

015F00000011
BEFORE THE HEARING OFFICER PANEL
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

RECEIVED
JUL 12 2002
WATER RESOURCES DEPT.
SALEM, OREGON

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

Horsefly Irrigation District; Langell Valley
Irrigation District; Medford Irrigation District;
Rogue River Valley Irrigation District; Roger
Nicholson; Roger Nicholson Cattle Co.; Lloyd
Nicholson Trust; Dorothy Nicholson Trust;
Richard Nicholson; Jim McAuliffe; McAuliffe
Ranches; Maxine Kizer; Ambrose McAuliffe;
Susan McAuliffe; Joe McAuliffe Company;
Kenneth L Tuttle and Karen L. Tuttle DBA
Double K Ranch; Dave Wood; Kenneth
Zamzow; Anita Nicholson; Wm. S. Nicholson;
John B. Owens; Kenneth Owens; WM. L.
Brewer; Mary Jane Danforth; Jane M. Barnes;
Franklin Lockwood Barnes Jr.; Jacob D. Wood;
Elmore E. Nicholson; Mary Ann Nicholson;
Gerald H. Hawkins; Hawkins Cattle Co.;
Owens & Hawkins; Harlowe Ranch; Terry M.
Bengard; Tom Bengard; Dwight T. Mebane;
Helen Mebane; Walter Seput; Clifford Rabe;
Tom Griffith; William Gallagher; Thomas
William Mallams; River Springs Ranch; Pierre
A. Kern Trust; William V. Hill; Lillian M. Hill;
Carolyn Obenchain; Lon Brooks; Newman
Enterprise; William C. Knudtsen; Wayne
Jacobs; Margaret Jacobs; Robert Bartell; Hilda
Francis for Francis Loving Trust; Rodney Z.
James; James R. Goold For Tillie Goold Trust;
Duane F. Martin; William J. Rust; Ethel J. Rust
Contestants,

PROPOSED ORDER

Case No. 015

Claim No. 168

Contest No. 2056, 3162, 3280

vs

Pacificorp,
Claimant/Contestant

HISTORY OF THE CASE

This proceeding in the Klamath Basin Water Adjudication was commenced by a claim filed on
January 31, 1981 by Pacificorp based upon use of water beginning prior to February 24, 1909.

Proposed Order, Case No. 015, Claim 168, Page 1

On October 4, 1999, OWRD issued its Preliminary Evaluation concluding that the elements of pre-1909 claim had been established, and preliminarily approving the claim, but changing the priority date from the date claimed, December 11, 1891, to October 16, 1905.

On May 5, 2000, Pacificorp filed Contest Number 02056, objecting to the change in priority date.

On May 8, 2000, Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District and Medford Irrigation District, filed Contest Number 03162, asserting an interest in water potentially subject to the claim, and seeking to bar the claim to the extent it would effect the water rights of these contestants.

On May 8, 2000, Roger Nicholson, Roger Nicholson Cattle Co., Lloyd Nicholson Trust, Dorothy Nicholson Trust, Richard Nicholson, Jim McAuliffe, McAuliffe Ranches, Maxine Kizer, Ambrose McAuliffe, Susan McAuliffe, Joe McAuliffe Company, Kenneth L. Tuttle and Karen L. Tuttle DBA Double K Ranch, Dave Wood, Kenneth Zamzow, Anita Nicholson, Wm. S. Nicholson, John B. Owens, Kenneth Owens, WM. L. Brewer, Mary Jane Danforth, Jane M. Barnes, Franklin Lockwood Barnes Jr., Jacob D. Wood, Elmore E. Nicholson, Mary Ann Nicholson, Gerald H. Hawkins, Hawkins Cattle Co., Owens & Hawkins, Harlowe Ranch, Terry M. Bengard, Tom Bengard, Dwight T. Mebane, Helen Mebane, Walter Seput, Clifford Rabe, Tom Griffith, William Gallagher, Thomas William Mallams, River Springs Ranch, Pierre A. Kern Trust, William V. Hill, Lillian M. Hill, Carolyn Obenchain, Lon Brooks, Newman Enterprise, William C. Knudtsen, Wayne Jacobs, Margaret Jacobs, Robert Bartell, Hilda Francis for Francis Loving Trust, Rodney Z. James, James R. Goold for Tillie Goold Trust, Duane F. Martin, William J. Rust, and Ethel J. Rust (The Nicholson Group) filed Contest No. 03280, asserting that the Claimant did not prove the necessary elements of the claim.

This matter was then referred to the Hearing Officer Panel for a contested case hearing. A prehearing conference was conducted by Maurice L. Russell, II, Administrative Law Judge of the Hearing Officer Panel, on December 21, 2001, after which a Pre-Hearing Order was issued, December 31, 2001, listing the issues presented in this case, and setting a schedule for proceedings. This schedule was amended by orders issued January 22, 2002 and February 21, 2002, the latter order setting the matter for hearing on June 11 and 12, 2002. Pursuant to the order of February 21, 2002, a Notice of Hearing was duly served on all participants on May 10, 2002, for a hearing commencing June 11, 2002. OWRD, Pacificorp, and the Districts timely submitted written testimony and exhibits. The Nicholson Group submitted no testimony or evidence.

The hearing for cross-examination of witnesses was convened on June 11, 2002, at 9:00 a.m. in the Conference Room at the offices of the Hearing Officer Panel at 3420 Cherry Ave. NE, Suite 140, Salem, Oregon.

Kimberly Grigsby appeared as Agency Representative for Oregon Water Resources Department (OWRD). Laura Schroeder and Carra Sheppard appeared for Contestants Medford Irrigation

District and Rogue River Irrigation District (the Districts). Jennie Bricker and Greg Corbin appeared for Claimant/Contestant, Pacificorp (Pacificorp). The Nicholson Group did not appear at the hearing. Maurice L. Russell, II, Administrative Law Judge for the Hearing Officer Panel, presided.

ISSUES

1. Whether water from the Klamath Basin described in the water rights held by Rogue River Valley Irrigation District and Medford Irrigation District should "be 'water available' for appropriation under the Klamath Adjudication."
2. Whether the claimant submitted sufficient evidence to prove the claimed priority date of December 11, 1891.
3. Whether the claimant established the elements for a pre-1909 claim.
4. Whether the claimant applied the claimed quantity of water to beneficial use within a reasonable time.

EVIDENTIARY RULINGS

Pursuant to stipulation of the participants at the hearing, all exhibits and written testimony offered by OWRD, Pacificorp and the Districts were admitted without the necessity of authentication or cross-examination of the witnesses giving the written testimony, subject to the objection of Pacificorp to the testimony offered by the Districts on grounds of relevance, which objection was taken under advisement. No witness was called to testify by any participant.

Pacificorp objected to the written testimony of Carol Bradford and Jeff Eicher, with concurrence in that testimony by Jim Pendleton and Ralph Kime, offered by the Districts. Pacificorp argued that the testimony is not relevant or material to these proceedings because it does not tend to prove or disprove the elements of Pacificorp's claim, and is offered to prove a proposition that is not a matter at issue in this case.

The evidence objected to describes the development of works for diversion of water from Four Mile Lake to Fish Lake, and the history of the water rights attendant to that diversion. It is offered to support the proposition, stated in the Districts' contest, that the appropriation of water by Pacificorp should be conditioned so as to prevent a call that would conflict with the District's rights to the water in Four Mile Lake.

It is suggested that the adjudicator does not have the authority to impose such a condition as the Districts' propose. If this were so, then Pacificorp's objection would be well taken, since if the adjudicator cannot grant the relief requested, evidence in support of that relief would be immaterial.

However, I am not prepared to decide in the abstract whether, as a matter of law, the adjudicator is authorized to grant such relief in specific cases, if the evidence in this case would not support the exercise of that authority even if it existed. The parties have not briefed that question in this case, and the arguments presented at the hearing regarding it were somewhat cursory. In order to decide whether it is necessary to reach the issue of the adjudicator's authority, I must review the evidence to determine whether it would support the imposition of the condition requested, even if such a condition was authorized. I find the evidence relevant and material to the determination whether, even if authorized, the relief should be allowed in this case. Consequently, the objection is overruled, and the evidence admitted.

FINDINGS OF FACT

1. In 1877, William S. Moore built a ditch on the west side of the Link River, a tributary of the Klamath River, flowing out of Klamath Lake, to generate power at a sawmill. This ditch diverted 100 cfs of water. The ditch and sawmill were sold to Charles S. Moore and Rufus S. Moore, sons of William S. Moore, in 1887. (Test. Richard W. Barney at 3; Ex. 2 to Test. Of Richard W. Barney (Barney Ex. 2); OWRD Ex. 1 at 20)
2. On December 11, 1891, West Side Canal Company filed a notice of appropriation, claiming the right to 10,000 inches of water from the Link River. (OWRD Ex. 1 at 20) The incorporators of West Side Canal Company were Charles S. Moore, Rufus S. Moore and Thomas Martin. The Articles of Incorporation for the West Side Canal Company, dated November 30, 1891, provided in the preamble that the company was incorporated for the purposes of "engaging in the business pursuit of appropriating and conveying water by canals and ditches and flumes for rental and sale for purposes of irrigation, household and domestic consumption, watering livestock and manufacturing purposes. In the body of those Articles, however, Article III recites that the company's purpose was "to appropriate 10,000 inches of water under a six inch pressure of the waters of Link or Klamath River in Klamath County, Oregon***," and "To furnish and supply the waters to be appropriated for rental and sale to all persons whose lands lie along or accessible to said main ditch or canal or any branch thereof, and lawfully applying therefor, so far as the waters to be appropriated will supply such persons, for the purposes of irrigation, household and domestic consumption, and watering livestock." (Test. Richard W. Barney; Barney Ex. 1 at 1-3). The water diverted under this appropriation was used to operate a sawmill until 1907, when the sawmill was moved to another location. (Test of Barney: Barney Ex. 2 at 36.)
3. A second ditch, having a capacity of 15 cfs was constructed in 1892 by Charles S. Moore and Rufus S. Moore, who had taken over the properties of the West Side Canal Company, to carry water under the appropriation of December 11, 1891 to a flour mill. (Test. Of Barney; OWRD Ex. 1 at 20.)
4. In April, 1905, the West Side Canal Company filed supplemental Articles adding to the purposes for which the company was formed to include use of the water to generate electricity. (Test. Of Barney; Barney Ex. 3)

RECEIVED

JUL 19 2002

WATER RESOURCES DEPT.
SALEM, OREGON

5. In June, 1905, the West Side Canal Company resolved to dissolve itself and convey all its property, including its water rights, to Charles and Rufus Moore (the Moores), individually. (Barney Ex. 4.)
6. In 1906, the Moores conveyed to the United States two canals that had been built by the West Side Canal Company down the West side of Link River as part of the works for diversion of the water appropriated by the company. (Barney Ex. 2 at 42; OWRD Ex 1 at 21) In this transfer, the Moores reserved for themselves 205 cubic feet per second (cfs) for power purposes, to be conveyed by the canal constructed by the United States in replacement of the two earlier canals (the Keno Canal). (Barney Ex. 5; OWRD Ex 1 at 21.)
7. The Moores constructed the West Side Power Plant that is the subject of these proceedings, using the water right reserved when the canals were transferred to the United States, in 1907 or 1908. (Barney Ex 6; Barney Ex 2 at 45; OWRD Ex. 1 at 21.) That plant and water right was acquired by the California-Oregon Power Company (Copco) in 1911. (Barney Ex 6 at 21.)
8. Although the configuration of the works for diversion of the water right has been modified extensively over the years, particularly with the construction of the Link River Dam in the 1920s, the West Side Power Plant has been in essentially continuous operation, using the 205 cfs for generation of electricity, since 1905. (Test. Of Barney)
9. In 1961, Pacific Power and Light Company merged with Copco. The successor company, now named Pacificorp, has operated the West Side Power Plant using the 205 cfs water right since that time. (Test of Barney)
10. On August 28, 1906, the Fish Lake Water Company filed a Notice of Appropriation of the water in Four Mile Lake, as then configured, comprising 248.2 cfs and caused the same to be recorded in Volume I of Water Rights at page 218, in the records of Klamath County, Oregon. (Ex. 2 at 3 to the Testimony of Carol Bradford(Bradford Ex. 2 at 3))
11. On June 23, 1907, the Fish Lake Water Company applied to the United States Department of Interior for a right of way to build a canal connecting Four Mile Lake with Fish Lake, which was subsequently approved. (Bradford Ex. 1 at 6) By subsequent application of March 28, 1910, the Fish Lake Water Company amended the rights acquired from the United States to enlarge the impoundment at Four Mile Lake. (Bradford Ex. 1 at 6.)
12. On September 12, 1910, the State Engineer granted Applications for a Permit to appropriate the Public Waters of the State of Oregon, Permits R-50 and S-407, for the combined waters of Four Mile Lake and Fish Lake as enlarged. (Bradford Ex. 1 at 7-8; 2 at 15-16.) The application recited that the application was for an increase from the previous appropriation for Four Mile Lake recorded August 28, 1906, as noted above. Completion of the works and application of the water subject to this permit has been extended numerous times, the latest in the record dating October 1, 1993. (Bradford Ex. 2 at 16.)These applications were in the

name of Rogue River Valley Canal Company, as successor to Fish Lake Water Company. (Bradford Ex. 1 and 2.)

- 13. The date when the Cascade Canal was completed, connecting Four Mile Lake and Fish Lake is unclear. A right of way was approved, as noted above based upon an application in 1907, but was subsequently amended by applications in 1910 and 1912. (Bradford Ex. 4 and 6) The U.S. Department of Interior concluded in March 1927, that all the works called for under the various applications to that Department for easements and right of ways had been completed by that date. (Bradford Ex. 4 at 2.)
- 14. The rights of Rogue River Valley Canal Company were subsequently assigned to Rogue River Valley Irrigation District, and Medford Irrigation District, the districts which are contestants in this case. (Bradford Ex. 12.)
- 15. The amount of original flow, if any, from Four Mile Lake into the Klamath Basin is unclear in this record. There exists the possibility, as disclosed by maps supplied by the Districts, that some water originally flowed from Four Mile Lake, as configured before construction of the dam and canal, into Four Mile Creek, and from there into Klamath Lake. (Test. Of Bradford; Bradford Ex. 3.)

CONCLUSIONS OF LAW

- 1. The evidence is insufficient to determine whether water from the Klamath Basin described in the water rights held by Rogue River Valley Irrigation District and Medford Irrigation District should "be 'water available' for appropriation under the Klamath Adjudication."
- 2. Claimant Pacificorp submitted sufficient evidence to prove the claimed priority date of December 11, 1891.
- 3. Claimant Pacificorp established the elements for a pre-1909 claim.
- 4. Claimant Pacificorp applied the claimed quantity of water to beneficial use within a reasonable time.

OPINION

The issues originally propounded by the Nicholson group, issues #3, and 4, above, will not be addressed specifically in this opinion for several reasons. First, Nicholson Group did not submit any evidence in support of its assertion that Pacificorp did not establish the requisite elements of a pre-1909 claim, and did not put the claimed water to beneficial use within a reasonable time. Second, the discussion of issues #1 and 2 essentially meet those assertions, establishing the neither assertion has merit.

There are really only two issues presented in this case that merit discussion. First, does the record support OWRD's conclusion that the priority date of Pacificorp water right should be

October 16, 1905, or should it be December 11, 1891 as Pacificorp asserts? Second, is the water in Four Mile Lake to be treated as part of the Klamath Basin, and therefore subject to this adjudication, or is it not?

RECEIVED

JUL 17 200

WATER RESOURCES
SALEM, OREGON

Priority Date of Pacificorp's Right.

A review of OWRD's file, Exhibit 1, shows that OWRD concluded that the priority date should be in 1905, because that is the date when construction of the powerhouse was commenced, as evidenced by contracts dated October 16, 1905. OWRD apparently concluded that a 14-year delay in beneficial use from the date of the Notice of Appropriation justified this determination. Also discussed in the notes, however, as a basis for this decision, is the "evidence, information, etc. included in claims on Riverside Drive from West Side Irrigation-Keno Canal." (OWRD Ex. 1 at 48.) That "evidence, information, etc." is not included in the record submitted by OWRD in this case, and therefore cannot be considered in this decision.

OWRD's file does not contain a critical piece of information that was provided in direct testimony, and that changes the complexion of the claim. This is the fact that William S. Moore, who built one of the two canals that preceded the Keno Canal, was the father of Charles S. Moore and Rufus S. Moore, and transferred that canal and the sawmill it powered to his sons in 1887, before the West Side Canal Company appropriation was filed.

Thus, when the West Side Canal Company appropriation was filed in 1891, the Moores, who were two of the three incorporators of that company, already owned a ditch from the Link River that carried 100 cfs to a sawmill. In 1892 the Moores built a second ditch, also on the West Side of the Link River, and drawing water from the same diversion point as the earlier canal, which was wider at the bottom, but which, according to the record, carried only 15 cfs to a flour mill and irrigation works.

By this time, the Moores controlled the West Side Canal Company, the original appropriator in 1891¹, and apparently treated the water running in the two canals as coming under that appropriation. These two canals were transferred to the United States, with the reservation to the West Side Canal Company of 205 cfs from the grant. The United States then replaced the two canals with the Keno Canal, the immediate source of the water subject to this claim.

Thus, rather than a delay of 14 years in the construction of works for beneficial use of the water appropriated in 1891, there was an immediate use of almost half the water now claimed, in a ditch that pre-existed the appropriation, and development of additional works increasing the amount of the appropriation in beneficial use, a short time later. Under the circumstances, this does not seem an unreasonable delay in beneficial application of the water appropriated.

¹ The applications of the West Side Canal Company appropriation to power for a sawmill and a flour mill are somewhat complicated by an ambiguity in the Articles of Incorporation for the company, since the preamble refers to use of water to power machinery, but the article stating the purpose of the corporation does not. It is apparent that the incorporators intended the water appropriated to be available for use in powering machinery, since part of it was already being put to that use, and additional water was applied for power a short time after the notice of appropriation was filed. In any case, it has not been argued that the articles, as originally prepared, did not authorize the water to be used for power, based on what was, at most, a scrivener's error.

JUL 17 2002

WATER RESOURCES DEPT.
SALEM, OREGON**Four Mile Lake**

In their contest the Districts asked the Adjudicator to impose a condition on Pacificorp's water right barring Pacificorp from making a call on water from Four Mile Lake. Aside from the question as to whether the Adjudicator would ever be authorized to impose such a condition, the record does not justify such an imposition in this case in any event.

Either Four Mile Lake originally had an outlet to Klamath Lake, or it did not. The evidence on this question is not conclusive, but the Districts appear to have concluded that at one time the two lakes were connected. The amount of water that actually reached Klamath Lake, if any, is completely unknown on this record.

If water from Four Mile Lake originally flowed into Klamath Lake, then the watershed of that lake is part of the Klamath Basin, and was originally part of the watershed that supplied Klamath Lake. Since the appropriation for the diversion of the water of Four Mile Lake to Fish Lake was not recorded until the 1900s, it would have supplied part of the water flowing through Link River when Pacificorp's predecessor appropriated water in 1891. As such, it would have been included as junior to that appropriation, and should not be removed from it now.

However, the evidence is insufficient in this record to establish that the water in Four Mile Lake ever actually did flow to Klamath Lake. If the water from Four Mile Lake never flowed into Klamath Lake, it could not be treated as subject to Pacificorp's water right. In that event there would be no need or reason for imposition of a condition on Pacificorp's water right, since the water in Four Mile Lake could never be subject that water right.

Since, on this record, there is not enough evidence to determine whether or how much water from Four Mile Lake flowed to Klamath Lake, there is no evidentiary basis for imposing the condition sought by the districts, and their request must be denied.

ORDER

I propose that the Adjudicator issue the following order:

That Pacificorp has established the elements of a pre-1909 claim for diversion of 205 cfs of water from the west side of Link River for generation of electric power, having a priority date of December 11, 1891.



Maurice L. Russell, II, Administrative Law Judge
Hearing Officer Panel

Date: July 11, 2002

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
158 12th Street NE
Salem OR 97301

RECEIVED

JUL 12 2002
WATER RESOURCES DEPT.
SALEM, OREGON

RECEIVED RECEIVED

JUL 17 2002 2002

WATER RESOURCES DEPT. SALEM, OREGON WATER RESOURCES DEPT. SALEM, OREGON

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2002, I mailed a true copy of the following: **PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

David E. Van't Hof/ Jenny Bricker
Stoel Rives LLP.
For Pacificorp
900 SW Fifth Ave., Suite 2600
Portland, OR 97204
Phone: 503-294-9168
Fax: 503-220-2480
devanthof@stoel.com
jlbricker@stoel.com

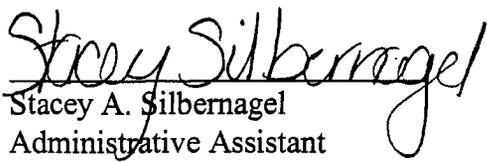
Walter Perry/Justin Wirth
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-378-4009
Fax: 503-378-3802
walter.perry@doj.state.or.us
justin.wirth@doj.state.or.us

Laura A. Schroeder
Schroeder Law Offices, P.C.
PO Box 12527
Portland, OR 97212
Phone: 503-281-4100
Fax: 503-281-4600
las@water-law.com

Richard D. Bailey
Oregon Water Resources Department
158 12th St NE
Salem, OR 97301
Phone: 503-378-8455
Fax: 503-378-6203
richard.d.bailey@wrp.state.or.us

Carol DeHaven Skerjanec/Larry Sullivan
Attorney at Law
PO Box 220
Vale, Oregon 97918
Phone: 541-473-3141
Fax: 541-473-2651
Skrjanec@valelawyers.com
Sullivan@valelawyers.com

Kimberly J. Grigsby
Klamath Basin Adjudication
Oregon Water Resources Department
158 12th Street NE
Salem, OR 97301
Phone: 503-378-8455 ext. 236
Fax: 503-378-6203
kimberly.j.grigsby@wrp.state.or.us


Stacey A. Silbernagel
Administrative Assistant