

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT**

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River,
a Tributary of the Pacific Ocean

United States of America; The Klamath Tribes; Klamath Irrigation District; Klamath Drainage District; Tululake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Klamath Hills District Improvement Co.; Malin Irrigation District; Midland District Improvement Company; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S. Luscombe; Berlva Prichard; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Reames Golf and Country Club; Van Brimmer Ditch Co.; Plevna District Improvement Company; and Collins Products, LLC, Contestants

**AMENDED
PROPOSED ORDER**

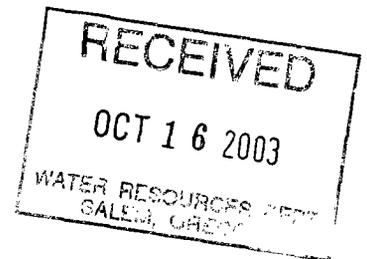
Case No. 112

Claims: 133

Contests: 2849, 3131, 3394, 3820, and 4161

vs.

Cameron A. Curtiss, Claimant



HISTORY OF THE CASE

THIS PROCEEDING under the provisions of ORS Ch. 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

On November 30, 1990, Cameron A. Curtiss and Deeanna E. Curtiss submitted a Statement and Proof of Claim for a total of 38.4 cubic feet per second (cfs) from four points of diversion located on Moss Creek, Denny Creek, Rock Creek¹ and Upper Klamath Lake, for irrigation of 936.6 acres and for livestock. Claimant indicated that the basis for the claim was appropriation of water since January 25, 1909, with a claimed period of use from March through September. On June 8, 1999, Mr. Curtiss provided the Oregon Water Resources Department with

¹ Rock Creek was renamed Denny Creek shortly before Mr. Curtiss filed his Statement and Proof of Claim. I will refer to the stream now known as Denny Creek as Rock Creek throughout this order.

a copy of a deed showing that Deanna E. Curtiss no longer owned an interest in the property appurtenant to the claim.

On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin General Adjudication, issued a Summary Preliminary Evaluation recommending approval of the claim and indicating that it appeared that Mr. Curtiss had established the elements of a pre-1909 claim to the extent of use claimed, with a priority date of January 25, 1909, and with a period of use from March 1 through October 31.

On May 8, 2000, WaterWatch of Oregon, Inc., filed Contest 2849 against the claim and against the Adjudicator's Preliminary Evaluation. On May 20, 2003, WaterWatch of Oregon, Inc. was dismissed as a party contestant from all proceedings in the Klamath Basin General Adjudication.

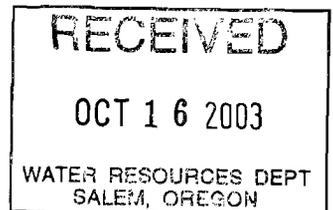
On May 8, 2000, Horsefly Irrigation District, Langell Valley Irrigation District, Medford Irrigation District, and Rogue River Valley Irrigation District (Irrigation Districts) filed Contest No. 3131 against the claim and against the Adjudicator's Preliminary Evaluation. Contestant Irrigation Districts voluntarily withdrew their contest on March 26, 2002.

On May 8, 2000, the individuals and entities identified as the Klamath Project Water Users² (KPWU) filed Contest 3394 against the claim and against the Adjudicator's Preliminary Evaluation. Also on May 8, 2000, the United States of America (United States) filed Contest 3820 against the claim and against the Adjudicator's Preliminary Evaluation. The Klamath Tribes filed Contest 4161 on that same date, also contesting the claim and the Adjudicator's Preliminary Evaluation.

PROCEDURAL MATTERS

The Water Resources Department (OWRD) referred this matter to the Office of Administrative Hearings for a contested case hearing. A prehearing conference was held on April 23, 2002. All participants filed prehearing statements and appeared at the prehearing conference, at which the participants agreed to a discovery schedule and to dates for hearing.

² Klamath Irrigation District, Klamath Drainage District, Tulelake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement Company, Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Bradley S. Luscombe, Berlva Prichard (On June 24, 2002 Contestant Berlva Pritchard informed the Office of Administrative Hearings that she had sold her interest in property giving rise to her claims and contest and was no longer a participant in this contested case.), Don Vincent (On November 28, 2000, Contestant Don Vincent informed the Adjudicator that he had sold his interest in property giving rise to his claims and this contest and was no longer a participant in this contested case.), Randy Walthall, Inter-County Title Co., Winema Hunting Lodge, Inc., Reames Golf and Country Club, Van Brimmer Ditch Co., Plevna District Improvement Company, and Collins Products, LLC.



Pursuant to a Notice of Hearing mailed to all participants by certified mail on April 16, 2003, a hearing was held on June 3, 2003 for the purpose of admitting evidence into the record and cross-examining witnesses whose direct testimony had previously been filed and whose presence had been requested for cross-examination. William D. Young, Administrative Law Judge, presided. Mr. Curtiss appeared and was represented by his attorney, Mark G. Reinecke. The United States were represented by their attorney, Stephen R. Palmer. Contestant Klamath Tribes were represented by their attorney, Lorna Babby. The KPWU were represented by their attorney, Dan Kelly. The Oregon Water Resources Department (OWRD) was represented by Renee Moulun, an authorized agency representative. Written direct testimony, with attached exhibits, was provided by Cameron Curtiss, Bev Demetrakos, Bruce Lamoreaux, Alvert E. ABud@ Wampler, Donald E. Alexander, Diana Grimm, Teri Hranac, and Loring Gurney. Rebuttal testimony was also provided by Loring Gurney. Cameron Curtiss and Loring Gurney appeared as witnesses for cross-examination. At the hearing, Mr. Curtis withdrew that portion of his claim regarding Moss Creek, which had been identified in the claim as having one point of diversion and a rate of 1.5 cfs.³

I held the hearing record open to allow Mr. Curtiss an opportunity to file a written memorandum and to allow the Contestants and OWRD an opportunity to file written responses, to which the participants might reply. I received Mr. Curtiss' Proposed Order on July 10, 2003. The United States filed its Post-Hearing Memorandum on August 14, 2003. OWRD also filed its Response Memorandum on August 14, 2003. The Klamath Tribes elected not to file a written closing argument in this proceeding. Instead, the Tribes adopted by reference the post-hearing argument of the United States. KPWU elected to not file written argument in this proceeding, relying on the memoranda filed by the other participants. Mr. Curtis filed a Reply Memorandum on September 15, 2003. I closed the hearing record on that date.

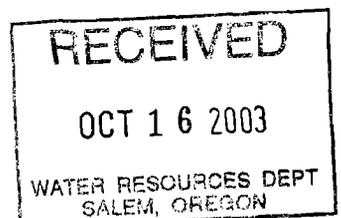
EVIDENTIARY RULINGS

I admitted all offered documentary evidence and written testimony without objection, including (1) OWRD's Exhibits 1 and 2; (2) Klamath Tribes Exhibits "1", "2" and "3"; (3) United States of America, Exhibits "1", "2", "3" and "4" and (4) the direct testimony and exhibits of Cameron Curtiss, Bev Demetrakos, Bruce Lamoreaux, Alvert E. "Bud" Wampler, Donald E. Alexander, Diana Grimm and Loring Gurney, including Mr. Gurney's written rebuttal testimony.

ISSUES

Claimants filed the above entitled claim based upon use of water commenced before February 24, 1909. Contestants raise the following issues, more specifically stated in the Statements of Contest filed in these matters:

³ Mr. Curtiss indicated that he had not utilized waters from the point of diversion on Moss Creek for a period exceeding five years and that he would file the appropriate documents to effect the withdrawal of this portion of his claim.



(1) Have the required pre-1909 elements been established and, if so, what is the priority date for claim 133?

(2) Does the record support the rate, duty, actual use, points of diversion, seasonal limitations and acreage claimed?

(3) If a pre-1909 water right is established, what is the appropriate season of use for irrigation?

FINDINGS OF FACT

1. Beginning in 1888, William Spence and his brothers began the process of acquiring real property in Klamath County, Oregon. By 1906, William Spence had bought out his brothers and other landowners, putting together what is now known as the Rock Creek Ranch, a property encompassing approximately 2,000 acres in Sections 28, 33, and 34 Tp. 36 R7E and Sections 4 and 9 Tp. 37S. (*Cameron Curtiss Testimony; Diana Grimm Testimony; OWRD exhibit 1, pgs. 43-61; Claimant's exhibit 1.*)

2. On September 8, 1888 William Spence filed the following Notice of Appropriation of Water Right:

* * * * *

To all persons to whom these presents shall come, Greeting:

Know Ye that I William Spence of Klamath County State of Oregon claim and hereby appropriate Two Thirds of the Water flowing in a stream known as Balls Creek or Rock Creek situated in Tp. 37S R7 East Will Mer. and more particularly described as rising in the North Westerly corner of Tp. 37S R7 East and flowing North Easterly through sections 8, 9 + 4 Tp. 37S R7 East.

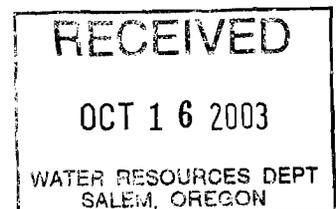
That I claim the right to divert and use Two Thirds of the Water flowing in said Balls or Rock Creek for Irrigating, Mechanical and domestic purposes.

That I intend to use said water on my premises situated on Balls' Bay in Klamath County State of Oregon described as Lots 7, 8 + 9 Sec 32 Lots 4, 5, 6, 7 + 8 Sec. 33 + Lots 3 + 4 Sect 28 + Lot1 Sec 33 Tp 36S R7E.

* * * * *

(OWRD exhibit 1, pg. 12.)

3. While the Spence family owned Rock Creek Ranch, an irrigation system was developed and completed by 1906. The primary source of irrigation for the ranch was Rock Creek, which watered approximately 1,000 acres of the Rock Creek Ranch from its earliest days. Ditching was constructed and utilized to allow irrigation. Grass hay was raised from the irrigated lands and a large log hay barn was built to store hay. Near the beginning of the 20th Century, a Best Steam Engine was used to operate a low lift irrigation pump from Upper Klamath Lake



when waters of Rock Creek were insufficient. (*Donald E. Alexander Testimony*; Curtiss exhibit 4.)

4. On January 25, 1909, M.H Wampler and R.S. Moore posted a Notice of Water Appropriation, which stated:

Notice is hereby given that M. H. Wampler and R.S. Moore, of Klamath County, Oregon, and having title and possessory rights to land in said county and in the vicinity of said Rock Creek, and being citizens of the United States and of the State of Oregon, that they hereby appropriate of the waters of Rock Creek, in Klamath County, Oregon, six hundred (600) cubic inches, by miners measurement under six inch pressure, being in volume a continuous flow of fifty (50) cubic feet per second for the purpose of developing electric power and its transmission and energy, for light and all purposes, and also for the purpose of irrigation and reclamation of arid land, for mining, for domestic use, manufacturing and municipal uses.

The point of diversion is where this notice is posted, on the north or left bank of Rock Creek, about 300 feet westerly from the northeast corner of the southeast quarter of the southeast quarter of section 8, in Tp. 27 South, Range 7 East of Willamette Meridian.

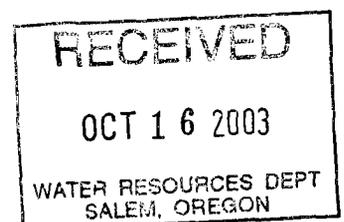
The water will be diverted by a dam at said point of diversion and by the construction of one or more headgates at the intake. The dimensions of the ditch will be as follows: ten feet wide at the top and seven feet wide at bottom, and three and one-half feet deep, and said ditch will be known as Rock Creek Ditch.

The general course of said ditch will be northeasterly for a distance of about one-half mile, * * * to its terminus, about one-fourth mile easterly of the quarter section corner between sections 8 and 9, Tp. 37S R7 E.

(OWRD exhibit 1 pgs. 10-11.)

5. Mr. Curtiss is the present owner of the Rock Creek Ranch. (*Cameron Curtiss Testimony*; OWRD exhibit 1, pgs. 83-89). Approximately 1,000 acres of Rock Creek Ranch have been irrigated by water diverted from Rock Creek since the late 1880s. That same property can be irrigated from waters of Upper Klamath Lake. Mr. Curtiss can irrigate his entire ranch from either Rock Creek or Upper Klamath Lake. (OWRD exhibit 1, pg. 84).

6. On November 30, 1990, Cameron Curtiss submitted a Statement and Proof of Claim (Claim No. 133) to OWRD for 39.4 cubic feet per second (cfs) from three points of diversion located on Moss Creek, Denny Creek (Rock Creek), and Upper Klamath Lake for irrigation of 936.6 acres and for livestock. The period of use claimed was March through September of each year for irrigation, and year-round for livestock watering. The priority date claimed was January 25, 1909. (OWRD exhibit 1, pgs. 1-5.)



7. The point of diversion on Rock Creek is located at the NW¼, SE¼, Section 9, T 37S, R 7E, Willamette Meridian. The distribution system for Rock Creek is a ditch 6 feet wide, 4 feet deep, with a slope of 1 foot/100 feet. Waters taken from the point of diversion on Rock Creek are capable of irrigating all the land identified with Claim 133. (OWRD exhibit 1, pgs. 2, 6, 34 and 83-84.)

8. The point of diversion on Upper Klamath Lake is located at the NE¼ SE¼ Section 32 T 36S, R7E, Willamette Meridian, and Lot 7 Section 33 T 36S, R 7E. The distribution system for Upper Klamath Lake consists of s two 24-inch CMP's with headgates that run to a 30-HP electric motor on a turbine pump, leading to an open discharge to a ditch. Waters taken from this point of diversion on Upper Klamath Lake are also capable of irrigating all the land identified with Claim 133. (OWRD exhibit 1, pgs. 2, 6, 34 and 83-84.)

9. Mr. Curtiss can draw 13.5 cfs from Rock Creek for irrigation of property appurtenant to Claim 133. A normal season of use for irrigation within the Klamath Basin begins March 1 and runs through October 31 of each year. Mr. Curtiss' season of use ends on September 30 of each year. Because of the reduced season of use, the duty for Claim 133 may not exceed 3.06 af/acre for irrigation.

10. Mr. Curtiss waters 2,500 head of livestock from the irrigation and drainage ditches on Rock Creek Ranch at a rate of 0.05 cfs. (OWRD exhibit 1, pgs. 83 and 88.)

11. Open inspection for this claim occurred in October 1999. (OWRD exhibit 1, pgs. 37-39.)

CONCLUSIONS OF LAW

1. Mr. Curtiss established the existence of a pre-1909 water right for that part of Claim 133 affecting Rock Creek, with a priority date of January 25, 1909. He did not establish the existence of a pre-1909 water right for that part of Claim 133 affecting Upper Klamath Lake.

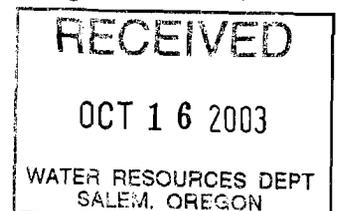
2. Mr. Curtiss' pre-1909 water right on Rock Creek entitles him to withdraw water from a single point of diversion located at the NW¼, SE¼, Section 9, T 37S, R 7E, Willamette Meridian to irrigate 936.6 acres, with a rate of 13.55 cfs, and a duty of 3.06 af/acre.

3. The irrigation season regarding this pre-1909 water right runs from April 1 to September 30 of each year.

OPINION

Pre-1909 Water Right. To establish a claim for a pre-1909 water right in the Klamath Basin General Stream Adjudication, a claimant must prove the following elements: (1) a *bona fide* intent prior to February 24, 1909, to apply the water to a currently existing or currently

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contemplated future beneficial use; (2) a diversion from the natural channel; and (3) application of the water within a reasonable time to some useful purpose. ORS 539.010; *In Re Water Rights to Waters of Silvies River*, 115 Or. 27 (1925); *In Re Rights of Deschutes River and Tributaries*, 134 Or. 623 (1930).

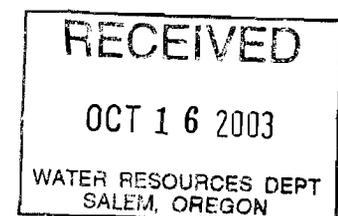
Claimant has the burden of establishing the claim by a preponderance of the evidence. ORS 539.110; ORS 183.450(2); *see Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of 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). Claimant met his burden with regard to his claim for Rock Creek. He did not meet his burden with regard to his claim for Upper Klamath Lake.

Rock Creek

Water Use Prior to February 24, 1909: The first question is whether the evidence establishes the existence of a *bona fide* intent prior to February 24, 1909, to apply the water to a currently existing or currently contemplated future beneficial use. The greater weight of the available evidence established that the Spence family developed the Rock Creek Ranch prior to 1909, irrigating approximately 1,000 acres from the waters of Rock Creek under Mr. Spence's 1888 Notice of Appropriation.

Given the passage of time since the claims were filed and the resulting unavailability of witnesses who can provide first-hand testimony, I found the testimony of Mr. Alexander particularly compelling. He was born on the ranch in 1923, shortly after his parents purchased it. He testified, from first-hand knowledge and reliable hearsay from family members and others, that the ditches and dikes were already in place and that the ranch had been fully developed when his parents purchased it. He also testified to the presence of a pump located near Upper Klamath Lake, and to farming and ranching being continuous as far back as he could recall. He testified to the presence of a Best steam engine being used for pumping water at the lake to the main canal for a truck garden, and to the engine's being "in use for many years and probably prior to 1909," reporting that they replaced the engine pump in 1928, and that it was "very old at that time." Mr. Alexander's testimony recounted the building of a log barn on the property in the late 1800s to store loose hay, which had been raised on "irrigated pasture land for decades prior to [his] family's purchase of the ranch." He concluded that because the barn certainly dated from before 1909 that it was likely that the Best steam engine was also in use on the property before 1909. He also referred to an old hay track and trolley system in the barn, which he found in the 1898 edition of the Sears & Roebuck catalog. (*Donald E. Alexander Testimony.*)

Mr. Alexander's testimony, when viewed in combination with the documentary record including the Cleghorn maps and the Wiley letter discussed below, convince me that the waters of Rock Creek have been used to irrigate approximately 1,000 acres of the Rock Creek Ranch since before the beginning of the 20th Century. Mr. Curtiss has met his initial burden of showing



a *bona fide* intent beneficially use water from Rock Creek for beneficial use, *i.e.*, for irrigation of pasture.

Diversion from Natural Channel. John C. Cleghorn, a registered professional engineer, performed surveys of the irrigation works on Rock Creek Ranch from June 30, 1923 through September 27, 1930. The maps identify the dates the irrigation works began and the dates that construction of the works was completed. According to the Cleghorn map, certified by him as true and correct, the last irrigation ditch was completed in 1906. (OWRD Exhibit 1, pgs. 106-107.)

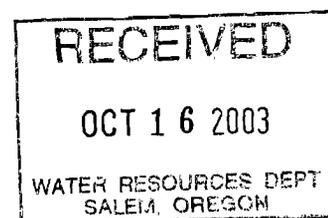
The map and statements by Mr. Cleghorn, made 70 years ago, are not contemporaneous with construction of the ditches or other diversion and are likely a result of hearsay. Like the Wiley letter, discussed below, I find it highly reliable as it is an official document upon which reasonable persons would have made important decisions when the document was prepared. Also, this map corroborates the testimony of Mr. Alexander and the Wiley letter. The consistency of the evidence regarding the existence of an irrigation system in place before 1909 is remarkable. The greater weight of the evidence establishes that ditching and other works to distribute the waters of Rock Creek existed prior to 1909.

Continuity of Use. Mr. Curtiss also provided evidence of historical use at a point far closer in time than the present-day affidavits. In July 1923 Mr. Alexander's father filed an application for a permit to appropriate water from Rock Creek for power development. In a July 16, 1923 letter to the State Engineer, from Wilson Wiley, an attorney for the elder Mr. Alexander, provided the following history:

* * * The Alexander Ranch (formerly known as the Doak Ranch) has been irrigated from [Rock Creek] since 1998. The ranch comprises about 1565 acres, and 1000 acres of the ranch have been irrigated since about 1887. Some years since that time it has been difficult to irrigate the full 1000 acres under ditches on account of shortage of water in Rock creek, as this creek averages about 6 to 13 second feet of water. No other use of the waters of Rock Creek has ever been made, and there are no other agricultural lands nearby or capable of being irrigated from it, unless it be a 120-acre ranch on the margin of the lake that water from the creek is not needed. Mr. Alexander can show by witnesses continuous use of the water of this creek for a period of upwards of thirty years according to information I have received. * * *

(Curtiss exhibit 4.)

I consider this document, although hearsay itself and based on hearsay, highly reliable. It was filed with the state water agency in an effort to establish an additional water right for power generation. In the letter, Mr. Alexander's attorney stated that he had witnesses available who could testify to continuous use of water from Rock Creek since about 1887. He went on to suggest that an adjudication of Rock Creek might be preferable to the application process for a water certificate. This letter establishes that about 1,000 acres of the Alexander ranch (Rock



Creek Ranch) had been irrigated by Rock Creek since 1887 (except when the creek would not supply sufficient water), and that ditching had taken place for irrigation more than thirty years before 1923.

Acreage and Diversion. Although Mr. Spence's notice of appropriation does not specify what property is to be irrigated, Mr. Wiley's letter established that about 1,000 acres of Rock Creek Ranch were, in fact, irrigated from the waters of Rock Creek the earliest days of the ranch, and certainly before 1909. It also established that ditching was used to spread the water throughout the ranch. The amount of property irrigated is about the same as that claimed by Mr. Curtiss. Given the difficulty in obtaining more persuasive evidence resulting from the passage of time, the greater weight of the available evidence establishes the existence of a pre-1909 water right for the acreage claimed.

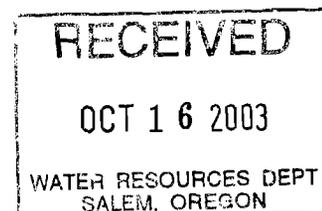
Mr. Curtis obtained testimony from witnesses to buttress his claim regarding continuity of use. Bruce Lamoreaux' family owned the ranch from 1953 until Mr. Curtiss' father bought it in 1964 and, according to him, irrigated the ranch "using at least 25 cubic feet per second of water, part of which was diverted from [Rock] Creek and part of which was drawn from Upper Klamath Lake." (*Bruce Lamoreaux Testimony.*) "Bud" Wampler also provided helpful testimony regarding continuity of use. Although he was not born until 1930, he grew up on the ranch next to the Rock Creek Ranch and has observed the "uninterrupted and continuous ranching and irrigation operations on the ranch. (*Alvert E. "Bud" Wampler Testimony.*) Finally, Bev Demetrakos testified that for the past 70 years she has watched the irrigation operation of Rock Creek Ranch and that it continuously used water from [Rock] Creek and Upper Klamath Lake to irrigate all the fields on the property. (*Bev Demetrakos Testimony.*)

Overall, the testimony of these witnesses show that the irrigation of Rock Creek Ranch has remained about the same over the decades and that there is no significant gap, of which these witnesses are aware, during which the water of Rock Creek was not used for irrigation of about 1,000 acres.

Upper Klamath Lake

Water Use Prior to February 24, 1909: Again, the first question is whether the evidence establishes the existence of a *bona fide* intent prior to February 24, 1909, to apply the water to a currently existing or currently contemplated future beneficial use. The greater weight of the available evidence does not establish the existence of the requisite intent prior to February 24, 1909 or actual diversion before 1909.

Mr. Alexander's testimony about the Best Steam engine did not establish active diversion of waters from Upper Klamath Lake prior to February 24, 1909. Mr. Alexander was born fourteen years after 1909 and his conclusion that the engine had been "in use * * * probably prior to 1909," is mere conjecture. Although I am generally persuaded by his testimony, this part of his testimony was uncorroborated by other evidence and is insufficient by itself to establish a pre-1909 water right.



Mr. Curtiss pointed out that the Cleghorn map identifies a ditch called the "west ditch," begun in 1893. He argues that there was no reason for the west ditch unless there was a diversion located on Upper Klamath Lake that the diversion must have to be constructed between 1893 and 1906. He also points out another point of diversion on the, leaving us with two lake diversions.

As stated in the findings, the entire property can be irrigated from either the Rock Creek or the Upper Klamath Lake diversions. The existence of the west ditch does not make it more likely than not that a point of diversion had been established on Upper Klamath Lake prior to 1909. On this record Mr. Curtis did not meet his burden of proving that a predecessor-in-interest had an intent to use the waters of Upper Klamath Lake to irrigate Rock Creek Ranch before February 24, 1909 or that water from that source was used within a reasonable time. *See* ORS 539.010(4); *see also In re Water Rights of Silvies River*, 115 Or 27 (1925). Because of this conclusion regarding the diversion from Upper Klamath Lake, it is unnecessary to discuss the other elements of the claim regarding that point of diversion.

Point of Diversion and Place of Use. No participant contested and the evidence established the accuracy of Mr. Curtiss' identification of the point of diversion on Rock Creek as NW¼, SE¼, Section 9, T 37S, R 7E. Likewise, no participant contested and the evidence established the accuracy of Mr. Curtiss' identified places of use.

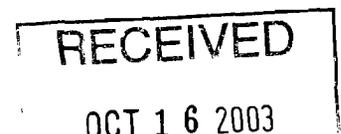
Season of Use and Priority Date. When Mr. Curtiss filled out his Statement and Proof of Claim he was asked the question "When does the irrigation season begin and end * * *." He answered "March — September." Mr. Curtiss now contends that he mistakenly indicated a season of use ending on September 30.

OWRD correctly points out that ORS 539.210 and OAR 690-030-0085 prohibit claim amendments that would expand a claim. By attempting to amend his claim for a longer period of use than originally claimed, Mr. Curtiss is basically making a new claim – outside the claim period – and therefore contrary to the time limits or in the manner required by law. ORS 539.210 states, in part:

Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law.

OWRD's position is buttressed by its rule, which clearly prevents amendment of the claim at this late date. OAR 690-030-0085 states:

The Water Resources Director shall not permit any alteration or amendment of the original claim after the period for inspection has commenced; but any new matter which the claimant may wish to set forth shall be set forth in the form of an affidavit, regularly verified before a proper officer and filed with the Water Resources Director prior to the close of the period for public inspection.



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The period for public inspection has long since passed. Mr. Curtiss' season of use ends no later than was claimed when he filed his claim, September 30 of each year.

Interestingly, the issue regarding the appropriate priority date potentially raises the same issue as was raised by Mr. Curtiss' position regarding season of use. Mr. Curtiss testified that had he been aware of William Spence's 1887 Notice of Appropriation when he filed his claim he would have used that as the claimed priority date. Nonetheless, he concedes that his claimed priority date for purposes of this case is January 25, 1909, the date claimed in his Statement and Proof of Claim.

Rate and Duty. The Adjudicator's Preliminary Evaluation recommended approval of Mr. Curtiss' claim for irrigation of 936.6 acres at a rate of 1/40th cfs/acre and a duty of 3.5 acre feet (af) per acre based on Appendix A, the Department's "Standards for Rates, Duties and Seasons of Use Within Previously Unadjudicated Areas of the Klamath Basin." That document is the result of studies conducted and hearings held regarding the appropriateness of those limitations. (OWRD Exhibit 1 pgs. 183-185.) See OAR 690-028-0040. As such, it is persuasive evidence of the appropriate rates and duties for all claims in the Klamath Basin Adjudication. Mr. Curtiss indicated that he was "satisfied" with the Adjudicator's recommendation that the rate for Rock Creek be 13.5 cfs. That "satisfaction" was based on a concurrent recommendation that additional pre-1909 diversions were established on Moss Creek and on Upper Klamath Lake. Mr. Curtiss withdrew his claim for Moss Creek, and this order proposes that the claim for Upper Klamath Lake be denied. Still, the greater weight of the persuasive evidence establishes that a rate of 13.5 cfs from Rock Creek is an appropriate rate for irrigation.

The United States does not disagree with a rate of 13.5 cfs, but contends that Mr. Curtiss should be limited to a duty of 3.0 af/acre, rather than the 3.5 af/acre recommended by the Adjudicator. That position is supported by a water right certificate issued to the owners of the Rock Creek Ranch in 1932. The certificate limits the owner to "one-fortieth of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 3 acre feet per acre for each acre irrigated during the irrigation year." (OWRD exhibit 1, pg. 80.)

Appendix A assigns a standard rate of one-fortieth on one cubic foot per second for each acre irrigated, as did the 1932 certificate. The certificate does not explain the need for or the rational behind the additional limitation. The record does not include significant evidence regarding the appropriate duty and I will rely upon Appendix A in recommending the appropriate duty.

My reliance on Appendix A is tempered, however, by the reduced season of use for irrigation, discussed above. Appendix A assumes a duty based upon a standard irrigation season of March 1 – October 31 of each year. Mr. Curtiss' season of use ends September 30 of each year. Instead of an eight month season of use, Mr. Curtiss's season is only seven months. His reduced irrigation season necessarily requires a reduced duty. The irrigation season is reduced by approximately 12.5 percent. His duty should be reduced by a similar amount, to 3.06 af/acre (3.5 – 12.5% = 3.0625).

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No participant actively contested or presented evidence on the appropriate rate, duty, or season regarding Mr. Curtiss' livestock watering. Appendix A is the only evidence regarding the appropriate season (year round), or rate (twelve gallons per day per head for non-dairy livestock). The evidence shows that Mr. Curtiss' waters 2,500 head of livestock from his irrigation and drainage ditches at a rate of 0.05 cfs. (OWRD exhibit 1, pgs. 83 and 88.) This amount may be added to his rate, but does not affect his duty.

ORDER

I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as specifically set out below:

The elements of a pre-1909 water right are not established for Claim 133 regarding Upper Klamath Lake. The elements of a pre-1909 water right are established for Claim 133 regarding Rock Creek as follows:

SOURCE: Rock Creek, tributary to the Klamath River

POINT OF DIVERSION: NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 9, Township 37 South, Range 7 East, W.M.

USE: irrigation of 936.6 acres and watering 2,500 livestock.

RATE: 13.55 cfs.

DUTY: 3.06 af/acre.

PERIOD OF USE: March 1 – September 30 of each year.

PRIORITY DATE: January 25, 1909.

PLACE OF USE:

LOT 4 SE $\frac{1}{4}$ SE $\frac{1}{4}$ 6.4 ACRES IRRIGATION AND LIVESTOCK
LOT 7 NE $\frac{1}{4}$ SE $\frac{1}{4}$ 15.6 ACRES IRRIGATION AND LIVESTOCK
SECTION 32
TOWNSHIP 36 SOUTH, RANGE 7 EAST, W.M.

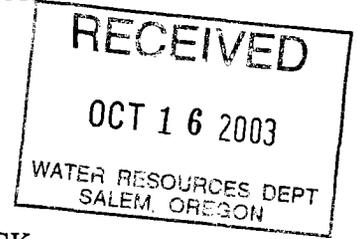
NE $\frac{1}{4}$ SW $\frac{1}{4}$ 40.0 ACRES IRRIGATION AND LIVESTOCK
NW $\frac{1}{4}$ SW $\frac{1}{4}$ 34.4 ACRES IRRIGATION AND LIVESTOCK
SW $\frac{1}{4}$ SW $\frac{1}{4}$ 39.8 ACRES IRRIGATION AND LIVESTOCK
SE $\frac{1}{4}$ SW $\frac{1}{4}$ 40.0 ACRES IRRIGATION AND LIVESTOCK
NW $\frac{1}{4}$ SE $\frac{1}{4}$ 40.0 ACRES IRRIGATION AND LIVESTOCK
SW $\frac{1}{4}$ SE $\frac{1}{4}$ 40.0 ACRES IRRIGATION AND LIVESTOCK
SE $\frac{1}{4}$ SE $\frac{1}{4}$ 40.0 ACRES IRRIGATION AND LIVESTOCK
LOT 2 SW $\frac{1}{4}$ NE $\frac{1}{4}$ 2.0 ACRES IRRIGATION AND LIVESTOCK
LOT 2 SE $\frac{1}{4}$ NE $\frac{1}{4}$ 1.0 ACRES IRRIGATION AND LIVESTOCK
LOT 3 NE $\frac{1}{4}$ SE $\frac{1}{4}$ 36.0 ACRES IRRIGATION AND LIVESTOCK
LOT 4 SW $\frac{1}{4}$ NE $\frac{1}{4}$ 16.0 ACRES IRRIGATION AND LIVESTOCK
LOT 4 SE $\frac{1}{4}$ NE $\frac{1}{4}$ 2.4 ACRES IRRIGATION AND LIVESTOCK

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LOT 7 SE ¼ NW ¼ 11.8 ACRES IRRIGATION AND LIVESTOCK
SECTION 33
TOWNSHIP 36 SOUTH, RANGE 7 EAST, W.M.



NE ¼ SW ¼ 0.6 ACRES IRRIGATION AND LIVESTOCK
SE ¼ SW ¼ 1.4 ACRES IRRIGATION AND LIVESTOCK
LOT 1 NW ¼ SW ¼ 6.5 ACRES IRRIGATION AND LIVESTOCK
LOT 2 SW ¼ SW ¼ 22.4 ACRES IRRIGATION AND LIVESTOCK
LOT 11 SW ¼ SW ¼ 15.3 ACRES IRRIGATION AND LIVESTOCK
LOT 12 NW ¼ SW ¼ 4.3 ACRES IRRIGATION AND LIVESTOCK
SECTION 34
TOWNSHIP 36 SOUTH, RANGE 7 EAST, W.M.

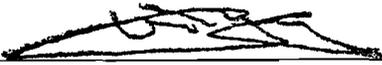
LOT 3 NW ¼ NW ¼ 0.2 ACRES IRRIGATION AND LIVESTOCK
NW ¼ NW ¼ 30.4 ACRES IRRIGATION AND LIVESTOCK
SECTION 3
TOWNSHIP 37 SOUTH, RANGE 7 EAST, W.M.

NW ¼ NE ¼ 40.0 ACRES IRRIGATION AND LIVESTOCK
NE ¼ NW ¼ 40.0 ACRES IRRIGATION AND LIVESTOCK
SE ¼ NW ¼ 39.1 ACRES IRRIGATION AND LIVESTOCK
LOT 4 NE ¼ NE ¼ 8.0 ACRES IRRIGATION AND LIVESTOCK
LOT 5 SE ¼ NE ¼ 19.7 ACRES IRRIGATION AND LIVESTOCK
LOT 6 NE ¼ SE ¼ 2.8 ACRES IRRIGATION AND LIVESTOCK
LOT 6 NW ¼ SE ¼ 4.7 ACRES IRRIGATION AND LIVESTOCK
LOT 7 SW ¼ SE ¼ 5.6 ACRES IRRIGATION AND LIVESTOCK
LOT 8 SW ¼ SE ¼ 17.4 ACRES IRRIGATION AND LIVESTOCK
LOT 9 NW ¼ SE ¼ 26.1 ACRES IRRIGATION AND LIVESTOCK
LOT 10 SW ¼ NE ¼ 40.0 ACRES IRRIGATION AND LIVESTOCK
LOT 10 SE ¼ NE ¼ 9.9 ACRES IRRIGATION AND LIVESTOCK
LOT 11 NE ¼ NE ¼ 32.0 ACRES IRRIGATION AND LIVESTOCK
LOT 12 NW ¼ NW ¼ 28.4 ACRES IRRIGATION AND LIVESTOCK
LOT 12 SW ¼ NW ¼ 10.8 ACRES IRRIGATION AND LIVESTOCK
LOT 13 NE ¼ SW ¼ 37.0 ACRES IRRIGATION AND LIVESTOCK
LOT 13 NW ¼ SW ¼ 1.2 ACRES IRRIGATION AND LIVESTOCK
LOT 14 SW ¼ SW ¼ 2.0 ACRES IRRIGATION AND LIVESTOCK
LOT 14 SE ¼ SW ¼ 38.6 ACRES IRRIGATION AND LIVESTOCK
SECTION 4
TOWNSHIP 37 SOUTH, RANGE 7 EAST, W.M.

NW ¼ SE ¼ 2.0 ACRES IRRIGATION AND LIVESTOCK

LOT 4 SW ¼ NE ¼ 9.8 ACRES IRRIGATION AND LIVESTOCK
LOT 5 NW ¼ NE ¼ 3.0 ACRES IRRIGATION AND LIVESTOCK
LOT 6 NW ¼ NE ¼ 17.4 ACRES IRRIGATION AND LIVESTOCK
LOT 7 SW ¼ NE ¼ 6.0 ACRES IRRIGATION AND LIVESTOCK
LOT 8 SE ¼ NW ¼ 12.8 ACRES IRRIGATION AND LIVESTOCK
LOT 9 NE ¼ NW ¼ 35.8 ACRES IRRIGATION AND LIVESTOCK
SECTION 9
TOWNSHIP 37 SOUTH, RANGE 7 EAST, W.M.

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William D. Young, Administrative Law Judge
Office of Administrative Hearings

Date: October 15, 2003

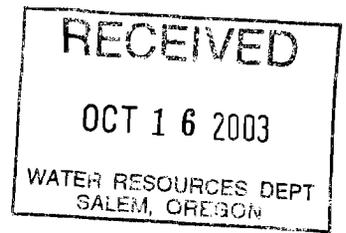
NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Hearing Officer. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

Exceptions must be in writing and must clearly and concisely identify the portions of this Order excepted to and cite to appropriate portions of the record to which modifications are sought. Parties opposing these exceptions may file written arguments in opposition to the exceptions within 45 days of service of the Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

Dick Bailey
Klamath Basin Adjudication
Oregon Water Resources Dept
725 Summer Street N.E., Suite "A"
Salem OR 97301



CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2003, I mailed a true copy of the following: **AMENDED PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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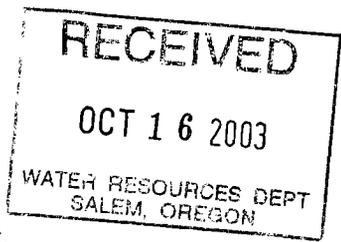
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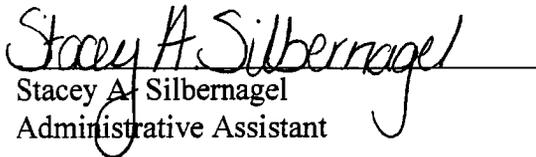
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