

**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; Horsefly Irrigation District; Langell Valley Irrigation District; Medford Irrigation District; Rogue River Valley Irrigation District; 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; 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

PROPOSED ORDER

Case No. 141

Claim: 210

Contests: 41, 3196, 3416,¹ 3850, and 4192²

v.

Tule Smoke, Inc.,
Claimant/Contestant.

HISTORY OF THE CASE

On January 31, 1991, Tule Smoke, Inc., (Claimant) filed Claim 210 in the Klamath River Basin Adjudication, claiming a water use vested prior to February 24, 1909. The claim is for 3.0 acre-feet per acre or as much as is necessary to maintain the elevation of the water covering the

¹ On December 4, 2000, Don Vincent voluntarily withdrew from Contest 3416. On June 24, 2002, Berlva Pritchard voluntarily withdrew from Contest 3416.

² On October 10, 2003, the Klamath Tribes voluntarily withdrew Contest 4192.

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land between elevation 4,085.0 and 4,086.5 feet above sea level, from natural overflow and flooding from the Klamath River, tributary to the Pacific Ocean, for wildlife and recreation. The claimed period of use is January 1 through December 31. The claimed priority date is “time in memoriam.”

On October 4, 1999, the Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation, recommending that the claim be denied due to the fact the record does not establish that there was use of water, an intent to use water or construction of works for the application of water, and the record does not establish that the intent to utilize the natural overflow existed prior to February 24, 1909.

On May 1, 2000, Claimant filed Contest 41. On May 8, 2000, the following contests were filed: The Horsefly Irrigation District *et al.* (HID *et al.*)³ filed Contest 3196; the Klamath Project Water Users (KPWU)⁴ filed Contest 3416; and the United States of America (United States) filed Contest 3850.

On July 16, 2004, the United States filed a Motion for Ruling on Legal Issues (United States’ Motion). On September 1, 2004, Claimant filed a Response. On September 21, 2004, the United States and OWRD each filed Replies. On September 12, 2005, an Order on Motion for Ruling on Legal Issues and Proposed Order Denying Claim was issued. On October 12, 2005, Claimant filed Exceptions to the Proposed Order with OWRD. On October 27, 2005, the United States filed a Response to Claimant’s Exceptions to the Proposed Order with OWRD.

On May 10, 2007, OWRD referred the matter back to the OAH on the basis that the Order on Motion for Ruling on Legal Issues and Proposed Order Denying Claim failed to address all relevant legal and factual issues in the case, and that further hearing is appropriate on the following issues: (1) whether there was a permissible change from pre-1909 beneficial use of natural overflow for the purpose of plant growth to support haying and grazing to the claimed “wildlife and recreation” use; and (2) whether, under Oregon law, beneficial use of natural overflow for the purpose of plant growth to support haying and grazing is legally distinct as a purpose of use from beneficial use of natural overflow for the purpose of plant growth to support wildlife and recreation. On May 18, 2007, ALJ Gutman issued an Order Vacating the Order on Motion for Legal Issues and Proposed Order Denying Claim, and reopened the record for further hearing on the issues identified by OWRD.

On January 15, 2008, the United States filed an Amended Statement of Contest of Claim and/or Preliminary Evaluation of Claim.⁵ On March 7, 2008, Claimant, Langell Valley Irrigation District, and Horsefly Irrigation District filed a Stipulation to Resolve Contest 3196.

On March 25, 2008, a cross-examination hearing was held in Klamath Falls, Oregon. Senior Administrative Law Judge Dove L. Gutman of the Office of Administrative Hearings

³ HID *et al.* consists of the Horsefly Irrigation District, Langell Valley Irrigation District, Rogue Valley Irrigation District and Medford Irrigation District.

⁴ KPWU is an association of several individual parties otherwise identified in these proceedings and in the caption of this Notice.

⁵ A copy of this document was provided to ALJ Gutman for the first time on March 13, 2008. *Proposed Order, Case No. 141*

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(OAH) presided. Ronald Yockim appeared in-person and represented Tule Smoke, Inc. Stephen Palmer appeared in-person and represented the United States of America (USA). Andrew Hitchings appeared by telephone and represented the Klamath Project Water Users (KPWU). Justin Gericke appeared by telephone and represented Horsefly, Langell Valley, Medford, and Rogue River Irrigation Districts. Jesse Ratcliffe appeared by telephone and represented Oregon Water Resources Department (OWRD). William Ganong, Lewis E. Furber, Jerry Molatore, Rick Barnes, and Robert Flowers testified in the hearing. The record was held open to receive closing memorandum, responses and reply briefs.

On May 22, 2008, claimant submitted its closing memorandum. On July 8, 2008, the United States submitted its Response. On July 8, 2008, KPWU filed its Joinder in the United States' Response. On August 13, 2008, claimant submitted its Reply brief. The record closed on August 21, 2008.

ISSUES

- (1) Whether there is insufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right. (USA)
- (2) Whether flooding/sub-irrigation/natural overflow is a valid basis for a water right. (USA)
- (3) Whether the record demonstrates intent to divert water for wildlife as of the claimed priority date. (USA)
- (4) Whether the claimed rate, duty and total quantity of water is in excess of the standard rate and duty and is not supported by evidence of use prior to February 24, 1909. (USA)
- (5) Whether there is evidence to support the claimed priority date. (USA)
- (6) Whether any irrigation use that may have occurred on the claimed place of use has been abandoned. (USA)
- (7) Whether there is insufficient evidence to support the right claimed because the claim does not include sufficient documentation to support the following legally required elements of a pre-1909 right based on historical use: use of water or construction of works for the application of water before February 24, 1909; and completion of works within a reasonable time after beginning construction or use. (KPWU)
- (8) Whether claimant did not construct works within a reasonable time after beginning construction or use of water. (KPWU)
- (9) Whether the record establishes intent to use natural overflow before February 24, 1909. (KPWU)

(10) Whether the Claimant's use of water is wasteful for fish and wildlife habitat. (KPWU)

(11) Whether the record supports the rate, duty, actual use, points of diversion, seasonal limitations or acreage claimed. (KPWU)

(12) Whether there is sufficient evidence to support a tribal treaty right with a priority date of "time in memoriam." (KPWU)

(13) Whether the record establishes year round use of water as claimed. (KPWU)

(14) Whether the Claimant has changed the use water from irrigation to fish and wildlife management but has not complied with Oregon statutory procedures for securing a change of use and Claimant is not using water for the use claimed. (KPWU)

(15) Whether Claimant's changed use and application of the water is detrimental to contestants' priority water rights. (KPWU)

(16) Whether Claimant abandoned any rights acquired with lands included in the claim when it was purchased by Claimants. (KPWU)

(17) Whether the Klamath River and its tributaries were over-appropriated at the time Claimant began its use of the claimed water. (KPWU)

(18) Whether the current use was developed within a reasonable time after the claimed date of appropriation. (KPWU)

(19) Whether the purposes of the Klamath Reclamation Project may not be realized in the event that water used pursuant to this claim interferes with the purpose of the Klamath Reclamation Project. (KPWU)

(20) Whether, to the extent the Claimant asserts a right for fish and wildlife use which interferes with the direct diversion and storage of waters for domestic and irrigation uses, it is in violation of Article III.C of the Klamath River Basin Compact. (KPWU)

(21) Whether any rights to use or store water for this purpose is subordinate to domestic and irrigation rights of contestants as provided in the Klamath River Basin Compact. (KPWU)

(22) Whether the water has been naturally applied to this land for wildlife water use forever. (Claimant)

(23) Whether the claim is barred to the extent it seeks water used by *HID et al.* (*HID et al.*)

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(24) Whether the water described in the 1910 permits for Four Mile and Fish Lakes held by Rogue River Valley Irrigation District and Medford Irrigation District should be “water available” for appropriation in the adjudication. (HID *et al.*)

(25) Whether there was a permissible change from pre-1909 beneficial use of natural overflow for the purpose of plant growth to support haying and grazing to the claimed wildlife and recreation. (OWRD)

(26) Whether, under Oregon law, beneficial use of natural overflow for the purpose of plant growth to support haying and grazing is legally distinct as a purpose of use from beneficial use of natural overflow for the purpose of plant growth to support wildlife and recreation. (OWRD)

EVIDENTIARY RULINGS

OWRD’s Exhibit 1, the United States’ Exhibits A through L, and Claimant’s Exhibits TS1 through TS48, TS50, TS59 through TS64, TS68 through TS74, and TS76 through TS90 were admitted into evidence without objection. Claimant withdrew Exhibits TS49 and TS51 through TS58. Claimant added page two to Exhibit TS48, which was admitted into evidence without objection. Claimant added page two to Exhibit TS50, which was admitted into evidence without objection. USA objected to Claimant’s Exhibits TS65, TS66, TS67, and TS75 as not relevant. The objection was overruled and Claimant’s Exhibits TS65, TS66, TS67, and TS75 were admitted into evidence.

FINDINGS OF FACT

Claim at issue

(1) On January 31, 1991, Claimant filed Claim 210 in the Klamath River Basin Adjudication, based on use of water commencing prior to February 24, 1909. The claim is for 3.0 acre-feet per acre or as much as is necessary to maintain the elevation of the water covering the land between 4,085.00 and 4,086.50 feet above sea level, from natural overflow irrigation and flooding from the Klamath River, tributary to the Pacific Ocean, for wildlife and recreation use. There are no specific diversion or distribution systems. The claimed period of use is January 1 through December 31. The claimed priority date is “time in memoriam.” (OWRD Ex. 1 at 2-8.)

(2) Claimant calculated the 3.0 acre-feet per acre by using the pan evaporation rate per growing season and determining the amount of water needed to maintain a moist environment on the property. Claimant used the rate that was similar to the United States’ claims for refuge purposes. (Test. of Ganong.)

(3) Claimant originally claimed 1650 acres as the amount of acreage irrigated, but also claimed that OWRD’s map totaling 1300.8 acres accurately reflected the acreage in the claim. (OWRD Ex. 1 at 4.)

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(4) On November 16, 1998, OWRD sent a letter to Claimant requesting, among other things, clarification regarding the correct number of acres in the claim. OWRD informed Claimant that the listing that was provided with the claim added up to 1570.7 acres, which matched OWRD's map. (*Id.* at 11-12.)

(5) On October 4, 1999, OWRD issued its Preliminary Evaluation of the claim, recommending that the claim be denied due to the fact that the record did not establish that there was use of water, an intent to use water, or construction of works for the application of water, and did not establish that the intent to utilize the natural overflow existed prior to February 24, 1909. (*Id.* at 135-136.)

(6) On May 1, 2000, Claimant filed Contest 41. In its Contest, Claimant asserted, among other things, that the correct amount of acreage in the claim is 1570.7. (*Id.* at 47-49.)

(7) Claimant's lands are bordered on the west by the Klamath River, on the east by the Southern Pacific Railroad, on the south by the Ady Canal or straits, and on the north by a dike. Claimant's lands are south of the city of Midland and north of Wild Horse Butte. (*Id.* at 14, 31.)

(8) The claimed places of use are located in Township 40 South, Range 8 East, of the Willamette Meridian as follows:

<u>Location</u>	<u>Lot</u>	<u>Acres</u>
Section 1	NE ¼ NW ¼	7 5.9
	NW ¼ NW ¼	36.1
	SW ¼ NW ¼	39.8
	SE ¼ NW ¼	6.1
	NW ¼ SW ¼	33.1
	SW ¼ SW ¼	19.5
Section 2	NE ¼ NE ¼	36.2
	NW ¼ NE ¼	6 30.0
	SW ¼ NE ¼	7 9.9
	SE ¼ NE ¼	40.0
	NW ¼ NE ¼	5 4.0
	NE ¼ NW ¼	6 1.0
	NE ¼ NW ¼	5 5.4
	NE ¼ SE ¼	40.0
	NW ¼ SE ¼	8 2.5
	SW ¼ SE ¼	9 14.2
	SE ¼ SE ¼	40.0
SW ¼ SE ¼	1.2	
Section 10	SE ¼ NE ¼	4.3
	SE ¼ NE ¼	5 3.9
	NE ¼ SE ¼	1.1

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	NE ¼ SE ¼	6	36.0
	SE ¼ SE ¼	7	31.4
Section 11	NE ¼ NE ¼		40.0
	NW ¼ NE ¼		0.9
	SW ¼ NE ¼		40.0
	SE ¼ NE ¼		37.6
	NW ¼ NE ¼	2	39.8
	NE ¼ NW ¼		13.0
	NW ¼ NW ¼		1.6
	SW ¼ NW ¼		10.1
	SE ¼ NW ¼		0.7
	NE ¼ NW ¼	3	15.4
	SW ¼ NW ¼	5	23.3
	SW ¼ NW ¼	4	39.9
	NE ¼ SW ¼		40.0
	NW ¼ SW ¼		40.0
	SW ¼ SW ¼		40.0
	SE ¼ SW ¼		40.0
	NE ¼ SE ¼		23.7
	NW ¼ SE ¼		40.0
	SW ¼ SE ¼		40.0
	SE ¼ SE ¼		10.5
Section 14	NE ¼ NE ¼		0.4
	NW ¼ NE ¼		34.8
	SW ¼ NE ¼		24.5
	NE ¼ NW ¼		40.0
	NW ¼ NW ¼		40.0
	SW ¼ NW ¼		40.0
	SE ¼ NW ¼		40.0
	NE ¼ SW ¼		40.0
	NW ¼ SW ¼		40.0
	SW ¼ SW ¼	2	31.2
	SE ¼ SW ¼		36.3
	NW ¼ SE ¼		8.5
	SW ¼ SE ¼		0.5
Section 15	NE ¼ NE ¼	16	37.7
	NW ¼ NE ¼		3.6
	SW ¼ NE ¼		0.4
	SE ¼ NE ¼		40.0
	NW ¼ NE ¼	16	4.0
	SW ¼ NE ¼	15	39.6
	NE ¼ SE ¼		40.0
	NW ¼ SE ¼		32.0

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	SE ¼ SE ¼	8	11.7
Section 23	NE ¼ NW ¼	4	6.5
	NW ¼ NW ¼	4	0.9
	Total acreage		1,570.7

(OWRD Ex. 1 at 32, 36-38, 47.)

European Settlement – Prior to 1880s

(9) Prior to and during European settlement, the Klamath River was subject to seasonal flooding, during which the property subject to this claim was seasonally inundated with water. As snow melted in early spring, the level of the Klamath River would rise until it flooded the adjoining land through natural breaks in the berm along the river. Starting in June of each year, the floodwaters receded from parts of the land, which produced an abundant crop of vegetation suitable for cattle feed. (TS-60, TS-81, TS-82, TS-83.)

(10) Beginning in the 1850s, European settlers began coming into the area. They grazed cattle and harvested hay in the area of the land in question. Wildlife was prevalent in the area. (Exs. TS-60, TS-66, TS-67, TS-76, TS-77, TS-80, TS-81.)

(11) In the 1860s, John Miller established a cattle grazing operation that extended from below the Oregon-California border to beyond Midland, Oregon. Mr. Miller grazed and pastured cattle along the shores of the Klamath River for several decades, including on portions of the property subject to this claim.⁶ (Exs. TS-63, TS-64, TS-80, TS-81.)

(12) On January 1, 1870, O.A. Stearns, a settler on the marsh lands across the river from the claimed lands, described the early homesteads present and the lands in the area as:

“The flat lands are 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.”

A fine variety of wild clover grows abundant near where there are springs and a native blue joint is also quite plentiful. There are no meadows of tame grass yet and **everybody depends upon the natural grass for the grazing and feeding all their stock.** Some idea of the grazing qualities of this valley can be gained by taking into consideration the fact that there are nearly eight hundred head of cattle and one hundred horses owned and kept by persons

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⁶ Because parts of the claimed lands are located along the shore of the Klamath River in the area of Mr. Miller’s grazing operation, the reasonable inference is that Mr. Miller grazed and pastured cattle on those lands.

residing here, besides the thousands of cattle, sheep and horses grazed by droves in passing through here. ***.

This valley is but one among many in this great basin, and though the first to commence settling up is by no means the only one that is becoming peopled with industrious pioneers. I suppose if I want to say that there are already more than three hundred people in this country when I was the second one, I would not exaggerate.”

(Ex. TS-77 at 5.) (Emphasis added.)

(13) In September 1872, William Turner and James Howard, surveyors from the General Land Office, surveyed portions of Township 40 South, Range 8 East, of the Willamette Meridian. The surveyors noted the following:

The land included in our survey in this township is rich bottom, bearing very heavy blue-joint, meadow and wire or tule grass. **Several hundred tons of hay have been made in this township, within the lines of the present survey this season. There are eight settlers located within the limits of the so called swamp land in this township who have made permanent improvements and opened up a road several miles in length from the center of the north-east part of the township.** The area of the present survey embraces the most valuable and desirable land in the whole township.

(Ex. TS-76.) (Emphasis added.)

The Swamp Act; Amendments

(14) On October 26, 1870, the Oregon legislature passed a law regarding reclamation of the swamp lands within its borders. The 1870 Swamp Act provided:

“No patent shall be issued to any applicant for any swamp or overflowed lands until the applicant therefore has proved to the satisfaction of said Commissioner, that the land for which he claims a patent has been drained or otherwise made fit for cultivation;...”

(Oregon Laws 1870, §4.)

(15) Under the Swamp Act, the reclamation requirement was defined as the land “which has been successfully cultivated in either grass, the cereals or vegetables for three years shall be considered as fully reclaimed within the meaning of the act.” (*Id.*)

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(16) Beginning in the 1870s, the State of Oregon began selling swamp land for \$1 per acre, with 20 percent as a down payment and the rest when proof was given that the acreage had been reclaimed. (Exs. J, K, L.) Some purchasers designated dry land as swamp land in an effort to defraud the government. (*Id.*)

(17) The Board of Commissioners for the Sale of School and University Lands (State Land Board) was responsible for issuing Swamp Act Deeds once it had been proven to the satisfaction of the State Land Board that the land had been reclaimed. (Oregon Laws 1870.)

(18) In 1878, the Swamp Act was amended, effective January 17, 1879. (Act of 1878.) The Act of 1878 voided all applications for swamp lands previously made under the 1870 Act wherein the purchase was not made in accordance with that Act. The Act of 1878 also provided that upon the payment of \$2.50 per acre for which the application was duly made prior to January 1, 1880, a deed would issue “without proof of reclamation.” (*Id.* at §10.)

(19) The Act of 1878 limited the purchase of swamp lands to 320 acres and required “that each proposed purchase is for the actual use of the applicant, and not for the purposes of speculation.” (*Id.* at §5.) To be a legal applicant after January 18, 1879, one had to be an actual settler. (*Id.*)

(20) In 1887, the Legislature modified the 1870 and 1878 Acts to provide:

“[a]ll swamp or overflowed lands sold under the provision of the Act approved October 26, 1870, relating to swamp lands which have not been reclaimed or paid for in accordance with the provisions of said Act are hereby declared forfeited and the certificates of sale are declared void, . . . but the provisions of this section shall not apply to actual settlers on lands of 320 acres or less, who have paid their twenty per centum, which settlers may perfect title without reclamation by the payment of the remaining eighty per centum before January 1, 1889.”

(Act of 1887 §2.)

(21) The Act of 1887 also provided:

“[A]ny legal applicant to purchase swamp or overflowed lands who had complied with the provisions of an Act approved October 26, 1870 . . . including the payment of the twenty per cent. of the purchase price prior to January 17, 1879, shall, without reclamation, upon payment of the balance of the purchase price be entitled to and shall receive a deed for the land; provided that such payment be made prior to January 1, 1889; and provided further, that no deed shall issue to any one person for more than 640 acres; . . .”

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(*Id.* at §5.)

(22) The Act of 1887 further provided that all sales or conveyances of lands “made under the provisions of this Act or which shall hereafter be made of swamp lands, an easement of thirty feet on each side of all section lines shall be reserved for a public highway.” (*Id.* at §6.) The Act of 1887 left unchanged the opportunity to reclaim and obtain a deed in accordance with the 1870 Act provisions. (Act of 1887.)

Swamp Act Deeds; 1880s – 1900s

(23) On February 1, 1886, the State Land Board issued Swamp Act Deed M-55 to Quincy A. Brooks for swamp land reclaimed, including the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 14: S½, NW¼
Section 15: Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 & 19, N½ SE¼, SE¼ NE¼

(Ex. TS-1.) Mr. Brooks paid \$1 per acre for 1,947.48 acres of land. (*Id.*)

(24) On December 20, 1888, the State Land Board issued Swamp Act Deed M-147 to N.C. Strong for swamp land, without easements, including the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 23: Lot 4

(Ex. TS-3.) Mr. Strong paid \$1 per acre for 329.23 acres of land. (*Id.*)

(25) On January 26, 1889, the State Land Board issued Swamp Act Deed M-184 to J. R. Cooper for swamp land, without easements, including the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 1: SW¼, W½ NW¼, Lot 7

(Ex. TS-4.) Mr. Cooper paid \$1 per acre for 294.60 acres of land. (*Id.*)

(26) On January 26, 1889, the State Land Board issued Swamp Act Deed M-185 to D. G. McIntosh for swamp land, without easements, including the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 11: SE¼ NE¼

(Ex. TS-5.) Mr. McIntosh paid \$1 per acre for 320 acres of land. (*Id.*)

(27) On January 26, 1889, the State Land Board issued Swamp Act Deed M-186 to Annie McIntosh for swamp land, without easements, including the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 2: E $\frac{1}{2}$ E $\frac{1}{2}$, Lot 6
Section 11: NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Lot 2

(Ex. TS-2.) Ms. McInstosh paid \$1 per acre for 314.85 acres of land. (*Id.*)

(28) On February 1, 1889, the State Land Board issued Swamp Act Deed M-202 to Mary A. Devoe for swamp land, without easements, including the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 11: E $\frac{1}{2}$ SE $\frac{1}{4}$
Section 14: NE $\frac{1}{4}$

(Ex. TS-6.) Ms. Devoe paid \$1 per acre for 320 acres of land. (*Id.*)

(29) On February 2, 1889, the State Land Board issued Swamp Act Deed M-203 to James W. Sears for swamp land, without easements, including the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 10: Lots 6, 7
Section 11: SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$

(Ex. TS-7.) Mr. Sears paid \$1 per acre for 318.71 acres of land. (*Id.*)

(30) On March 11, 1889, the State Land Board issued Swamp Act Deed M-240 to James Logan for swamp land, without easements, including the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 2: Lots 5, 7, 8, 9
Section 11: Lots 3, 4, 5

(Ex. TS-8.) Mr. Logan paid \$1 per acre for 270.37 acres of land. (*Id.*)

(31) On October 5, 1889, E. P. McCormack purchased the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 14: S $\frac{1}{2}$, NW $\frac{1}{4}$
Section 15: N $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, Lots 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

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(Ex. TS-10.) Mr. McCormack was a known rancher and cattleman.⁷ (Ex. TS-63.)

(32) Sometime prior to June 1891, Mr. McCormack owned the claimed land in Section 1 of Township 40 South Range 8 East of the Willamette Meridian. (Ex. TS-11.) In June 1891, Mr. McCormack sold his properties to the Klamath Land Company.⁸ (*Id.*)

(33) On July 20, 1891, the Klamath Land Company purchased the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:⁹

Section 2: E½ E½, Lot 6
Section 11: E½ E½, SW¼ NE ¼, Lot 2
Section 12: W½, W½ NE¼, SE¼ NE¼
Section 14: NE¼

(Ex. TS-22.)

(34) Before the turn of the century, the entire area was used for haying and grazing. As a practical matter, grazing anywhere in the area, meant grazing all over. (Ex. TS-81.)

(35) The early settlers and ranchers grazed cattle and harvested hay on the claimed lands, including the property located in Sections 1, 2, 10, 11, 14, 15, 22 and 23 of Township 40 South, Range 8 East, Willamette Meridian. Wildlife was abundant in the area. (*Id.*; Exs. TS-10, TS-60, TS-61, TS-63, TS-66, TS-76, TS-80, TS-81.)

1900s – 1930s

(36) Sometime prior to 1900, William Belloni, a dairyman from California, came to the Klamath Basin in search of meadowlands that would be suitable for a dairy. Mr. Belloni, along with a man named Ottolini, purchased approximately 1000 acres of the marsh and meadowlands along the Lower Klamath Lake area. Mr. Belloni and Mr. Ottolini leased the lands to cattlemen. (Ex. TS-80; test. of Ganong.)

(37) From the turn of the century until the Keno dam was installed, typical ranching operations in the area included grazing, haying and wildlife activities. (Exs. TS-61, TS-62, TS-81.)

(38) Sometime prior to December 4, 1905, the Klamath Land Company owned Lots 6 and 7 in Section 10 in Township 40 South, Range 8 East, of the Willamette Meridian.¹⁰ (Ex. TS-12.)

⁷ More likely than not, Mr. McCormack grazed cattle and harvested hay on the claimed lands that he owned.

⁸ Because the entire area was used for grazing and haying prior to the turn of the century, the reasonable inference is that the Klamath Land Company continued to make beneficial use of the claimed lands for grazing and haying purposes from 1891-1905.

⁹ *Id.*

¹⁰ *Id.*

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(39) On December 4, 1905, Abel Ady purchased the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 10: Lots 6, 7
Section 14 All
Section 15: N $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, Lots 8, 9, 10, 11, 12, 13, 14, 15, 16

(*Id.*; Ex. TS-13.)

(40) On December 12, 1906, Mr. Ady purchased the N $\frac{1}{2}$ of Section 12 in Township 40 South, Range 8 East, of the Willamette Meridian. (Ex. TS-24.)

(41) Sometime prior to December 31, 1906, Abel Ady owned the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 1: W $\frac{1}{2}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$, Lots 4, 5, 6, 8, 9
Section 2: E $\frac{1}{2}$ E $\frac{1}{2}$, Lots 5, 6, 7, 8, 9
Section 11: NE $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, Lots 2, 3, 4, 5
Section 14: N $\frac{1}{2}$, SE $\frac{1}{4}$
Section 23: NE $\frac{1}{4}$

(Ex. TS-23.) On December 31, 1906, Mr. Ady sold the property to G. W. White. (*Id.*) On February 23, 1907, Mr. Ady and Leo Robinson purchased $\frac{2}{3}$ interest in the property back from Mr. White. (Ex. TS-25.)

(42) On May 27, 1907, Mr. Ady negotiated with the Southern Pacific Railroad Company wherein Mr. Ady received a "hog-tight fence along the right of way" for the "purpose of livestock protection" in exchange for granting an easement to the Railroad along the eastern part of his property.¹¹ (Exs. TS 41, TS-74.)

(43) In 1907, the claimed lands were a mixture of wet and dry areas, or marshes. (Exs. TS-46, TS-47, TS-48.)

(44) On January 15, 1908, Mr. Ady entered into an agreement with the United States of America wherein the California Northeastern Railway Company and the Southern Pacific Railroad Company constructed a railroad embankment across the marshes extending from a point in the NW $\frac{1}{4}$ of Section 23 in a straight line to a point in the NW $\frac{1}{4}$ of Section 1, Township 40 South, Range 8 East of the Willamette Meridian. (Ex. TS-42.)

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¹¹ The reasonable inference is that Mr. Ady pastured livestock on the lands that he owned from 1905 - 1910.

(45) In 1909, the Southern Pacific Railroad Company completed the railroad along the east side of the claimed lands, cutting off natural river flow and drainage through the east branch to the Lower Klamath Lake. (Ex. TS-81.)

(46) From 1910 – 1935, the Hooper family ran cattle and harvested hay on Section 15 of the claimed lands. The land was covered with grass that grew after the river receded in the summer. Cattle were driven across the Furber property to the Belloni property to pasture and put up hay.¹² The Hooper family also pastured hogs on the lands that are located south of the Furber property.¹³ (Exs. TS-59, TS-64.)

(47) In June 1910, a decree of foreclosure was rendered in court against Mr. White, Mr. Ady, and Mr. Robinson for the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 1: W½ NW¼, SW¼, SW¼ SE¼, Lots 4, 5, 6, 7, 8, 9
Section 2: E½ E½, Lots 5, 6, 7, 8, 9
Section 11: NE¼ NE¼, SW¼ NE¼, SE¼ NE¼, Lots 2, 3, 4, 5
Section 12: N½
Section 14: N½, SE¼
Section 23: NE¼

(Ex. TS-31.) On November 10, 1911, Mabel Cluness purchased the property from W. B. Barnes, Sheriff.¹⁴ (*Id.*) In 1912, Ms. Cluness purchased ½ interest in Lot 5 in Section 10 in Township 40 South, Range 8 East, of the Willamette Meridian. (Ex. TS-32.)

(48) In 1912, Mr. Belloni purchased the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian

Section 14: SW¼
Section 15: N½ SE¼, SE¼ NE¼, Lots 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16
Section 22: SE¼ NW¼, N½ NW¼, Lots 8, 9

(Ex. TS-14; *see also*, TS-12, TS-13.) The Belloni family subsequently leased their lands to ranchers and cattlemen for haying and grazing. (Exs. TS-59, TS-61, TS-63, TS-64, TS-80.)

(49) In 1917, Frank Flowers built a dairy in the southeast part of Section 15, just across the straits from the claimed lands. Mr. Flowers also built a hay barge to cross the straits. From

¹² Because the Furber property is located north of the claimed lands, more likely than not, the cattle were driven across the claimed lands located in Sections 1, 2, 10, 11, 14, and 15 during that time period. (OWRD Ex. 1 at 14.)

¹³ Because the claimed lands in Sections 1 and 2 are located south of the Furber property, more likely than not, the Hooper family pastured hogs on those lands. (*Id.*)

¹⁴ Because cattle were driven across the claimed lands during the time Ms. Cluness owned the property, more likely than not, she allowed grazing and haying to take place on the property. (Ex. TS-64.)

1917 through 1921, Mr. Flowers ran cattle and harvested hay on the claimed lands across the straits.¹⁵ Wildlife was abundant in the area. (Exs. TS-63, TS-80.)

(50) On August 13, 1920, Anita O. Jensen purchased the following relevant property in Township 40 South, Range 8 East, of the Willamette Meridian:¹⁶

- Section 1: SW $\frac{1}{4}$ lying west of the recorded right of way of the railroad, W $\frac{1}{2}$ NW $\frac{1}{4}$, Lots 6 and 7 lying west of the recorded right of way
- Section 2: E $\frac{1}{2}$ E $\frac{1}{2}$, Lots 5, 6, 7, 8, 9
- Section 10: Lots 6, 7
- Section 11: E $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$ lying west of the right of way, Lots 2, 3, 4, 5
- Section 12: NW $\frac{1}{4}$ lying west of the right of way
- Section 14: NW $\frac{1}{4}$, E $\frac{1}{2}$ lying west of the right of way

(Ex. TS-34.)

(51) From 1921 – 1923, Daisy Turner rented the Flowers' farm. Ms. Turner grazed cattle and harvested hay on property located on both sides of the straits, including portions of the claimed lands.¹⁷ Wildlife was present on the lands. (Exs. TS-61, TS-62.)

Keno Dam; 1930s – Present

(52) In 1930s, the Largent family grazed cattle on the southern part of the claimed lands.¹⁸ The Hooper family also grazed cattle and harvested hay on Section 15 of the claimed lands. (Exs. TS-59, TS-64, TS-81.)

(53) On August 16, 1930, William Ottolini et al granted to the California Oregon Power Company (COPCO) a perpetual right of way and easement of raising and/or lowering the water level of the Klamath River between elevations of 4,085.0 and 4,086.50 feet above sea level on the following property in Township 40 South, Range 8 East, of the Willamette Meridian:

- Section 14: SW $\frac{1}{4}$
- Section 15: N $\frac{1}{2}$ SE $\frac{1}{4}$, Lots 10, 11, 12, 13, 14, 15

(Ex. TS-43.)

¹⁵ Sections 14 and 15, and lot 4 in Section 23 are located across the straits. (*Id.*) More likely than not, Mr. Flowers ran cattle and harvested hay on those sections of the claimed lands.

¹⁶ Because cattle were driven across the claimed lands during the time Ms. Jensen owned the property, more likely than not, she allowed grazing and haying to take place on the property. (Ex. TS-64.)

¹⁷ Sections 14 and 15, and lot 4 in Section 23 are located across the straits. (OWRD Ex. 1 at 14.) More likely than not, Ms. Turner grazed cattle and harvested hay on those sections of the claimed lands.

¹⁸ Sections 14 and 15, and lot 4 in Section 23 are located on the southern part of the claimed lands. (*Id.*) More likely than not, the Largent family grazed cattle and harvested hay on those sections of the claimed lands.

(54) On October 17, 1930, Anita O. Jensen et al granted to COPCO a perpetual right of way and easement of raising and/or lowering the water level of the Klamath River between the elevations of 4,085.0 and 4,086.50 feet above sea level on the following property in Township 40 South, Range 8 East, of the Willamette Meridian:

Section 1: W $\frac{1}{2}$ NW $\frac{1}{4}$, Lots 6, 7 lying west of the railroad,
SW $\frac{1}{4}$ lying west of the railroad
Section 2: E $\frac{1}{2}$ E $\frac{1}{2}$, Lots 5, 6, 7, 8, 9
Section 10: Lots 6, 7
Section 11: SW $\frac{1}{4}$, Lots 2, 3, 4, 5, E $\frac{1}{2}$ NE $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, W $\frac{1}{2}$
SE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$ lying west of the railroad
Section 12: NW $\frac{1}{4}$ lying west of the railroad
Section 14: NW $\frac{1}{4}$, E $\frac{1}{2}$ lying west of the railroad

(Exs. TS-39, TS-40.)

(55) Prior to the installation of the dam at Keno, sheep and cattle were grazed on the claimed lands when the water receded from parts of the land. The quality of the grazing depended on how wet the year was. (Ex. TS-84.)

(56) In the 1930s, COPCO installed a needle dam at Keno to control the level of the Klamath River between Klamath Falls and Keno. The dam kept the Klamath River at a perpetual flood stage between Klamath Falls and Keno, which resulted in year round flooding on property in the area, including the claimed lands. The ranchers in the area grazed cattle on the sub-irrigated berm and islands in the sloughs. (Ex. TS-81.)

(57) COPCO is the predecessor of PacifiCorp (PP&L). (Ex. TS-84.)

(58) In 1941, Claimant acquired the claimed lands. (Test. of Ganong.)

(59) In the 1940s, Lewis Furber leased the claimed lands from Claimant and grazed approximately 50 head of cattle on the lands. The cattle would wade out into the water and eat the tops of the tule grass. (Test. of Furber; Ex. TS-81.)

(60) In the 1950's, 60's and 70's, the claimed lands were a mixture of wet and dry areas. The vegetation and conditions were similar to those depicted in 1907. (Test. of Barnes; Exs. TS-86, TS-RB-A through TS-RB-J.)

(61) Claimant manages the property as wetland to provide habitat for waterfowl and other wildlife. The water level on the property is regulated to produce marsh vegetation that is utilized by waterfowl and wildlife. (Ex. TS-84.)

(62) The claimed lands are open to the Klamath River. Water enters and leaves the property everyday. The water levels are deepest in March, April, October and November. During the summer months, the water levels recede at higher elevations and the land produces

grass, plants and vegetation. There are no control devices on the claimed lands. (*Id.*; Test. of Ganong; test. of Malatore.)

(63) Claimant depends on the Keno Dam to maintain the elevation of the water covering the land between 4,085.0 and 4,086.5 feet above sea level on the property to produce plants and waterfowl habitat. (Test. of Ganong; OWRD Ex. 1 at 5, 31.)

(64) Claimant contacts PP&L if the water level must be raised. (Test. of Malatore.)

CONCLUSIONS OF LAW

(1) There is sufficient information on the development of water on the places of use prior to February 24, 1909, to establish a vested pre-1909 water right for irrigation purposes.

(2) Flooding/sub-irrigation/natural overflow is a valid basis for a water right.

(3) The record demonstrates intent to divert water prior to February 24, 1909. It is irrelevant whether the intent was to use water to grow plants and grasses for cattle or to grow plants and grasses for wildlife.

(4) The claimed rate, duty and total quantity of water is not in excess of the standard rate and duty and is supported by evidence of use prior to February 24, 1909.

(5) There is evidence to support the following claimed priority dates: February 1, 1883; December 20, 1888; January 26, 1889; February 1, 1889; February 2, 1889; and March 11, 1889. There is insufficient evidence to support the claimed date of "time in memoriam."

(6) The irrigation that occurred on the claimed place of use has not been abandoned.

(7) The evidence in the record establishes a pre-1909 water right. Construction of works is not required when the land is naturally irrigated.

(8) Construction of works is not required when the land is naturally irrigated.

(9) The record establishes intent to use natural overflow before February 24, 1909.

(10) Claimant's use of water is not wasteful for fish and wildlife habitat.

(11) The record supports the rate, duty, use, and 1,523.80 acres to be irrigated.

(12) There is insufficient evidence to support a tribal treaty right with a priority date of "time in memoriam."

(13) The record establishes a season of use of April 1 through October 31.

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(14) The use of natural overflow irrigation to grow plants and grasses on the claimed lands has not changed.

(15) Claimant's use and application of the water is not detrimental to contestants' priority water rights.

(16) Claimant did not abandon any rights acquired with the lands included in the claim when they were purchased by Claimant.

(17) The Klamath River and its tributaries were not over-appropriated at the time Claimant began its use of the claimed water.

(18) The current use was developed within a reasonable time after the claimed date of appropriation.

(19) It is irrelevant whether the purposes of the Klamath Reclamation Project may not be realized in the event that water used pursuant to this claim interferes with the purpose of the Klamath Reclamation Project, because this claim is senior to the priority of the Klamath Reclamation Project.

(20) To the extent the Claimant asserts a right for fish and wildlife use which interferes with the direct diversion and storage of waters for domestic and irrigation uses, it is not in violation of Article III.C of the Klamath River Basin Compact.

(21) Any rights to use or store water for this purpose is not subordinate to domestic and irrigation rights of contestants as provided in the Klamath River Basin Compact.

(22) There is insufficient evidence to determine whether the water has been naturally applied to this land for wildlife use forever.

(23) The claim is not barred to the extent it seeks water used by HID *et al.*

(24) It is irrelevant whether the water described in the 1910 permits for Four Mile and Fish Lakes held by Rogue River Valley Irrigation District and Medford Irrigation District should be "water available" for appropriation in the adjudication, because this claim is senior to the priority of the 1910 permits.

(25) There was a permissible change from pre-1909 beneficial use of natural overflow for the purpose of plant growth to support haying and grazing to the claimed wildlife use.

(26) Under Oregon law, beneficial use of natural overflow for the purpose of plant growth to support haying and grazing is not legally distinct as a purpose of use from beneficial use of natural overflow for the purpose of plant growth to support wildlife.

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OPINION

Claimant contends that it has established a pre-1909 water right. The USA and KPWU contend to the contrary. The burden of proof to establish a claim is on the Claimant. ORS 539.110; OAR 690-028-0040. The standard of evidence applicable in these cases is preponderance of the evidence. *Cook v. Employment Division*, 47 Or App 437 (1980). Proof by a preponderance of the evidence means that the fact finder is convinced that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

To establish a pre-1909 water right, the Claimant must prove the following elements: (1) an intent to apply the water to a beneficial use, existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, canal or other structure; and (3) the application of the water within a reasonable time to some useful industry. *In re Water Rights of Silvies River*, 115 Or 27, 65 (1925); *In re Water Rights of Deschutes River*, 134 Or 623 (1930).

It is also the Claimant's burden to prove the terms of the right, such as the priority date, amount claimed, season of use, and number and location of irrigated acres. As modified below, Claimant has met its burden.

I will review the elements of a pre-1909 water right, and then address the remaining issues raised by the parties.

1. Whether there is insufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right.

(a) Intent

Where the claim is based on natural overflow, the appropriation may be established by evidence that 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***." *Silvies River*, 115 Or at 66.

In this case, the evidence in the record establishes that the claimed lands produced grass and vegetation from natural overflow irrigation that was used by settlers, ranchers and landowners for grazing and haying purposes beginning in the 1850s and continuing through Claimant's ownership of the lands.

In addition, the Swamp Act deeds in the record are evidence that the water was beneficially used by the settlers on the lands at the time the conveyances were made, or in Mr. Brooks' case, evidence that the land had been reclaimed three years prior to his receipt of the deed.

The USA argued that the issuance of the Swamp Act deeds did not necessarily mean that the land had been reclaimed or that water was being beneficially used by the time those deeds were given. I disagree.

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With regard to the Swamp Act deed issued to Mr. Brooks, because he purchased the land for \$1 per acre and received the deed in 1886, the Acts of 1878 and 1887 (the amendments) are not applicable. Accordingly, the fact that Mr. Brooks received a Swamp Act deed on February 1, 1886 is conclusive evidence that he reclaimed the swamp lands subject to that deed and provided proof of said reclamation to the State Land Board. Therefore, I find by a preponderance of the evidence that the intent to appropriate water for the claimed lands in Swamp Act Deed M-55 is February 1, 1883.

With regards to the remaining Swamp Act deeds in the record, the lands were purchased for \$1 per acre without easements. As such, the Acts of 1878 and 1887 are not applicable. However, even if the Acts were applicable, reclamation is not at issue in this case. As set forth in the record, the claimed lands were being used by settlers for grazing and harvesting hay without construction of any works. Thus, no active efforts at reclamation were required. More importantly, because the claimed lands were already planted in grass from natural overflow, it only remained for the settlers to harvest the crop for three years for reclamation to be complete. The evidence clearly establishes that the claimed lands were subject to natural overflow irrigation from the Klamath River, and the grasses that were harvested were nurtured by the overflow. The evidence also establishes that the settlers on the claimed lands used the grasses for grazing and harvesting hay without construction of any works. Therefore, I find by a preponderance of the evidence that the conveyance of the remaining Swamp Act deeds is evidence of the beneficial use of water as of the date of the conveyance.

The USA next argued that there was significant corruption in the way Swamp Act properties were acquired. However, the evidence of corruption does not relate to the specific lands subject to this claim. As such, the argument is unpersuasive.

The USA also argued that the statements of others post 1909 do not support a pre-1909 water right. However, in an adjudication involving a pre-1909 water right in the Klamath Basin, generally speaking, a party must depend upon family recollections, statements from neighbors and former landowners, old letters and deeds, and other historical documents regarding the historical use of water from the Klamath River. In this case, I have considered all of the relevant evidence in the record, including the statement of others, in evaluating this claim. Thus, the argument is unpersuasive.

(b) Diversion

As a general rule, to constitute a valid appropriation of water there must be a diversion from the natural channel by means of a ditch, canal, or other structure. *Id.* at 65. However, in Oregon, a vested pre-1909 right can be established even in the absence of a physical diversion. Oregon courts have long recognized that the diversion element is not an absolute, and in situations where nature has been generous, the courts will not vainly require diversions. *Silvies River*, 115 Or at 66 (“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”); *Hough v. Porter*, 51 Or 318, 419 (1909) (no certain method is necessary to constitute a valid appropriation so long as the water is applied to a beneficial use).

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In this case, the evidence in the record establishes that the claimed lands were flooded by overflow from the Klamath River initially through natural breaks in the berm, and later by construction of water works (the Keno dam). The evidence further establishes that the settlers and land owners made beneficial use of the water by harvesting the hay that grew on the land, and by grazing cattle and other animals on the claimed lands from the 1850s through Claimant's ownership of the lands.

The USA argued that artificial diversion has not been established. However, because the claimed lands were initially flooded through natural breaks in the berm and later by the Keno dam, the argument is unpersuasive.

(c) Application of water

The third element is the requirement that within a reasonable time the water must be applied to a beneficial use. *Silvies River*, 115 Or at 61. This reasonable diligence requirement is designed to manifest to the world that there is a bona fide intention to complete the appropriation within a reasonable time. *Id.*

In this case, the evidence in the record establishes that the settlers to the claimed lands manifested their intent to put the water to beneficial use when they grazed or harvested the grasses resulting from the natural overflow. Mr. Brooks' application of water began in 1883. The remaining landowners established their intent to put the water to beneficial use on the date the Swamp Act Deeds were conveyed. In addition, the evidence establishes that the beneficial use continued through Claimant's ownership in the claimed lands. Accordingly, I find by a preponderance of the evidence that the water was applied to a beneficial use within a reasonable time. I further find that Claimant has established a pre-1909 water right for irrigation purposes. Claimant has not established a pre-1909 water right for recreation purposes.

(d) Claimed priority date

Claimant contends that the priority date is "time in memoriam." However, a priority date of "time in memoriam" applies to water rights based on aboriginal claims of the Tribes, and this case does not involve such a claim.

More importantly, the use of natural overflow on the land cannot form the basis for a water right until it coincides with evidence of a claim of right in the land. *Hough v. Porter*, 51 Or 318, 421 (1909). In this matter, Mr. Brooks established a claim of right when he began reclaiming the land in 1883. In addition, the remaining landowners established a claim of right when they received the Swamp Act Deeds to the land. As such, assuming the claimed places of use are established, the appropriate priority dates for the claimed lands under the various Swamp Act Deeds are as follows:

Deed	Priority Date
M-55	February 1, 1883
M-147	December 20, 1888

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M-184	January 26, 1889
M-185	January 26, 1889
M-186	January 26, 1889
M-202	February 1, 1889
M-203	February 2, 1889
M-240	March 11, 1889

(e) Claimed rate, duty, and quantity of water

Claimant contends that three acre feet per acre or as much as necessary to maintain the elevation of 4,085.0 and 4,086.50 feet above sea level is appropriate in this case. I agree.

Mr. Ganong testified that the “three acre feet per acre” number was similar to the United States’ claims for refuge purposes and that it represented the “pan evaporation” rate to maintain a moist environment on the property. Because there is no evidence in the record that contradicts Mr. Ganong’s testimony, I find that the claimed rate, duty and quantity of water is appropriate.

(f) Claimed period of use

Claimant contends that the period of use is year round. I disagree.

In this case, the evidence in the record establishes that prior to 1909, the claimed lands were flooded in early spring from natural overflow from the Klamath River. The evidence further establishes that beginning in June, the floodwater receded from parts of the land which produced an abundant crop of vegetation for grazing and haying in the summer and fall. It was not until the construction of the Keno damn that the claimed lands were flooded year round. Therefore, the appropriate period of use is April 1 through October 31.

(g) Claimed places of use

Claimant contends that the lands described in the Swamp Act Deeds are the appropriate places of use. However, Claimant is limited by the amount of acreage that it claimed (1,570.70), the places of use that it claimed (OWRD Ex. 1 at 32, 36-38), and what has been established by the evidence. As such, the appropriate places of use are as follows:

<u>Location</u>	<u>Lot</u>	<u>Acres</u>	<u>Priority Date</u>	
Section 1	NE ¼ NW ¼	7	5.9	January 26, 1889
	NW ¼ NW ¼		36.1	January 26, 1889
	SW ¼ NW ¼		39.8	January 26, 1889
	NW ¼ SW ¼		33.1	January 26, 1889
	SW ¼ SW ¼		19.5	January 26, 1889
Section 2	NW ¼ NE ¼	6	30.0	January 26, 1889
	NE ¼ NW ¼	6	1.0	January 26, 1889
	NE ¼ NE ¼		36.2	January 26, 1889

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	SE ¼ NE ¼		40.0	January 26, 1889
	NE ¼ SE ¼		40.0	January 26, 1889
	SE ¼ SE ¼		40.0	January 26, 1889
	NW ¼ NE ¼	5	4.0	March 11, 1889
	NE ¼ NW ¼	5	5.4	March 11, 1889
	SW ¼ NE ¼	7	9.9	March 11, 1889
	NW ¼ SE ¼	8	2.5	March 11, 1889
	SW ¼ SE ¼	9	14.2	March 11, 1889
Section 10	NE ¼ SE ¼	6	36.0	February 2, 1889
	SE ¼ SE ¼	7	31.4	February 2, 1889
Section 11	NE ¼ NE ¼		40.0	January 26, 1889
	SW ¼ NE ¼		40.0	January 26, 1889
	NW ¼ NE ¼	2	39.8	January 26, 1889
	SE ¼ NE ¼		37.6	January 26, 1889
	NE ¼ SE ¼		23.7	February 1, 1889
	SE ¼ SE ¼		10.5	February 1, 1889
Section 11	NE ¼ SW ¼		40.0	February 2, 1889
	NW ¼ SW ¼		40.0	February 2, 1889
	SW ¼ SW ¼		40.0	February 2, 1889
	SE ¼ SW ¼		40.0	February 2, 1889
	NW ¼ SE ¼		40.0	February 2, 1889
	SW ¼ SE ¼		40.0	February 2, 1889
	NE ¼ NW ¼	3	15.4	March 11, 1889
	SW ¼ NW ¼	4	39.9	March 11, 1889
	SW ¼ NW ¼	5	23.3	March 11, 1889
Section 14	NW ¼ SE ¼		8.5	February 1, 1883
	SW ¼ SE ¼		0.5	February 1, 1883
	NE ¼ SW ¼		40.0	February 1, 1883
	NW ¼ SW ¼		40.0	February 1, 1883
	SW ¼ SW ¼	2	31.2	February 1, 1883
	SE ¼ SW ¼		36.3	February 1, 1883
	NE ¼ NW ¼		40.0	February 1, 1883
	NW ¼ NW ¼		40.0	February 1, 1883
	SW ¼ NW ¼		40.0	February 1, 1883
	SE ¼ NW ¼		40.0	February 1, 1883
	NE ¼ NE ¼		0.4	February 1, 1889
	NW ¼ NE ¼		34.8	February 1, 1889

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	SW ¼ NE ¼		24.5	February 1, 1889
Section 15	NE ¼ SE ¼		40.0	February 1, 1883
	NW ¼ SE ¼		32.0	February 1, 1883
	SE ¼ NE ¼		40.0	February 1, 1883
	SE ¼ SE ¼	8	11.7	February 1, 1883
	SW ¼ NE ¼	15	39.6	February 1, 1883
	NE ¼ NE ¼	16	37.7	February 1, 1883
	NW ¼ NE ¼	16	4.0	February 1, 1883
Section 23	NE ¼ NW ¼	4	6.5	December 20, 1888
	NW ¼ NW ¼	4	0.9	December 20, 1888
	Total acreage		1,523.80	

2. Whether flooding/sub-irrigation/natural overflow is a valid basis for a water right.

Oregon courts have recognized that natural overflow is a valid basis for a water right. *See McCall v. Porter*, 42 Or 49, 55 (1902) (if land is rendered productive by the natural overflow without the aid of any appliances whatever, the cultivation of the land by water moistening the land is sufficient appropriation of the water); *Silvies River*, 115 Or 27, 66 (1925) (appropriation may be established by evidence that 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); *Springer v. Dunn*, 177 Or 30, 41-42 (1926) (appropriation provided by natural irrigation dated to homestead entry); *Campbell v. Walker*, 137 Or 375, 383 (1931) (depasturing of cattle or cutting hay on swamp or overflow lands establishes the priority date rather than the date of drainage, water rights based on the beneficial use of natural overflow are established as of the date upon which an honest effort was made to occupy or acquire title to the lands and use both the land and water for beneficial purposes); *Masterson v. Pacific Livestock Co.*, 144 Or 396, 408 (1933) (it is well settled that where practically no artificial works for irrigation are necessary, the requirement that there be a diversion from the natural channel is satisfied when the appropriator accepts the gift of nature).

In addition, the OAH has also recognized that beneficial use of natural overflow creates a vested pre-1909 water right. *See* Order on Motion for Ruling on Legal Issues, Consolidated Cases 124, 126, & 127, May 22, 2003; Order on Motion for Ruling on Legal Issues, Case 128, August 20, 2003; Proposed Order, Consolidated Cases 124, 126, & 127, July 22, 2004; and Order on Motion for Ruling on Legal Issues, Case 157, August 24, 2004.

Accordingly, the law and pertinent authority is well settled that natural overflow is a valid basis for a water right.

USA argued that without an artificial diversion the use of natural overflow is a privilege. However, because the claimed lands were initially flooded through natural breaks in the berm and later by the Keno dam, the argument is unpersuasive. *Silvies River*, 115 Or at 66 (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).

3. Whether the record demonstrates intent to divert water for wildlife as of the claimed priority date.

As indicated previously, the record demonstrates intent prior to February 24, 1909. It is irrelevant whether the intent was to use water to grow plants and grasses for cattle or to grow plants and grasses for wildlife.

4. Whether the claimed rate, duty and total quantity of water is in excess of the standard rate and duty and is not supported by evidence of use prior to February 24, 1909.

The claimed rate, duty and total quantity of water is not in excess of the standard rate and duty, and is supported by evidence of use prior to February 24, 1909.

5. Whether there is evidence to support the claimed priority date.

The evidence in the record establishes the following claimed priority dates: February 1, 1883; December 20, 1888; January 26, 1889; February 1, 1889; February 2, 1889; and March 11, 1889.

6. Whether any irrigation use that may have occurred on the claimed place of use has been abandoned.

The evidence in the record establishes that irrigation on the claimed place of use has not been abandoned.

7. Whether there is insufficient evidence to support the right claimed because the claim does not include sufficient documentation to support the following legally required elements of a pre-1909 right based on historical use: use of water or construction of works for the application of water before February 24, 1909; and completion of works within a reasonable time after beginning construction or use.

The evidence in the record establishes a pre-1909 water right. Construction of works is not required when the land is naturally irrigated. *See Silvies River*, 115 Or at 65.

8. Whether claimant did not construct works within a reasonable time after beginning construction or use of water.

As stated above, construction of works is not necessary to appropriate a pre-1909 water right.

9. Whether the record establishes intent to use natural overflow before February 24, 1909.

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The evidence in the record establishes intent to use natural overflow before February 24, 1909.

10. Whether the Claimant's use of water is wasteful for fish and wildlife habitat.

The evidence in the record established that claimant's use of water is not wasteful for fish and wildlife habitat. To the contrary, claimant's current use of water is beneficial for wildlife habitat.

11. Whether the record supports the rate, duty, actual use, points of diversion, seasonal limitations or acreage claimed.

The record supports the rate, duty, actual use, and 1,523.80 acres claimed. There are no points of diversion.

12. Whether there is sufficient evidence to support a tribal treaty right with a priority date of "time in memoriam."

There is insufficient evidence to support a tribal treaty right with a priority date of "time in memoriam."

13. Whether the record establishes year round use of water as claimed.

The period of use is April 1 through October 31.

14. Whether the Claimant has changed the use from irrigation to fish and wildlife management but has not complied with Oregon statutory procedures for securing a change of use and Claimant is not using water for the use claimed.

The evidence in the record establishes that the use of natural overflow irrigation to grow plants and grasses on the claimed lands has not changed.

15. Whether Claimant's changed use and application of the water is detrimental to contestants' priority water rights.

The evidence in the record establishes that Claimant's water use is not detrimental to contestants' water rights.

16. Whether Claimant abandoned any rights acquired with lands included in the claim when it was purchased by Claimant.

The evidence in the record establishes that Claimant has not abandoned any rights acquired with lands included in the claim.

17. Whether the Klamath River and its tributaries were over-appropriated at the time Claimant began its use of the claimed water.

There is no evidence in the record that the Klamath River and its tributaries were over-appropriated at the time Claimant began its use of the claimed water.

18. Whether the current use was developed within a reasonable time after the claimed date of appropriation.

The evidence in the record establishes that the current use was developed within a reasonable time after the claimed date of appropriation.

19. Whether the purposes of the Klamath Reclamation Project may not be realized in the event that water used pursuant to this claim interferes with the purpose of the Klamath Reclamation Project.

The priority date of the Klamath Project is 1905. Since this claim has priority dates of 1883, 1888 and 1889, it is senior to the Klamath Project and not included in the claims for that project. When Congress passed the Reclamation Act of 1902, it specified that the water rights of reclamation projects would be subject to existing water rights. 43 USC §383. Thus, even if the allowance of this claim were to interfere with the purposes of the Klamath Project, it would not be precluded because this claim has senior priority.

20. Whether, to the extent the Claimant asserts a right for fish and wildlife use which interferes with the direct diversion and storage of waters for domestic and irrigation uses, it is in violation of Article III.C of the Klamath River Basin Compact.

The Klamath River Basin Compact does not control rights that vested before the Compact was established in 1957. ORS 542.620, Article III. Because this claim vested prior to 1909, it cannot be defeated by inconsistency with the Klamath River Basin Compact.

21. Whether any rights to use or store water for this purpose is subordinate to domestic and irrigation rights of contestants as provided in the Klamath River Basin Compact.

The Klamath River Basin Compact does not control rights that vested before the Compact was established in 1957. Because this claim vested prior to 1909, it is not subordinate to the Klamath River Basin Compact.

22. Whether the water has been naturally applied to this land for wildlife water use forever.

There is insufficient evidence in the record to establish that water was naturally applied to the land for wildlife water use “forever.”

23. Whether the claim is barred to the extent it seeks water used by HID *et al.*

There is no evidence in the record that this claim is barred to the extent it seeks water used by HID *et al.*

24. Whether the water described in the 1910 permits for Four Mile and Fish Lakes held by Rogue River Valley Irrigation District and Medford Irrigation District should be “water available” for appropriation in the adjudication.

This claim vested prior to 1909. As such, this claim is not subordinate to the 1910 permits for Four Mile and Fish Lakes.

25. Whether there was a permissible change from pre-1909 beneficial use of natural overflow for the purpose of plant growth to support haying and grazing to the claimed wildlife and recreation.

The evidence in the record establishes that the use of natural overflow irrigation to grow plants and grasses on the claimed lands has not changed over the years. However, the use of the plants and grasses nurtured by the overflow has changed from feeding cattle to feeding fowl and other wildlife. I find, by a preponderance of the evidence, that the change is permissible.

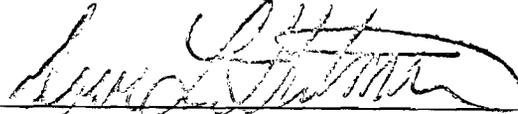
26. Whether, under Oregon law, beneficial use of natural overflow for the purpose of plant growth to support haying and grazing is legally distinct as a purpose of use from beneficial use of natural overflow for the purpose of plant growth to support wildlife and recreation.

In this case, the original use of water was for irrigation of plants and grasses growing on the property in question to provide food for animals (cattle). The evidence in the record establishes that Claimant has continued to apply water in order to grow plants and grasses on the property to provide food for animals (waterfowl). The difference is not in the use of the water, but in the use of the plants and grasses nurtured by the water. Simply put, Claimant is growing plants and grasses to provide food and habitat for waterfowl, just as hay was grown in the past to provide food for cattle. Accordingly, I find that there is no legally cognizable difference between the pre-1909 water use to feed cattle and the present use of water to support wildlife.

ORDER

Claimant has demonstrated the necessary elements to support a pre-1909 claim for the use of water for irrigation purposes. There has been a permissible change from feeding cattle to feeding wildlife with the plants and grasses nurtured by the natural overflow.

Based on the foregoing, 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. The elements of a water right cognizable under ORS Chapter 539 are established for Claim 210 and the claim is approved as modified.



Dove L. Gutman, Senior Administrative Law Judge
Office of Administrative Hearings

Dated: February 12, 2009

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:

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

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2009, 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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Sacramento, CA 95825
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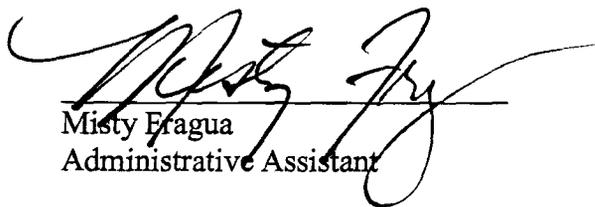
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Misty Fragua
Administrative Assistant

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