

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

WALLOWA COUNTY

IN THE MATTER OF CANCELLATION )  
OF A WATER RIGHT IN THE NAME )  
OF JAMES HAYS TO USE WATERS )  
OF ALDER CREEK )  
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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, allowed by decree of the Court in the Matter of the Determination of the Relative Rights to the Various Claimants to the Use of the Waters of Wallowa River and Its Tributaries, tabulated in the name of James Hays at Volume 5, page 172, Order Record of the Water Resources Director, is for the use of water from Alder Creek with a priority date of 1878, as a supplemental supply to water from the Alder Slope Ditch, for irrigation of a certain 130 acres, being: 37.0 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$  and 28.0 acres in SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 16; and 33.0 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$  and 32.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 15, Township 2 South, Range 44 East, W.M., and is described by the certificate recorded at page 3050, Volume 4, State Record of Water Right Certificates.

Notice dated July 21, 1978, of initiation of the proceeding for cancellation of the subject water right was given pursuant to ORS 540.631 to Vernon and Sally Robinson, Guy and Joyce Davis, William G. George, Don Stein, William and Mattie Hays, and Stephen Hays as owners and/or occupants of the real property to which the water right in question is appurtenant.

No protest has been filed against cancellation of that portion of the water right in question which is appurtenant to real property owned by William G. George or Don Stein.

On August 18, 1978, a protest in the names of Stephen Hays, W.E. Hays and Mattie Hays was filed against cancellation of that portion of the subject water right appurtenant to the Hays' property. On August 22, 1978, a protest in the names of Guy Davis and Joyce Davis was filed against cancellation of that portion of the subject water right appurtenant to the Davis' property. On September 18, 1978, a protest in the names of Vernon Robinson and Sally Robinson was filed against cancellation of that portion of the subject water right appurtenant to the Robinson's lands.

On November 29, 1978, at the time and place set for hearing in the above entitled matter, a prehearing conference was held and a stipulation was made between the parties in regard to the facts as to the use of water under the provisions of the water right in question as it pertains to the Davis property. The said stipulation limits the use of water under the subject water right, on the Davis property, to: "Use of water from an unnamed spring within the N $\frac{1}{2}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 15, Township 2 South, Range 44 East, W.M., for domestic use in a single-family residence in the said N $\frac{1}{2}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 15; and use of water from a spring branch for stock and supplemental irrigation of 0.25 acre, with diversion and use all within the said N $\frac{1}{2}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 15; all with the priority date of 1878."

At the close of the prehearing conference, the parties agreed to a postponement of the hearing to a new date to be determined.

Pursuant to the Water Resources Director's Second Amended Notice of Hearing dated August 21, 1979, the above entitled matter was brought to hearing before Mr. James W. Carver, Jr., Water Resources Department, in the Wallowa County Courthouse in Enterprise, Oregon, on September 25, 1979. Protestants Vernon and Sally Robinson and Stephen Hays were represented by Mr. Jonel K. Ricker, Attorney at Law, Enterprise, Oregon. The proponents were not represented by counsel.

The relative locations of the channel of Alder Creek, Silver Creek Ditch, Upper Alder Slope Ditch, and the lands to which the water right in question are

appurtenant are shown on Figure 1, herein, which is a photocopy of Exhibit "D" which, in turn, is a photocopy of a portion of the Wallowa County Assessor's tax lot map for Township 2 South, Range 44 East, W.M.

The specific lands to which the water right in question is appurtenant are shown by Figure 2, herein.

#### RULING ON MOTION

At the conclusion of the proponents testimony, protestant moved for dismissal of the proceeding on grounds that proponents had failed to bear their burden of proof.

Motion is denied.

#### EVIDENTIARY RULING

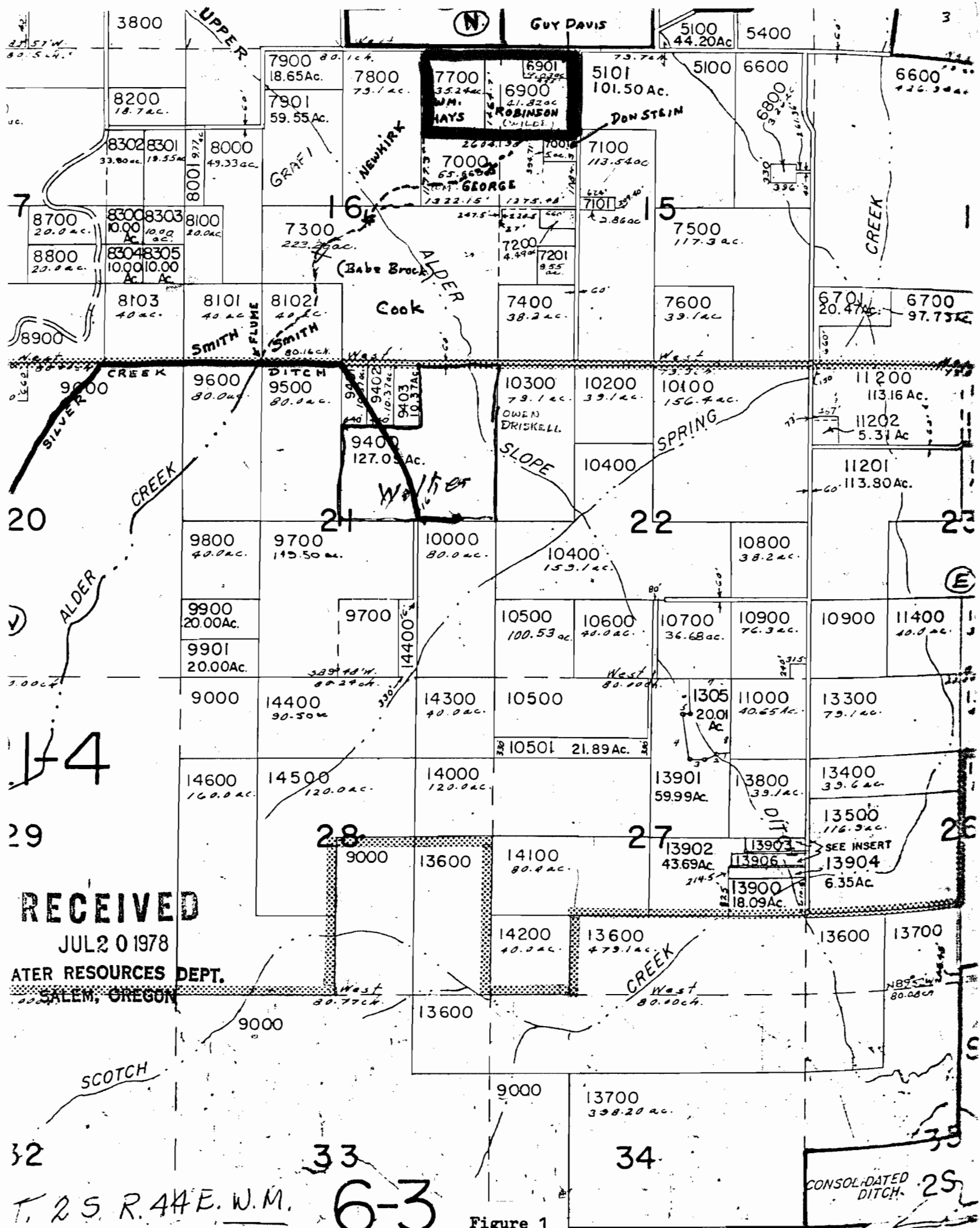
Protestant offers as exhibit "M" an affidavit by Reatha McCormack. Protestant states that said Reatha McCormack was a resident of Wallowa County, Oregon, and in good health on the date of hearing.

It is agreed between parties that the said affidavit is not best evidence; however, no objection having been made by proponents, the said affidavit is received in accord with OAR 137-03-050(3).

#### FINDINGS OF FACT

Water may be appropriated under the water right in question only at such times as the appropriator has need for use of the water for irrigation within the limits of the irrigation season and there is not sufficient water available under the provisions of the primary water right for the subject lands from Hurricane Creek through the Upper Alder Slope Ditch for such use.

The Newkirk, Cook, Smith, and Walker properties, identified on Figure 1, all have irrigation rights through the Silver Creek Ditch. The Newkirk, Cook, and Walker properties also have irrigation and/or supplemental irrigation rights from Alder Creek. The Smith property has a domestic and stock water right from Alder

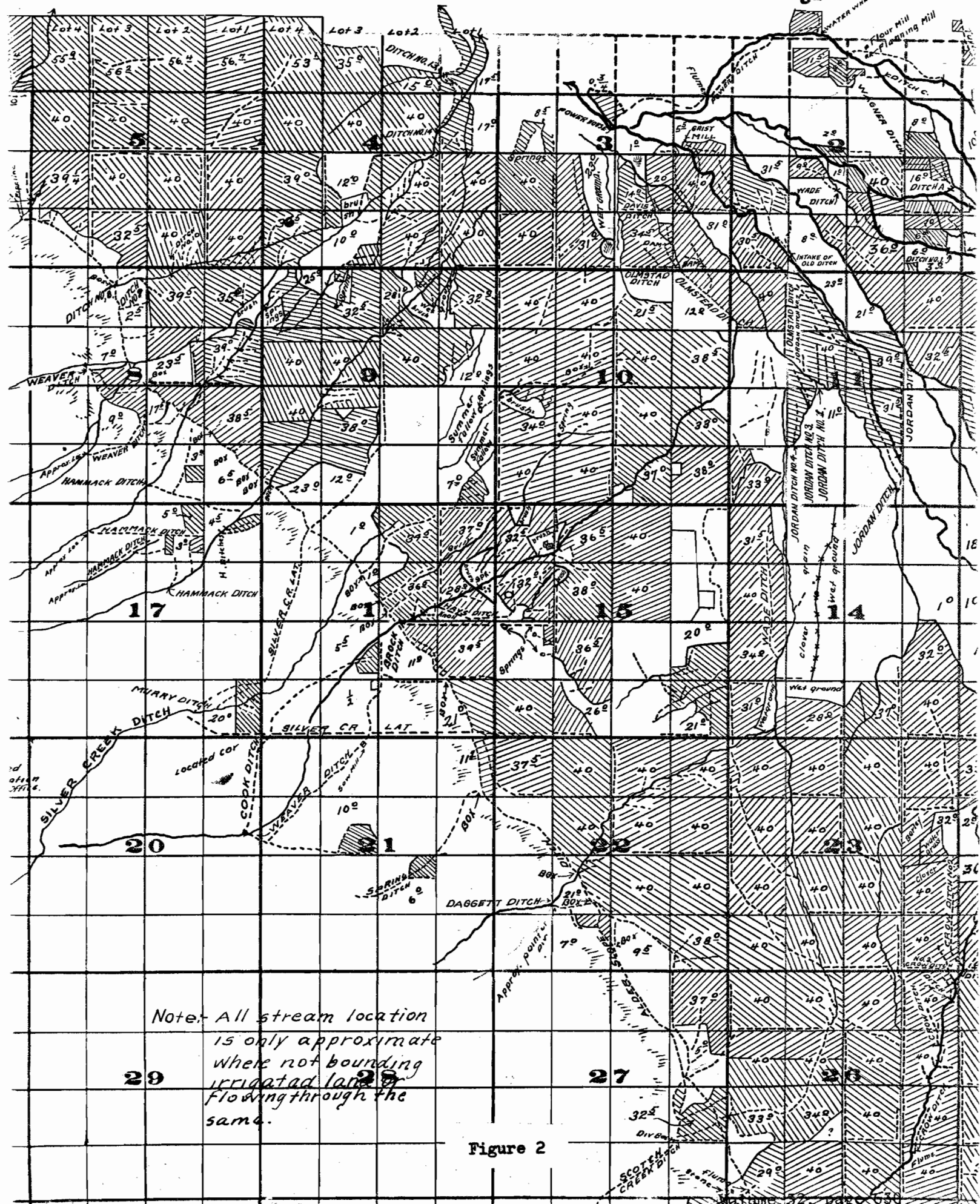


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Figure 1

T. 2 S. R. 4 E. W.M.

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Note: All stream location is only approximate where not bounding irrigated land flowing through the same.

Figure 2

Creek. All of the aforesaid rights from Alder Creek for the aforesaid properties are inferior in priority to the water right in question.

As shown on Figure 1, the channel of Alder Creek intersects with the channel of the Silver Creek Ditch at the north line of the Northwest Quarter of Section 21. At that point a flume carries the flow of Alder Creek across the channel of Silver Creek Ditch. There is, and has been for many years, a door in the side of the flume that can be opened to divert the waters of Alder Creek into the channel of Silver Creek Ditch.

At the intersection of the channel of Alder Creek with the Upper Alder Slope Ditch, Alder Creek passes under the Upper Alder Slope Ditch by flowing through a metal culvert pipe which passes under a concrete flume section carrying the flow of Upper Alder Slope Ditch. A headgate installed in the side of the said concrete flume section can be regulated to release water from the Upper Alder Slope Ditch into the channel of Alder Creek.

Testimony was in agreement that Alder Creek is a seasonal stream with sufficient flows for irrigation purposes occurring during the period of snow-pack melt, usually within the months of May and June of each year.

The testimony of the several witnesses indicates that water was available in Alder Creek that could have been demanded by the protestant for use under the provisions of the water right in question, within any successive five year period within the span of years considered in this matter.

The uncontested testimony of the proponents was that water from Alder Creek was not used for irrigation of any of the lands to which the water right is appurtenant during the years of 1968, 1969, 1970 or 1971.

The proponents further testified that with the exception of the years 1977 and/or 1978, the waters of Alder Creek were used on lands lying above the Hays property and that not enough water passed on down the channel of Alder Creek to

provide for irrigation of the lands to which the water right in question is appurtenant.

The protestants testified to the following:

(a) During the month of May, 1972, the channel of Alder Creek was cleaned out from the west line of the George property up to the intersection of Alder Creek with the Silver Creek Ditch, and Alder Creek water was brought down the channel by the protestants and used for irrigation of approximately seven acres of grass pasture in the northwest corner of the Hays property.

Again in 1973, water from Alder Creek was used for irrigation of the same area during the early portion of the irrigation season.

(b) During the early part of June, 1974, Mr. David Tucker, who rented the Hays property and had the use of the farmland during the years of 1974 and 1975, turned water out of Upper Alder Slope Ditch into the channel of Alder Creek and used the water for irrigation of an unspecified crop on six or seven acres of land located in the southwest corner of the Hays property. Mr. Tucker's testimony was that he believes the water from Upper Alder Slope Ditch was augmented by some natural flow coming down the channel of Alder Creek; and that after approximately ten days of use there was not water available in either source to continue irrigation of the said land.

Mr. Tucker further testified that the same lands were irrigated in the same manner and at the same time of the year in 1975.

(c) During the month of May, 1977, the channel of Alder Creek was again cleaned out from the west line of the George property up to the intersection of Alder Creek with Silver Creek Ditch and Alder Creek water was brought down the channel by protestants and used for irrigation of five or six acres of potatoes in the southeast corner of the Hays property and five or six acres of corn in the northwest corner of the said property. Mr. Stephen Hays testified that they received water for no more

than three weeks in 1977, and that water was not available from the Upper Alder Slope Ditch during the beginning of irrigation of the said lands in 1977.

No testimony was offered to show use of water from Alder Creek under the provisions of the water right in question on any of the Robinson lands within the span of years from 1968 through 1978.

#### ULTIMATE FINDINGS OF FACT

Testimony in regard to use or nonuse of water under the provisions of the water right in question was not in agreement as to the years of 1972 through 1975. However, it is noted that the testimony of the protestants was directed to specific times and areas of land irrigated, while that of the proponents was directed more to utilization of the available waters of Alder Creek on upstream lands in the absence of demands for the water for use by the protestants.

Proponents have the initial burden of proof of the occurrence of nonuse resulting in forfeiture of the water right. Therefore, where conflict in the testimony of the several witnesses results in doubt as to facts in issue, that doubt is resolved in favor of the protestants.

A careful consideration of the testimony adduced shows that with the exception of a certain not more than six acres of land located within the northwest corner of the Hays property, being within the NW $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 16, Township 2 South, Range 44 East, W.M., which six acres were irrigated during the irrigation seasons of 1972, 1973 and 1977, the land to which the water right in question is appurtenant was not irrigated under the provisions of said water right for periods for five and more 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 question before the Water Resources Director in this matter is whether there has occurred a period of five or more successive years of nonuse of water under the provisions of the water right in question, with water having been available in Alder Creek.

With the exception of that portion of the water right in question appurtenant to not more than six acres of land located within the northwest corner of the Hays property, water appropriated under the provisions of the water right in question was not used for irrigation of the subject lands for a period of five and more successive years of nonuse, thereby resulting in a forfeiture of said right.

Therefore, that portion of the water right in question being for the appropriation of water from Alder Creek with a priority date of 1878, as a supplemental supply of water from the Alder Slope Ditch, for irrigation of a certain 31.0 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$  and 28.0 acres in SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 16, and 33.0 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$  and 32.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 15, Township 2 South, Range 44 East, W.M.,

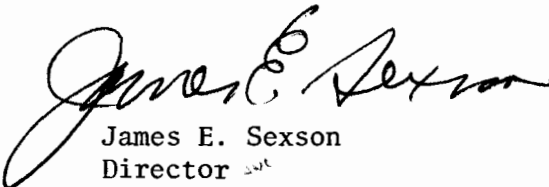
should be canceled pursuant to the provisions of ORS 540.610 to 540.650.

ORDER

NOW, THEREFORE, it is ORDERED that the right to appropriate waters of Alder Creek with a priority date of 1878, as a supplemental supply of water from Alder Slope Ditch, for irrigation of a certain 31.0 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$  and 28.0 acres in SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 16, and 33.0 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$  and 32.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 15, Township 2 South, Range 44 East, W.M., being a portion of the right described by the certificate recorded at page 3050, Volume 4, State Record of Water Right Certificates, in the name of James Hays, be, and the same hereby is, canceled.

It is FURTHER ORDERED that the said certificate of water right is canceled, and in lieu thereof a new certificate be issued to describe the remaining right being for the appropriation of water from Alder Creek and springs, with a priority date of 1878, as a supplemental supply to water from Alder Slope Ditch for irrigation of 0.25 acre in N $\frac{1}{2}$  NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 15, 6.0 acres in NW $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 16; and for domestic and stock use in W $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 15 and E $\frac{1}{2}$  NE $\frac{1}{4}$  of Section 16, all within Township 2 South, Range 44 East, W.M.

Dated at Salem, Oregon this 18th day of January, 1980.

  
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.