

4031

Name Leonard Osburn

By _____

Address _____

Monument, OR 97864Change in PODDate filed Aug 28, 1978Date of hearing Nov. 1, 1978Place of hearing Canyon CityDate of order 7-9-79 Vol. 32, page 275Date for application of water Completed

Proof mailed _____

Proof received _____

RR Certificate issued _____ Vol. _____, page 48441-RR
Sept 27, 1988 54 57732to survey 7/79

DESCRIPTION OF WATER RIGHT

Name of stream Cottonwood CreekTrib. of N.F. John Day R. County of Grant

Use _____

Quantity of water _____ No. of acres _____

Name of ditch Beymer DitchDate of priority Aug 5, 1909

In name of _____

_____ Adjudication, Vol. _____, page _____

App. No. 218 Per. No. E-15 Cert. No. 1851

Certificate cancelled _____

Notation made on record by _____

FEES PAID

Date	Amount	Receipt No.
8-28-78	86- < 2.00 >	5759
TOTAL . . .		
10-11-78	\$2 Cert. Fee	Trsf fr 5759
Blue Mountain Lg #39.00 10/11/78 ck # 2679		

FEES REFUNDED

Date	Amount	Check No.
10-11-78	9.00	2678

Ex 20-
POD 15-
Cert 2-
PON 39-
76-

REMARKS

See PC-78-17 re cancellation of right involved herein
Sp. Or. 132, P72

W.R.I.S.

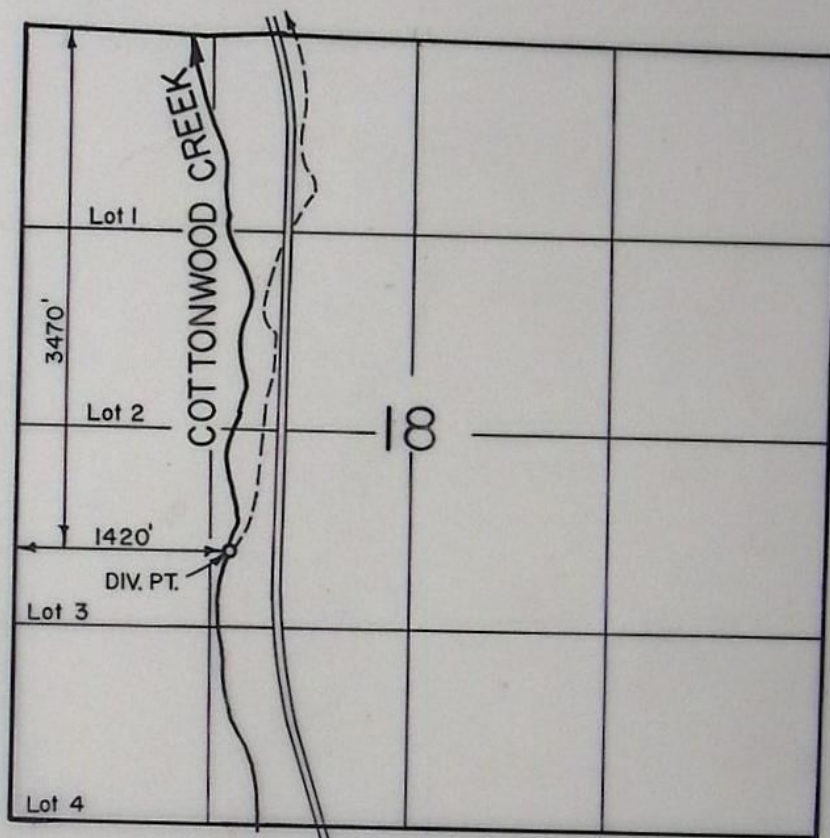
Assembled 7/18/84 by CLH

Entered _____ by _____

Verified _____ by _____

TO BE ENTERED WHERE CHECKED	INDEX CARDS:	
	Entered	Checked
<input checked="" type="checkbox"/> Name	<u>CLH</u>	_____
<input checked="" type="checkbox"/> Stream	<u>CLH</u>	_____
<input checked="" type="checkbox"/> Pt. of Div.	<u>CLH</u>	_____
<input checked="" type="checkbox"/> Calendar	<u>CLH</u>	_____
<input checked="" type="checkbox"/> Twp. & Rge.	<u>CLH</u>	_____
<input type="checkbox"/> Decree-vault	_____	_____
<input type="checkbox"/> Decree-safe	_____	_____
<input checked="" type="checkbox"/> Cert. of W/R	<u>CLH</u>	_____
<input checked="" type="checkbox"/> Per. Folder	<u>CLH</u>	_____
<input type="checkbox"/> Chainindex	_____	_____
<input type="checkbox"/> Cross Ref.	_____	_____
<input checked="" type="checkbox"/> Power Claim	<u>CLH</u>	_____
<input checked="" type="checkbox"/> Abstracts	<u>CLH</u>	_____

T.9S.,R.28E.,W.M.



FINAL PROOF SURVEY
UNDER

TRANSFER NO.4031

IN NAME OF

LEONARD OSBURN

Surveyed OCT. 6., 1981., by *W. Brown*

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

GRANT COUNTY

IN THE MATTER OF THE APPLICATION)
OF LEONARD OSBURN FOR APPROVAL OF)
A CHANGE IN POINT OF DIVERSION)
OF WATER FROM COTTONWOOD CREEK)
- - - - -

ORDER APPROVING
TRANSFER NO. 4031

On August 28, 1978, an application was filed in the office of the Water Resources Director by Leonard Osburn for approval of a change in point of diversion of water from Cottonwood Creek, pursuant to the provisions of ORS 540.510 to 540.530.

The certificate recorded at page 1851, Volume 3, State Record of Water Right Certificates, in the names of James W. Beymer, T. J. Merrill, Lawrence Sweek and J. C. Owen, describes a right which includes the use of not to exceed 0.73 cubic foot per second from Cottonwood Creek under a date of priority of August 5, 1909, for irrigation of 0.8 acre in NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 1.3 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1, Township 9 South, Range 27 East, W.M.; 5.3 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 5.8 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6; and 22.7 acres in Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$) and 22.7 acres in Lot 2 (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 7, Township 9 South, Range 28 East, W.M.

The authorized point of diversion of record for said right is located South 13 degrees 16 minutes East, 20.18 chains from the Northwest Corner of Section 30, being within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 9 South, Range 28 East, W.M. (Beymer Ditch).

The applicant herein, owner of the lands above described, is seeking approval of a change in point of diversion therefrom and, without loss of priority, to hereafter divert water from a point located 500 feet South and 1500 feet East from the West Quarter Corner of Section 18, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, Township 9 South, Range 28 East, W.M. (Carris Ditch).

Notice of the application, pursuant to ORS 540.520(2), was published in The Blue Mountain Eagle, a newspaper printed and having general circulation in Grant County, Oregon, for a period of three weeks in the issues of September 7, 14 and 18, 1978.

Mr. Jerry Rodgers, Watermaster, has filed a statement to the effect that the proposed change in point of diversion may be made without injury to existing rights.

No objections having been filed and it appearing that the proposed change in point of diversion may be made without injury to existing rights, the application should be approved.

NOW, THEREFORE, it hereby is ORDERED that the requested change in point of diversion, as described herein, without loss of priority, is approved.

It is FURTHER ORDERED that the quantity of water diverted at the new point of diversion shall not exceed the quantity of water available at the old point of diversion under the subject right, and shall not exceed 0.73 cubic foot per second.

It is FURTHER ORDERED that the following provisions shall be effective when in the judgment of the watermaster it becomes necessary to install headgates and measuring devices:

That the diversion works shall include an in line flow meter, a weir, or other suitable device for measuring the water to which the applicant is entitled;

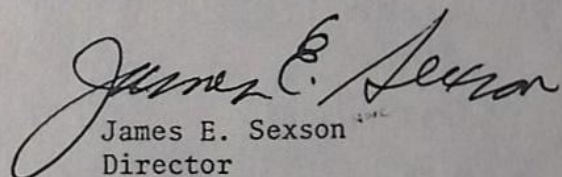
That the type and plans of the measuring device be approved by the watermaster before the beginning of construction work and that the weir or measuring device be installed under the general supervision of said watermaster.

It is FURTHER ORDERED that NO time need be fixed for completion as the change in point of diversion is completed.

An order of the Water Resources Director entered May 9, 1979, provided for cancellation of a portion of the right described by the certificate recorded at page 1851, Volume 3, State Record of Water Right Certificates, and cancellation of the said certificate; therefore,

It is FURTHER ORDERED that the portion of the right involved in the change authorized herein NOT be included in the new certificate to be issued as provided by the order entered May 9, 1979, and upon receipt of proof satisfactory to the Water Resources Director of completion of works and beneficial use of water to the extent intended under the provisions of this order, a confirming certificate of water right shall be issued to the applicant herein.

Dated at Salem, Oregon this 9th day of July, 1979.


James E. Sexson
Director

STATE OF OREGON

WATER DIVISION NO. 2 COUNTY OF GRANT

CERTIFICATE OF WATER RIGHT

(For rights perfected under original, enlargement or secondary permits)

This is to Certify, That ~~JAMES W. BEYLER, T.J. MERRILL, LAWRENCE SWEET, J.C. OWEN~~ ^{Leonard Osburn}

of Monument, State of Oregon 97862, has made proof to the satisfaction of the STATE WATER BOARD of Oregon, of a right to the use of the waters of Cottonwood Creek, a tributary of John Day River

, for the purpose of the irrigation of 212.59 acres of land under Enlargement Permit No. 15 of the State Engineer, and that said right to the use of said waters has been perfected in accordance with the laws of Oregon and duly confirmed by order of the STATE WATER BOARD of Oregon, made and entered of record in the Record of Proceedings of said Board, at Salem, in Volume 1

at page 257, on the 24th day of September, 1917; that the priority of the right hereby confirmed dates from August 5, 1909; that the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not

exceed 2.66 cubic feet per second, or its equivalent in case of rotation. The use hereunder shall conform to any reasonable rotation system ordered by the proper State Officer. A description of the lands under such right, and to which the water hereby confirmed is appurtenant, or, if for other purposes, the place where such water is put to beneficial use, is as follows:

0.8 7.2 acres in NE 1/4 SE 1/4 - 6.4
1.3 10.35 acres in SE 1/4 SE 1/4 - 2.05
Section 1
11.6 acres in NE 1/4 NE 1/4
Section 12
T 9 S, R 27 E, W.M.
1.4 acres in NW 1/4 NW 1/4
5.3 33.14 acres in NW 1/4 SW 1/4 - 27.84
5.8 34.53 acres in SW 1/4 SW 1/4 - 28.73
Section 6
22.7 34.0 acres in Lot 1 (NW 1/4 NW 1/4) - 11.3
22.7 35.15 acres in Lot 2 (SW 1/4 NW 1/4) - 12.45
Section 7

8.0 acres in NE 1/4 NW 1/4
6.0 acres in SE 1/4 NW 1/4
12.0 acres in NE 1/4 SW 1/4
11.1 acres in SE 1/4 SW 1/4
Section 18
6.0 acres in NE 1/4 NW 1/4
2.12 acres in NE 1/4 SW 1/4
Section 19
T 9 S, R 28 E, W.M.

1 Clause

This certificate is issued to confirm a change in point of diversion approved by an order of the Water Resources Director entered July 9, 1979, and together with certificate 48441, supersedes certificate 1851, State Record of Water Right Certificates.

The issuance --- 540.610

Recorded in State Record of Water Right Certificates, Volume 0

T-4031

T#4031 also PC 78-17

STATE OF OREGON
COUNTY OF GRANT
CERTIFICATE OF WATER RIGHT

THIS IS TO CERTIFY, that LEONARD OSBURN, of MONUMENT, OREGON 97862, has a right to the use of the waters of COTTONWOOD CREEK, a tributary of JOHN DAY RIVER, for the purpose of IRRIGATING 58.6 ACRES.

The right has been perfected under ENLARGEMENT Permit E-15. The date of priority is AUGUST 5, 1909. The right is limited to not more than 0.73 CUBIC FOOT PER SECOND, IF AVAILABLE AT THE ORIGINAL POINT OF DIVERSION; BEYMER DITCH, LOT 1 (NW 1/4 NW 1/4), SECTION 30, T 9 S, R 28 E, W.M., or its equivalent in case of rotation, measured at the point of diversion from the source.

The point of diversion is located as follows:

NE 1/4 SW 1/4, SECTION 18, T 9 W, R 28 E, W.M., CARRIS DITCH; 3470 FEET SOUTH & 1420 FEET EAST FROM NW CORNER SECTION 18.

The amount of water used for irrigation, together with the amount secured under any other right existing for the the same lands, shall be limited to ONE-EIGHTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated during the irrigation season of each year.

The right shall conform to such reasonable rotation system as may be ordered by the proper state officer.

A description of the place of use under the right, and to which such right is appurtenant, is as follows:

NE 1/4 SE 1/4	0.8 ACRE
SE 1/4 SE 1/4	1.3 ACRES
SECTION 1	
TOWNSHIP 9 SOUTH, RANGE 27 EAST, W.M.	
NW 1/4 SW 1/4	5.3 ACRES
SW 1/4 SW 1/4	5.8 ACRES
SECTION 6	
LOT 1 (NW 1/4 NW 1/4)	22.7 ACRES
LOT 2 (SW 1/4 NW 1/4)	22.7 ACRES
SECTION 7	
TOWNSHIP 9 SOUTH, RANGE 28 EAST, W.M.	

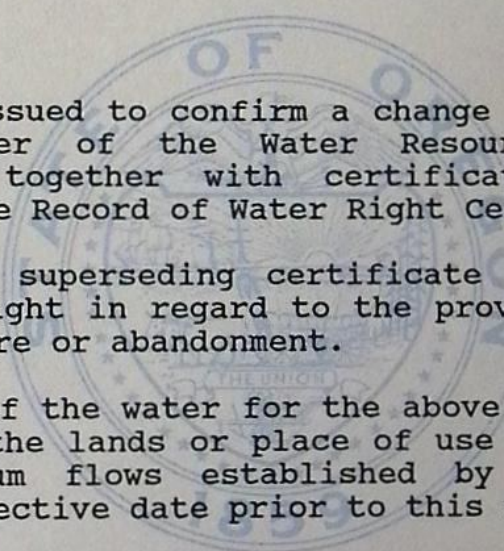
SEE NEXT PAGE

This certificate is issued to confirm a change in POINT OF DIVERSION approved by an order of the Water Resources Director entered JULY 9, 1979, and together with certificate 48441, supersedes certificate 1851, State Record of Water Right Certificates.

The issuance of this superseding certificate does not confirm the status of the water right in regard to the provisions of ORS 540.610 pertaining to forfeiture or abandonment.

The right to the use of the water for the above purpose is restricted to beneficial use on the lands or place of use described. The right is subject to minimum flows established by the Water Resources Commission with an effective date prior to this right.

WITNESS the signature of the Water Resources Director, affixed this date SEPTEMBER 27, 1988.


William H. Young
Water Resources Director

Recorded in State Record of Water Right Certificates numbered 57732

T-4031

STATE OF OREGON

WATER DIVISION NO. 2 COUNTY OF GRANT

CERTIFICATE OF WATER RIGHT

(For rights perfected under original, enlargement or secondary permits)

This is to Certify, That JAMES W. BEYLER, T.J. MERRILL, LAWRENCE STEEK, J.C. OWEN

of Monument, State of Oregon, has made proof to the satisfaction of the STATE WATER BOARD of Oregon, of a right to the use of the waters of Cottonwood Creek, a tributary of John Day River, for the purpose of the irrigation of 45.22 acres of land.

under enlargement Permit No. E-15 of the State Engineer, and that said right to the use of said waters has been perfected in accordance with the laws of Oregon and duly confirmed by order of the STATE WATER BOARD of Oregon, made and entered

of record in the Record of Proceedings of said Board, at Salem, in Volume 1

at page 257, on the 24th day of September, 1917; that the priority of the right hereby confirmed dates from August 5, 1909; that the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not

exceed 0.57 cfs cubic feet per second, or its equivalent in case of rotation. The use hereunder shall conform to any reasonable rotation system ordered by the proper State Officer. A description of the lands under such right, and to which the water hereby confirmed is appurtenant, or, if for other purposes, the place where such water is put to beneficial use, is as follows:

REMAINING RIGHT →

8.00 acres in NE 1/4 NW 1/4
6.00 acres in SE 1/4 NW 1/4
12.00 acres in NE 1/4 SW 1/4
11.10 acres in SE 1/4 SW 1/4
Section 18

6.00 acres in NE 1/4 NW 1/4
2.12 acres in NE 1/4 SW 1/4
Section 19

T 9 S, R 28 E, W.M.
45.22 ac
0.57 cfs

Not in question

This certificate describes that portion of the water right confirmed by the prior certificate recorded at page 1851, Volume 3, State Record of Water Right Certificates, NOT canceled by order of the Water Resources Director dated May 9, 1979, and NOT modified by the provisions of an order of the Water Resources Director entered on July 9, 1979, approving transfer application No. 4031.

The issuance of this superseding certificate does not confirm the status of the water right in reference to ORS 540.610.

JOHN H. LEWIS
State Engineer, President

Attest: F. E. HENRY
Secretary

Recorded in State Record of Water Right Certificates, Volume 3, Page 1851.

T#4031 also PC 78-17

AUG 23 1979

48441

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

GRANT COUNTY

IN THE MATTER OF CANCELLATION)
OF A WATER RIGHT IN THE NAME)
OF JAMES W. BEYMER, ET AL, TO)
WATERS OF COTTONWOOD CREEK)

STATEMENT, FINDINGS
CONCLUSIONS AND
ORDER

STATEMENT

This proceeding was initiated by the Water Resources Director under the provisions of ORS 540.610 to 540.650 for the cancellation of a certain water right.

The water right in question is for the appropriation of not to exceed 2.09 cubic feet per second of water from Cottonwood Creek with a priority date of August 5, 1909, for irrigation of a certain 167.37 acres, being: 7.2 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 10.35 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1; and 11.6 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, Township 9 South, Range 27 East, W.M.; 1.4 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 33.14 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 34.53 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6; and 34.0 acres in Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$) and 35.15 acres in Lot 2 (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 7, Township 9 South, Range 28 East, W.M., as described by the certificate issued to James W. Beymer, T. J. Merrill, Lawrence Sweek, and J. C. Owen and recorded at page 1851, Volume 3, State Record of Water Right Certificates.

Notice dated November 3, 1978, of initiation of the proceedings for cancellation of the subject water right was given pursuant to ORS 540.631 to Leonard O. Osburn and to Gwendola B. Osburn as owners and occupants of the real property to which the said water right is appurtenant.

On December 20, 1978, a protest was filed in the office of the Water Resources Director by Leonard O. Osburn, through his attorney, Mr. Mike Kilpatrick, Attorney at Law, Mt. Vernon, Oregon, against the proposed cancellation of the subject water right.

Pursuant to notice of hearing dated January 29, 1979, the matter was brought to hearing before Mr. James W. Carver, Jr., Water Resources Department, in the Grant

County Courthouse in Canyon City, Oregon, on March 8, 1979. The proponents of cancellation selected Mr. Waldo (Bud) Engle to serve as their spokesman during the hearing. The protestant was represented by Mr. Mike Kilpatrick, Attorney at Law, Mt. Vernon, Oregon.

Cottonwood Creek, the source of water appropriated under the water right in question, is a perennial stream which drains in excess of 125,000 acres within the southerly portion of the North Fork John Day River basin, east of Rudio Mountain, and runs generally west and north to its confluence with the North Fork John Day River at the town of Monument, in Grant County, Oregon.

The authorized diversion of water under the subject right is through the Beymer Ditch, which diverted from the east side of the channel of Cottonwood Creek, from a point within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 30, Township 9 South, Range 28 East, W.M. The said Beymer Ditch, which carried water to the north by gravity flow for a distance of approximately four and one-half miles, coursed generally parallel to the channel of Cottonwood Creek, running along the face of steep hillsides and crossing several washes and gullies by means of flumes. The lands to which the water right in question is appurtenant lie immediately downslope from the course of the said Beymer Ditch as shown by Figure 1, herein.

The Carris Ditch, which diverts water from the east side of the channel of Cottonwood Creek from a point within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 18, Township 9 South, Range 28 East, W.M., also courses north, running between the Beymer Ditch and the channel of Cottonwood Creek, and defines the lower, or westerly, extremity of a portion of the lands to which the water right in question is appurtenant. The Carris Ditch is also shown on Figure 1, herein, a photoreduction of Water Resources Department Exhibit No. 3, with certain features emphasized for clarity.

FINDINGS

Testimony was in agreement that the Beymer Ditch has been inoperable due to missing flumes across draws and washes and also due to sections of the ditch having

been destroyed by waterspouts; and that the ditch has not carried water from the channel of Cottonwood Creek to the lands to which the water right in question is appurtenant, for at least the last twenty years.

At the hearing, for the sake of clarity of testimony, the lands to which the water right in question is appurtenant was considered to consist of two portions. The portion of the subject lands lying to the north of Deer Creek Road, which follows the section line between Sections 6 and 7, was designated as the "North Portion"; and the portion of the subject lands lying to the south of the said road was designated as the "South Portion",

With reference to the "North Portion", the testimony of the witnesses for proponents of cancellation was not conclusive as to use or nonuse of water from Cottonwood Creek for irrigation of said lands within the period of years of 1973 through 1977. One witness stated that the lands were not irrigated within the said period of years; another stated that he thought the lands were irrigated within the said time period; and the others stated that they could not make a positive statement either way.

Mr. Leonard O. Osburn, protestant herein and owner-operator of the subject lands in both the "North Portion" and the "South Portion", testified that since he took possession of the lands in February of 1967, the use of water from Cottonwood Creek for irrigation of lands within the said "North Portion" was accomplished every year or every other year by means of a tractor power pump and sprinkler system using water diverted from Cottonwood Creek through the Carris Ditch and was confined to an area he outlined with pencil on WRD Exhibit No. 3, being determined to comprise 0.8 acre in NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 1.3 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1, Township 9 South, Range 27 East, W.M.; 5.3 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 5.8 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6, Township 9 South, Range 28 East, W.M., as shown on Figure 1. Mr. Osburn further testified that the last occurrence of such irrigation was during the spring of 1974.

With reference to the "South Portion", testimony of all parties was in

agreement that the lands lying between the Beymer Ditch and the Carris Ditch, within Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$) and Lot 2 (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 7, were irrigated by means of a sprinkler system during the summer of 1978. Testimony was also in agreement that the said lands were not irrigated during the years of 1975, 1976 and 1977.

Sometime prior to 1967, protestant's predecessor in interest had installed a 30-horsepower, electrically-driven pump on the Carris Ditch near the Southwest Corner of Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 7, and had installed a buried irrigation mainline pipe which extends upslope to the east, from the pump to the upper edge of the field, to provide for the irrigation of the said lands with water diverted from the channel of Cottonwood Creek through the Carris Ditch. Protestant testified that he used the said pump and buried pipeline in the operation of a sprinkler irrigation system for irrigation of the said lands in 1970, and again in 1978.

Testimony covering the years 1970 through 1974 was not in agreement. Three of the witnesses for the proponents of cancellation stated that they had not observed the subject lands in the "Southern Portion" being irrigated within the said period of years, but could not swear that the lands were not irrigated. Another, who stated that the subject lands are within view from his place of residence, stated that his knowledge of the matter began when he moved to his property in February of 1973; and that he observed the lands being used for pasture during the years of 1973 through 1977; and that the lands was not irrigated during those years. Another witness for the proponents of cancellation, who also stated that the subject lands are in view of his place of residence, stated that he had also observed the lands being used for pasture within the subject period of years, but could not swear that the lands had not been irrigated within those years; and that he recalls seeing at least a portion of the land being sprinkler irrigated about 1972.

The protestant testified that during the spring of 1974 he used the same tractor powered pump and sprinkler system he had employed for irrigation of the lands in the "North Portion", to pump Cottonwood Creek water from the Carris Ditch for

irrigation of "about seventy-five to eighty percent" of the subject lands in the "South Portion"; and that while he was so engaged in irrigation of the "South Portion", the tractor motor "burned up" and was not used again. The lands claimed to have been irrigated with waters of Cottonwood Creek in 1974 are as shown on Figure 1.

A preponderance of evidence adduced at the hearing established that, with the exception of the certain 0.8 acre in NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 1.3 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1, Township 9 South, Range 27 East, W.M.; 5.3 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 5.8 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6; 22.7 acres in Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$) and 22.7 acres in Lot 2 (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 7, Township 9 South, Range 28 East, W.M., as identified on Figure 1, the lands to which the water right in question is appurtenant have not been irrigated with waters diverted from the channel of Cottonwood Creek since sometime prior to the year of 1967.

ULTIMATE FINDINGS OF FACT

Water appropriated from Cottonwood Creek under that portion of the water right in question appurtenant to 6.4 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 9.05 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1; and 11.6 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, Township 9 South, Range 27 East, W.M.; 1.4 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 27.84 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 28.73 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6; 11.3 acres in Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$) and 12.45 acres in Lot 2 (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 7, Township 9 South, Range 28 East, W.M., has not been applied to the use of irrigation of said lands since before the year of 1967, being more than five successive years of nonuse.

CONCLUSIONS OF LAW

That the question before the Water Resources Director is one of fact concerning forfeiture of the water right, not one concerning abandonment or voluntary relinquishment of the water right, is made clear by *Withers v. Reed*, 194 Or. 541 (page 558) 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 limitations--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 further commented in *Bausch v. Meyers*, 273 Or. 376: "Urbanites might not know that the water rights are conclusively presumed abandoned for failure to use for five successive years. This law, however, is common knowledge among all in Oregon who are dependent upon an adequate supply of water for irrigation. We believe it is equally well known that five years of non use is a conclusive abandonment whether proceedings before the State Engineer are brought immediately after the five years of nonuse or 10 or 15 years later. . . .".

The diversion of water from the channel of Cottonwood Creek at the head of the Carris Ditch over a period of years, instead of at the authorized point of diversion at the head of the Beymer Ditch, would not serve to change the location of the authorized point of diversion without complying with the provisions of ORS 540.510 to 540.530. However, neither would the diversion of water from the channel of Cottonwood Creek at some point other than the authorized point of diversion of record, of itself, constitute a failure to use the water appropriated under the provisions of the water right in question.

Proponents of cancellation have the burden to show, by a preponderance of evidence, the occurrence of five or more successive years of nonuse of the water right in question or of a specific portion of the water right in question. That burden has not been carried with regard to that portion of the subject water right for the appropriation of not to exceed 0.73 cubic foot per second of water from Cottonwood Creek under a date of priority of August 5, 1909, for irrigation of 0.8 acre in NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 1.3 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1, Township 9 South, Range 27 East, W.M.; 5.3 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 5.8 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6; 22.7 acres in Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$) and 22.7 acres in Lot 2 (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 7, Township 9 South, Range 28 East, W.M.;

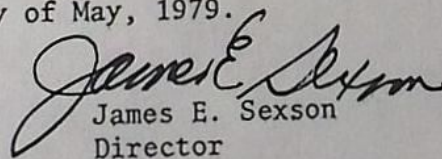
Proponents of cancellation have carried the burden to show the occurrence of a period of five and more successive years of nonuse of that portion of the subject water right for the appropriation of not to exceed 1.36 cubic feet per second of water from Cottonwood Creek under a priority date of August 5, 1909, for irrigation of 6.4 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 9.05 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1; and 11.6 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, Township 9 South, Range 27 East, W.M.; 1.4 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 27.84 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 28.73 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6; 11.3 acres in Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$) and 12.45 acres in Lot 2 (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 7, Township 9 South, Range 28 East, W.M.; therefore, said portion of said water right should be canceled pursuant to the provisions of ORS 540.610 to 540.650.

ORDER

NOW, THEREFORE, it is ORDERED that the right to appropriate not to exceed 1.36 cubic feet per second of water from Cottonwood Creek under a date of priority of August 5, 1909, for irrigation of a certain 6.4 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 9.05 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 1; and 11.6 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 12, Township 9 South, Range 27 East, W.M.; 1.4 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$, 27.84 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 28.73 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 6; 11.3 acres in Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$) and 12.45 acres in Lot 2 (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 7, Township 9 South, Range 28 East, W.M., being a portion of the right described by the certificate issued to James W. Beymer, T. J. Merrill, Lawrence Sweek and J. C. Owen and recorded at page 1851, Volume 3, State Record of Water Right Certificates, be, and the same hereby is, canceled.

It is FURTHER ORDERED that said certificate recorded at page 1851, Volume 3, State Record of Water Right Certificates, is canceled, and in lieu thereof a new certificate be issued to describe the balance of the water right described by said prior certificate.

Dated at Salem, Oregon this 9th day of May, 1979.


James E. Sexson
Director

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for review within sixty days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.

AFFIDAVIT OF PUBLICATION

STATE OF OREGON

County of Grant

SS.

I, Karla Dalton, being first duly sworn, depose and say that I am the owner, editor, publisher, manager, principal clerk of THE BLUE MOUNTAIN EAGLE, a newspaper of general circulation, as defined by ORS 193.010 and 193.020; printed and published at John Day, in the aforesaid county and state; that the notice of water right transfer application No. 4031

_____, a printed copy of which is hereto attached, was published in the entire issue of said newspaper for three successive and consecutive weeks in the following issues:

September 7

September 14 ---- September 21, 1978

Subscribed and sworn to before me this 22nd day of Sept., 1978

Patricia A. Carpenter
Notary Public for Oregon

My commission expires Sept 8, 1980

Cost of this publication was \$ 39.00

(Seal)

RECEIVED

OCT 4 1978

WATER RESOURCES DEPT.
SALEM, OREGON

Public Notices

NOTICE OF WATER RIGHT TRANSFER APPLICATION NO. 4031

Notice is given hereby that an application has been filed in the office of the Water Resources Director by Leonard Osburn for approval of a change in point of diversion from Cottonwood Creek, pursuant to the provisions of ORS 540.510 to 540.530.

The certificate recorded at page 1851, volume 3, State Record of Water Right Certificates, in the names of James W. Beymer, T. J. Merrill, Lawrence Sweek and J. C. Owen, describes a right which includes the use of not to exceed 1.81 cubic feet per second from Cottonwood Creek for irrigation of 33.14 ac in NW $\frac{1}{4}$ SW $\frac{1}{4}$, 34.53 ac in SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 6; 34.0 ac in Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$), 35.15 ac in Lot 2 (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Sec. 7, T 9S, R 28E, WM; 2.6 ac in NE $\frac{1}{4}$ SE $\frac{1}{4}$, 3.7 ac in SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 1; and 1.2 ac in NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Sec. 12, T 9S, R 27E, WM, with a date of priority of Aug. 5, 1909.

The authorized point of diversion of record for said right is located S 13° 16' East, 20.18 chains from the NW Corner of Sec. 30, being within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ of Sec. 30, T 9S, R 28E, WM (Beymer Ditch).

The applicant herein, owner of the lands above described, is seeking approval of a change in point of diversion therefrom and, without loss of priority, to hereafter divert water from a point located 500 ft. S and 1500 ft. E from the W $\frac{1}{4}$ Corner of Sec. 18, being within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 18, T 9S, R 28E, WM (Carris Ditch).

All persons interested are notified hereby that a hearing will be held at the county courthouse at Canyon City, Ore., on Nov. 1, 1978, at 9:30 a.m. All objections to the proposed change, if any there are, will be heard at said time and place. Any and all objections shall be prepared in writing: one copy to be served on Leonard Osburn, Monument, Ore. 97864; and one copy filed with the Water Resources Department, Salem, Ore. 97310, together with a \$10 filing fee, at least 10 days prior to the date set for hearing. IF NO OBJECTIONS ARE FILED, THE APPLICATION MAY BE APPROVED BY THE WATER RESOURCES DIRECTOR WITHOUT A HEARING. Administrative rules pertaining to the filing of a protest will be furnished by the Water Resources Department upon request.

Dated at Salem, Ore., this 30th day of August, 1978.

By: JAMES E. SEXSON
Director
36-38