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BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

Klamath County

IN THE MATTER OF THE)
CANCELANON OF A WATER)
RIGHT IN THE NAME OF)
MISS JESSIE P. ROSE)

ORDER

STATEMENT

This proceeding was initiated by the State Engineer (now Water Resources Director) under the provisions of ORS 540.610 to 540.650 for the cancelation of a certain water right. The water right in question is for the appropriation of not to exceed 2.0 cubic feet per second of water from Cherry Creek, with a date of priority of June 28, 1911, for the irrigation of 40.0 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 40.0 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 23; 40.0 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 40.0 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 24, Township 34 South, Range 6 East, W.M., Klamath County, Oregon, as evidenced by the certificate recorded at page 4851, Volume 5, State Record of Water Right Certificates, in the name of Miss Jessie P. Rose.

Notices dated September 7, 1972, were served on Roy Howard and Nickolas Ostapkevich by certified mail of intention to cancel said water right. No protest having been filed within the 60 day period immediately following the notice, the water right was canceled as provided by ORS 540.641 (1) by order of the State Engineer entered November 13, 1972.

On June 7, 1974 and again on February 13, 1975 letters were received from Wallace W. Watkins stating that he was the owner of the land to which the water right in question was appurtenant and that he was not duly notified of the proceeding.

A thorough check of the Klamath County deed records revealed that Ben F. Watts and Mary Jane Watts were owners of record in 1972 when the initial proceeding was started and that a warranty deed dated May 11, 1970 was recorded

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on January 29, 1974 conveying the property to Southern Oregon Land and Timber Co., by W. Watkins, an individual, DBA. Subsequently, an order rescinding the order canceling a water right was entered on June 12, 1975.

This proceeding was reinitiated by the State Engineer's notice dated June 18, 1975, and served on Ben F. Watts and Mary Jane Watts, Wallace W. Watkins and Southern Oregon Land and Timber Co., by W. Watkins, DBA by certified mail.

On June 24, 1975, a protest in the name of Wallace W. Watkins was filed in the office of the State Engineer against the proposed cancelation of the water right in question.

In accordance with the provisions of Chapter 581, Oregon Law 1975, effective July 1, 1975, all duties, functions, and powers of the State Engineer were transferred to the Director of the Water Resources Department.

Pursuant to Notice of Hearing dated July 28, 1975, the matter was brought to hearing before Mr. Larry W. Jebousek, Assistant to the Water Resources Director, in the hearing room of Klamath County Library in Klamath Falls, Oregon, on August 19, 1975. The proponents of cancelation, Francis D. Brown and Mary Jane Danforth, were present at the hearing and were represented by Wm. Ganong, Jr., Attorney at Law, Klamath Falls, Oregon. The protestant, Wallace W. Watkins was not present nor was he represented by legal counsel.

Daniel G. Brown and Dee Valentine testified for the proponents of cancelation. Donald Knauer, Watermaster for District No. 17 also testified.

Cherry Creek is a perennial stream which heads near the summit of the Cascade Mountains in unsurveyed territory, at an elevation of 5,650 feet mean sea level. Cherry Creek flows in a southeasterly direction for approximately 4 miles to a point near the northwest corner of Section 28, Township 34 South, Range 6 East, thence turns in a northeasterly direction flowing two miles to the point of diversion of the Pinewood Place Ditch. From this point,

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Cherry Creek flows in a northerly direction approximately two miles to its confluence with Four Mile Creek near the northeast corner of Section 11 in said township and range.

Under the provisions of the water right in question, water was diverted from Cherry Creek by a dam located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 22, Township 34 South, Range 6 East into the Pinewood Place Ditch which transported the water easterly to the west line of the land in question. Water was distributed from this point, being near the center of the NE $\frac{1}{4}$ of Section 23 by a number of small ditches which flood irrigated the land.

FINDINGS OF FACT

From the evidence and testimony submitted, it was established that the land in question was obtained by federal patent by Miss Jessie P. Rose in the early 1900's. The property in question was last lived on by Jessie P. Rose in approximately 1912, but retained in her ownership until approximately 1968 at which time it was sold to Ben P. and Mary Jane Watts.

Daniel G. Brown testified that he has been familiar with the land in question since his father, Francis D. Brown moved the family to an adjoining ranch in 1938. Mr. Brown stated that he had been on the property at least once every year since that date. Mr. Brown stated that William and Ernest Plants were renting the property from Jessie P. Rose in 1938 which they continued to do until the middle of World War II. Mr. Brown also stated that during this period of time, the Plants brothers irrigated a small garden area and approximately four acres of clover seed from Cherry Creek through the Pinewood Place Ditch.

Mr. Brown stated that no one has occupied the property since the Plants brothers left, that the Pinewood Ditch has not been maintained since that time, and that it has not been usable or possible to divert water from Cherry Creek into the ditch at the point of diversion since prior to 1966.

Dee Valentine, manager of the trucking division for Francis D. Brown and Sons, Inc., testified that he has been on the land in question regularly since 1961 for the purpose of scouting elk herds and during hunting season. Mr. Valentine stated that the Pinewood Place Ditch was in very poor condition at that time and he never had seen any water in it and that the fences around the land in question were down or in disrepair. Mr. Valentine further stated that the property has remained generally in the same condition since that time with the exception of some logging of the larger trees sometime in the latter part of the 1960's.

Francis D. Brown testified that he was born on October 11, 1893 on the ranch adjoining the property in question to the south and that with the exception of from World War I to 1938, he had resided there continuously. Mr. Brown further testified that the land in question was last occupied by Ernest and William Plants who moved to Colorado shortly after the start of World War II. Mr. Brown stated that the land had not been used for any agricultural purposes since that time, that the ditch and fences had never been maintained, and that since the 1964 flood the diversion dam and ditch could not divert and transport water to the land in question.

The testimony of Mary Jane Danforth, daughter of Francis D. Brown, corroborated the testimony of the earlier witnesses.

At the request of Mr. Canong, counsel for the proponents of cancellation, an inspection of the land in question was made by the hearings officer accompanied by Donald Knauer, watermaster, Mr. Canong, and Mr. Francis D. Brown. The visual inspection of the property in question confirmed the testimony of the witnesses in that only remnants of the ditch system were visible, the fences were in disrepair, the westerly portion of the 160 acre tract was in a well established growth of sage or buckbrush, and the easterly portion was in smaller timber and brush.

CONCLUSIONS

The question before the Water Resources Director is one of fact as to whether or not a period of five successive years or more of nonuse has occurred. From the evidence and testimony submitted, it is very clear that water has not been appropriated for beneficial use under the terms of the water right in question for a period of five or more successive years prior to August 19, 1975. Therefore, the water right has been forfeited under the provisions of ORS 540.610 to 540.650 and should be canceled.

ORDER

NOW, THEREFORE, it is hereby ORDERED that the water right for the appropriation of not to exceed 2.0 cubic feet per second of water from Cherry Creek, with a date of priority of June 28, 1911, for the irrigation of 40.0 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$, 40.0 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 23; 40.0 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 40.0 acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 24, Township 34 South, Range 6 East, W.M., Klamath County, Oregon, as evidenced by the certificate recorded at page 4851, Volume 5, State Record of Water Right Certificates, in the name of Miss Jessie P. Rose, be and the same is hereby canceled.

It is FURTHER ORDERED that the certificate recorded at page 4851, Volume 5, State Record of Water Right Certificates, is canceled.

Dated at Salem, Oregon this 10th day of October, 1975.

/s/ JAMES E. SEXSON
Water Resources 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.

STATE OF OREGON

County of Marion

James A. Jensen

Water Resources Director of the State of Oregon

in testimony that the foregoing copy is a true and correct copy of the original as shown to me by the person presenting the same for filing.

At page 11, Volume 14, Special Order Record of the Water Resources Director has been reviewed with the original and that it is a correct transcript thereof and the whole of such original is hereby certified to be a true and correct copy of the same as shown to me by the person presenting the same for filing.

Witness my hand and seal of office at Salem, Oregon, this 10th day of January, 1976.

STATE OF OREGON; COUNTY OF KLAMATH; ss.

I hereby certify that the within instrument was received and filed for record on the 14th day of JANUARY A.D., 19 76 at 8:51 o'clock A.M., and duly recorded in Vol. 14 76 of WATER RIGHTS on Page 630.

FEE \$1.00

WM. D. MILNE, County Clerk

By K. L. Dugan Deputy