

**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

Horsefly Irrigation District; Langell Valley
Irrigation District; United States of America;
The Klamath Tribes,
Contestants

PROPOSED ORDER

Case No. 128

Claim: 185

Contests: 2728¹, 2853, 3175,² 3406,³
3836, and 4178

v.

Keno Irrigation District,
Claimant/Contestant.

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HISTORY OF THE CASE

On January 24, 1991, Keno Irrigation District, filed a claim for a pre-1909 water right. This claim is for a total of 3 acre-feet per acre from multiple points of diversion located on Klamath River, tributary to Pacific Ocean, for irrigation of 3,614.2 acres and incidental livestock use. The claimed period of use is January 1 through December 31. The claimed priority date is December, 1858.

On October 4, 1999, the Adjudicator, Richard D. Bailey, issued a preliminary evaluation (P.E.) of the claim, recommending a partial granting of that claim at the following totals: irrigation use of 3,889.16 acres, with 90.47 cfs, or 10,855.5 acre-feet measured at the various points of diversion, a duty of 3.5 acre-feet per acre and a season of use of March 1 - October 31 with a priority date of December 31, 1858.

¹ By an Order dated May 20, 2003, WaterWatch of Oregon, Inc. was dismissed as a party contestant from all proceedings in the Klamath Basin Adjudication.

² On August 29, 2002, Contestants Rogue River Valley Irrigation District and Medford Irrigation District withdrew their participation in the contest filed against Claim No. 185.

³ On October 10, 2002, the Contestants in Contest No. 3046 (Tulelake Irrigation District, Klamath Irrigation District, Klamath Drainage 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, 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) withdrew that contest in its entirety.

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The United States filed a contest to the claim on the following grounds:

1) There is insufficient information on the development of water on the claimed place of use prior to February 24, 1909, to establish a vested pre-1909 water right; and

2) Natural irrigation or overflow is not a valid water right. In addition, the United States contested the P.E. on the grounds that the total acreage in the Place of Use exceeds the irrigated acreage supported by the evidence. This latter issue was resolved by the stipulation reached at the hearing.'

A hearing was held in Salem, Oregon, on December 9, 2003, at 9:00 A.M. The active participants at the hearing were the Keno Irrigation District, represented by their attorney, or its attorney, Ron Yockim; United States of America was represented by its attorney, Stephen Palmer; Klamath Tribes were represented by their attorney, Lorna Babby; and the Water Resources Division, the agency before whom this hearing is held, was represented by Kimberly Grigsby, an authorized agency representative. Administrative Law Judge William Young presided.

Subsequent to that time, and prior to this proposed order being prepared, ALJ Young retired. Michael Andrew Francis from the Office of Administrative Hearings was assigned to prepare this order based on the review of the record as a whole.

EVIDENTIARY RULINGS

Before the scheduled hearing the participants identified certain documents as evidence: a copy of OWRD's claim (OWRD exhibit 1); Keno Irrigation District, in a Motion dated September 9, 2003, Claimant identified OWRD and the following as exhibits they offer as exhibits:

Pages in 7002 are duplicative
7001 exhibit J and pages 5&7 of exhibit K
Objections to exhibit J were sustained as irrelevant
No objection to pages 5 and 7 of exhibit K were made

(128E000070003-128E000070013)

128E000070003	Martin Kerns
128E000070004	Lester Hinton
128E000070005	Martin Kerns
128E000070006	John Kern Lilly
128E000070007	Julian Ager
128E000070008	Winston Patterson
128E000070009	J.W. Kerns & G.G. Kerns
128E000070010	John V. Lilly

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128E000070011 Edna Lilly
128E000070012 Esther M. Johnston
128E000070013 Ruth McCollum

II. DOCUMENTARY EVIDENCE

(128E000070014-128E000070040)

128E000070014	State of Oregon Deed	E-325
128E000070015	State of Oregon Deed	E-469
128E000070016	State of Oregon Deed	F-175
128E000070017	State of Oregon Deed	F-312
128E000070018	State of Oregon Deed	I-159
128E000070019	State of Oregon Deed	J-850
128E000070020	State of Oregon Deed	K-33
128E000070021	State of Oregon Deed	L-110
128E000070022	State of Oregon Deed	M-41
128E000070023	State of Oregon Deed	M-44
128E000070024	State of Oregon Deed	M-55
128E000070025	State of Oregon Deed to Orson Stearns	
128E000070026	Deed Q. Brooks to J. H. Miller	
128E000070027	Lease Quincy Brooks to Jacob Thompson	
128E000070028	Deed Abstract Q. Brooks to Nichols & Terwiliger	
128E000070029	1929 Survey of C.C. Kelley	
128E000070030	State Lands Map T39S,R8E	
128E000070031	State Lands Map T40S,R8E	
128E000070032	General Land Office Survey 4-18-1872, T40S,R8E	
128E000070033	General Land Office Survey 9-17-1872, T39S,R8E	
128E000070034	Report by Fred Locky	
128E000070035	Summary of Miller Cattle Operation	
128E000070036	State Engineer Letter to Atty. Ganong	
128E000070037	State Land Commission Minutes July 20, 1882	
128E000070038	State Land Commission Minutes April 29, 1888	
128E000070039	State Land Commission Minutes August 12, 1882	
128E000070040	Deed Abstract Nichols to Mills	

In a Motion dated September 26 , 2003, Claimant identified the following rebuttal evidence as evidence they offer as exhibits:

(128E000070041-128E000070053)

128E000070041	Martin Kern Affidavit
128E000070042	History of Klamath County Cattle Industry
128E000070043	Abstract of Title - Warren Mills Estate
128E000070044	Abstract of Title - Warren Mills Deed

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128E000070045	John V. Lilly & Edna B. Lilly Deed
128E000070046	John V. Lilly Affidavit
128E000070047	Edna B. Lilly Affidavit
128E000070048	Esther M. Johnston Affidavit
128E000070049	State Land Board Minutes June 9, 1885
128E000070050	Keno Irrigation District Resolution
128E000070051	Ruth E. McCollum Affidavit
128E000070052	D.E. Knauer notes of Selma Furber Interview
128E000070053	State Land Board Minutes (Certified)

On October 9, 2003 the United States' filed Objections to Claimant's proffered Testimony and Exhibits. In its written Objections, the United States reserved the right to make further objections to the testimony and exhibits offered by Keno or any other participant, and requested the opportunity to further discuss the basis for the objections stated in its motions. Claimant filed a written response, conceding that certain documents were duplicated in the hearing record. The United States objections to the following exhibits as unduly repetitious were sustained, to wit:

Keno's Exhibit 70011 and OWRD Exhibit 1 p. 49 are the same documents;
Keno's Exhibit 70046 and OWRD Ex. 1, p. 48 are the same documents;
Keno's Exhibit 70048 and OWRD Ex. 1, p. 50 are the same documents (as is 70012).

Ruling on other aspects of the United States' Objections to Testimony and Exhibits was deferred until the cross-examination hearing. Those objections are now declared overruled.

The following exhibit are declared irrelevant based on having a different priority date: 70035

The United States identified

128E00040001-128E00040004 - documents accompanying US response to Claimant's motion for ruling on Legal issues.

128E00040005-128E00040008 -- Direct testimony and exhibits of Loring Gurney

128E00040009 -- Fund for Reclamation of Arid Lands -- (selected pages)

(128E00040010-128E00040011) -- Rebuttal

128E00040010 - History of Oregon School Lands-- (selected pages)

128E00040011 - History of Klamath County Oregon-- (selected pages)

No objections were stated to these exhibits. They are admitted to the record.

FINDING OF FACTS
Stipulation

A stipulation was reached at the hearing that the Adjudicator's Preliminary Evaluation should be corrected to reflect the actual number of acres claimed. Tr. 7. This resulted in a change in the number of acres attributed by the Adjudicator for Point of Diversion no. 17 from 498.9 acres to 15.5 acres. This issue was the sole issue raised in claimant's contest. Thus, the maximum amount of water claimed should be limited to be 3 acre-feet per acre times the total number of acres (3614.2 acres) or 10,842.6 acre-feet.

INTRODUCTION

This case involves a determination of the beneficial use of water prior to February 24, 1909 on the lands covered in Claim 185. The claim was filed January 24, 1991 and is founded on the pre-1909 beneficial use of grasses provided by natural irrigation and the subsequent improvements made in irrigation efficiency over time.

FINDING OF FACTS

1. Prior to the turn of the century, the water was beneficially utilized to grow grasses that grew as a result of natural overflow irrigation. This early irrigation was later improved through the construction of diversions and canals. The Kerns Family⁴ further improved the irrigation efficiency through the construction of an elaborate system of dikes, canals and ditches.

2. The Claimant relied on historical writings; physical evidence on the ground; oral histories; and, statements of witnesses who have provided testimony as to activities after the turn of the century. While many of the witnesses are now deceased, they were available during the pendency of this adjudication and their testimony has been preserved either in writing or through oral histories.

3. Claimant's predecessor in interest, Benjamin S. Kerns, purchased the land that is now the claimed place of use for claim no. 185 in 1901. Exh. 128EOO040012, Transcript of Proceedings (hereafter "Tr."), 46. In approximately 1905, the Kerns began to build a system of dikes along the Klamath River to facilitate the draining of the lands. Tr. 124.2. These dikes were completed around 1916 or 1917. Tr. 116 and 124. The claimed place of use was not useable until the dikes were completed and the drainage system was in place. Exh. 128EOO040012. In fact, some of the claimed place of use was still "sort of useless" in the 1950s. Further, there is only one portion of the claimed place of use that is high enough for winter feeding of cattle.

⁴. As used herein the phrase "Kerns Family" refers to B.S. Kerns, his sons and their descendants.

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SALEM, OREGONPre-1909 Beneficial Use:

1. The history of beneficial usage of the waters on the lands which are now part of the Keno Irrigation District dates back to the mid-1800, when Judge F. Adams introduced cattle into Klamath County. Historical accounts reveal that in the winter of 1856 he grazed 2,000 head of cattle in the area of what is now the town of Keno.⁵ During this time he observed that the:

"... wild rye so high and plentiful that stock came out in the spring fat and ready for market."

128E00002001, p. 7).⁶

2. Judge Adams' use of the land was followed in 1858 by Wendolen Nus who also used the lands for pasturage. The Klamath County Historical Society sanctioned *Klamath Echoes* Vol. 7, in 1969 reprinted excerpts from the *1905 History of Central Oregon* which observed that:

"... Wendolen Nus, who during the winter of 1858-59 grazed a band of stock on the Klamath River where is now the ranch of O.A. Stearns a few miles southwest of Klamath Falls."

(128E00002001, pp. 7-8).^{7 8}

⁵. The map at 128E000400004 provides a reference as to the location of Keno and its close proximity to the claimed lands. For a more detailed map of the area see 124E000070011, the Klamath Falls Quadrangle 15 minute series (1957) which reveals the contour lines and elevations of the area.

⁶. As Judge F. Adams stated in 1856 the wild rye was high and plentiful, providing ample forage for the grazing of 2,000 head of cattle in this area. Since Keno is less than two miles west of the claimed properties and is situated at the eastern edge of a canyon.

(See 128E000400004 and 124E000070011) it is more likely than not that the lands he grazed were the claimed land lying to the east of Keno. The close spacing in the contour lines on the maps depicted on 128E000400004 and 124E000070011 reveals the canyon nature adjacent to Keno. Similarly the lack of contours in the area covered by the claimed lands indicates a relatively flat relief to the land.

⁷. The Orson Stearns ranch was located on the northeast and easterly boundaries of the claimed lands. (See 128E000070025; 128E000070030)

⁸. As Mr. Lilly noted it was, and is today, the common practice to summer the cattle on the high mountain range land and then to winter them on the claimed lands. (Transcript p. 115, lines 1-9, p. 117, lines 1-9).

3. The article also referenced that in 1859 when soldiers from Fort Jones were in the area looking for stolen livestock, they reported that Mr. Nus was "in the vicinity at the time with a band of stock." (128E00002001, p. 7).

4. The 1977 *Klamath Echoes* reported that Mr. Nus pastured his stock along the Klamath River about midway between Klamath Falls and Keno. (128E00002001, p. 22)⁹.

5. Similar to the description provided by Judge Adams, Orson Stearns described these lands in an 1870 letter as:

" . . . flat lands . . . covered with a great variety of native grasses, prominent among which is the rye grass; this frequently grows from seven to nine feet high so that a man riding on horseback is completely hidden by it where it is thick upon the ground. . . . There are no meadows of tame grass yet and everybody depends upon the natural grass for the grazing and feeding all their stock."

(128E00002001, p. 24).

6. Mr. Kerns noted that Mr. Stearns' description of the lands also fit the lands covered by this claim. (Transcript p. 76, lines 16-21)¹⁰

7. These comments are also consistent with Mrs. Fulkerson's observations that in 1868 the:

"hay we cut on the marshland was a small type of the Tule specie and grew from twelve or fourteen inches to as high as twenty-four and twenty-six inches. In the late summer and fall during the low water season, the marsh lands would be dry so we could cut the tule and stack it back on the higher land for our stock during the winter season, and they seemed to like it and really put on weight."

⁹. The maps at 128E00040004 and 124E000070011 provide a reference as to the location of the claimed lands relative to Keno and Klamath Falls. Since Judge Adams was grazing along the Klamath River near Keno and Mr. Nus was grazing between Keno and Klamath Falls, then they were more likely than not grazing the claimed lands. A review of the contours on the USGS Quadrangle Map (124E000070011) indicates that the only low lands available in the area described were those covered by this claim and adjacent lands

¹⁰. That the lands were similar in nature to the claimed lands is evidenced by the fact that the O.A. Stearns' land was at one time part of the Keno Irrigation District. Mr. Murdoch, a successor to Mr. Stearns, petitioned prior to February 1929 to have his lands excluded from the District. (128E00002001, pp. 51-53).

(128E00002001, p. 15).

8. In 1872, Government Surveyors Turner and Howard described the claimed lands as:

"... rich bottom covered with a heavy growth of valuable prairie and meadow grass. In some portions the arable and swamp lands is equally mingled. The land along the margin of the Marsh is very valuable for the abundant grass and pasturage."¹¹

(128E00007033).¹²

9. When these government agents made these comments about the abundant grass and pasturage in the area, John F. Miller and his sons (John H. Miller, William Miller and Warren Miller) were operating the Miller Cattle Ranch in the area. Early writings indicate they started ranching in this area by 1868. (128E00002001, p. 8).

10. Title records indicate that John Miller received title to Lots 4, 5, 6 of Section 16, in 1876 (128E00007026) and that William Miller received title to Lots 4, 5, 6, 7, 8 & 12 of Section 34, in Township 39 South, Range 8 East; and, Section 5, lot 5; Section 9, Lots 2, 3, 4, 5 in Township 40 South, Range 8 East in 1883.¹³ (128E00007021).

11. During this same period Mr. Quincy Brooks obtained title in 1882 from the State of Oregon to lands in Section 27, 28, 32, and 34 of Township 39 South, Range 8 East (128E0000700019; 128E0000700037); and, in 1886 to lands in Sections 2, 3, 4, 5, & 8 (128E0000700023; 128E0000700049) and Sections 9, 10 all in Township 40 South, Range 8 East (128E0000700024).

¹¹. It is notable that the surveyors stated in the present tense that the land "is very valuable for the abundant grass and pasturage." (128E00007033). The use of the present tense indicates that at the time of the survey in 1872 the lands were being used for pasturage. Their comments are consistent with the statements of O.A. Stearns and Mrs. Fulkerson supra which describe early haying activities in the 1868-69 time period.

¹². The 1872 survey states on its face that the lands being surveyed were the "meanders of the right bank of the Link River and contiguous marsh through this township" and the "meanders of the marsh." (emphasis added) (128E00007033)(See 128E00007001, Ex. I for a larger versions of this map). The GLO map clearly states in the right hand and left hand columns that it only covered the lands along the river and within the marsh. Since they did not survey the remainder of the township, their description of the lands and vegetation represented the lands within these claims.

¹³. While the deed references Lots 2-9, only Lots 2-8 are part of these claims.

12. In addition, W. I. Nichols and P.S. Terwilliger obtained title in 1882 to lands within Sections 27, 28, 32, 33, and 34 of Township 39 South, Range 8 East (128E0000700022; 128E0000700020). Their ranch became known as the "Nichols & Terwilliger Stock Ranch" (128E0000700040) and, alternatively, as the Nichols and Terwilliger Ranch (128E000070005, Attachment A, p. 2). By 1890 this ranch had been sold and was part of the "Mills & Rider Ranch" (128E000070044, p. 2) also known as the "Mills Ranch" (128E000070043).¹⁴

13. A review of the contemporaneous minutes of the State Land Board reveals that by 1882 Mr. Terwilliger and Mr. Nichols had satisfied the reclamation requirements (128E000070039).

14. To have satisfied the reclamation requirement they had to have made beneficial use of the land since at least 1879. Similarly, the minutes reflect that Quincy Brooks had satisfied the reclamation requirement by 1882 (128E000070037, p. 3; 128E000070049).

15. The State Land Board's minutes are the official records of the State of Oregon and provide a contemporaneous account of the early beneficial use of these properties during the 1870-82 time period. The decision by the Land Board over 120 years ago that these claimants had satisfied the requirements of the Act and were entitled to a patent is conclusive evidence of the beneficial use (*Corpe v. Quincy A. Brooks*, 8 Or. 222, 224 (1880)).

16. While the 1879 date represents the minimum three year period required for demonstrating "reclamation," a review of early statutes reveals that the claims had to have originated prior to 1878. Under the 1878 revisions to the 1870 Swamp Act¹⁵, a

¹⁴. By definition the fact that these lands were described as "ranches" is indicative that they were beneficially used for the raising of cattle, horses, or sheep. See generally Merriam Webster's Collegiate Dictionary, Tenth Edition.

¹⁵ The Swamp Land Act deeds from the State of Oregon were issued in the 1882-1886 time period, and, where issued for acreages in excess of 160 acres, and were issued to early ranchers who had been making beneficial use of the property at least three years earlier than the date the deed was issued.

The Swamp Land Act of 1870 ("An act providing for the selection and sale of the swamp and overflowed lands" Laws, 1870, p. 54), any citizen could apply to the State Lands commissioner to purchase swamp or overflowed lands granted by the United States to the State of Oregon. To obtain title to the lands, the applicant had to (1) make a cash payment, and (2) provide proof that the lands had been drained or otherwise made fit for cultivation. Under the law, the successful cultivation in either grass, cereals, or vegetables for three years represented sufficient reclamation. Based on the fact that these deeds were issued in 1882, 1883 and 1886, is direct evidence that

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claimant was allowed to thereafter acquire only 320 acres - however, a savings provision in the law allowed a greater number of acres if the applicant had made a down payment prior to 1878. (Oregon Laws 1878, p. 46). Therefore, since the original state deeds to the claimed lands were for 895.33 acres, (Mr. Terwilliger and Mr. Nichols); 777.55 acres and 1,321.23 acres (Mr. Brooks); and, 795.55 acres (W. Miller), all of these parties had to have filed for the property and made their down payment prior to 1878. All of the claims had to relate back to at least 1878.

The title records reveal that by 1891, all the lands covered in these early state deeds were part of the "Mills Ranch." In probate papers accompanying the estate of Mr. Mills, these lands were described as "agricultural and meadow lands" (128E000070043, p. 2). Mr. Kerns testified that the agricultural and meadow lands character still applied when his great grandfather Benjamin Shuster Kerns purchased the lands at the turn of the century (Transcript p. 46, lines 6-12; p. 51, lines 7-11).

17. The historical records indicate that the early ranchers, Miller, Mills, Rider, Nichols, & Terwilliger, all used these agricultural and meadow properties for haying and grazing prior to the turn of the century. These early haying and ranching activities were described in the writings of some of the earliest settlers, Mrs. Fulkerson and Mr. Stearns.¹⁶

18. As a result of the natural overflow irrigation the grasses and tules grew throughout the claimed area (128E000070041, p. 2, lines 17-23). These tules and grasses were noted for their use as cattle feed (128E000070041, p. 3, lines 5-16).¹⁷

19. While these photos were of activities on the neighboring lands to the south and east of the lands subject to this claim, they depicted haying practices similar in

the grantees of these deeds had made beneficial use of the lands for at least three years prior to the date of the deed.

¹⁶. Mrs. Fulkerson's husband, John Fulkerson, was an early owner of the lands to the north and west of the claimed lands (See deed at 128E0000700016 and map at 128E0000700030). Notably, her discussion of activities on the "marsh" occurring in 1868-69 predate her husband's acquisition of the deed to the property by 5 years. Mr. Stearns was the owner of the lands to the north and east of the claimed lands (See deed at 128E0000700035 and the map at 128E0000700030). As with the Fulkerson property, the record of Mr. Stearns' harvesting of hay activities predates his deed by 7 years. It is also of note that at one time the lands of Mr. Stearns were included within the Keno Irrigation District (See 128E000070050 wherein these lands were excluded from the Keno Irrigation District and the district boundaries redrawn in 1929).

¹⁷. Warren "Doc" Naggle observed that prior to the winter of 1889-90 the tule roots provided the winter sustenance for the livestock (128E000070042, p. 1).

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manner and volume to those occurring on the claimed lands during that time period (128E000070006, p. 3, lines 18-23).

20. Prior to Benjamin Shuster Kerns acquiring the property there was an inlet that allowed water in and out of the claimed area to help irrigate and drain the property (128E000070005, p. 2, lines 18-27; Transcript p. 54, lines 4-9).

21. As noted earlier, prior to the turn of the century, as the Klamath River experienced high water periods the land would be flooded and the land would be naturally irrigated. As the season progressed, the water would recede to the lower areas and in turn the grasses would start growing. The inlet noted above was to quicken these processes. (Transcript p. 56, lines 5-14; p. 120, lines 10-18)). Similarly, the early canal¹⁸ 200 yards in length was built by horse and scraper (fresno) to bring water onto the various parts of the property and to help drain the property (Transcript p. 77, lines 12-16, p. 78, lines 20-25; Transcript p. 120, lines 5-18, p. 121, lines 12-22; Transcript p. 124-25, pp. 127-29, p. 130, lines 1-8).

22. As the spring irrigation was complete, the grass grew and the people used all of the land for haying. (128E000070005, p. 3, lines 8-14; Transcript p. 57, lines 12-20; p. 58, lines 1-24). They farmed out from the river berm as the water receded and moved to the center of the property where the water would last the longest. (Transcript p. 59, lines 7-18).

23. It was subsequent to 1917 that the Keno Irrigation District was formed in 1927 (128E00005, p. 8, line 20; Transcript p. 99, lines 12-14). By January 1929 the lands were served by a series of levees, canals, and intake structures.¹⁹ The survey of C.C. Kelley (128E000070029)²⁰ details the presence of "irrigation canal," "intakes" and identifies the beneficial uses being made of the land as of 1929. By 1929 the original irrigation system was extensively modified (Transcript p. 82, lines 12-13; Transcript p. 111, lines 13-25, p. 112, line 1)).

24. Currently the claimed lands are served by 18 diversion points (Transcript p. 136, lines 18-25, p. 137, lines 1-10; 128E00002001, pp. 69-75, 166-183, 150-54). The early reliance on natural overflow has been replaced with a drainage system that drains the water off the land early in the spring and they then apply irrigation water (128E000070005, p. 4, lines 13-18). George C. Kerns, J.W. Kerns, and Ben Kerns installed drains and irrigated the land (128E000070005, p. 5, lines 6-8).

¹⁸. See photos at 128E00070004, Ex. A, pp. 1-4

¹⁹. That the district was in operation by that date is evidenced by the exclusion from the District in 1929 of the former O.A. Stearns lands which at the time of exclusion were owned by H. F. Murdoch (128E000070050, pp. 1-3). The Murdoch lands were formerly the O.A. Stearns property.

²⁰. A larger version of this map is found at Ex. A of 128E00007001.

OPINION

A. Standard of Evidence:

As noted in the Introduction, the delays in commencing this adjudication and the delays throughout the adjudication process have left few, if any, live witnesses who can testify as to the beneficial use of the land and water that occurred prior to 1909; however, there are historical accounts of these activities and, in fact, some witnesses with critical knowledge provided affidavits and statements as to these early uses (*i.e.* J.W. Kerns, G.G. Kerns, John V. Lilly, Edna Lilly, Selma Furber, Winston Patterson, Julian Ager, and Esther M. Johnston). While these early pioneers are now deceased, they were able to provide statements and affidavits at the onset of this proceeding - and until recently were available to be cross examined by anyone who wished to contest the claims.

While these deceased witnesses' statements and the historical accounts published in the *Klamath Echoes* are of a hearsay nature, they are nonetheless admissible in this case. In administrative hearings, when hearsay is offered as substantial evidence of a fact at issue, the courts have allowed the evidence but have applied the five-part test enumerated in *Reguero v. Teacher Standards and Practices*, 312 OR 402 (1991) to determine the weight to be afforded the evidence. These five factors are:

- (1) the alternative to relying on the hearsay evidence;
- (2) the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy;
- (3) the state of the supporting or opposing evidence, if any;
- (4) the degree of lack of efficacy of cross-examination with respect to the particular hearsay statements; and,
- (5) the consequences of the decision either way.

Applying the *Reguero* analysis to the evidence in this case validates the admission of the statements as substantive evidence. First, the majority of evidence relative to the activities prior to 1909 is of historical accounts or testimony from now deceased witnesses. Thus, there is virtually no alternative to consideration of the hearsay evidence as to the historical use during these early periods.

Second, the hearsay evidence is important. Without hearsay evidence as to activities between 1858 and 1909, there would be no evidence at all on matters dispositive of this case.

Third, corroboration of the facts for which hearsay is offered is available. In this case the deceased witnesses and historical accounts corroborate each other; physical evidence on the ground corroborates these accounts; and, the direct testimony of the live witnesses, John Lilly, Martin Kerns, and Lester Hinton corroborate the statements made by the deceased witnesses and the historical writings.

As demonstrated by the record, the statements of the deceased witnesses and historical accounts represent substantial evidence of facts at issue.

DISCUSSION

In the pioneer day the land was predominantly used for grazing of cattle, and not for farming operations. While the use of the irrigation would be by nature more haphazard, it still indicated beneficial use of the land and water use.

Neither Nus nor Adams had title to the property. They were using the ground as open range. One cannot have a water right until one has at least exclusive claim to the ground on which the water is applied. *See Case 124 Proposed Order; Hough v. Porter*, 51 Or 318, 421 (1909).

The Oregon Supreme Court *In re Water Rights in Silvies River*, 115 Or 27, 64-65 (1925) has stated the elements necessary to establish a valid appropriation of water are:

- (1) an intent to apply it to a beneficial use, existing at the time or contemplated in the future;
- (2) a diversion from the natural channel by a means of a ditch, canal or other structure; and
- (3) an application of it within a reasonable time to some useful industry.

The Supreme Court, however, also recognized that the burden established in *In re Water Rights in Silvies River* is met when settlers appropriated the natural bounty provided by natural overflow irrigation. *Campbell v. Walker*, 137 Or 375, 382-83 (1931).

In this case the intent element of the *Silvies* is clearly demonstrated by the continued use of the property for haying and pasturage of cattle. These beneficial uses date to the early cattlemen utilizing the land. These cattlemen were Judge Adams in 1856 and Wendolen Nus in 1858 - followed thereafter by Mr. Miller, Mr. Brooks, Mr. Terwilliger, Mr. Nichols, Mr. Mills, Mr. Rider and the Kerns Family.

As to the second element - diversion by ditch, canal or other structure - the *Silvies* court and others have recognized an exception to the element when the land is naturally irrigated. The *Silvies* court stated:

"The rule as to the second requirement or diversion of the water has a special application or exception to much of the land in Harney Valley. It involves the matter of the natural irrigation of the land. Nature has been very generous to Harney Valley in this respect. With practically no artificial works for irrigation, thousands of acres are naturally watered. When will the date of appropriation be fixed in such cases? It would seem to be fair and equitable, if not absolutely essential, that such date be deemed to be when the proprietor of the land accepts the gift made by nature, and garners the produce of the irrigation by harvesting or utilizing the crops grown on the land, or making preparation of so doing, or in

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some substantial way indicates that is his intention to reap the benefit of the fruit of the irrigation. When no 'ditch, canal, or other structure' is necessary to divert the water from its natural channel, the law does not vainly require such works, prior to an appropriation."

(*Silvies*, 115 at 66).

The Claimant likewise has demonstrated that no ditch, canal or other structure was necessary to irrigate these lands. The natural bounty provided by the overflow of the land was utilized by the early settlers and cattlemen for the pasturage of cattle and haying. The testimony also demonstrates that this natural overflow was later augmented by diverting water from the river through an ancient diversion inlet and canal. The inlet and canal allowed the Claimant's predecessors to control the irrigation and drainage of the claimed lands. Subsequently, diversions and canals were added by the early cattlemen and settlers to improve the system.

The third element - reasonable diligence - is dependent upon the circumstances and necessities. In this case, the claimed lands and water were diligently utilized for beneficial purposes commencing in 1858 by Wendolen Nus. The early State of Oregon swamp act deeds and the State Land Board minutes also demonstrate reasonable diligence in the beneficial use of the lands occurring in the 1878 to 1882 time period. In this claim the water has been continuously and beneficially utilized since 1858, although a water right cannot be found until 1878 when exclusive claims of right commenced.

The diversion and canals described by the witnesses' evidence that the early settlers also were diligent in improving the system prior to 1909. The subsequent development of dikes, headgates, canals, and other improvements demonstrate a continuing history of improvements in the efficiency of the water use.

The Claimant has demonstrated that the elements identified by the Supreme Court in *Silvies* have been met and that it is entitled to a vested pre-1909 water right for irrigation and wildlife use.

The Claimant has also demonstrated that its claimed rate of diversion is an efficient rate and is the appropriate rate.

ORDER

I propose that the Adjudicator issue the following order:

Claim 185 is allowed as stated in the Preliminary Evaluation, except as follows:

1. Priority date: December 31, 1878.
2. From 19 points of diversion located on the Klamath River, tributary to Pacific Ocean: irrigation use of 3,889.16 acres, with 90.47 cfs, or 10,855.5 acre-feet measured at the various points of diversion, and as set out in

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OWRD Exhibit #1, pages 235 to 254 except as previously stipulated.

3. Place of Use: Klamath County


Michael Andrew Francis, Administrative Law Judge
Office of Administrative Hearings

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Dated: April 5, 2005

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 Administrative Law Judge. 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:

Richard D. 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 April 5, 2005, 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:

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