

FOR HOOD RIVER COUNTY

DEC 12 4 26 PM '89

No. CC-88-116

TRIAL COURT CLERK  
BY *A. Roberts*

IN THE MATTER OF THE DETERMINATION )  
OF THE RELATIVE RIGHTS TO THE USE OF )  
THE WATERS OF PHELPS CREEK AND ITS )  
TRIBUTARIES, A TRIBUTARY OF THE )  
COLUMBIA RIVER )

DECREE

RECEIVED

DEC 10 1989

WATER RESOURCES DEPT.  
SALEM, OREGON

This proceeding came on regularly on the \_\_\_\_\_,  
1989, for entry of a decree based upon "Findings of Fact and Order of  
Determination, Phelps Creek and its tributaries, Hood River County,"  
(Determination) dated November 28, 1988, and filed by the Water Resources  
Director (Director) in the Circuit Court of Hood River County on the 5th day  
of December, 1988. The Decree is also based on the following:

(1)

The Director filed a certified copy of the Determination along with  
original evidence or certified copies of the evidence and certified copies of  
the maps of record used to make this Determination with the clerk of the  
court.

(2)

This Court set March 2, 1989, as the date at which the determination  
would be heard by the court.

(3)

The notice of hearing was served in the manner required by law on all  
interested parties.

CERTIFIED TO BE A TRUE AND CORRECT  
COPY OF THE ORIGINAL DOCUMENT  
TRIAL COURT CLERK  
HOOD RIVER COUNTY, OREGON

BY *[Signature]*  
DATED DEC 5 1989

(4)

Allymae Engel Atwood filed a Statement and Proof of Claim in the Phelps Creek Determination (Claim #2) with the Water Resources Department (Department) on September 16, 1987, with additional evidence and required fees. Claim #2 accepted with additional evidence and required fees. Claim #2 was filed with the Court on December 5, 1988.

(5)

The Director held all evidence, including Allymae Engel Atwood's Claim #2 and additional evidence, open to inspection by all the various claimants. The open inspection period lasted 80 hours as required by ORS 539.090. No contest to Claim #2 was filed.

(6)

Based on the evidence submitted by the various claimants, on data collected by the Department and existing water rights of record the Director included the Atwood claim as part of the Farmers Irrigation District claim, (Determination paragraph 24, page 14 and 15, filed in the office of the Director in Order Record Volume 18, page 447).

(7)

On February 24, 1989, an "EXCEPTIONS TO FINDINGS AND ORDER OF DETERMINATION" was filed in Circuit Court. The participants were Wilson Appelgren and Dorothy Appelgren, John F. Cushman and Anna J. Cushman, Allymae Engel Atwood, John H. Bennett, Robert Wilsey. The Exception was to the claim and award of 2.42 cubic feet per second to the Farmers Irrigation District with a priority date of 1874, which is "Proof #7", found at page 20 of the Findings of fact, and summarized in paragraph "44".

(8)

On March 1, 1989, an "EXCEPTIONS TO FINDINGS AND ORDER OF DETERMINATION" was filed with Circuit Court by the Farmers Irrigation District. The Exception was to the claim and award of any water out of Phelps Creek for use by A. WILSON APPELGREN and DOROTHY D. APPELGREN for either irrigation or power usage.

(9)

On March 1, 1989, an "EXCEPTIONS TO FINDINGS AND ORDER OF DETERMINATION" was filed in Circuit Court by the Farmers Irrigation District. The Exception was that the Claimants, ROBERT L. WILLSEY and FAYE WILSEY or their predecessors in interest, had abandoned any rights to the use of the waters of Phelps Creek by virtue failure to use or divert the same for a period of five (5) consecutive years prior to 1987.

(10)

On March 1, 1989, a "MOTION" was filed in Circuit Court by the Farmers Irrigation District to strike the Exceptions filed by Wilson Appelgren and Dorothy Appelgren, John F. Cushman and Anna J. Cushman, Allymae Engel Atwood, John H. Bennett and Robert Willsey.

(11)

On March 1, 1989, the following document "EXCEPTION" was filed with Circuit Court:

"Anna Sterr, Trustee of the Wolfgang Sterr Trust, Wolfgang Sterr, Trustee of the Ann Sterr Trust, Carl Sterr, Lore Sterr, and John H. Bennett (hereinafter "the Exceptors") hereby file this Exception to the Findings of Fact and Order of Determination filed in the above-entitled proceeding by William H. Young, Director of the Water Resources Department, State of Oregon. Specifically, the Exceptors except to the present wording of Finding 43 of said Findings and Order of Determination. The Exceptors propose that Finding 43 should read as follows:

"Except as otherwise determined herein, the order of rights of the respective appropriators of the waters of Phelps Creek and its tributaries, and the order in which they are entitled to divert and use said water shall be and is according to the date of relative priority of the rights as determined and set forth herein, and the first in order of time according to the date of relative priority shall be and hereby is first in order of right, and so on down to the latest priority; and those having prior rights are entitled to divert and use the water of said stream and its tributaries when necessary for the irrigation of their respective lands, or other useful and beneficial purposes for which they were allowed a right of use, and in accordance with such right at all times against those having rights of subsequent priority, without let or hindrance. Provided further that a right with a priority date with a year, month and day is senior to a right with a priority date of the same year and month only, which in turn is senior to a right with a priority date of the same year only.<sup>1</sup> Whenever the water is not required for beneficial use by the appropriator having such prior right to its use for the purpose for which such water was appropriated, he must and shall permit it to flow down the natural channel of the stream as it was wont to flow in its natural course, without let or hindrance or diversion thereof, and those having subsequent rights are entitled to the use of said water and to divert the same to the extent of their respective rights, according to the order of priority of their respective rights. At all times the water diverted by the appropriator whose rights have been determined herein, shall be beneficially and reasonably used without waste, and no rights of appropriation are hereby confirmed to divert a greater quantity of water into the head of the ditch, pump, pipeline, or other means of conveyance of the appropriator having a valid right to divert the water than such appropriator can beneficially use for the purpose to which

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<sup>1</sup>Underline is new language to be added to Determination Finding 43 and reflects the Department's convention for distributing water among priority dates.

the water is to be used, in accordance with his right.

The Exceptors, except for John H. Bennett, claim an interest in this proceeding as follows:

1. Exceptors own the following real property:

13.4 acres in the SW1/4 SW1/4, and 38.6 acres in the SE1/4 SW1/4, all located in Section 4 of Township 2 North, Range 10 East of the Willamette Meridian, Hood River County, Oregon.

Exceptors acquired ownership of the above-described property by virtue of an Assignment of Contract recorded December 13, 1985, as MF No. 85-2302, Hood River County records, which assigned the vendee's interest in the following contracts to Exceptors:

a. Contract, including the terms and provisions thereof, John H. Bennett and Janey H. Bennett, husband and wife, vendors, with Howard Harris and Betty Harris, husband and wife, vendees, dated December 23, 1976, recorded December 30, 1976, as MF NO. 762723, Hood River County Records;

b. Contract, including the terms and provisions thereof, Bennett Orchards, Inc., an Oregon corporation, vendor, with Howard Harris and Betty Harris, husband and wife, vendees, dated December 23, 1976, recorded December 30, 1976, as MF No. 762724, Hood River County Records; and

c. Contract, including the terms and provisions thereof, Bennett Orchards, Inc., an Oregon corporation, vendor, with Howard Harris and Betty Harris, vendees, dated January 3, 1977, recorded January 3, 1977, as MF No. 770001, Hood River County Records. (Includes other property).

Through their purchase of the above-described property, the Exceptors, except for John H. Bennett, claim the right to divert .65 cubic feet per second to irrigate 52 acres with a priority date of May 2, 1874. A Statement and Proof of Claim for said water right as filed herein by Exceptor, John H. Bennett.

2. Exceptor, John H. Bennett, claims an interest in this matter by virtue of his ownership of the vendor's interest on the contract described in paragraph 1 above.

The Exceptors believe the above proposed wording to Finding 43, clarifies the relative priority dates between the several claimants that claim a priority date of 1874."

On August 31, 1989, the following document "STIPULATION" was filed in Circuit Court:

"The parties in this court proceeding being Farmers Irrigation District and the following exceptors, to-wit: Wilson Appelgren and Dorothy Appelgren, Allymae Engel Atwood, John F. Cushman and Anna J. Cushman, Robert L. Willsey and John H. Bennett, and it appearing that all of the parties have rights and interest in the adjudication of rights to the use of Phelps Creek and its tributaries and that the adjudication should proceed;

And the parties hereto have agreed upon the competing claims between themselves in the adjudication proceedings for the waters of Phelps Creek and that the final decree of the Court shall incorporate the agreement of the parties.

Now, therefore, the within parties stipulate and agree as follows:

1. That all of the claimants above named, to wit: Wilson and Dorothy Appelgren, Allymae Engel Atwood, John and Anna Cushman, Robert L. Willsey and John H. Bennett shall have the priority dates of their water rights as specified and found in the Findings of Fact and Order of Determination filed December 5, 1988, in these proceedings.
2. That the priority date of Farmers Irrigation District shall be a date not earlier than September 15, 1904, which date follows the priority date of John F. and Anna J. Cushman of September 14, 1904.
3. That the exceptions to findings and the order of determination filed December 5, 1988, with respect to Wilson Appelgren and Dorothy Appelgren shall be and are hereby withdrawn by Farmers Irrigation District, and that no further assertions of failure to use or divert waters for a period of five consecutive years prior to 1987 shall be made.
4. That the exceptions to findings and order of determination filed December 5, 1988, with respect to Robert L. Willsey and Faye Willsey, shall be and are hereby withdrawn by Farmers Irrigation District and that no further assertion of failure to use or divert water for a period of five consecutive years prior to 1987 shall be made.
5. That those two certain springs which are tributaries of Phelps Creek and located near the center of Section 7, Township 2 North, Range 10 E, W.M., and which from time to time been diverted, (and which springs are shown on the 1907 "General Plan of Proposed Improvements" in the Hood River Irrigation District map and which map was at one file filed with the State of Oregon) shall continue

to be waters of Phelps Creek and its tributaries, for benefit of holders of adjudicated water rights adjudicated in this proceeding and in order of priority. Said springs shall not be the subject of any other appropriation by the parties hereto.

6. That Phelps Creek water courses and existing ditches may continue to be used as transportation canals for irrigation waters by the Farmers Irrigation District, all in accordance with the laws and regulations of the State of Oregon, and that the Farmers Irrigation District agrees and shall establish reasonable and accurate measurements of water put in and taken out of Phelps Creek and its tributaries by the District, which measurements shall continue to be made for the benefit of all parties so long as Phelps Creek and its courses are used by the District to transport irrigation water.

7. The parties hereto agree that the terms of this stipulation shall be incorporated in any decree of the Court and that the findings of fact and order of determination shall reflect the agreement of the parties hereto in the contested proceeding."

(13)

On August 31, 1989, the following document "ORDER OVERRULING MOTION TO STRIKE" was filed in Circuit Court:

"The motion of Farmers Irrigation District to strike the Exceptions to Findings filed on behalf of Wilson Appelgren and Dorothy Appelgren, John F. Cushman and Anna J. Cushman, Allymae Engel Atwood, John H. Bennett and Robert Willsey having come on before this court for hearing on March 2, 1989, and the Court having heard statements from Alan J. Bell, counsel for Farmers Irrigation District, and John F. Cushman, counsel for exceptors, and the Court having considered this matter and the parties having stipulated to a full settlement of contested matters between them, and good cause appearing:

It is ORDERED that the motion to strike is overruled."

(14)

On August 31, 1989, a hearing was held in Circuit Court by Judge John A. Jelderks. The Judge and parties agreed that the foregoing exceptions and stipulations be accepted and that the Allymae Engel Atwood claim be remanded to the Water Resources Director for further consideration.

On September 20, 1989, the following document "ORDER" was filed in Circuit Court:

"This matter coming on before the Court on the 31st day of August, 1989 for Hearing and it appearing that all of the parties to the controversy with the exception of ALLYMAE ENGEL ATWOOD, who filed Claim #2 set forth in the Findings of Fact and Order of Determination filed herein have settled their differences, and it appearing to the Court that the merits of the Claim of ALLYMAE ENGEL ATWOOD was not adjudicated and determined on the merits by the Water Resources Director due to the ALLYMAE ENGEL ATWOOD Claim being included with the FARMERS IRRIGATION DISTRICT Claim; NOW, THEREFORE,

IT IS HEREBY ORDERED that as to the Claim of ALLYMAE ENGEL ATWOOD, Claim #2, set forth in the Findings of Fact and Order of Determination filed by the Water Resources Director in the above entitled matter in this matter is remanded to the Water Resources Director for further Findings of Fact and the preparation of an Order of Determination concerning the Claim of ALLYMAE ENGEL ATWOOD on the merits and in it's own stead and that upon the refiling of a Finding of Fact and Order of Determination concerning the ALLYMAE ENGEL ATWOOD Claim the court will reschedule another Hearing as to that Claim alone.

IT IS FURTHER ORDERED that it is the Judgment of the Court that the balance of the Claims other than the ALLYMAE ENGEL ATWOOD Claim set forth in the Water Resources Director's Findings of Fact and Order of Determination filed herein are hereby closed, Final Judgment herein including the ALLYMAE ENGEL ATWOOD Claim and the balance of the Claims and assertions by the various exceptors and claimants shall be entered following the final Hearing on the ALLYMAE ENGEL ATWOOD Claim and after the Water Resources Director has filed his Findings of Fact and Order of Determination on said ALLYMAE ENGEL ATWOOD Claim."

The following amendments are made to the Findings of Fact and Order of Determination ordered by the Water Resources Director dated November 28, 1988:

a) The Allymae Engel Atwood Proof #2, Finding 24, Page 14 and 15 is amended to:



County: Hood River

Basin Number: 04

Source: Phelps Creek

Tributary to: Columbia River

Source Type: Stream

Diversion Point Location: SE1/4 SW1/4, Section 33 T3N R10E W.M.

Use: Irrigation

Place of Use Location: 6.6 acres SE1/4 SW1/4, Section 33 T3N R10E W.M.

0.1 acre SW1/4 SE1/4, Section 33 T3N R10E W.M.

Date of Initiation: 1902<sup>2</sup>

Hood River County Assessor records show that the claimant owns Tax Lot #3N1033-2400 and 3N10333-2500. The WRD field inspection found that an old unused diversion point and ditch did exist with remnants here and there. A portion of the ditch is on the claimants property. The old ditch would have diverted water from Phelps creek. At present the claimant uses two pumps to divert water from Phelps Creek. One of the pumps is a 5 hp centrifugal pump and the other is a 1 hp centrifugal pump. The larger pump is used for irrigation of pasture and the smaller pump is used for irrigation of lawn and garden. There is a combination of aluminum and plastic pipe which conveys the water to eleven Rainbird 30 sprinkler heads.

The claimant submitted copies of affidavits by Raymond E. Nicholson and Archie Radcliff. These affidavits describe water use from Phelps Creek and various properties.

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<sup>2</sup>Priority date as originally claimed.

It appears this claimed right should be limited to a rate of diversion of not to exceed 0.08 cubic feet per second from Phelps Creek for irrigation with a priority date of 1902.

Claimants right is more particularly set out and described in the tabulation of water rights under Finding 44 herein.<sup>3</sup>

b) The Farmers Irrigation District Proof #7, Finding 29, Page 20 and 21 is amended to:

FARMERS Irrigation District Proof #7

County: Hood River

Basin Number: 04

Source: Phelps Creek

Tributary to: Columbia River

Source Type: Stream

Diversion Point Location: NW1/4 NE1/4 Section 18 T2N R10E

Use: Irrigation

Place of Use Location: 94.4<sup>4</sup> acres Section 33 T3N R10E

64.3 acres Section 4 T2N R10E

20.0 acres Section 5 T2N R10E

8.4 acres Section 8 T2N R10E

Date of Initiation: September 15, 1904<sup>5</sup>

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<sup>3</sup>References to Farmers Irrigation District's claim deleted from this Finding, new language is underlined.

<sup>4</sup>Acreage in this section reduced by 6.7 acres as claimed by Ms. Atwood.

<sup>5</sup>Priority date amended as by stipulation.

The claimant has a dam and headgate in Phelps Creek that diverts water into the Riordan Hill Highline Canal. This is an extension of the Highline Canal which diverts water from ditch Creek. This is a district canal that is an earth section. The canal is earth section for about a mile where it changes from that to various pipe sizes here and there along the way. The water that is diverted is used for irrigation by members of the district.

Edward R. and Katharine R. Gunderson have submitted a Statement and Proof of Claim in this proceeding. The claim is for the use of water from Phelps Creek for irrigation with a priority date of 1887. The acres described include a portion of the Farmers Irrigation District right claimed herein: 2.6 acres within the NE1/4 SW1/4 and 0.6 acre within the NW1/4 SE1/4 Section 33 T3N R10E W.M.

Permit #140, Certificate #723 in the name of E. Shelley Morgan evidences the right of use of the waters of Post Creek for irrigation of twenty acres of land and domestic use with a priority date of August 7, 1909. There is a question about the true location of use under this certificate, however, the acres described appear to include a portion of the Farmers Irrigation District right claimed herein: 10 acres within the NE1/4 SW1/4 and 10 acres within the SE1/4 SW1/4 Section 33 T3N R10E W.M.

A Certificate of Water Right #46954 was issued to the Hood River Irrigation District confirmed by Decree of Circuit Court of the State of Oregon for Hood River County. The right is for the use of water of Ditch Creek and Dead Point Creek for irrigation with a priority date of 1874; December 19, 1892; and October 6, 1902. The acres described for irrigation include a portion of the Farmers Irrigation District right claimed herein: 2.4 acres SW1/4 NE1/4, 6.8 acres SW1/4 NW1/4, 16.8 acres SE1/4 NW1/4, 36.7 acres

NE1/4 SW1/4, 10.9 acres NW1/4 SW1/4, 24.3 acres SE1/4 SW1/4, 1.3 acres NW1/4 SE1/4, all Section 33 T3N R10E W.M. 36.6 acres NE1/4 NW1/4. 4.5 acres NW1/4 NW1/4, 8.5 acres SE1/4 NW1/4, 10.8 acres NW1/4 SW1/4 all Section 4 T2N R10E W.M. 20.0 acres NE1/4 SE1/4, Section 5, 6.4 acres NE1/4 NE1/4, 2.0 acres NW1/4 NE1/4, Section 8 T2N R10E W.M.

A Certificate of Water Right #46956 was issued to the Hood River Irrigation District confirmed by Decree of the Circuit Court of the State of Oregon for Hood River County. The right is for the use of water of Ditch Creek and Parker Springs, North Fork Green Point Creek and Spring at Camp No. 4 for irrigation and supplemental irrigation with a priority date of 1891 and 1899. The acres described for supplemental irrigation include a portion of the Farmers Irrigation District right claimed herein: 2.4 acres SW1/4 NE1/4, 6.8 acres SW1/4 NW1/4, 16.8 acres SE1/4 NW1/4, 36.7 acres NE1/4 SW1/4, 10.9 acres NW1/4 SW1/4, 1.0 acres SW1/4 SW1/4, 24.3 acres SE1/4 SW1/4, 1.3 acres NW1/4 SE1/4, Section 33 T3N R10E W.M. 36.6 acres NE1/4 NW1/4, 4.5 acres NW1/4 NW1/4, 8.5 acres SE1/4 NW1/4, 10.8 acres NW1/4 SW1/4 Section 4, 20.0 acres NE1/4 SE1/4 Section 5, 6.4 acres NE1/4 NE1/4, 2.0 acres NW1/4 NE1/4 Section 8 T2N R10E, W.M.

The Hood River Irrigation District and the Farmers Irrigation District merged. The Farmers Irrigation District now delivers the water under certificates #46965 and #46956.

It appears this claimed right should be limited to a rate of diversion from Phelps Creek and all other sources not to exceed 2.34<sup>6</sup> cubic feet per second for irrigation with a priority date of September 15, 1904.<sup>7</sup>

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<sup>6</sup>Rate reduced by 0.08 cubic feet per second as claimed by Ms. Atwood.

<sup>7</sup>Priority date amended by stipulation.

Claimant's right is more particularly set out and described in the tabulation of water rights under Finding 44 herein.

c) The Finding 44, tabulation for Atwood, Allymae Engel is amended to:

|                       |      |      |     |            |                    |              |           |                        |
|-----------------------|------|------|-----|------------|--------------------|--------------|-----------|------------------------|
| ATWOOD, Allymae Engel | 1902 | 0.08 | 6.7 | Irrigation | 2 pumps & pipeline | Phelps Creek | 6.6 acres | SE1/4 SW1/4            |
| 4551 Post Canyon Rd.  |      |      |     |            |                    |              | 0.1 acre  | SW1/4 SE1/4            |
| Hood River, OR 97031  |      |      |     |            |                    |              |           | Section 33             |
| (Proof #2)            |      |      |     |            |                    |              |           | T. 3 N. R. 10 E., W.M. |
| (See Finding 24)      |      |      |     |            |                    |              |           |                        |

d) The Finding 44, tabulation for Farmers Irrigation District is amended to:

|  |              |      |       |            |                |              |            |                        |
|--|--------------|------|-------|------------|----------------|--------------|------------|------------------------|
| FARMERS IRRIGATION DISTRICT  | Sept 15 1904 | 2.34 | 187.1 | Irrigation | Highline Ditch | Phelps Creek | 2.4 acres  | SW1/4 NE1/4            |
| 1985 Country Club Road   |              |      |       |            |                |              | 6.8 acres  | SW1/4 NW1/4            |
| Hood River, OR 97031   |              |      |       |            |                |              | 16.8 acres | SE1/4 NW1/4            |
| (Proof #7)   |              |      |       |            |                |              | 36.7 acres | NE1/4 SW1/4**          |
| (Also see Proof #8)  |              |      |       |            |                |              | 10.9 acres | NW1/4 SW1/4            |
| (See Finding 29)   |              |      |       |            |                |              | 1.8 acres  | SW1/4 SW1/4            |
| (Also see Finding 30)  |              |      |       |            |                |              | 17.7 acres | SE1/4 SW1/4            |
| (Also see Findings 19 through 22)  |              |      |       |            |                |              | 1.3 acres  | NW1/4 SE1/4**          |
| **An alternate point of diversion located within the NW1/4 SE1/4 Section 33 T3N R10E W.M. is used to supply Farmers Irrigation District water to the Gunderson property for 2.6 acres NE1/4 SW1/4 and 0.6 acre NW 1/4 SE1/4 Section 33 T3N R10E W.M. |              |      |       |            |                |              |            | Section 33             |
|  |              |      |       |            |                |              |            | T. 3 N. R. 10 E., W.M. |
|  |              |      |       |            |                |              | 36.6 acres | NE1/4 NW1/4            |
|  |              |      |       |            |                |              | 8.4 acres  | NW1/4 NW1/4            |
|  |              |      |       |            |                |              | 8.5 acres  | SE1/4 NW1/4            |
|  |              |      |       |            |                |              | 10.8 acres | NW1/4 SW1/4            |
|  |              |      |       |            |                |              |            | Section 4              |
|  |              |      |       |            |                |              | 20.0 acres | NE1/4 SE1/4            |
|  |              |      |       |            |                |              |            | Section 5              |
|  |              |      |       |            |                |              | 6.4 acres  | NE1/4 NE1/4            |
|  |              |      |       |            |                |              | 2.0 acres  | NW1/4 NE1/4            |
|  |              |      |       |            |                |              |            | Section 8              |
|  |              |      |       |            |                |              |            | T. 2 N. R. 10 E., W.M. |


And the Court now being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Findings of Fact and Order of Determination, Phelps Creek and its tributaries, Hood River County,

of the Water Resources Director, dated November 28, 1988 as amended, be and hereby is affirmed.

IT IS FURTHER ORDERED that none of the parties hereto shall recover costs and disbursements in these proceedings.

Dated this 12 day of December, 1989.

  
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JOHN A. JELDERKS, CIRCUIT JUDGE

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