



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department

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BEFORE THE OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF:) FINAL ORDER
)
THE PROPOSED PARTIAL) OAH Case No.: WR-06-003
CANCELLATION OF THE WATER) Agency Case No.: PC-03-06
RIGHT EVIDENCED BY)
CERTIFICATE 81558 FOR USE OF)
WATER FROM EAGLE CREEK FOR)
IRRIGATION, BAKER COUNTY,)
OREGON)

HISTORY OF THE CASE

On January 5, 2006, the Oregon Water Resources Department (OWRD) issued a Notice of Proposed Partial Cancellation of Water Right to Baker County (Protestant). On January 30, 2006, Lorrie Harvey, on behalf of the Protestant, filed a Protest and requested a hearing.

On April 3, 2006, OWRD referred the hearing request to the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Dove L. Gutman was assigned to preside at hearing. On May 18, 2006, a pre-hearing conference was conducted by telephone. John Ames and Byrl Landers (Proponents) appeared and were represented by Martin Leuenberger, attorney at law. Lorrie Harvey and Fred Warner appeared on behalf of Protestant and were represented by Dan Van Thiel, attorney at law. Juno Pandian appeared and represented OWRD. The site visit was scheduled for November 1, 2006, and the hearing was scheduled for November 2, 2006.

On August 24, 2006, the parties filed a Joint Motion to reschedule the site visit and hearing dates. On August 24, 2006, ALJ Gutman granted the Joint Motion, and the site visit was rescheduled for April 4, 2007, and the hearing was rescheduled for April 5 and April 6, 2007.

A site visit was held on April 4, 2007, in Baker County. ALJ Gutman presided. Proponents appeared and were represented by Mr. Leuenberger. Lorrie Harvey appeared on behalf of Protestant and was represented by Mr. Van Thiel. Also appearing on behalf of Baker County was Pamela DuMars. Ms. Pandian appeared and represented OWRD. Also appearing on behalf of OWRD was Richard Lusk, Assistant Region Manager and District 8 Watermaster. After viewing the site, ALJ Gutman met with Mr. Leuenberg, Mr. Van Thiel, Ms. Pandian, and Mr. Lusk at the Baker County Courthouse to discuss procedural matters and exhibits.

A hearing was held on April 5, 2007, at the Baker County Courthouse in Baker City, Oregon. ALJ Gutman presided. Proponents appeared and were represented by Mr. Leuenberger. Testifying on behalf of Proponents were Byrl Landers, Ralph Graven, Bud Brasler, Ellie Davis,

Jerry Dennis, Eldon Deardorff, Robby Stacy, John Ames, and Lyn Akers. Lorrie Harvey appeared on behalf of Protestant and was represented by Mr. Van Thiel. Testifying on behalf of Protestant were Grant Young, Bill Smith, Ed Elms, Cecil Best, and Robert DuMars. OWRD was represented by Ms. Pandian. Testifying on behalf of OWRD was Mr. Lusk, Assistant Region Manager and District 8 Watermaster.

The hearing was continued on April 6, 2007. ALJ Gutman presided. Proponents appeared and were represented by Mr. Leuenberger. Testifying on behalf of Proponents were Fred Riggs and Byrl Landers. Lorrie Harvey and Fred Warner appeared on behalf of Protestant and were represented by Mr. Van Thiel. Testifying on behalf of Protestant were Fred Warner, Pamela DuMars, and Lorrie Harvey. OWRD was represented by Ms. Pandian. The record closed on April 6, 2007.

ISSUE

Whether a portion of the water right evidenced by certificate 81558 has been forfeited by failure to make beneficial use of the water for irrigation purposes for a period of 10 years and four months from March 1994 through July 2004.

EVIDENTIARY RULINGS

On April 4, 2007, Exhibits A1 through A9, offered by OWRD, Exhibits P1 through P13, offered by Proponents, and Exhibit R1, offered by Protestant, were admitted into the record. On April 5, 2007, Exhibit P14, offered by Proponents, was admitted into the record.

FINDINGS OF FACT

(1) Certificate of water right 81558, is in the name of Charles A. Harville, and authorizes the use of 0.53 cubic feet per second (cfs) from Eagle Creek for irrigation of 42.85 acres, being 7.24 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 29; 28.67 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 29; and 6.94 acres in the SE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 30, Township 9 South, Range 46 East, Willamette Meridian. The priority date is June 10, 1912. (Ex. A7.)

(2) On July 21, 2005, Proponent Byrl Landers filed an affidavit asserting nonuse of water right for irrigation from September 1993 through July 2004, for water right certificate 81558. On December 12, 2005, Proponent Landers filed a revised affidavit asserting nonuse of a portion of water right for irrigation from September 1993 through July 2004, for water right certificate 81558, for a total of 6.94 acres, within Tax Lot 200, located in Township 9 South, Range 46 East, in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 30 in Baker County. (Ex. A6.)

(3) On October 17, 2005, Proponent John Ames filed an affidavit asserting nonuse of water right for irrigation from March 1994 through July 2004, for water right certificate 81558. On December 12, 2005, Proponent Ames filed a revised affidavit asserting nonuse of a portion of water right for irrigation from March 1994 through July 2004, for water right certificate 81558, for a total of 6.94 acres, within Tax Lot 200, located in Township 9 South, Range 46 East, in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 30 in Baker County. (Ex. A5.)

(4) On January 5, 2006, OWRD issued a Notice of Proposed Partial Cancellation of Water Right evidenced by Certificate 81558 to Baker County, the Record Owner of Tax Lot 200, and to the occupant at 41132 Robinette Road, Richland, Oregon, due to nonuse for irrigation for the period of March 1994 through July 2004. (Ex. A4.)

(5) On January 30, 2006, Baker County (Protestant) filed a Protest against Proposed Cancellation of Water Rights with OWRD. (Ex. A3.)

(6) Hewitt Park is located at 41132 Robinette Road, Richland, Oregon. The 6.94 acres within Tax Lot 200 is located on the hillside (Hewitt Park Hillside) that runs above and north of the parking lot of Hewitt Park. (Exs. P1, R1 at 1-3.) The Hewitt Park Hillside is quite precipitous and drops down sharply to the parking lot. (Test. of Lusk; Ex. R1 at 1, 2, 3.)

(7) Proponent Landers resides at 41315 Robinette Road, Richland, Oregon, and has since September 1993. The eastern portion of his property borders the western portion of Tax Lot 200. (Test. of Landers; Exs. P2, P12.)

(8) The Newt Young Ditch (Ditch) carries water from Eagle Creek to various properties in the Richland area for appropriation of water. The Ditch runs through the northeastern portion of Proponent Landers' property and through the northwestern, middle, and northeastern portion of Tax Lot 200. The Hewitt Park Hillside is located below the Ditch. (Test. of Ames; Exs. P1, P2, P7 at 4, P10, P12)

(9) There is a concrete structure (western concrete take-out) on the Ditch on Tax Lot 200 that carries water underground to 3.5 acres of Protestant's property located south of the Hewitt Park Hillside and below the parking lot. The 3.5 acres is subject to water right certificate 4665. (Test. of Landers; test. of Dennis; Exs. A8 at 3, R1 at 18, 92.)

(10) During April through October for the relevant time period, Proponent Landers was on his property almost every day. Occasionally, he would traverse up the county road located on Tax Lot 200. During those times, Proponent Landers did not observe any laterals, dams, taps, or breaks in the Ditch. He did not observe any structures in the Ditch, other than the western concrete take-out. (Test. of Landers.)

(11) Proponent Ames resides at 37150 Sullivan Lane, Richland, Oregon. He is a ditch walker and has been since 1994. He is employed by the Newt Young Ditch Company (Ditch Company) and the Kay Young Ditch Company. As part of his job, Proponent Ames responds to property owners who make calls for water from the Ditch. He disperses the water on a rotation system, which is based on water availability, acreage to be irrigated, and seniority of the water rights. From 1994 through 2004, Protestant did not make a call for water for the 6.94 acres on the Hewitt Park Hillside. (Test. of Ames; Ex. R1.)

(12) Ralph Graven is an excavating contractor. He has been employed by the Ditch Company continuously for the past 15 years. From 1992 through 2005, Mr. Graven cleaned the Ditch each year, usually during March, including the portion that runs through Tax Lot 200. He

used a cat to clean the bottom and the sides of the Ditch. Mr. Graven spent approximately 45 minutes cleaning the Ditch on Tax Lot 200. He did not observe any laterals, dams, taps, or breaks in the Ditch. Mr. Graven did not observe any structures in the Ditch, other than the western concrete take-out. (Test. of Graven.)

(13) From 1997 through 1998, David Young was the Baker County Parks Director. Protestant was the end-user on the Ditch and never made a call for water. Mr. Young recalls seeing man-made irrigation on two separate occasions on the Hewitt Park Hillside. On the first occasion, which was in May or June of 1997, Mr. Young observed a canvas dam in the Ditch with water flowing out. The canvas dam was downstream of and not far from the western concrete take-out. On the second occasion, which was in September or October of 1997, Mr. Young observed a dirt dam with cut-outs in the Ditch with water flowing out. The dirt dam was near the end of the Ditch on Tax Lot 200 just before it vanishes into the canyon or draw. Mr. Young does not know who was irrigating the area on those two occasions. He assumed it was Mr. Davis, the park manager at that time. Mr. Young also assumed the water was being applied to the plants and trees on the Hewitt Park Hillside. He believes he spoke to Mr. Davis about the reason for the irrigation. Mr. Young did not walk upstream to Proponent Landers property on those two occasions. Prior to 1997 and after 1997, Mr. Young also observed water flowing down Hewitt Park Hillside when he went fishing in the park. (Test. of Young; Ex. R1 at 83.)

(14) From March 1997 through March 2000, Ellie Davis and her husband were caretakers of Hewitt Park. Their duties included keeping the park clean, collecting fees, taking reservations, mowing, pruning, and irrigating the area located below the parking lot. Mrs. Davis handled the inside duties and Mr. Davis handled the outside duties. They worked as a team. Mrs. Davis never saw water applied to the Hewitt Park Hillside. She never saw water flowing down the Hewitt Park Hillside. Mrs. Davis was on the Hewitt Park Hillside approximately six times in three years. (Test. of Davis; Ex. P1.)

(15) Bill Smith is a retired fire chief. He owns a floating dock at Hewitt Park. Sometime in 2000, when Mr. and Mrs. Davis were still caretakers at Hewitt Park, Mr. Smith observed a man using a sprinkler to water the Hewitt Park Hillside. Mr. Smith questioned the man who indicated he was watering the hillside to keep it from catching on fire. Mr. Smith observed one sprinkler watering an area of approximately 8-10 feet. The sprinkler was connected to a garden hose that ran into the Ditch. Throughout the years, Mr. Smith also recalls seeing green patches below the Ditch on the Hewitt Park Hillside, but he never saw water being applied to the green patches. The green patches were approximately 4 feet by 8 feet. (Test. of Smith.)

(16) From March 2000 through June 2004, Bud Brassler was the park manager of Hewitt Park. Sometime in October 2000, for approximately three hours, Mr. Brassler and Larry Taylor, the Baker County Parks Director at that time, applied water to a small portion of the Hewitt Park Hillside by making one cut-out in the Ditch upstream of the western concrete take-out, towards Proponent Landers property. Mr. Brassler applied the water to see what would happen. The water ran down the hillside, along parts of the county road and flooded the parking lot. The water path was approximately 10 feet wide. It did not cover the entire 6.94 acres. Mr. Brassler took pictures of the water application. Mr. Taylor narrated the steps taken on the back of each photograph. Mr. Taylor wrote "Irrigating hillside above Hewitt Park" on several of the

photographs. He also wrote "using our water right." Other than that one time, Mr. Brassler did not apply water or irrigate the Hewitt Park Hillside. (Test. of Brassler; Ex. R1 at 1-3.)

(17) Ed Elms owns a cabin adjacent to the Hewitt Park. He has been using Hewitt Park since 1965. Throughout the years, Mr. Elms observed strips of green on the Hewitt Park Hillside, usually during May, June or July. The strips were 15-20 feet long and approximately 8 feet wide. He does not know if the green spots were man-made or not. Mr. Elms never observed the Hewitt Park Hillside being irrigated. (Test. of Elms.)

(18) Cecil Best owns a floating dock at Hewitt Park. During the time period of 1994 through 2004, Mr. Best observed water coming off of the Hewitt Park Hillside at the end of the Ditch where it goes into the draw. He also observed green spots on the Hewitt Park Hillside, but does not know if the green spots were man-made or not. Mr. Best never went up onto the Hewitt Park Hillside to see what was taking place. (Test. of Best.)

(19) On July 1, 2004, Pamela DuMars was hired as the park manager of Hewitt Park. She did not irrigate the Hewitt Park Hillside during July 2004. (Test. of DuMars.)

(20) In early 2005, Mr. DuMars, Mrs. DuMars, and a prison crew put a gated pipe on the Hewitt Park Hillside. A second concrete structure (eastern concrete take-out) was added in the Ditch at that time. (Test. of DuMars; test. of Landers; Ex. R1 at 95.)

(21) In early 2007, Mrs. DuMars and a prison crew cleaned the Ditch. They found pieces of old dam material in the Ditch. They also found two metal galvanized pipes in the ground near the Ditch. The pipes were two feet tall and 30 yards apart, and were beyond the western concrete take-out. Mrs. DuMars also found old boards lying beside the pipes. (Test. of DuMars.)

(22) The Hewitt Park Hillside has wild plum, apple, and walnut trees on it. It also has medusa and blue grass on it. (Test. of DuMars; test. of Brassler.)

CONCLUSION OF LAW

A portion of the water right evidenced by certificate 81558 has been forfeited by failure to make beneficial use of the water for irrigation purposes for a period of 5 years four months, from March 1999 through July 2004.

OPINION

Proponents of the proposed water cancellation have the burden of proving, by a preponderance of evidence, at least five successive years of nonuse. *Rencken v. Young*, 300 Or 352 (1985); *See* ORS 183.450(2); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); and *Cook v. Employment Div.*, 47 Or App 437 (1980) (in absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*,

303 Or 390 (1989). Proponents have met their burden, as modified below.

I. Forfeiture of water right

ORS 540.610 is titled "Use as measure of water right; presumption of forfeiture of right for nonuse; basis for rebutting presumption; confirmation of rights of municipalities" and provides, in relevant part:

(1) Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. Whenever the owner of a perfected and developed water right ceases or fails to use all or part of the water appropriated for a period of five successive years, the failure to use shall establish a rebuttable presumption of forfeiture of all or part of the water right.

(2) Upon a showing of failure to use beneficially for five successive years, the appropriator has the burden of rebutting the presumption of forfeiture***.

Beneficial use is defined as the reasonably efficient use of water without waste for a purpose consistent with the laws, rules and the best interests of the people of the state. OAR 690-300-0010(5).

In this case, Protestant has a water right for irrigation purposes for 6.94 acres located on the Hewitt Park Hillside on Tax Lot 200. Irrigation means the artificial application of water to crops or plants by controlled means to promote growth or nourish crops or plants. Examples of these uses include, but are not limited to, watering of an agriculture crop, commercial garden, tree farm, orchard, park, golf course, play field or vineyard and alkali abatement. OAR 690-300-0010(26). Naturally occurring sub-irrigation does not qualify as irrigation. *Staats v. Newman*, 164 Or App 18, 23 (1999).

The evidence in the record establishes that water was applied to the Hewitt Park Hillside in 1997 and 2000. The evidence also establishes that several individuals saw green areas and water running on the Hewitt Park Hillside throughout the years. The question becomes whether the water that was seen and/or applied was irrigation of the 6.94 acres and, if so, whether the water was put to beneficial use.

A. The time period of March 1994 through March 1999

1. Observations of green patches/spots

Mr. Smith, Mr. Elms and Mr. Best all testified that they observed green patches/spots on the Hewitt Park Hillside throughout the years. However, Mr. Smith testified that he never saw water being applied to the green patches. In addition, Mr. Elms and Mr. Best both testified that they did not know if the green areas were man-made or not. Because green areas on a hillside can come from naturally occurring means such as rain and sub-irrigation, as well as artificial

application of water, ALJ Gutman was unable to find that the observation of green patches/spots, by itself, meets the definition of irrigation.

Therefore, the observations that Mr. Smith, Mr. Elms and Mr. Best made of green patches/spots on the Hewitt Park Hillside throughout the years does not prove that irrigation took place on the 6.94 acres.

2. Observations of water running off the hillside

Mr. Young and Mr. Best both testified that they observed water running off the Hewitt Park Hillside throughout the years. However, neither gentleman presented evidence that the water came from irrigation or artificial application. Mr. Young assumed the water came from the Ditch, and Mr. Best never went up onto the Hewitt Park Hillside to see what was taking place. Because water running off a hillside can come from naturally occurring means as well as artificial application, ALJ Gutman was unable to find by a preponderance of the evidence that the observation of water running off the hillside, by itself, met the definition of irrigation.

Consequently, the observations that Mr. Young and Mr. Best made of water running off the Hewitt Park Hillside throughout the years does not prove that irrigation took place on the 6.94 acres.

3. Observations by Mr. Young in 1997

Mr. Young testified that he observed man-made irrigation on two separate occasions on the Hewitt Park Hillside in 1997. On the first occasion, which was in May or June of 1997, Mr. Young observed a canvas dam in the Ditch with water flowing out. The canvas dam was downstream of and not far from the western concrete take-out. On the second occasion, which was in September or October of 1997, Mr. Young observed a dirt dam with cut-outs in the Ditch with water flowing out. The dirt dam was near the end of the Ditch on Tax Lot 200 just before it vanishes into the canyon or draw. Mr. Young does not know who was irrigating the area on those two occasions, but assumed it was Mr. Davis, the park manager at that time. Mr. Young also assumed the water was being applied to the plants and trees on the Hewitt Park Hillside, and believes he spoke to Mr. Davis about the reason for the irrigation.

As stated previously, irrigation means the artificial application of water to crops or plants by controlled means to promote growth or nourish crops or plants. OAR 690-300-0010(26). Irrigation requires more than just applying water to land. *Hennings v. Water Resources Department*, 50 Or. App. 121, 123-124 (1981) (court found that applying water to land for the purpose of wetting the dry ground to assist with plowing was not irrigation). Irrigation also requires a deliberate intent or purpose to promote growth or nourish crops or plants. In addition, if the water is not applied for a particular purpose, the water has not been put to a beneficial use. See, *In the Matter of the Proposed Cancellation of Water Right Certificate 29364 In the Name of Harold Biddle for Use of Water From East Branch of Long Branch and East Fork of East Branch and Reservoir, Jackson County, PC 91-2*, Special Order Book Volume 46, pp. 34-39, at p. 37 (noting that "Irrigation required deliberate and intentional diversion and application of water to a beneficial purpose").

In this case, Mr. Young observed artificial application of water to the Hewitt Park Hillside on two separate occasions in 1997. He assumed the water was being applied to the plants and trees that were growing on the Hewitt Park Hillside. Because there was no credible evidence presented to the contrary, ALJ Gutman found that Mr. Young's assumption is a reasonable one, and is further supported by his belief that he spoke to Mr. Davis about the reason for the irrigation.

ALJ Gutman found by a preponderance of the evidence that irrigation took place on the Hewitt Park Hillside in May or June of 1997, and in September or October of 1997. ALJ Gutman was unable to determine if the entire 6.94 acres were irrigated on those two occasions.

Nevertheless, as set forth below, because the evidence establishes that the Hewitt Park Hillside was not irrigated during the period of March 1999 through July 2004, there is no need to determine the number of acres that were irrigated in 1997.

B. The time period of March 1999 through July 2004

1. Water sprinkler

Mr. Smith testified that sometime in 2000, he observed a man using a sprinkler to water a portion of the Hewitt Park Hillside. The sprinkler was attached to a hose that ran into the Ditch and was watering an area approximately 8-10 feet. When Mr. Smith questioned the man, he indicated that he was watering the hillside to keep it from catching on fire.

As stated above, irrigation requires a deliberate intent or purpose to promote growth or nourish crops or plants. The man that Mr. Smith observed using a sprinkler on the Hewitt Park Hillside was not watering the land to promote growth or nourish crops or plants. He was simply wetting the dry ground to prevent fire. Consequently, using *Hennings* as a guideline, ALJ Gutman concluded that watering the Hewitt Park Hillside in 2000 to keep it from catching on fire was not irrigation.

2. Water application by Mr. Brassler

Mr. Brassler testified that sometime in October 2000, for approximately three hours, he applied water to a small portion of the Hewitt Park Hillside by making one cut-out in the Ditch upstream of the western concrete take-out. Mr. Brassler testified that the reason he applied the water was to see what would happen. Unfortunately, the end result was that the water ran down the hillside along parts of the county road and flooded the parking lot. Because of the flooding, Mr. Brassler chose to not apply water to the Hewitt Park Hillside from that date forward through June 2004.

In this instance, the evidence establishes that Mr. Brassler artificially applied water to the Hewitt Park Hillside. However, his intent was not to promote growth or nourish crops or plants, but to see what would happen. In other words, Mr. Brassler was evaluating the feasibility of applying water to the Hewitt Park Hillside. Consequently, ALJ Gutman found that Mr.

Brassler's application of water in October 2000 was not irrigation. Furthermore, even if it was irrigation, the application of the water was not for a beneficial use and the path of water did not cover the entire 6.94 acres on the Hewitt Park Hillside in order to maintain the water right at issue.

3. Green areas/water running off hillside

As indicated above, although there was evidence presented of observations of green areas on the Hewitt Park Hillside and water running off said hillside throughout the years, the observations alone do not prove irrigation.

4. Pipes, boards, remnants of material in the Ditch

Mrs. DuMars testified that when she and a prison crew cleaned the Ditch in 2007, they found pieces of old dam material in the Ditch, two galvanized pipes in the ground near the Ditch, and old boards lying beside the pipes. However, the presence of those items in 2007 does not prove irrigation during the period of March 1994 through July 2004.

II. Protestant's arguments

Protestant argued that Proponents and their witnesses were not credible. To the extent that ALJ Gutman relied upon said testimony, ALJ Gutman disagreed.

A witness testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. ORS 44.370 provides, in relevant part:

A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testified, by the character of the testimony of the witness, or by evidence affecting the character or motives of the witness, or by contradictory evidence.

A determination of a witness' credibility can be based on a number of factors other than the manner of testifying, including the inherent probability of the evidence, internal inconsistencies, whether or not the evidence is corroborated, and whether human experience demonstrates that the evidence is logically incredible. *Tew v. DMV*, 179 Or App 443 (2002).

Proponent Landers presented evidence that he did not observe irrigation or indications of irrigation on Tax Lot 200 from September 1993 through July 2004. However, Proponent Landers was not on his property everyday. Thus, it is quite possible that water was applied on the Hewitt Park Hillside without Proponent Landers observing said application. This reasonable inference is supported by the testimony of Mr. Brassler and Mr. Young. To the extent necessary, ALJ Gutman relied more on the evidence presented by Mr. Brassler and Mr. Young, and made findings of fact that reflect that determination.

Proponent Ames testified that Protestant did not make a call for water for the 6.94 acres on the Hewitt Park Hillside from 1994 through 2004. This testimony was corroborated by Mr. Young's testimony and the evidence presented by Protestant.

Mr. Graven presented evidence that from 1992 through 2005, during the month of March, he cleaned the Ditch on Tax Lot 200 and did not observe evidence of irrigation. Because Mr. Graven was only on the property during March, it is possible that water was applied on the Hewitt Park Hillside without Mr. Graven observing said application. This reasonable inference is supported by the testimony of Mr. Brassler, Mr. Young, and Mr. Smith. To the extent necessary, ALJ Gutman relied more on the evidence presented by Mr. Brassler, Mr. Young, and Mr. Smith, and have made findings of fact that reflect that determination.

Mrs. Davis testified that she never saw water applied to the Hewitt Park Hillside. However, Mrs. Davis was only on the Hewitt Park Hillside approximately six times in three years. As such, it is possible that water was applied on the Hewitt Park Hillside without Mrs. Davis observing said application. This reasonable inference is supported by the testimony of Mr. Young and Mr. Smith. To the extent necessary, ALJ Gutman relied more on the evidence presented by Mr. Young and Mr. Smith, and made findings of fact that reflect that determination.

Finally, even if ALJ Gutman found that Proponents and their witnesses were not credible, the evidence that was presented by Protestant and Protestant's witnesses did not prove irrigation of the 6.94 acres on the Hewitt Park Hillside for the period of March 1999 through July 2004.

Protestant next argued that Proponents failed to meet their burden. As indicated previously, ALJ Gutman found to the contrary for the period of March 1999 through July 2004.

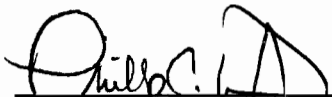
III. Proponent's arguments

Since ALJ Gutman determined that Proponent's met their burden of proof, the Proponent's arguments were not addressed

ORDER

IT is therefore ORDERED that the portion of the water right evidenced by certificate 81558 for use of water from Eagle Creek for irrigation of 6.94 acres in the SE1/4 NE1/4, Section 30, Township 9 South, Range 46 East, Willamette Meridian, is cancelled.

Dated this 12th day of July, 2007



Phillip C. Ward, Director
Water Resources Department

APPENDIX A

LIST OF EXHIBITS CITED

- Ex. A3: Baker County's Protest.
- Ex. A4: Notice of Proposed Partial Cancellation.
- Ex. A5: The affidavit of John Ames asserting nonuse of water right certificate 81558.
- Ex. A6: The affidavit of Byrl E. Landers asserting nonuse of water right certificate 81558.
- Ex. A7: Water Right Certificate 81558 and final proof map.
- Ex. A8: Final Order PC 97-1.
- Ex. P1: Aerial photo of area in question.
- Ex. P2: Assessor's map of area in question.
- Ex. P7: Affidavit asserting nonuse with attachments.
- Ex. P10: Map of area in question with topography.
- Ex. P12: Map of area in question with markings on it.
- Ex. R1: Respondent's Exhibit containing 104 pages.