



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: September 14, 1999

TO: Richard Bailey, Adjudicator
Water Resources Department

FROM: Meg Reeves, Assistant Attorney General
Natural Resources Section

Walter Perry, Assistant Attorney General
Natural Resources Section

SUBJECT: Klamath Adjudication / Pre-1909 Claims - Legal Overview

A number of claimants to water rights in the Klamath Basin Adjudication have made claims based upon uses of water commenced prior to February 24, 1909. Oregon's Water Code provides that although water rights created after February 24, 1909 require a permit from the State Engineer, the water rights of people who had been using water under the common law prior to February 24, 1909 will be recognized in water rights adjudications.¹ You have asked us to provide a brief statement of the law applicable to such pre-1909 claims. We conclude that the rule pertaining to pre-Code appropriations is that "beneficial use shall be basis, the measure, and the limit of all rights to the use of water."² Three elements are necessary to constitute a valid appropriation: 1) a *bona fide* intent to apply the water to a currently existing or currently contemplated future beneficial use; 2) a diversion; and 3) an application to a beneficial use within a reasonable time. What constitutes a "*bona fide* intent" or "reasonable time" are questions of fact particular to each case.

I. The Elements

The elements were clearly articulated by the Oregon Supreme Court in the case of *In re Water Rights of Silvies River*, 115 Or 27 (1925), where the Court held:
As a general rule, to constitute a valid appropriation of water, three

¹ ORS 539.010(4), quoted *infra*, at page 3.

² *In re Waters of Umatilla River*, 88 Or 376, 380 (1918), and cases cited therein.

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

A. Intent

The *Silvies River* Court elaborated upon the first element:

(I)t is the present *bona fide* design or intention of applying it to some *immediate* beneficial use, or the appropriation must be made in the present *bona fide* contemplation of a *future* application of it to such a purposes; it should be *shown in all its fullness by the facts and circumstances* to have been present in the mind of the appropriator *at the time the appropriation was made or claimed*.⁴

Thus, while the “use” or application may be present or future, the “intent” or “contemplation” must in either case be contemporaneous with the initial appropriation.

B. Diversion

The *Silvies River* Court also elaborated upon the “diversion” element, adding the caveat that no initial diversion is required where the appropriator’s land is “naturally irrigated” and the appropriator “in some substantial way indicates that it is his intention to reap the benefit of the fruit of the irrigation.”⁵ In that case, the priority date is “deemed to be when the proprietor of the land accepts the gift made by nature...”⁶ The Court further explained:

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. We do not intend to suggest that in most cases the building of some kind of an irrigation system is not *requisite after the appropriation is made* in order to effect an economical beneficial use of

such water and prevent waste. This should be accomplished within a reasonable

³ *In re Water Rights in Silvies River*, 115 Or 27, 64-65 (1925). See also, *Low v. Rizor*, 25 Or 551, 557 (1894).

⁴ *Id.* (emphasis added). See also, *Hindman v. Rizor*, 21 Or 112, 120 (1891): “While (the appropriators) could rightfully appropriate water *not only for the present but also for the future* needs of the land, the water so appropriated must have been utilized within a reasonable time...” (Emphasis added).

⁵ *Silvies River*, 115 Or at 66.

⁶ *Id.*

time as circumstances permit and necessities require...⁷

However, while the beneficial use of natural overflow creates an appropriative water right, the appropriative *method* of natural overflow is a privilege only.⁸ Thus, the appropriator must employ some technologically reasonable means of appropriation and cannot insist upon allowing the system to actually overflow. The right extends only to the amount of water which *would* overflow if no water were removed by junior appropriators.

C. Reasonable Time

The requirement of an “application of (the water) within a reasonable time to some useful industry”⁹ is synonymous with “reasonable diligence,” which courts use synonymously also with “due diligence.”¹⁰ The *Silvies River* Court, for example, defined the “reasonable time” element in terms of “reasonable diligence,” explaining that such determination must be fact-specific:

The test, both in the construction of the necessary works and in the application of the water to a beneficial purpose, is *reasonable diligence*. There must be such assiduity of work of construction as will manifest to the world a *bona fide intention to complete it within a reasonable time*. The question is one of fact and must be determined from the surrounding circumstances.¹¹

This articulation of the rule highlights the interconnectedness of the first (“intent”) and third (“reasonable time”) elements.

II. The Water Code

ORS 539.010(4) currently states:

The right of any person to take and use water shall not be impaired or affected by any provisions of the Water Rights Act ... where

appropriations were *initiated prior to February 24, 1909*, and such appropriators, their heirs, successors or assigns did, in *good faith* and in compliance with the

⁷ *Id.* (emphasis added).

⁸ See, e.g., *Warner Valley Stock Co. v. Lynch*, 215 Or. 523 (1959).

⁹ *Silvies River*, 115 Or. 27 at 65.

¹⁰ See, e.g., *Teel Irrigation Dist. v. Water Resources Dept.*, 323 Or. 663, 669 (1996) (noting a showing of “due” diligence under ORS 537.230, which requires “reasonable” diligence).

¹¹ *Silvies River*, 115 Or. 27 at 61 (citations omitted) (emphasis added). See also, *In re Water Rights of Hood River*, 114 Or. 112, 131 (1924): “That which is usual and ordinary with men engaged in like enterprises who desire to speedily effect their designs is required.”

laws then existing, *commence the construction* of works for the application of the water so appropriated to a *beneficial use*, and thereafter *prosecuted such work diligently* and continuously to completion. However, all such rights shall be adjudicated in the manner provided in this chapter.

12

This statute articulates a three-part test applicable to a pre-1909 water right: (1) good faith commencement prior to February 24, 1909; (2) of construction of works to apply water to a beneficial use; and (3) prosecuted with due diligence. This formulation parallels the common law elements discussed above: (1) *bone fide* intent to apply to a beneficial use (good faith commencement); (2) diversion (construction of works); and (3) reasonable time (prosecuted diligently).

MRR:bjw:rws/GEN28772

¹² ORS 539.010(4) (emphasis added).