

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

JACKSON COUNTY

IN THE MATTER OF CANCELLATION) PC 83-8
OF A WATER RIGHT IN THE NAME OF)
PAUL A. SEELY FOR USE OF WATER) STATEMENT, FINDINGS
FROM EVANS CREEK THROUGH THE) CONCLUSIONS & ORDER
VROMAN DITCH)

This proceeding was initiated by the Water Resources Director under the provisions of ORS 540.610 to 540.650 for the cancellation of certain water rights, based on information furnished to the Director in the form of affidavits alleging nonuse of the said water rights over a period of five successive years of nonuse.

The water rights in question pertain to use of water from Evans Creek through the Vroman Ditch, under a priority date of 1902, for domestic, stock and irrigation on a certain 1.9 acres of land in Tax Lot 3402, within the SE 1/4 SW 1/4 of Section 15, Township 35 South, Range 4 West, WM; and on a certain 1.0 acre of land in Tax Lot 1900 within the SW 1/4 SW 1/4 of Section 22 of said township and range, and is a part of the right allowed by decree of the court in the adjudication proceeding for the Rogue River and its tributaries and described by the certificate issued in the name of Paul A. Seeley and recorded at page 46876, Volume 39, State Record of Water Right Certificates.

On February 21, 1984, pursuant to the provisions of ORS 540.631, Joseph E. and Martha Scheiblauser (Tax Lot 3402), Brian and Jacqueline Smedegaard (Tax Lot 3402) and Leslie E. and Grace H. Heer (Tax Lot 1900) were given notice as the owners of record, contract purchasers and/or occupants of the real property to which the aforesaid water rights are appurtenant, of the proposed cancellation of said water rights.

On April 16, 1984, a protest against cancellation of the water right in question as it pertains to irrigation of the 1.9 acres of land in Tax Lot 3402, within the SE 1/4 SW 1/4 of Section 15, Township 35 South, Range 4 West, WM, was filed in the office of the Water Resources Director by Brian Smedegaard.

Pursuant to the Director's Notice of Hearing dated May 11, 1984, the matter was brought to hearing in Medford, Oregon on May 24, 1984, before James W. Carver, Jr., an employe of the Water Resources Department, authorized to preside in behalf of the Water Resources Director as a finder of fact. The protestant, Brian Smedegaard, appeared pro se. Proponents of cancellation were not represented by legal counsel in the hearing. Rocky Wardle, a party to the proceeding and a proponent of cancellation, did not appear in person or by counsel.

FINDINGS OF FACT

Prior to the year of 1979, water from Evans Creek for irrigation of the subject 1.9 acres in Tax Lot 3402 (now the Smedegaard property) was conveyed to the property through the Vroman Ditch, also known as the Pleasant Valley Ditch.

The Vroman Ditch diverted from the channel of Evans Creek near the east line of Section 11, conducted the water west and south to an inverted siphon under the channel of Evans Creek within the SW 1/4 SW 1/4 of Section 11, and continued on in a southerly and westerly direction, to pass by the easterly (uphill) edge of the subject 1.9 acres. The relative locations of the channel of Evans Creek, the course of the Vroman Ditch and the subject 1.9 acres which is identified by yellow shading, are shown on Figure 1, herein.

Testimony was in agreement that by the year of 1979 the Vroman Ditch had become incapable of conveying water to lands lying south and east of the channel of Evans Creek; and that no water from Evans Creek was conveyed by any means to the subject 1.9 acres in Tax Lot 3402 within the years of 1979, 1980, 1981 and 1982.

Testimony was further in agreement that no water from Evans Creek was diverted and conveyed to the subject 1.9 acre tract by any ditch or pipeline within the irrigation season of 1983.

Protestant, Brian Smedegaard, testified that he and his wife purchased Tax Lot 3402 in January of 1983, having resided on the property since November of the previous year, by arrangement with the former owner. Protestant was away from the property, temporarily, from December 24, 1982, to approximately April 5, 1983.

A previous operator of the property had constructed a secondary ditch a few feet downslope from and parallel to the Vroman Ditch, across the width of Tax Lot 3402. The secondary ditch is a "V" shaped ditch having a depth of approximately five feet and a top width of approximately six feet. Mr. Smedegaard testified that former operators had used the secondary ditch to receive their water from the Vroman Ditch, for distribution of the water onto the subject 1.9 acres by means of subirrigation from the secondary ditch. (The calculated capacity of the secondary ditch is approximately 0.1 acre-foot or approximately 36,000 gallons.)

Mr. Smedegaard further testified that within the irrigation season of 1983, he employed the services of a tank truck with a capacity of not more than 3,000 gallons; that about the middle of May of 1983 the tank truck delivered one load of water from the channel of Evans Creek into the secondary ditch; and that in late August of 1983 the tank truck delivered a second load of water from the channel of Evans Creek into the secondary ditch. It was the protestant's intent that the water delivered into the secondary ditch would seep out from the ditch and sub-irrigate the subject 1.9 acre tract.

Mr. Smedegaard also testified that a few days prior to the first tank truck delivery of water into the secondary ditch, he had a custom farming service cut the grass growing on the subject 1.9 acre tract and spread three sacks of fertilizer over the 1.9 acres. (Exhibits Smedegaard "A" and "B")

Even if it were possible to spread water over the subject 1.9 acre tract with a distribution efficiency of one-hundred percent, an application of 3,000 gallons of water over an area of 1.9 acres would result in an application of less than 6/100 of an inch depth of water over the area. Such an insignificant amount of water would not make a significant contribution toward the nourishment of any vegetation growing on the land; and would not constitute beneficial irrigation under the provisions of the water right in question.

T35 S, R4 W

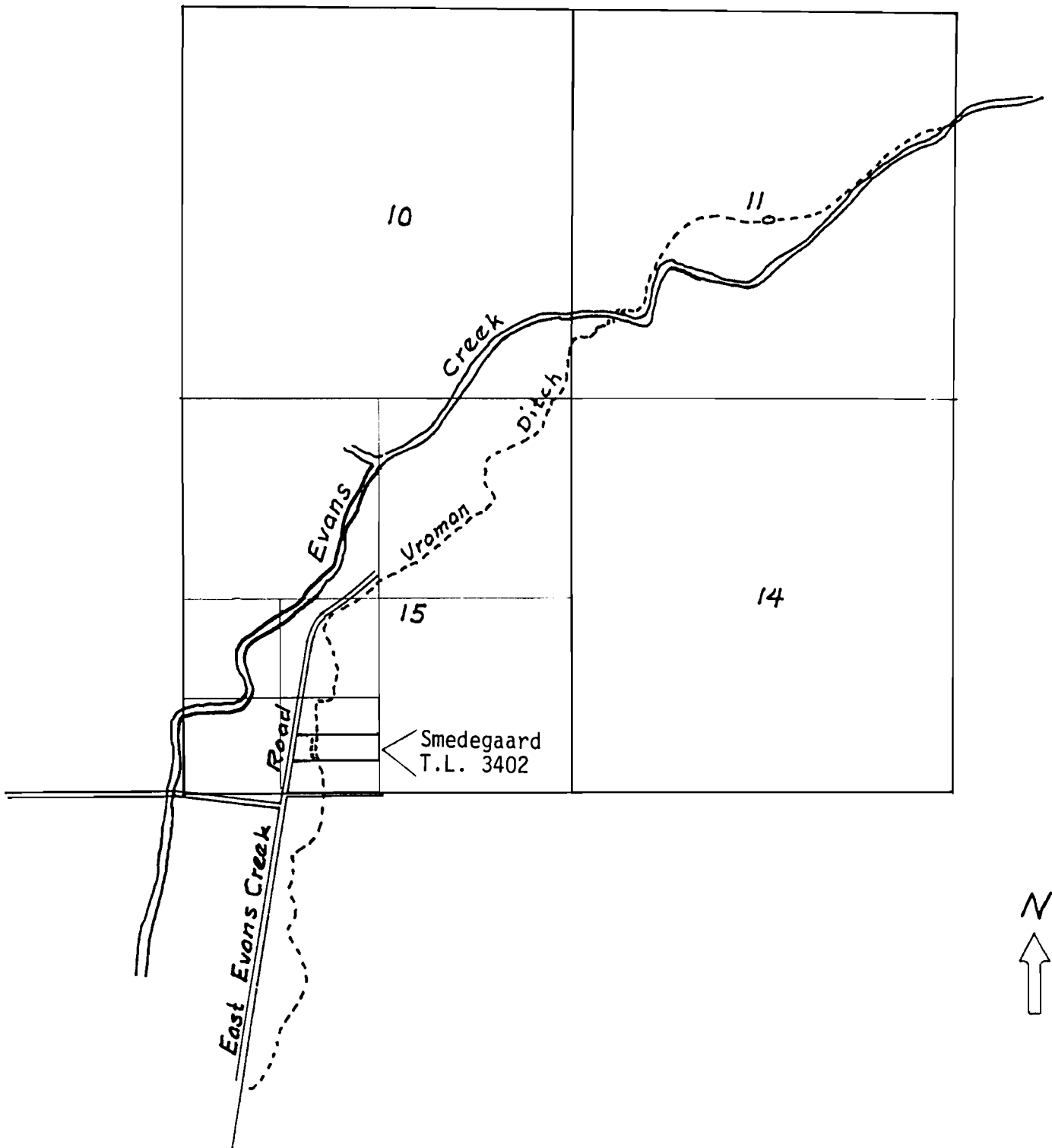


Figure 1

The protestant, Mr. Smedegaard, testified that the whole of his 1.9 acre tract was visibly more green than the nearby unirrigated fields of his neighbors. It would not have been physically possible for a 3,000 gallon delivery of water into the secondary ditch to have been distributed over the whole of the 1.9 acre area by means of sub-irrigation from the ditch. The "more green" appearance of Mr. Smedegaard's field may have resulted from the application of fertilizer over the area.

ULTIMATE FINDINGS OF FACT

The two tank truck deliveries of water from the channel of Evans Creek into the secondary ditch during the irrigation season of 1983, being not more than 3,000 gallons of water in each delivery, did not constitute beneficial use of water for irrigation under the provisions of the water right in question.

Water from Evans Creek was not appropriated to beneficial use under the provisions of the water right in question within the years of 1979, 1980, 1981, 1982 and 1983, being a period of 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. Myers*, 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 nonuse 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...."

Water appropriated under the provisions of the water right in question as it pertains to the above described 1.9 acres of land within Tax Lot 3402, being the Smedegaard property, was not used for beneficial irrigation of the subject lands for a period of five successive years of nonuse, thereby resulting in a forfeiture of the water right.

No other protest was filed against the cancellation of the water rights in question. Therefore, the entirety of the water rights in question should be canceled pursuant to the provisions of ORS 540.610 to 540.650.

ORDER

NOW, THEREFORE, it is ordered that the water rights in question as described in paragraph two, above, being a part of the water rights described by the certificate issued in the name of Paul A. Seeley and recorded at page 46876, Volume 39, State Record of Water Right Certificates, be and the same hereby are canceled.

The balance of the water rights described by the said certificate are the subject of Water Right Transfer Applications 5126, 5139, 5197, 5214, 5249 and 5250; therefore, no certificate to describe remaining rights will be necessary to replace the said certificate.

Dated at Salem, Oregon this 20 day of July, 1984.

William H. Young
WILLIAM H. YOUNG
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 this service of this order. Judicial review is pursuant to the provisions of ORS 183.482.

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