The years 1988, 1991, 1993 and 1995 were "good" water years with near or above-average precipitation and flows. 1989, 1990, 1992 and 1994 were "bad" water years, with below-average flows which dried up earlier in the irrigation season than in the "good" years.
7. Protestants planted a 50' x 50' garden (constituting approximately 0.06 acre) in mid-April of 1992. Protestants irrigated this garden plot and seven fruit trees (comprising at most 0.01 acre in area) by pump and pipe from the East Branch on four or five occasions until the stream dried up in mid-May. The garden area expanded in size each year, and the garden and fruit trees were watered from the East Branch each year, with the exception of 1994, as long as water was available in the East Branch.
8. After the flow in the East Branch ceased in 1992, Protestants inquired of Mr. Henry about release of their allocated portion of stored water from the reservoir located on proponent Henry's property. The inquiry was not a request for release or delivery of stored water. In 1992, less than the full amount of water had been stored and the water level was below the level of the release valve, thus no attempt to release water was made. However, because the stream bed in the East Fork was dry at the time the request was made, even if stored water had been available to release at the authorized rate, it is highly unlikely that water would have made it to either the middle or the southern point of diversion.
9. Even had there been water available from the East Fork, protestants were not ready or able, in 1992, to apply that water to any of their property beyond the seven fruit trees and the 50' x 50' garden plot they established. To get water from the middle point of diversion, protestant Michael Smiley testified, would require installation of a pipeline. It did not appear from the testimony or exhibits that the existing pipe on the East Branch had been extended to any lands east of the garden in 1992.

ULTIMATE CONCLUSIONS

1. With the preceding four years of nonuse, 1992 was the fifth year of nonuse on all but a 50' x 50' (0.06 acres) and seven fruit trees, at most 0.01 acre, of the 2.7 acres in question. Since 1992, that 0.07 acre has continued to be irrigated and the right appurtenant to that 0.07 acre parcel has not been forfeited for nonuse.

2. Of the 2.7 acres at issue, 2.63 acres have not been irrigated, and the appurtenant portion of Certificate 29364 has not been exercised, for five successive years, from 1988 through 1992.

ORDER

It is ORDERED that the portion of Certificate 29364 for irrigation on 2.63 acres in Tax Lot 202, located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 34 South, Range 1 West, WM., 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.


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.

Certificate of Service

I certify that on _____, 1997, I placed in the U.S. Mail, first-class postage prepaid, copies of this Final Order addressed as follows:

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