

BEFORE THE WATER RESOURCES DIRECTOR OF OREGON

UNION COUNTY

IN THE MATTER OF CANCELLATION OF )  
WATER RIGHTS IN THE NAMES OF O. E.)  
SILVERTHORN & ALICE O. ALLEN TO )  
THE WATERS OF MILL CREEK AND )  
HULICK BRANCH OF MILL CREEK )  
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STATEMENT, FINDINGS,  
CONCLUSIONS AND ORDER  
DISMISSING PROCEEDING

STATEMENT

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.

The water rights in question are:

(a) For the use of not to exceed 0.25 cubic foot per second of the waters of Mill Creek, with a priority date of 1870, for irrigation of 20.0 acres in SE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 16, Township 3 South, Range 40 East, W.M., being a portion of the right described by the certificate issued to Alice O. Allen and recorded at page 313, Volume 1, State Record of Water Right Certificates.

(b) For the use of not to exceed 1.0 cubic foot per second of water from Mill Creek and Hulick Branch of Mill Creek, with a priority date of July 23, 1925, for irrigation of 20.0 acres in NE $\frac{1}{4}$  NW $\frac{1}{4}$ , 20.0 acres in SE $\frac{1}{4}$  NW $\frac{1}{4}$  and 40.0 acres in NE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 16, Township 3 South, Range 40 East, W.M., being a portion of the right described by the certificate issued to O. E. Silverthorn and recorded at page 5812, Volume 6, State Record of Water Right Certificates.

Notice dated June 26, 1978, of initiation of the proceeding for cancellation of the subject water rights was given pursuant to ORS 540.631 to Burton J. Hill and Ilene C. Hill and to Anton Pedro and Maur Pedro as owners and/or occupants of the real property to which the said water rights are appurtenant.

On July 24, 1978, a protest was filed in the office of the Water Resources

Director by Burton J. Hill and Ilene C. Hill, through their attorney, Mr. Ross E. Hearing, Attorney at Law, LaGrande, Oregon, against the proposed cancellation of the subject water rights.

Pursuant to notice of hearing dated October 19, 1978, the matter was brought to hearing before Mr. James W. Carver, Jr., Water Resources Department, in the Jury Room of the Union County Courthouse in LaGrande, Oregon, on November 30, 1978. The proponents of cancellation were represented by Mr. Sam H. Ledridge, Attorney at Law, LaGrande, Oregon. The protestants were represented by Mr. Ross E. Hearing, Attorney at Law, La Grande, Oregon.

A reduced photocopy of protestants' Exhibit "A", being a copy of the Union County Assessor's plat of a portion of Section 16, Township 3 South, Range 40 East, W.M., to which certain pertinent data were added, showing the relative location of the lands to which the water rights in question are appurtenant and the streams and ditches from which the said lands receive water under said water rights, is included herein as Figure 1.

During the irrigation season, a substantial portion of the water reaching said lands via the watercourse indentified on Figure 1 as "Hulick Creek" is conveyed from the main channel of Mill Creek by a watercourse which seperates from the said main channel within the SE $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 22, Township 3 South, Range 40 East, W.M., approximately one mile upstream from the town of Cove.

#### EVIDENTIARY RULING

Protestants' exhibit "B" is a signed copy of a document titled: "Farm Lease", which pertains to the lands identified on Figure 1 by a red border. Protestants' exhibit "C" is an unsigned copy of a document titled: "Farm Lease", which pertains to the lands identified on Figure 1 by a yellow border.

Initially protestants' exhibits "B" and "C" were offered and received

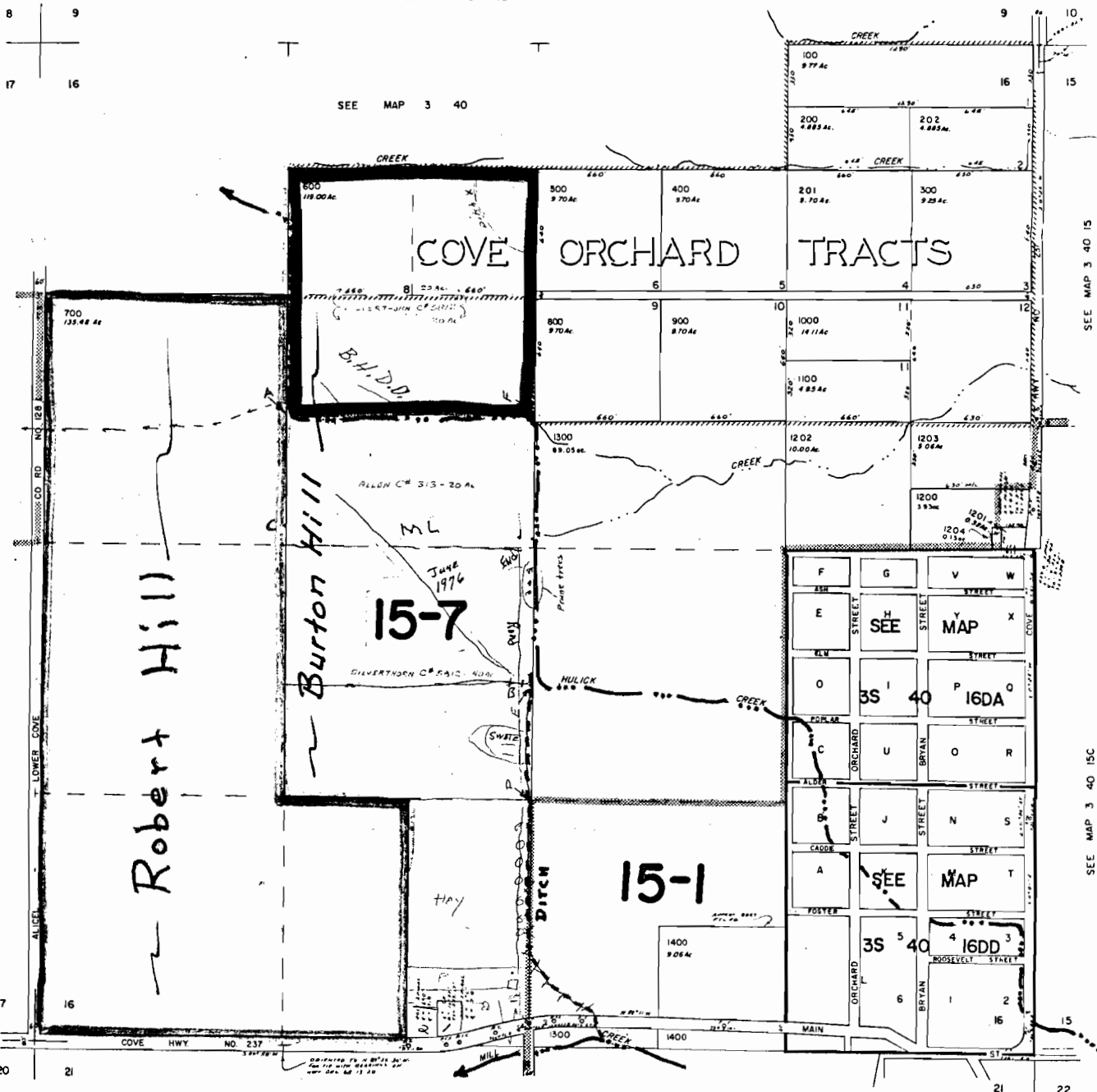
P. 664

SECTION 16 T 3 S R 40 E W.M.  
UNION COUNTY  
1" = 400'

3S 40  
COVE & IND

SEE MAP 3 40

SEE MAP 3 40



SEE MAP 3 40

SEE MAP 3 40 15

SEE MAP 3 40 15C

FIGURE 1  
(REDUCTION FROM ORIGINAL)

Protestants Ex A

without objection, only for the purpose of identifying the subject lands by the property descriptions contained therein.

Subsequently, said exhibits were offered in their entirety. Proponents object on the grounds that the terms of said leases are not material to this proceeding.

Testimony was received from both, protestants and proponents, that Robert Hill, a proponent of cancellation, was in possession of the lands identified on Figure 1 by the red border from June 1, 1969 to mid-October of 1975; and in possession of the lands identified on Figure 1 by the yellow border from October of 1969 to October of 1975. Both parties are in agreement that protestants' exhibits "B" and "C" are copies of documents by means of which, together with other similar documents, protestants conveyed to proponent Robert Hill possession of the subject lands for the limited period of time ending in October of 1975.

Proponents' objection is overruled and protestants' exhibits "B" and "C" are received in their entirety.

#### FINDINGS OF FACT

The testimony of Mr. Robert Hill, a proponent of cancellation, was to the effect that by means of leases from the protestants, Burton J. Hill and Ilene C. Hill, he had possession of the lands to which the water rights in question are appurtenant, throughout the cropping years of 1970 through 1975; that throughout said period of years the lands were farmed by him or under his direct supervision; and that at no time within said period of years was any of the subject lands irrigated.

Mr. Robert Hill further testified that the only channel or ditch work he carried out in the vicinity of the subject lands was to convey Hulick Branch waters across the subject lands (point "F" to point "A" on Figure 1), and on west, onto his own adjacent lands; that no ditches were constructed or maintained for diversion of

water from Mill Creek or from Hulick Branch for the subject lands, or for distributing water over the subject lands.

Mr. Burton Hill, protestant, testified that he has owned the subject lands since 1947, and, prior to leasing the lands to Mr. Robert Hill in 1969, he had personally farmed the lands and irrigated them from Mill Creek and Hulick Branch. His method of irrigation was to make small cuts in the bank between the watercourse and the farm fields, dam up the watercourse downstream of the cut by building a temporary dam in the channel, using boards and plastic, causing the water to back up in the channel and flow out through the cut and into ditches used to distribute the water over the lands being flood irrigated.

Mr. Burton Hill testified that he was on the subject lands in late August of 1970, and observed freshly made cuts through the bank between the watercourse and the field identified on Figure 1 by the yellow border (yellow tract); that he was again on the subject lands in June of 1971 and again observed fresh cuts through the bank between the watercourse and the "yellow tract" and got his motorcycle stuck in the mud within a large wet area within the easterly portion of the  $S\frac{1}{2}$   $SE\frac{1}{4}$   $NW\frac{1}{4}$  of Section 16; that he was again on the subject lands during the fall of 1972 and again observed cuts in the watercourse bank that had recently run water out onto the "yellow tract".

Mr. Burton Hill further testified that in June of 1973, he was again on the lands and while there for a few days, borrowed the use of a small farm tractor with an attached blade and used it to construct some ditches from Hulick Branch into the southwesterly portion of the "red tract", placed a temporary dam in the channel of Hulick Branch and forced water out onto the "red tract" for irrigation of the crop planted there.

Mr. Burton Hill further testified that in July of 1974, he observed water

on the land in the southerly portion of the "yellow tract" and that in 1976, he assisted Mr. Anton Pedro, who leased the property subsequent to the termination of Robert Hill's lease, in the construction of contour ditches within the "yellow tract" for the purpose of irrigating the lands by surface (flood) irrigation methods.

Mr. Anton Pedro testified that he had possession of the subject lands for the entire cropping year of 1976, and subsequent years, and that he irrigated the lands during the irrigation season of 1976 with water from Mill Creek and Hulick Branch.

Ilene C. Hill, wife of Burton Hill, testified that she was on the property for a few days during the summer of 1970 and saw water on the lands within the southeasterly portion of the "red tract"; that she was also on the subject property within the summer season of 1973 and the summer season of 1975 and on both occasions observed recently constructed cuts through the bank of the watercourse which runs along the easterly side of the "yellow tract", and water on portions of the lands within the said "yellow tract".

Several other individuals were called and testified, but their testimony was not definitive as to use or nonuse of water on the subject lands within the period of years of 1970 through 1975.

#### ULITMATE FINDINGS OF FACT

Pursuant to the provisions of ORS 540.610(1), as defined by the Oregon Supreme Court in Withers v. Reed, 194 Or 541 (page 558), and in Bausch v. Myers, 273 Or 376, the question before the Water Resources Director in this matter is one of fact: Whether or not water appropriated under the water rights in question was applied to the beneficial use of irrigation of the subject lands without the occurrence of a period of five or more successive years of failure to make such use.

The proponents of cancellation have the burden to show, by a preponderance

of evidence, that water appropriated under the water rights in question was not applied to the beneficial use of irrigation of the subject lands, or a specific portion of the lands, for a period of five or more successive years, thereby working a forfeiture of the rights or the specific portion of the rights appurtenant to the lands upon which the five or more successive years of nonuse occurred.

There is not a preponderance of evidence to support a finding that any portion of the water rights in question has been forfeited as a result of the occurrence of a period of five or more successive years of nonuse.

CONCLUSION

This proceeding for cancellation of certain water rights described herein should be dismissed.

ORDER

NOW, THEREFORE, it is ORDERED that this proceeding for cancellation of certain water rights described herein be, and the same hereby is, DISMISSED.

Dated at Salem, Oregon this 27th day of February, 1979.

  
James E. Sexson  
Director