

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF THE PROPOSED PARTIAL) PC 94-3
CANCELLATION OF THE WATER RIGHTS)
EVIDENCED BY CERTIFICATES 30471 & 28072) Final Contested Case Order
FOR USE OF WATER FROM EAST FORK OF)
EVANS CREEK, TRIBUTARY TO EVANS)
CREEK, AND THE PROPOSED CANCELLATION)
OF CERTIFICATE 11766 FOR USE OF WATER)
FROM TWO MINING TUNNELS, TRIBUTARY)
EVANS CREEK WATER SHED, JACKSON CO.)

On review of the record made at the contested case hearing in the above-entitled matter on Wednesday, May 24, 1995, in the Josephine County Courthouse in Grants Pass, Oregon before Weisha Mize, Administrative Law Judge, a Proposed Order was issued in this case on June 20, 1995. No exceptions having been filed within the time allowed, this Final Order now issues.

STATEMENT AND BACKGROUND OF PROCEEDINGS

This proceeding for the proposed cancellation of a water right was initiated by the Water Resources Department under the provisions of ORS 540.610 to 540.650 following receipt of information from the proponents of cancellation alleging that the entirety of the water right evidenced by Certificate 11766 and a certain portion of the water rights evidenced by Certificates 30471 and 28072 had been forfeited by failure to make beneficial use of water under the provisions of the rights for a period of five or more successive years.

Affidavits filed with the Department by eight individuals contained allegations that all or the portions of the water rights for irrigation, stock, domestic and camp use appurtenant to the property in question and as described below 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. The affiants/proponents and the periods of nonuse of which personal knowledge was asserted were:

- Frances Hanks, March 1, 1958 through April 17, 1994
- Virgil Jenkins, May, 1986 through May, 1994
- Ralph Bryant, January, 1987 through January, 1993
- Wayne Regula, May, 1988 through April, 1994
- Thomas and Martha Sensenig, March, 1989 through April, 1994
- William and Rosemarie Short, October, 1990 through April, 1994

The proponents of cancellation asserted nonuse against all or part of three water rights. The entirety of Certificate 11766 for domestic and camp use within Tax Lot 600 from two mining tunnels under a priority of 1936 was asserted to have been forfeited. Only the portion of Certificate 40371 for irrigation, stock and domestic use appurtenant to 3 acres (priority date 1888) and the portion of Certificate 28072 for irrigation use appurtenant to 8 acres (priority date July 9, 1951) in Tax Lot 600, located in the NW¼ NW¼ Section 21, T34S, R2W, are asserted to have been forfeited for 5 consecutive years of nonuse. The source of water for these rights is East Fork Evans Creek. The remaining portions of these latter water rights were **not** in question in this proceeding, no information regarding nonuse having been received regarding other portions of these two rights.

Based on the information contained in the affidavits, a Notice of Proposed Cancellation was prepared and served on August 2, 1994, by certified mail on Michael and Diane Ireland, the owners of the property to which all or the portion of the rights asserted to have been forfeited are appurtenant, being Tax Lot 600 in the NW¼ NW¼ of Section 21, Township 34 South, Range 2 West, WM.

A protest against the proposed partial cancellation of Certificates 28072 and 40371 was received from Michael Ireland on September 30, 1994. Mr. Ireland asserted that he had not irrigated all or most of the lands in question since 1978 because he was advised to put the lands in question in dry land crops in 1978, that water has not been available due to drought during the most of the 1980's and in 1991-1992, and that the pump system was storm damaged at an unspecified date and not repaired until 1994. Protestant did not protest the proposed cancellation of the domestic and camp right under Certificate 11766.

Notice of hearing was issued to the parties and a contested case hearing was held May 24, 1995. Michael Ireland, protestant, appeared and represented himself. Present with Mr. Ireland was Brian Crowder. Mike Hanks was called as protestant's witness. Proponents Ralph Bryant, Virgil Jenkins, Thomas and Martha Sensenig and William and Rosemarie Short were present. The proponents were represented by Thomas Sensenig. Proponent Frances Hanks did not appear due to medical emergency. Proponent Wayne Regula did not appear.

Called as witnesses by the ALJ were Bruce Sund, watermaster for Jackson and Josephine counties from January 1, 1983 through the present, and Larry Menteeer, assistant watermaster for Jackson County from 1989 through the present.

Accepted into the record as proponents' exhibits were the initiating affidavits, Prop. 1, proponents' summary of anticipated testimony, Prop. 2, Pacific Power & Light 12-month Customer Account Summaries for June, 1986 through May, 1992, Prop. 3. A notarized letter from Mrs. Hanks was also submitted but not marked.

Accepted as protestant's exhibits were the initial protest, Prot. A, the summary of anticipated summary, Prot. B, various climatological data from the Medford area obtained from the National Oceanic and Atmospheric Administration, Prop. C, and copies of checks representing protestant's yearly payments for his power box near Evans Creek to Pacific Power and Light from 1983 through 1986. The ALJ accepted Prop. C. with the limitation that the data was not specific to the Evans Creek area and not conclusive of the availability of water to the rights in question.

FINDINGS OF FACT

1. With the exception of 1985, by Mr. Ireland's own testimony, the rights in question were not exercised between 1979 and 1994.
2. The irrigation season on East Evans Creek begins April 1 and ends October 31.
3. Beginning in May, the assistant watermaster regularly monitors the flow in East Evans Creek at the Meadows Bridge gage to determine whether and when regulation is or will be needed.
4. From 1986 through 1994, the first seasonal regulation of rights on East Evans Creek, where rights with 1951 priorities were regulated off, occurred on the following dates:
 - 1986: August 12
 - 1987: July 16
 - 1988: July 25
 - 1989: no regulation needed; ample water for all rights
 - 1990: July 18
 - 1991: August 19
 - 1992: July 17
 - 1993: no regulation needed; ample water for all rights
 - 1994: June 28
5. At no time between 1979 and 1995 were rights on East Evans Creek with 1888 priorities regulated or restricted in any way.
6. There are water rights with priorities junior to protestant's 1951 priority who divert and use water upstream from protestant's point of diversion and who had water available to them each year between 1986 and 1993 until mid-July.
7. In the East Evans Creek area the predominant use of irrigated lands is hay and pasture. Water users generally begin irrigating in May and take the first cutting of hay in June. Those right holders with more junior priorities of 1951 and younger typically irrigate following cutting the hay crop until the rights are regulated off, in order to provide pasture for stock, but do not attempt to irrigate to produce a second cutting of hay.
8. On advice of the Soil Conservation Service (SCS), Mr. Ireland placed the lands in question in an annual dry-land crop of peas and oats in 1978. The purpose of dry-land cropping was to eliminate a serious thistle problem. Mr. Ireland was advised to leave the land in dry-land crops for 3-5 years for best results.
9. The pea and oat crop is planted in the early fall and harvested and baled around the first of July, after which the land is left alone until it is disked and replanted in October. Protestant determined in 1981 that he could get as good or better a yield from the pea and oat crop as his neighbors holding more junior water rights could get from irrigated meadow hay.

10. Protestant made a conscious decision, by his own testimony, to leave the lands in dry-land crop beyond the period of time advised by the SCS because he felt it was not worth changing to irrigated pasture if he could raise as much or more through dry-land crops as he could from an irrigated crop.

11. Protestant's 1985 irrigation was, by his own testimony, undertaken because he became worried about losing his rights due to nonuse.

12. Protestant had available a pump, pipe and sprinklers for his use on the subject lands. With the exception of 1985, no effort was made to put this system in working order or utilize it.

ULTIMATE FINDINGS OF FACT

1. With the exception of 1994, when regulation occurred June 28, water was available to all priorities of water rights on East Evans Creek, including protestant's 1951 priority right, until mid-July.

2. With the possible exception of 1994, there was sufficient water available in East Evans Creek to allow protestant to change his cropping pattern from dry-land to irrigated pasture.

3. Where water is available for appropriation from the beginning of the irrigation season on April 1 to at least the middle of July, if not beyond, regulation of the 1951 priority rights in mid-July does not constitute a severe limit on the ability to use water.

CONCLUSIONS OF LAW

1. Protestant Ireland did not establish the existence of an economic hardship under OAR 690-17-800(1-2).

2. The water rights evidenced by Certificates 11766, 30471 and 28072 have been forfeited by five and more successive years of unexcused nonuse, from 1986 through 1994.

FINAL ORDER

NOW, THEREFORE, it is ORDERED that the portion of the water right evidenced by Certificate 40371 for use of irrigation, stock and domestic use and appurtenant to 3 acres in Tax Lot 600 of the NW¼ NW¼ Section 21, T34S, R2W, be and the same is hereby CANCELED.

IT IS FURTHER ORDERED that Certificate 40371 be canceled and a new certificate be issued confirming the portion of the right NOT canceled.

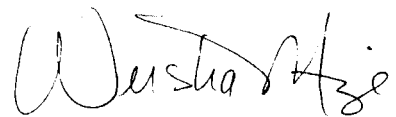
IT IS FURTHER ORDERED that the portion of the water right evidenced by Certificate 28072 for irrigation use appurtenant to 8 acres in Tax Lot 600 of the NW¹/₄ NW¹/₄ Section 21, T34S, R2W, be and the same is hereby CANCELED.

IT IS FURTHER ORDERED that Certificate 28072 be canceled and a new certificate be issued confirming the portion of the right NOT canceled.

IT IS FURTHER ORDERED that the water right for domestic and camp use evidenced by Certificate 11766 be and the same is hereby CANCELED in its entirety.

IT IS FURTHER ORDERED that Certificate 11766 be canceled in its entirety.

This Final Order in Case No. PC 94-3 was signed and placed in the US Mail this 25th day of July, 1995.



Weisha Mize
ALJ

NOTICE: You are entitled to judicial review of this Order. Judicial review may be initiated by filing a petition for review with the Oregon Court of Appeals in Salem within 60 days from the date of service (date of mailing) of this Order. Judicial review is pursuant to the provisions of ORS 537.075.