

124F00010012
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 Bureau of Reclamation; The
Klamath Tribes; Horsefly Irrigation District¹;
Langell Valley Irrigation District; Medford
Irrigation District²; 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,

vs.

Ruth A. Anderson; Lewis E. Furber; Sidney E.
Vidricksen; Russell E. Gmirkin; and Vasias
(Tom) Gmirkin,
Claimants

PROPOSED ORDER

Consolidated
Case Nos. 124, 126 & 127
Claim Nos. 177, 182, 183
Contest Nos. 3167, 3403, 3832, 4174, 3172,
3404, 3834, 4176, 3173

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¹ Contestants Medford Irrigation District, Rogue River Valley Irrigation District, Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew their Contest No. 3167 against claim 177.

² Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew from participation in Contest No. 3172 against Claim No. 182 and Contest 3173 against Claim No. 183.

HISTORY OF THE CASE

This proceeding in the Klamath Basin Water Adjudication was commenced by three claims filed on January 9, 1991 by Ruth A. Anderson as to Case 124 (Claim 177), December 7, 1990 filed by Lewis E. Furber as to Case 126 (Claim 182), and January 30, 1991 by Eva M. Gmirkin, as to Case 127 (Claim 183), based upon use of water beginning prior to February 24, 1909. (Ex. 12400002002 at 3 *et seq.* 154 *et seq.* 311 *et seq.*)

On October 4, 1999, OWRD issued its Preliminary Evaluations of each of the claims, concluding that in each case the elements of pre-1909 claims had been established, and preliminarily approving the claim. In each case, the claim as approved was for a lesser rate than that claimed. (Ex. 124E00002002 at 150 *et seq.* 307 *et seq.* and 466 *et seq.*)

Claimants did not file contests against the Preliminary Evaluations, and accepted the Preliminary Evaluations in their Prehearing Statements filed in this case.

On May 8, 2000, Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District and Medford Irrigation District, filed Contests Number 03167, 03172, and 03173 regarding cases 124, 126, and 127, respectively, asserting an interest in water potentially subject to the claim, and seeking to bar the claim to the extent it would effect the water rights of these contestants. (Ex. 12400002002 at 98 *et seq.* 261 *et seq.* and 408 *et seq.*)

On May 8, 2000, Klamath Project Water Users³ (KPWU) filed Contests 3403, 3404 and 3405, respecting cases 124, 126 and 127, respectively. (Ex. 12400002002 at 103 *et seq.* 266 *et seq.* 413 *et seq.*)

On May 8, 2000, the United States of America filed Contests 3832, 3834, and 3835, respecting cases 124, 126, and 127, respectively. (Ex. 12400002002 at 133 *et seq.* 286 *et seq.* and 449 *et seq.*)

On May 8, 2000, the Klamath Tribes filed Contests 4174, 4176 and 4177, respecting Cases 113, 114, and 115, respectively. (Ex. 124E00002002 at 137 *et seq.*; 124E00002002 at 294 *et seq.*; 124E00002002 at 453 *et seq.*)

This matter was then referred to the Office of Administrative Hearings for a contested case hearing. Thereafter, Contestants Langell Valley, Horsefly, Medford and Rogue River Valley Irrigation Districts withdrew Contest Number 03167. Medford and Rogue River

³ Klamath Project Water Users is an unincorporated group of participants joined together for the purposes of raising issues of common concern in this adjudication. For the purposes of this case, it is composed of Klamath Irrigation District, Klamath Drainage District, Tulalake Irrigation District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement Company, Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Bradley S. Luscombe, Berlva Prichard, Don Vincent, Randy Walthall, Inter-County Title Co., Winema Hunting Lodge, Inc., Reames Golf and Country Club, Van Brimmer Ditch Co., Plevna District Improvement Company, Collins Products, LLC.

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Irrigation Districts withdrew from participation in Contests 3172 and 3173, leaving Langell Valley and Horsefly Irrigation Districts still in the case. Klamath Project Water Users withdrew Contests 3403, 3404 and 3405. These participants made no further appearance in these cases. By order dated June 21, 2002, the three cases were consolidated for hearing, and the prehearing conference was reset to July 3, 2003. A prehearing conference was conducted by Maurice L. Russell, II, Administrative Law Judge of the Office of Administrative Hearings, on July 3, 2002, after which a Pre-Hearing Order was issued, July 5, 2002, ordering that Cases 124, 126, and 127 be consolidated for hearing, listing the issues presented in these cases, and setting a schedule for proceedings. The schedule was amended by order on November 27, 2002, December 3, 2002, December 17, 2002, and January 24, 2003, March 18, 2003 and April 9, 2003. Pursuant to the Order of April 9, 2003, a Notice of Hearing was duly served on all participants on August 22, 2003, for a hearing commencing October 7, 2003. The participants timely submitted written testimony and exhibits.

On March 3, 2003, Claimants filed their Motion for Ruling on Legal Issues. After briefing, an Order on Motion for Ruling on Legal Issues was issued on May 22, 2003, granting in part and denying in part Claimants' motion.

The hearing for cross-examination of witnesses was convened on October 7, 2003, at 9:00 a.m. in the Conference Room at the offices of the Office of Administrative Hearings at 3420 Cherry Ave. NE, Suite 140, Salem, Oregon.

Ron Yockim appeared as attorney for claimants. Kimberly Grigsby appeared as Agency Representative for Oregon Water Resources Department (OWRD). Stephen Palmer, Bruce Bernard and Dave Harder appeared for Contestant, United States. Lorna Babby appeared by telephone for Contestant, Klamath Tribes. Christopher Schwindt appeared by telephone for Contestants Horsefly and Langell Valley Irrigation Districts.

Maurice L. Russell, II, Administrative Law Judge for the Office of Administrative Hearings, presided.

Pursuant to an order setting Post Hearing Schedule, the participants timely filed additional matter, closing, responsive and reply briefs.

EVIDENTIARY RULINGS

Exhibits 124E00007001⁴ through 124E00007011, offered by Claimants, were admitted but for items 124E00007003 and 124E00007004, as to which the United States' objection was sustained. Exhibits 124E00007012 through 124E00007021, listed on Claimants Exhibit List, were not offered into evidence. Exhibits 124E000040002 through 124E000040016, offered by the United States, were admitted. Exhibits 124E000060001 through 124E000060056, offered by

⁴ At the beginning of this case, the parties were provided a range of numbers that they were instructed to use to mark evidentiary submissions. In some cases, the exhibits as offered were not necessarily marked in conformity with this instruction, generally through the variation in the number of zeros. As there are no duplications in the numbering, and the exhibits in their variation have been cited extensively in correspondence, argument and pleadings, these marks have been retained as received.

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Contestants Horsefly and Langell Valley Irrigation Districts, were admitted. The record was held open for additional exhibits proposed by the participants. On October 27, 2003, the United States submitted a complete copy of the document, a portion of which had been previously offered as Exhibit 124E000040011, entitled "History of the Klamath Project. Oregon-California From May 1, 1903, to December 31, 1912." The United States also submitted Exhibit 124E000040008, and, as a supplemental filing, an Affidavit of Loring Gurney providing foundation for offered Exhibit 124E0000400011.

Exhibits 124E000040008, 124E000040011, as augmented, and the supplemental affidavit of Loring Gurney are hereby admitted into the record.

On October 27, 2003, Claimants filed a Motion for Additional Time for Filing Documents, seeking an extension to file documents that were to be filed October 24, 2003. Claimant also filed the documents referred to in the motion at the same time, being Exhibits 123E00007022 and 123E00007023. Claimants also offered as a supplemental filing Exhibit 124E00007014 and 124E00007024. The United States objected to admission of these exhibits, as untimely, and not within the scope of the case. This objection is overruled for two reasons.

First, the United States objects that the Motion for Additional Time for Filing Documents was filed after the date the documents were due. While there are trial court rules addressing this point, there is no provision in OAR 137-003-0501 *et seq.*, or in the procedural rules adopted by OWRD and applicable to these proceedings that require such a Motion to be filed prior to the due date of the filing as to which an extension is sought⁵. In addition, the reason for the delay in filing, *i.e.* that one of the documents to be filed had taken longer to obtain from the County Surveyor than anticipated, is sufficient for good cause. In any event, the documents in question are, in my view, necessary to a full and fair inquiry, and their admission is not prejudicial to the other participants.

Second, as to the supplemental filings Exhibit 124E00007014 and 124E00007024, the field survey notes offered as 124E000070024 relate to the preparation of a map which the United States asserts was used by the United States' witness in preparing his testimony, and as such form part of the foundation for that testimony. In light of this, the exhibit is necessary for a full and fair inquiry and will be admitted. Exh. 124E00007014 is a map referred to in that witness' testimony as having been used in preparation of his written testimony, and, as such is relevant to this case. ORS 183.450(1).

Exhibits 124E00007013, 124E00007022, 124E00007023 and 124E00007024 are hereby admitted into the record.

The record is closed.

Because this case involves a determination of the application of water prior to February 24, 1909, it is inevitable and necessary that a greater reliance be placed on inference and hearsay than in other administrative cases. It would be a very unusual case where testimony could be

⁵ Indeed, OAR 137-003-0530, the rule governing late filing of documents, does not contain any such condition, only requiring a finding that there is good cause for the failure to file the document in the time required.

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taken at hearing from a percipient witness to conditions that obtained 94 years before. Nonetheless, although hearsay is generally admissible in administrative proceedings, (*Pierce v. MVD*, 125 OR App 79,85 (1993)) where hearsay is offered as substantial evidence of a fact at issue, it is necessary to apply the five-part test first stated in *Reguero v. Teacher Standards and Practices*, 312 Or 402 (1991).

In *Reguero*, the Supreme Court has enunciated 5 factors to be considered in determining whether hearsay is "substantial evidence" such as will support agency action. These factors are as follows:

[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."

Reguero, 312 Or at 418.

The Supreme Court has applied the *Reguero* analysis in several cases, including *Cole v. DMV*, 336 Or 565(2004).

In this case most of the evidence regarding circumstances prior to the 1940s is hearsay. Even after that time, evidence in the file includes considerable hearsay, although much of it is corroborated by the testimony presented at hearing.

For the earlier period, however, all the hearsay offered is subject to common factors, for *Reguero* purposes, as follows:

First, in all cases the declarant is unavailable and probably deceased. Thus, there is virtually no alternative to consideration of hearsay in some form for the early period.

Second, the hearsay evidence is important. Without hearsay evidence from the earlier period, there could be no evidence at all on matters dispositive of this case.

Third, whether there is corroboration to the facts for which the hearsay is offered depends on the specific item.

Fourth, the efficacy of cross-examination of the witnesses, were they available, is also questionable on the point at issue. For example, Julian Ager's affidavit is based upon his recollection of conversations he had with his Grandfather before 1929. If he were still alive, it might be possible to test the quality of that recollection through cross-examination, but it seems unlikely that additional details could be brought to light through cross-examination that would impeach the main point of the statement, that his Grandfather took hay from the property in question in the late 1800s.

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Finally, the consequences of the decision in this case are of the utmost significance, at least as great as that in *Reguero*, and perhaps more so. In times of drought, the fact that claimants could have other water rights based on an application after 1909 might well be unavailing in the face of claims having earlier priority. In that event, the land itself could be rendered unproductive.

Under the circumstances, I conclude that the hearsay evidence presented in this case for the period before the 1970s meets four of the five standards applicable under *Reguero*, to the extent it is corroborated by other evidence, including other hearsay from a different source, and is therefore substantial evidence of the facts that evidence presents. The evidentiary effect of that hearsay will depend on the state of corroborating and contrary evidence in the record, as discussed in greater detail, below.

ISSUES PRESENTED

1. Whether there is sufficient evidence to support the right claimed because the required elements are not established for this claim.
2. Whether the record supports the rate, duty, actual use, points of diversion and acreage claimed.
3. Whether the record establishes year round use of water as claimed.
4. Whether the record establishes an intent to use natural overflow before February 24, 1909.
5. Whether the claimed use of water for wildlife habitat is wasteful.
6. Whether Claimants have changed the use of water from irrigation to wildlife use without complying with Oregon statutory procedures for securing a change in use.
7. Whether Claimants are using the water for the claimed use.
8. Whether Claimants' changed use of water is detrimental to contestants' water rights.
9. Whether Claimants abandoned any water rights acquired with the land included in this claim.
10. Whether the Klamath River and its tributaries were over-appropriated at the time the claimant began use of the claimed water.
11. Whether the claimed use was developed within a reasonable time of the claimed date of appropriation. Whether the record establishes the completion of works within a reasonable time after beginning construction or use of water.

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12. Whether the purposes of the Klamath Reclamation Project will not be realized if this claim interferes with those purposes.
13. Whether the claimed right for wildlife habitat, if it interferes with domestic and irrigation rights, violated the Klamath River Basin Compact.
14. Whether rights for wildlife habitat are subordinate to domestic and irrigation rights pursuant to the Klamath River Basin Compact.
15. Whether there is sufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right.
16. Whether natural flooding/subirrigation/natural overflow is a valid water right.
17. The total acreage in the place of use exceeds the irrigated acreage supported by the evidence.
18. The diversion rate exceeds what can be beneficially used at the place of use.
19. An intent as of the claimed priority date to divert water for wildlife has not been demonstrated.
20. Whether the waters from Four Mile Lake and Fish Lake, together with the flood, storm, springs, new, developed, discovered, salvaged, excess, reclaimed, surplus and captured waters thereof and their tributary including all water which may drain or flow into Cascade Canal connecting Four Mile Lake and Fish Lake should be "water available" for appropriate under the Klamath Adjudication.
21. Whether the season of use as approved in the Preliminary Evaluation may lawfully exceed the season as claimed.
22. Whether waters originating within the Lost River Basin are subject to appropriation in the Klamath Adjudication.⁶

FINDINGS OF FACT

1. The property subject to these claims was divided into three parcels, acquired by the three separate owners through inheritance. The property is located on the easterly bank of the Klamath River, in T39S, R8E W.M. (Ex. 124E00007006 at 3, 4.)
2. Prior to European settlement, the Klamath River was subject to seasonal flooding, during which the property subject to these claims was seasonally inundated. As floodwaters receded in

⁶ This issue was not identified in the Prehearing Statement by OWRD, and consequently was not stated as one of the issues presented in this case in the Prehearing Order. A review of the Statements of Contest and Prehearing Statements filed in Cases 126 and 127 by Langell Valley and Horsefly Irrigation Districts, however, disclosed that this issue was presented in this case.

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the spring, the land would be exposed, and, since it was still saturated with water for some time after exposure, would produce an abundant crop of vegetation suitable for cattle feed. (Ex. 124E00007006 at 8 to 16.) In addition, the young shoots emerging from the saturated ground provided a suitable environment for waterfowl, especially juvenile waterfowl. (Trans. at 81.)

3. Beginning in the 1850s, European settlers began moving into the area. They grazed cattle on the land in question, and, perhaps, harvested hay there. (Ex. 124E00002002 at 17-32.) There is no record, however, that the land was taken into exclusive ownership by any person at this time. (Ex. 124E00007006 at 8 to 16.)

4. In 1876, James and Hannah Hudson conveyed lots 2-7⁷ Section. 35 Township 39 South Range 8 East. Willamette Meridian⁸ to Dennis Crowley. (Ex. 124E00002001 at 196, 124E00007005, Ex. A.) The basis for title in Hudson, however, is not in the record, so precisely what Hudson conveyed and Crowley acquired cannot be determined. In or before 1878 Miller paid the down payment required for a claim under the Swamp Act for property in lots 2-9 S 35, T 39 S, R 8 E W M. Based upon this claim, the State of Oregon conveyed those lots to Miller in 1882. (Ex. 124E00007006 at Ex 5.)

5. On April 21, 1886, the State of Oregon deeded Lots 7 and 10 of Section 36 to Eliza Coleman among other properties not included in these claims. (Ex. 124E00007019.)

6. On May 8, 1886, Josephine Callaghan received conveyance from the State of Oregon of 8.2 acres of property within Claim 177, among other land within the NW ¼ of S36, T39S, R 8 E W M (Ex. 124E00007023.)

7. In 1889 the State of Oregon conveyed the SW ¼ NE ¼ and lots 10, 11, 12, and 13 of Sect. 35 to E.C. Small. (Ex. 124E00007004, Ex D.)

8. In 1889 the State of Oregon conveyed lots 14 and 15 and the S ½ SE ¼ of Section 35 to James Logan. (Ex. 124E00007004, Ex. C.)

9. By 1891, all the property under these claims was in title to the Klamath Land Co. (Trans. at 77-78.)

10. From the time title was acquired to the properties by their first record holders other than the United States, until the flow of the Klamath River came under control through construction of dams, after 1909, the properties were subjected to irrigation by natural overflow from the Klamath River on a seasonal basis, and were used for grazing and hay. (Ex. 124E00002002 at

⁷ In the early 1900s the property was subdivided and platted in 40-acres tracts with roads between by the Midland Town Company. The roads have since been vacated. (Trans. at 138.) Although, for the most part these tracts correspond to "lots" previously surveyed, they were given different Midland Tract numbers. Consequently, some conveyances describe the property by Midland Tract numbers, while others use the original lot numbers by which they were designated in the pre-Midland deeds. To avoid confusion and assist in following the chain of title to the property, the original lot designations have been used throughout this order.

⁸ For convenience, land descriptions will be abbreviated according to the following format: "S 35, T39 S, R 8 E W M"

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17-32.) In the early years of the 20th century, berms and ditches were constructed to control the flow of water on the property. (Ex 124E00002002 at 26, 31.) After the Klamath River was controlled, the properties were irrigated through a series of ditches, drawing water directly from the Klamath River. (Ex. 124E00007006 at 18.)

11. In 1931 the California-Oregon Power Company ("COPCO") built a dam on the Klamath River at Keno, downstream from the property in question. This dam, constructed under contract with the U.S. Bureau of Reclamation, had the effect of flooding much of the property subject to these cases. (Ex. 124E00002002 at 44.) In 1948, COPCO completed a dike to prevent flooding of the subject property. A head-gate was installed in this dike to allow the property owners to irrigate the property and to regulate the flow. (Ex. 124E00002002 at 45.) Because of the flooding, the vegetation changed during the period 1931 to 1948, requiring the property owners to remove the "tule sod"⁹ and restore the land to grass.

12. Water did not flow from the Lost River into the Klamath River prior to 1909.

13. The property subject to these claims is as follows (Ex. 124E00002002 at 152-153, 308-309, 468-469.)

Claim 177

195.4 acres- Lots 3, 4, 6, 7, 9, 10, 13, 14 in Section 35
Lots 7, 10 in Section 36
All in Township 39 South, Range 8 East, Willamette Meridian

Claim 182

190.5 acres- SE ¼ SE ¼ Section 35-19.9 acres
Lot 10, NE ¼ SE ¼ Section 35-4.8 acres
Lots 2, 3, 7, 10, 14, 15 Section.35
SW ¼ SW ¼ Section 36-36.3 acres
Lot 10, NW ¼ SW ¼ Section 36-10.2 acres

All in Township 39 South, Range 8 East, Willamette Meridian

Claim 183

180.1 acres— Lots 4, 5, 6, 8, 9, 10, 11, 12 and 13-in Sect. 35,
All in Township 39 South, Range 8 East, Willamette Meridian

CONCLUSIONS OF LAW

1. There is sufficient evidence to support the right claimed.

⁹ "Tule sod" is a tangled mass of roots of the tule plant which flourished in the flooded conditions after the COPCO dam was built at Keno. Claimant Furber testified to the difficulty of removing this mass of sod in order to return the land to productivity. (Ex. 124E00007005 at 6; Ex. 124E00007005 at Ex. C.)

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2. The record supports the rate, duty, actual use, points of diversion and acreage as allowed in the Preliminary Evaluations.
3. The record establishes use of water as claimed.
4. The record establishes an intent to use natural overflow before February 24, 1909.
5. The claimed use of water for wildlife habitat is not wasteful.
6. Claimants have not changed the use of water from irrigation to wildlife use without complying with Oregon statutory procedures for securing a change in use.
7. Claimants are using the water for the claimed use.
8. Claimants' use of water is not detrimental to contestants' water rights.
9. Claimants have not abandoned any water rights acquired with the land included in these claims.
10. The Klamath River and its tributaries were not over-appropriated at the time the use of the claimed water commenced.
11. The claimed use was developed within a reasonable time of the established date of appropriation. The record establishes the completion of works within a reasonable time after beginning construction or use of water.
12. The purposes of the Klamath Reclamation Project will not be interfered with by these claims.
13. The claimed right for wildlife habitat has not been shown to have violated the Klamath River Basin Compact.
14. The evidence is sufficient to establish the relative priorities of rights for wildlife habitat and domestic and irrigation rights pursuant to the Klamath River Basin Compact.
15. There is sufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right.
16. Natural flooding/subirrigation/natural overflow gives rise to a valid water right.
17. The total acreage allowed in the Preliminary Evaluation in the place of use does not exceed the irrigated acreage supported by the evidence.
18. The diversion rate as allowed in the Preliminary Evaluation does not exceed what can be beneficially used at the place of use.

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19. An intent as of the established priority date to divert water for wildlife has been demonstrated.
20. The waters from Four Mile Lake and Fish Lake, together with the flood, storm, springs, new, developed, discovered, salvaged, excess, reclaimed, surplus and captured waters thereof and their tributary including all water which may drain or flow into Cascade Canal connecting Four Mile Lake and Fish Lake may be "water available" for appropriation under the Klamath Adjudication.
21. The season of use as approved in the Preliminary Evaluations may not lawfully exceed the season as claimed.
22. The evidence does not establish that waters originating within the Lost River Basin are subject to appropriation in the Klamath Adjudication.

OPINION

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. The standard of evidence applicable to these cases is by a preponderance. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division* 47 Or App 437 (1980); *Metcalf v. AFSD* 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

In order to establish the claim, Claimant must show (1) an intent to apply the water to some beneficial use existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, channel or other structure; and (3) the application of the water within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930). 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***." *In re Silvies River* 115 Or 27, 66 (1925).

It is also the burden of the Claimant to prove the terms of the right, such as the priority date, amount claimed, season of use and number and location of irrigated acres.

1. There is sufficient evidence to support the right claimed.

The United States has sought to show that the property was unreclaimed swamp land until after 1909, and that the previous owners therefore did not accept the benefit of the natural overflow of the Klamath River, so as to appropriate the water. The gravamen of the United States' argument is that the conveyances of property by the State of Oregon under a Swamp Act deed did not necessarily mean that the land had been reclaimed by the time those deeds were given, and that maps prepared after those conveyances established that the property was still swamp until well after 1909. Indeed, the United States appears to have questioned the validity of

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the deeds from the State of Oregon, themselves, suggesting that without evidence as to how the State of Oregon acquired title to the property, the deeds are not reliable evidence.

The minutes of the proceedings of the Board of Commissioners for the sale of school and university lands attached as exhibit 4 to the Direct Testimony of Lewis Furber (Ex. 124E00007006) establish that, at least as to lots 2 through 9, the commissioners had required and received proof of reclamation as a condition for a Swamp Land Deed. The State of Oregon used the same form of deed, designating the land as "swamp land" in the conveyances to Logan and Small of lots 10 through 15 in 1889. This creates the inference that Logan and Small were subjected to the same requirements, and provided proof of reclamation prior to the deeds. The evidence presented by the United States, primarily maps prepared for purposes other than identification of unreclaimed land (so far as the record shows), does not rebut this inference. Since these lots comprise the great bulk of the property in question, and there is no evidence differentiating the conditions on the small portion of property remaining, it is more likely than not that the property under consideration was reclaimed at or before the time title passed into private hands.

The case presented by the United States consists essentially of proposed inferences based upon aerial photographs of the property in the 1950s, and notations on maps from an earlier period that, as noted, are contradicted by the findings of a state commission. At the same time, the record includes photographs of haying operations on the property in question said to have occurred in the 1920's and 30's. One of those photographs shows Lewis Furber, one of the only percipient witnesses in this case, during haying operations in the 1930's, and other figures identified by Furber as being connected with the property in the period in question. These photographs directly contradict the inferences proposed by the United States, that the property in question was "marsh and not agricultural in nature until at least the 1950's." (United States' Closing Brief at 18.)

Taken together, the preponderance of the evidence in the record in this case establishes that the property was reclaimed and hay was harvested from it at least as early as the date title passed into private hands.

2. The record supports the rate, duty, actual use, points of diversion and acreage as allowed in the Preliminary Evaluations.

While claimants presented evidence and argument for a different rate and duty than that allowed in the Preliminary Evaluations, all the claimants accepted the Preliminary Evaluations in their Prehearing Statements filed in this case. Since the issues presented in the Prehearing Statements set the scope of the hearing, claimants were bound by those statements and could not resurrect issues at the hearing that had been previously conceded.

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3. The record establishes use of water as claimed.

As noted above, the record establishes that, at least as early as the first transfer into private ownership, crops that were watered by natural overflow were being harvested from the properties. This is sufficient for the purposes of these cases to allow appropriation.

4. The record establishes an intent to use natural overflow before February 24, 1909.

Likewise, the fact that crops watered by nature overflow were being harvested from the properties is sufficient to establish the intent to accept the bounty of the natural overflow at least as of the date the property passed into private ownership. *In re Silvies River, ibid.*

5. The claimed use of water for wildlife habitat is not wasteful.

The evidence presented in this case shows that the water used for wildlife habitat is essentially return flow from irrigation that is collected in ponds and low-points on the property before being pumped off the property. No evidence was presented that this use is wasteful.

6. Claimant has not changed the use of water from irrigation to wildlife use without complying with Oregon statutory procedures for securing a change in use.

Waterfowl have used standing water on the properties in question since well before 1909, according to the testimony. Additionally, the water presently used for water fowl is return flow that collects in ponds and low points on the property, before passing off the property. Consequently, there is no evidence of a "change" of use.

7. Claimant is using the water for the claimed use.

The record establishes that water is being applied to all three properties for the claimed use.

8. Claimant's use of water is not detrimental to contestants' water rights.

Either Claimants' water right is prior to that of the contestants, in which case the use of the water is lawful, or it is junior to that of the contestants, in which case it is subject to regulation if it causes detriment to the contestants' water right. Either way, there is no detriment that could effect whether the water right itself is lawful.

9. Claimant has not abandoned any water rights acquired with the land included in this claim.

"Abandonment" is a question of fact, requiring evidence of an intentional forsaking or desertion, as well as a failure to use the water. *In re Willow Creek*, 74 Or 592 (1914); *Wimer v. Simmons*, 27 Or 1, 12 (1895).

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An abandonment of a right is a forsaking or desertion of it, and operates as a relinquishment thereof. There can be no abandonment without some action of the will, and an intent to abandon, but such intent may be inferred from the acts and declarations of the party against whom the relinquishment is claimed. Time is not, however, an essential element of abandonment. The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete.

Wimer v. Simmons, 27 Or at 13, 14.

In this case, there was a considerable period of non-use after the Keno Dam was built in the 1930s. It cannot be said, however, that the water right was “abandoned” for non-use, since there is no evidence of such an intention. To the contrary, the flooding of the property as a result of the dam was the cause of extensive discussion, and, eventually the threat of litigation against COPCO, the dam owner, that resulted in construction of a dike to protect the property from flooding. There is no evidence of an intent to abandon.

10. The Klamath River and its tributaries were not over-appropriated at the time the use of the claimed water commenced.

It can hardly be argued that the Klamath River had been over-appropriated in the 1870s and 1880s, when the appropriation in this case occurred. In any event, no evidence even suggesting over-appropriation is contained in the record.

11. The claimed use was developed within a reasonable time of the claimed date of appropriation. The record establishes the completion of works within a reasonable time after beginning construction or use of water.

The record shows that works of some sort were constructed early in the 20th Century, including ditches and berms to control the flow of water across the property. There is no evidence from which it can be determined that an unreasonable time passed before works were constructed to more efficiently use the water.

12. The purposes of the Klamath Reclamation Project will not be interfered with by these claims.

No substantial evidence was presented on this question.

13. The claimed right for wildlife habitat has not been shown to have violated the Klamath River Basin Compact.

No substantial evidence or argument were submitted on this question.

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14. The evidence is sufficient to establish the relative priorities of rights for wildlife habitat and domestic and irrigation rights pursuant to the Klamath River Basin Compact.

Since the use of water on the property for wildlife habitat and irrigation appears to coincide with or predate the first private ownership of the property, the same priority date applies to both of these uses. No evidence of domestic use of Klamath River water on these properties is in the record.

15. There is sufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right.

Water was beneficially used on the properties in the mid-1800s. While it may well have been used in 1858 or even earlier, such use cannot form the basis for a water right until it coincided with evidence of a claim of right in the land. *Hough v. Porter* 51 Or 318, 421 (1909). Here, that evidence does not appear in the record earlier than 1876, when Hudson conveyed lots 2 through 7 Section 35 to Crawley. The basis for this conveyance is not clear, however, since Miller acquired title to lots 2 through 9 in 1882 from the State of Oregon based on a Swamp Act claim. As Claimants note, the conveyance exceeds the acreage permitted for Swamp Act claims based on a down payment made after the revisions in the swamp act in 1878, so Miller probably paid the down payment for the property before 1879. It seems possible that Crawley conveyed whatever right there was to Miller, but with no direct link between Crawley's deed in 1876 and Miller's title, the evidence is insufficient to allow a claim of right to the land by Hudson or Crawley to form the basis for a water appropriation. The clear chain of title between Miller and the present holders, however, is sufficient to establish at least that element of a water appropriation as to lots 2 through 7 back to the inception of Miller's claim of ownership. Again, however, the evidence does not show precisely when Miller first occupied those lots exclusively under claim of right, except that it was probably not later than 1878. In the absence of evidence as to when this down payment actually occurred, or when the amendments to the Swamp Act took effect, December 31, 1878 is the priority date for the parts of the claims within lots 2 through 7, Sect. 35.

On April 21, 1886, the State of Oregon deeded Lots 7 and 10 of Section 36 to Eliza Coleman along with other properties not included in these claims. On May 8, 1886, a portion of the properties was acquired by Callahan. The part of the lands under the current claims that Callahan acquired, however, was only 8.2 acres, since Callahan's deed describes the NW $\frac{1}{4}$ of Section 36, and only 8.2 acres of claim 177 is within this quarter section. While Callahan probably entered this property earlier than 1886, there is no evidence in the record to establish when that entry occurred. Consequently, the date of Callahan's conveyance, May 3, 1886, is taken as the priority date for the claimant's water right as to these 8.2 acres.

While the claimants state that all the properties had been settled by 1889, the only conveyances that are offered for that date involve only portions of the properties. Those lands in the SW $\frac{1}{4}$ SW $\frac{1}{4}$, of Section 36 (36.3 acres in claim 182) and the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 35 (40 acres in claim 183) are not included in the descriptions for these conveyances. The evidence therefore does not support a priority for those acreages as early as 1889. Taking at face value the

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assertion that all the properties subject to these claims were owned by the Klamath Land Company by 1891 that is the priority date assigned these properties.

Thus, the priority dates assigned the properties subject to these claims, as shown by a preponderance of the evidence in the record, are as follows:

Claim 177-

- All property in this claim located in lots 2-9, of Sect. 35,--December 31, 1878.
- All property in this claim located in lots 7 and 10, Sect. 36, --April 21, 1886.
- The 8.2 acres in NW ¼ of Section 36, --May 3, 1886.
- The remainder, lots 10-14 of Sect. 35, --1889.

Claim 182-

- All property in this claim located in lots 2-9, --December 31, 1878.
- That portion located in lot 10, Sect. 36, --April 21, 1886.
- The remainder, except for that land in the SW ¼ SW ¼, Section 36, --1889.
- That land in the SW ¼ SW ¼ Section 36, --1891.

Claim 183-

- All property in this claim located in lots 2-9, --December 31, 1878.
- The remainder, except for that land in the NE ¼ NW ¼ Section 35, --1889.
- That land in the NE 1/4 NW ¼ Section 35, --1891.

16. Natural flooding/subirrigation/natural overflow gives rise to a valid water right.

This issue was the subject of a Motion for Ruling on Legal Issues in this case, wherein it was determined that natural flooding/overflow could give rise to a valid water right, subject to proof.

17. The total acreage allowed in the Preliminary Evaluation in the place of use does not exceed the irrigated acreage supported by the evidence.

The evidence presented by the contestants in this case was based on the contention that no acreage at all was subject to a pre-1909 appropriation. Since it has been found that a pre-1909 appropriation for irrigation occurred, there is no evidence that the acreage as stated in the preliminary evaluation is not correct.

18. The diversion rate as allowed in the Preliminary Evaluation does not exceed what can be beneficially used at the place of use.

No evidence was presented that the diversion rate as allowed in the preliminary evaluation exceeds that which can be beneficially used at the place of use.

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19. An intent as of the claimed priority date to use water for wildlife has been demonstrated.

As noted, the evidence shows that water in ponds and low areas of the property have been habituated by waterfowl since before the property went into private ownership, and that use has continued to the present. The evidence also shows that these birds were hunted from the beginning of private holding.

20. The waters from Four Mile Lake and Fish Lake, together with the flood, storm, springs, new, developed, discovered, salvaged, excess, reclaimed, surplus and captured waters thereof and their tributary including all water which may drain or flow into Cascade Canal connecting Four Mile Lake and Fish Lake may be "water available" for appropriation under the Klamath Adjudication.

Medford Irrigation District and Rogue River Valley Irrigation District withdrew their contests prior to the hearing on this case. Therefore, this issue is moot.

21. The season of use as approved in the Preliminary Evaluation may not lawfully exceed the season as claimed.

The season of use for all three claims, was stated in the Proof of Claim as April 1 through October 31 for irrigation, livestock and waterfowl year round. The Preliminary Evaluation allowed a period from March 1 through October 31. Since that evaluation was issued after the period for amending a claim was closed, the season of use must conform to that originally claimed.

22. The evidence does not establish that waters originating within the Lost River Basin are subject to appropriation in the Klamath Adjudication.

No evidence was presented by claimants or the other contestants suggesting that water from the Lost River flowed into the Klamath River prior to 1909. Consequently, there is no evidence in the record in this case showing that water originating in the Lost River is subject to appropriation in the Klamath Adjudication.

SUMMARY

In general, it is found that water was appropriated for irrigation by natural flow prior to 1909. The rate and duty are as found in the Preliminary Evaluation. The priority date varies from parcel to parcel, but is later than the priority as stated in the preliminary Evaluation. The Season of Use is that claimed, from April 1 to October 31.

ORDER

I propose that the Adjudicator issue the following order:

Claim 177 is allowed as stated in the Preliminary Evaluation, except as follows:

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Priority dates shall be as follows:

All property in this claim located in lots 2-9, of Sect. 35,--December 31, 1878.
all property in this claim located in lots 7 and 10, Sect. 36, --April 21, 1886.
The 8.2 acres in NW ¼ of Section 36, --May 3, 1886.
The remainder, lots 10-14 of Sect. 35, --1889.

Season of Use shall be April 1 through October 31 for irrigation, year round for livestock and wildlife.

Claim 182 is allowed as stated in the Preliminary Evaluation, except as follows:

Priority dates shall be as follows:

All property in this claim located in lots 2-9, --December 31, 1878.
That portion located in lot 10, Sect. 36, --April 21, 1886.
The remainder, except for that land in the SW ¼ SW ¼, Section 36, --1889.
That land in the SW ¼ SW ¼ Section 36, --1891.

Season of Use shall be April 1 through October 31 for irrigation, year round for livestock and wildlife.

Claim 183 is allowed as stated in the Preliminary Evaluation, except as follows:

All property in this claim located in lots 2-9, --December 31, 1878.
The remainder, except for that land in the NE ¼ NW ¼ Section 35, --1889.
That land in the NE 1/4 NW ¼ Section 35, --1891.

Season of Use shall be April 1 through October 31 for irrigation, year round for livestock and wildlife.



Maurice L. Russell, II, Presiding Administrative Law Judge
Office of Administrative Hearings

Dated: July 22, 2004

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

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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

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2004, 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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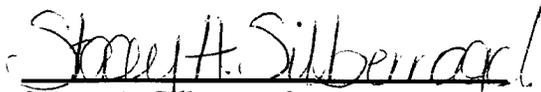
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