

Klamath County

IN THE MATTER OF THE DETERMINATION OF THE RELATIVE RIGHTS TO THE USE OF THE WATERS OF SWAN LAKE AND ITS TRIBUTARIES. )  
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FINDINGS AND ORDER  
OF  
DETERMINATION

Now at this time the above-entitled matter coming on for consideration by the State Engineer, and it appearing that all evidence and testimony have been taken in the above-entitled proceeding, and the State Engineer having carefully considered all of such evidence and testimony and the engineering data and information gathered in accordance with law, and being fully advised in the premises, makes and orders to be entered of record in his office the following

FINDINGS AND ORDER OF DETERMINATION

1.

Swan Lake and its tributaries are located in Klamath County, Oregon, just east of the rim of mountains which extend along the eastern edge of Upper Klamath Lake. The area drained by tributaries to Swan Lake constitutes a pear shaped basin covering approximately 115 square miles. The longitudinal axis of the basin extends in a northwesterly direction from its southern end near the Klamath Falls-Lakeview highway between the towns of Olene and Dairy, about eighteen miles to its northerly extremity within the Klamath Indian Reservation just east of the town of Modoc Point. The basin is about nine miles wide at its southern end, tapering to about five miles at its northern end. Bounded on the west, north and east by mountains which reach elevations of from 4500 to 7000 feet above mean sea level, and on the south by comparatively low hills which separate it from the adjoining drainage area of Lost River, it constitutes a drainage area which, from all visible appearance, is land-locked.

The lowest part of the basin is within the southeast portion thereof and comprises a relatively flat area of several thousand acres at an approximate elevation of 4200 feet above mean sea level, known as Swan Lake Valley. The mountains to the north and west of this valley afford the major part of the entire drainage basin and embrace within their more gradual slopes, several smaller valleys. The mountains to the east are more precipitous and their drainage area is comparatively small.

Situated across a low ridge to the west of the southerly end of Swan Lake Valley and approximately 150 feet higher in elevation, is a smaller valley known as Meadow Lake. It comprises an area of approximately 1,100 acres, being about 3/4 mile wide and 2 1/4 miles long with its longitudinal axis extending in a northwesterly direction. Meadow Lake is the area of confluence of the waters of its approximately eight square miles of drainage area and its northern boundary consists of a relatively low hill through which extends a draw, the highest point of

which is some 6 to 8 feet higher than the floor of the valley. This draw is the only place possible for water to flow from Meadow Lake.

Swan Lake proper is a shallow, oval shaped depression at the easterly edge of Swan Lake Valley, close under the rim of adjoining mountains. Its normal flow line embraces an area of approximately 792 acres, principally within Section 26 but also including parts of Sections 22, 23, 25, 27, 35 and 36, all within Township 37 South, Range 10 East, W. M. During years of low run-off from the surrounding drainage area, the lake dries up and its bed is well defined by a distinct line of demarcation between the land above the elevation of the normal water surface and the lake bed which is almost devoid of any natural vegetation.

Four well defined watercourses drain the western and northern areas of the Swan Lake watershed. Three of these watercourses may be considered as perennial streams throughout at least a part of their length. They are Brookside Creek, Cabin Creek and Edgewood Creek, also sometimes called Helena Creek. The fourth and larger watercourse is known as Anderson Creek and cannot be classed as a perennial stream since it is apparently dry during most of the year.

The channel of Anderson Creek arises in the high mountains at the extreme northern end of the Swan Lake drainage basin and, together with its tributary channels, drains the northern and northwestern portions of the Swan Lake drainage area. Its channel bears in a general southerly direction through Antelope Valley, thence turns westerly through a canyon for a short distance, with a considerable drop in elevation, to again turn southerly and into Two Mile Valley. Leaving Two Mile Valley at its southern extremity, the channel turns east and traverses a canyon for approximately two miles where it emerges onto the northwest side of Swan Lake Valley. After continuing easterly for about two miles across the valley floor, the channel divides into several sloughs before again consolidating into one channel and finally joining Swan Lake proper at its northwestern side.

Several tributary watercourses enter the channel of Anderson Creek at various points along its course, and, during the spring run-off from melting snow, Anderson Creek and its tributaries usually flow some water. During the remainder of the year it is dry throughout practically its entire length.

A dam has been partially constructed across the head of the canyon at the southern end of Two Mile Valley. The purpose of this dam was to impound the run-off of Anderson Creek for the irrigation of the lands within Two Mile Valley and other lands. The construction of this dam caused the controversy which has resulted in these proceedings.

2.

That on the 21st day of May 1945, there was filed in the office of the State Engineer an Order of the Circuit Court of the State of Oregon for Klamath County, dated May 19, 1945, in the case of Dave Liskey, Maude E. Liskey, D. D. Liskey, L. M. Hankins and Lloyd L. Hankins, Plaintiffs, vs. H. Douglas Whiteline, Defendant, directing that said cause be referred to the State Engineer in accordance with Section 116-801, O.C.L.A., for the purpose of adjudicating the relative rights of all water users from Swan Lake and its tributaries. That the State

Engineer thereafter fixed a time for making the necessary surveys and examinations and the beginning of taking of such testimony as would enable him to determine the rights of the various claimants to the use of the waters of Swan Lake and its tributaries, as provided by law.

3.

That notice was prepared by the State Engineer setting forth the date on or about which the State Engineer or his assistants would begin the investigation of the flow of water into said Swan Lake and its tributaries, and ditches diverting water therefrom, and said notice was published in two issues of the Herald & News, a newspaper printed and published daily at Klamath Falls, Klamath County, Oregon, and of general circulation in said county, said two issues of said newspaper being those of September 12 and September 19, 1946, the date of the last publication being more than ten days prior to the date fixed for the beginning of the taking of measurements of said lake and its tributaries by the State Engineer, as provided by law.

4.

That duly qualified assistants of the State Engineer did proceed to make examinations, surveys and measurements of said lake and its tributaries, and of ditches and canals or other works diverting water therefrom and surveys of the lands irrigated, and gathered such other data and information as were essential to the proper determination of the relative rights of the parties interested, which observations and measurements were reduced to writing and were made a matter of record in his office. And the State Engineer did cause to be prepared a set of maps or plats, showing with substantial accuracy the location of said lake, and streams, in the drainage basin, the location of each ditch or canal or other works diverting water therefrom, topographic maps of certain areas, and the number of acres of lands which had been irrigated in each legal subdivision, prints of said maps and plats being on file and a part of the record herein.

5.

That as soon as practicable after the examinations and measurements were completed as described in the preceding paragraph, the State Engineer did prepare a notice setting forth a place and time certain when he would begin the taking of testimony (statements and proofs of claim) as to the relative rights of the various claimants to the use of the waters of said lake and its tributaries; that said notice was published in two issues of the Herald & News, a newspaper printed and published daily, at Klamath Falls, Klamath County, Oregon, and of general circulation in said county, said two issues of said newspaper being those of October 23 and October 30, 1947, the date of the last publication being at least thirty days prior to the first date fixed for the taking of claims by the State Engineer.

6.

That the State Engineer did send by registered mail to each person, firm, or corporation claiming a right to the use of any of the waters of said Swan Lake or its tributaries and

to each person, firm, or corporation owning or being in possession of lands in, or bordering on, or having access to said lake or its tributaries, in so far as said claimants and owners and persons in possession could reasonably be ascertained, a notice similar to such published notice, setting forth the date when the State Engineer or his authorized assistants would receive the statements and proofs of claim of the various claimants to the waters of said lake and its tributaries. That said notice was mailed at least thirty days prior to the date set therein for the receiving of such statements and proofs of claims in each instance. And the State Engineer did enclose with each of said notices a blank form upon which the claimant or owner could prepare in writing all the particulars necessary for the determination of his right, under oath.

7.

That the time and place when and where the State Engineer, or his duly authorized assistants, should attend and receive the statements and proofs of claims of the various parties were fixed as follows:

On Tuesday, December 2, 1947, in the Circuit Court Room of the County Court House at Klamath Falls, Oregon.

And for a period of 20 days, beginning with Wednesday, December 3, and ending with Monday, December 22, 1947, at the office of the State Engineer, in the State Office Building, Salem, Oregon.

8.

That the following persons were duly notified of the proceeding by registered mail and by publication of said notices, as set forth by paragraphs 3 and 5 hereof, as evidenced by the affidavits of publication and post office registry receipts in Volume I of the evidence herein, and having failed, neglected and refused to appear herein and submit proof of a right to the use of the waters of said Swan Lake and its tributaries, if any they have or claim, such parties are in default; such default is here and now entered against them, and each of them, and such parties are hereby enjoined and inhibited from using or asserting any rights to the use of the waters of said lake or any tributary thereof included in this proceeding, except by, through or under the rights of persons whose water rights are defined herein, or under and by virtue of permits issued by the State Engineer.

- A -

Alcorn, A. T., Olene, Oregon

- B -

Budden, S. G., 1905 Etna Street,  
Klamath Falls, Oregon

Budden, S. G., c/o General Delivery  
Klamath Falls, Oregon

- C -

Campbell, A. R. and Iva Belle,  
Rt. 2, Box 714, Klamath Falls,  
Oregon

Collman, C. Fred, Box 46  
Olene, Oregon

Collman, Chester R., Box 62  
Olene, Oregon

Collman, Vernia T., Box 62  
Olene, Oregon

Cunningham, Wm. E. & Mildred, Rt. 2  
Box 714, Klamath Falls, Oregon

- F -

Fernández, Paul, 1035 Delores St.,  
Klamath Falls, Oregon

Fisher, Alfred, Olene, Oregon

- G -

Gabriel, Frank, Box 23,  
Olene, Oregon

- H -

Hagelstein, Geo. & John J., Rt. 3,  
Box 1252, Klamath Falls, Oregon  
Hall, Dean, 1905 Etna St.,  
Klamath Falls, Oregon

Hunt, Dr. Warren, c/o Valley Hospital,  
Klamath Falls, Oregon

- K -

Kane, John & Lillian, 2121 W. 9th St.,  
Glendale, California

Kesterson, S. T., Olene, Oregon

- L -

Lee, Denny, c/o Pop Brays Place,  
Bonanza, Oregon

Lee, Denny, c/o General Delivery,  
Klamath Falls, Oregon

- O -

Osborn, Jasper N., Rt. 3,  
Junction City, Oregon

- S -

Schmor, Herman, Olene, Oregon

- V -

von Barthelsdorf, S., Olene, Oregon

9.

That after the completion of the taking of such statements and proofs of claims the State Engineer did, on the 21th day of December, 1947, give notice by registered mail to each of the various claimants to the use of the waters of said Swan Lake and its tributaries, that at the times and places named in said notice, to-wit:

On Tuesday and Wednesday, January 6 and 7, 1948, in the County Court Room at the Court House at Klamath Falls, Oregon,

And for a period of 12 days, beginning with Thursday, January 8, 1948 and ending with Monday, January 19, 1948, (Saturdays and Sundays excepted) at the office of the State Engineer in the State Office Building, Salem, Oregon

the statements and proofs of claims theretofore filed would be open to public inspection.

That said notice did state therein the county in which the determination of the State Engineer in said proceeding would be heard by the Circuit Court of the State of Oregon, to-wit: the County of Klamath.

That the State Engineer did, in accordance with said notice as described in the preceding paragraph, keep said statements and proofs of claims open to public inspection at said time and place.

That within the time fixed therefor the following contests were initiated by the filing with the State Engineer of notices of contest in writing:

CONTEST NO. 1

H. Douglas Whiteline,	Contestant
v.	
Dave Liskey and D. D. Liskey,	Contestees

CONTEST NO. 2

H. Douglas Whiteline,	Contestant
v.	
L. M. Hankins and Lloyd L. Hankins,	Contestees

CONTEST NO. 2-A

H. Douglas Whiteline,	Contestant
v.	
Dave Liskey and D. D. Liskey,	Contestees

CONTEST NO. 3

Dave Liskey, D. D. Liskey, L. M. Hankins & Lloyd L. Hankins,	Contestants
v.	
Albert R. Devincenzi and Irene J. Devincenzi,	Contestees

CONTEST NO. 4

Dave Liskey, D. D. Liskey, L. M. Hankins and Lloyd L. Hankins,	Contestants
v.	
Albert R. Devincenzi and Irene J. Devincenzi,	Contestees

CONTEST NO. 5

Dave Liskey, D. D. Liskey, L. M. Hankins and Lloyd L. Hankins,	Contestants
v.	
H. Douglas Whiteline, Albert R. Devincenzi and Irene J. Devincenzi,	Contestees

CONTEST NO. 6

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L. Hankins,

Contestants

v.

H. Douglas Whiteline,

Contestee

CONTEST NO. 7

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L. Hankins,

Contestants

v.

H. Douglas Whiteline,

Contestee

CONTEST NO. 8

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L. Hankins,

Contestants

v.

H. Douglas Whiteline,

Contestee

CONTEST NO. 9

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L. Hankins,

Contestants

v.

H. Douglas Whiteline,

Contestee

CONTEST NO. 10

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L. Hankins,

Contestants

v.

H. Douglas Whiteline,

Contestee

CONTEST NO. 11

Dave Liskey, D. D. Liskey,  
L. M. Hankins, and Lloyd L. Hankins,

Contestants

v.

Katie E. Whiteline,

Contestee

11.

That after the filing of said statements of contest the State Engineer did fix a time and place for the hearing of each of said contests and did, on the 17th day of February, 1948, serve, by registered mail, notice of hearing of said contests on each of the parties to said contests, the date fixed for hearing being more than 30 and less than sixty days from the date the notice of said hearing was served on said parties. That upon the date and at the

place as fixed for said hearing, to-wit: Monday, March 29, 1948, at the hour of 10:00 o'clock a.m., in the County Court Chambers of the County Court House at Klamath Falls, Klamath County, Oregon, the taking of testimony was commenced before the State Engineer and continued until each of said contests was fully heard.

12.

That due proof of the sending of the various notices by registered mail as hereinbefore set forth, has been made and filed as a part of the record herein.

13.

CONTEST NO. 1

H. Douglas Whiteline, Contestant

v.

Dave Liskey and D. D. Liskey, Contestees

and

CONTEST NO. 2

H. Douglas Whiteline, Contestant

v.

L. M. Hankins and Lloyd L. Hankins, Contestees

Contestees, Dave Liskey and D. D. Liskey, filed herein Statements and Proofs of Claims Nos. 17 to 24 inclusive, asserting a right to the use of the waters of Swan Lake proper as fed by Anderson Creek for the irrigation of 706.0 acres of lands, hereinafter more specifically described, and water for 1500 head of stock. At the time of taking of testimony on these contests, the right asserted under Statement and Proof of Claim No. 19 was abandoned which reduced the total area for which a water right is claimed by contestees Liskeys to 586.0 acres.

Statement and Proof of Claim No. 17 asserts a right to the use of the waters of Swan Lake proper as fed by Anderson Creek for the irrigation of 29.0 acres in NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 14.1 acres in Lot 3, 14.0 acres in Lot 4, 12.5 acres in SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 7, 2.0 acres in NE $\frac{1}{4}$  NW $\frac{1}{4}$ , and 3.0 acres in Lot 1, Section 18, Township 38 South, Range 11 $\frac{1}{2}$  East, W. M., and water for 1500 head of stock, with a date of priority of April 12, 1886.

In Statement and Proof of Claim No. 18, a right is asserted to the use of the waters of Swan Lake proper as fed by Anderson Creek for the irrigation of 8.0 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 12, Township 38 South, Range 10 East, W. M. and water for 1500 head of stock; with a date of priority of May 18, 1888.

In Statement and Proof of Claim No. 20, a right is asserted to the use of the waters of Swan Lake proper as fed by Anderson Creek for the irrigation of 39.9 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$  Section 3, Township 38 South, Range 10 East, W. M. and water for 1500 head of stock, with a date of priority of January 16, 1889.



In Statement and Proof of Claim No. 21, a right is asserted to the use of the waters of Swan Lake proper as fed by Anderson Creek for the irrigation of 24.0 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 12, Township 38 South, Range 10 East, W. M., and for the watering of 1500 head of stock, with a date of priority of October 15, 1889.

In Statement and Proof of Claim No. 22, a right is asserted to the use of the waters of Swan Lake proper as fed by Anderson Creek for the irrigation of 39.9 acres in NW $\frac{1}{4}$  NE $\frac{1}{4}$ , 40.0 acres in SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 40.0 acres in SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 3, Township 38 South, Range 10 East, W. M., and water for 1500 head of stock, with a date of priority of April 21, 1892.

In Statement and Proof of Claim No. 23, a right is asserted to the use of the waters of Swan Lake proper as fed by Anderson Creek, for the irrigation of 39.8 acres in NE $\frac{1}{4}$  NW $\frac{1}{4}$ , 39.8 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$ , 40.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$ , and 40.0 acres in SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 2, Township 38 South, Range 10 East, W. M., and water for 1500 head of stock, with a date of priority of December 14, 1893.

In Statement and Proof of Claim No. 24, a right is asserted to the use of the waters of Swan Lake proper as fed by Anderson Creek for the irrigation of 160 acres in the SE $\frac{1}{4}$  of Section 1, Township 38 South, Range 10 East, W. M., and water for 1500 head of stock with a date of priority of February 17, 1908.

Contestees, L. M. Hankins and Lloyd L. Hankins, filed herein Statements and Proofs of Claims Nos. 4 to 15 inclusive, asserting a right to the use of the waters of Swan Lake proper as fed by Anderson Creek for the irrigation of 1053.80 acres of lands, hereinafter more specifically described, and water for 1000 head of stock.

Statement and Proof of Claim No. 4 asserts a right to the use of the waters of Swan Lake proper as fed by Anderson Creek for the irrigation of 6.0 acres in SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 36, Township 37 South, Range 10 East, W. M., and water for 1000 head of stock, with a date of priority of July 29, 1878.

In Statement and Proof of Claim No. 5, there is asserted a right to the use of the waters of Swan Lake proper as fed by Anderson Creek, for the irrigation of 28.5 acres in NW $\frac{1}{4}$  NE $\frac{1}{4}$ , 40.0 acres in NE $\frac{1}{4}$  NW $\frac{1}{4}$ , 40.0 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$ , and 40.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 36, Township 37 South, Range 10 East, W. M., and water for 1000 head of stock, with a date of priority of January 27, 1880. Of the total acreage for which a right for irrigation is claimed, 18.3 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 36, is within the bed of Swan Lake proper.

In Statement and Proof of Claim No. 6, a right is asserted to the use of the waters of Swan Lake proper, as fed by Anderson Creek, for the irrigation of 40.0 acres in SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 40.0 acres in SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 36, Township 37 South, Range 10 East, W. M., and water for 1000 head of stock, with a date of priority of July 28, 1883.

In Statement and Proof of Claim No. 7, a right is asserted to the use of the waters of Swan Lake proper, as fed by Anderson Creek, for the irrigation of 13.0 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$ , 39.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$ , 37.5 acres in NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 40.0 acres in NW $\frac{1}{4}$  SW $\frac{1}{4}$ , 40.0 acres in SW $\frac{1}{4}$  SW $\frac{1}{4}$ , 40.0 acres in SE $\frac{1}{4}$  SW $\frac{1}{4}$ , 13.0 acres in SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 25, 38.5 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$ , 40.0 acres in SE $\frac{1}{4}$  NE $\frac{1}{4}$ , 40.0 acres in NE $\frac{1}{4}$  SE $\frac{1}{4}$ , 40.0 acres in SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 26, and 20.0 acres in SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 23,

Township 37 South, Range 10 East, W. M., and water for 1000 head of stock with a date of priority of September 4, 1883. Of the total acreage for which a right for irrigation is asserted in Statement and Proof of Claim No. 7, the following lands lie within the bed of Swan Lake proper: 20.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$ , 0.5 acre in NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 32.3 acres in NW $\frac{1}{4}$  SW $\frac{1}{4}$ , 37.5 acres in SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 25, and 2.0 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$ , 36.7 acres in SE $\frac{1}{4}$  NE $\frac{1}{4}$ , 40.0 acres in NE $\frac{1}{4}$  SE $\frac{1}{4}$ , 34.8 acres in SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 26.

In Statement and Proof of Claim No. 8, a right is asserted to the use of the waters of Swan Lake proper as fed by Anderson Creek for the irrigation of 40.0 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 35, Township 37 South, Range 10 East, W. M., and water for 1000 head of stock, with a date of priority of December 23, 1885. Of this acreage, 2.4 acres lies within the bed of Swan Lake proper.

In Statement and Proof of Claim No. 9, a right is asserted to the use of the waters of Swan Lake proper, as fed by Anderson Creek for the irrigation of 40.0 acres in NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 40.0 acres in NW $\frac{1}{4}$  SW $\frac{1}{4}$ , 40.0 acres in SW $\frac{1}{4}$  SW $\frac{1}{4}$ , and 40.0 acres in NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 36, Township 37 South, Range 10 East, W. M., and water for 1000 head of stock with a date of priority of December 20, 1887.

In Statement and Proof of Claim No. 10, a right is asserted to the use of the waters of Swan Lake proper, as fed by Anderson Creek for the irrigation of 20.0 acres in NE $\frac{1}{4}$  SE $\frac{1}{4}$ , 33.5 acres in SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 36, Township 37 South, Range 10 East, W. M., and water for 1000 head of stock, with a date of priority of December 20, 1887.

In Statement and Proof of Claim No. 11, a right is asserted to the use of the waters of Swan Lake proper, as fed by Anderson Creek, for the irrigation of 40.0 acres in SE $\frac{1}{4}$  SW $\frac{1}{4}$ , 40.0 acres in SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 36, Township 37 South, Range 10 East, W. M., and water for 1000 head of stock with a date of priority of January 13, 1888.

In Statement and Proof of Claim No. 12, a right is asserted to the use of the waters of Swan Lake proper, as fed by Anderson Creek, for the irrigation of 4.5 acres in SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 25.0 acres in NE $\frac{1}{4}$  NW $\frac{1}{4}$ , and 40.0 acres in SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 7, Township 38 South, Range 11 $\frac{1}{2}$  East, W. M., and water for 1000 head of stock, with a date of priority of April 12, 1886.

In Statement and Proof of Claim No. 13, a right is asserted to the use of the waters of Swan Lake proper, as fed by Anderson Creek, for the irrigation of 2.3 acres in SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 6, Township 38 South, Range 11 $\frac{1}{2}$  East, W. M., and water for 1000 head of stock with a date of priority of April 19, 1889.

In Statement and Proof of Claim No. 14, a right is asserted to the use of the waters of Swan Lake proper, as fed by Anderson Creek, for the irrigation of 10.0 acres in Lot 7, Section 6, Township 38 South, Range 11 $\frac{1}{2}$  East, W. M., and water for 1000 head of stock with a date of priority of April 3, 1901.

In Statement and Proof of Claim No. 15, a right is asserted to the use of the waters of Swan Lake proper, as fed by Anderson Creek, for the irrigation of 3.0 acres in SW $\frac{1}{4}$  NE $\frac{1}{4}$  Section 23, Township 37 South, Range 10 East, W. M., and water for 1000 head of stock, with a date of priority of April 9, 1904.

The bases of the water rights asserted in the aforesaid seven Statements and Proofs of Claims filed by contestees Dave Liskey and D. D. Liskey and the 12 Statements and Proofs of Claims filed by contestees L. M. Hankins, and Lloyd L. Hankins, are the same in each proof. The bases, as set forth in said Statements and Proofs of Claims and in the manner set forth therein, are as follows:

4. Q - How was such right initiated or upon what is it based?
  - A - Appropriation of natural irrigation by harvesting and using crops and pasturage as produced by natural irrigation.
6. Q - What steps were taken by claimant or his predecessor in interest to initiate said right?
  - A - The right was initiated by the first settler thereon, by cutting the hay and pasturing the land after the hay was removed and, when no hay was cut, the lands pastured instead. Natural water grasses, consisting chiefly of small rushes, were grown in great abundance during wet years when the water covered the land, and less or no stock was placed thereon during very dry years. See attached "A".
8. Q - State the means of utilizing such water, give name by which the ditch is most commonly known, if a ditch is used.
  - A - Natural overflow from Swan Lake proper was used, and no other means could have been better or as efficient. Swan Lake was filled, chiefly by freshet or run-off water from Anderson Creek and the same condition obtains now.
9. Q - State the interest claimant has in such ditch, with the names of any other water users interested therein.
  - A - Claimant has no interest in any ditch, except that by long use, Anderson Creek, which takes the place of ditch to bring waters into Swan Lake proper, has become the main ditch supplying water to said Lake and from there the water naturally floods and irrigates claimant's lands.

Attached to each of the aforesaid Statements and Proofs of Claims is a sworn statement by L. M. Hankins, in which the method of irrigating the lands in the Swan Lake area is further described, and following is an excerpt from some of the pertinent statements therein:

I first came to Swan Lake Valley in 1936; I am very familiar with the Valley and water conditions therein; the Lake proper is only a small shallow body, fed chiefly by Anderson Creek; the water supply consists of the freshets and runoffs almost altogether; the whole valley is irrigated, in so far as natural irrigation is concerned, from said Swan Lake; the lake fills up and overflows and then spreads very rapidly over the adjoining lands for two or three miles; the valley is almost level and there is a very small slope from the lake so that the water goes a long ways over the land at a very slight depth; all land in the valley that has been reached by the water has been irrigated thus since my arrival in the Valley; no other application of the water could be more efficiently or better made in my judgment; there has never been nor is there now any need for artificial control of the irrigation of the lands in question; the more water the more land covered and the more crops and pasturage produced, and there has never been any water wasted, as it all has been put to a beneficial use during my time; to take the water off or restrain its natural flow will render Swan Lake Valley arid, while at present it is well irrigated and fertile when water is available; there is a full necessity to fill Swan Lake proper at all times when possible by water supply for stock purposes; the small lake dries up very rapidly and unless it is filled and the adjoining lands flooded there would be no stock water later in the season; the land is adobe covered with top soil of rotted vegetation from many years accumulation; the crops produced are native grasses, plants and chiefly rushes, which make a very fine quality of hay and pasturage; hay can always be cut during wet years and when not cut the meadows furnish pasture to support several thousand head of stock; I have cut hay from my own lands at times since 1936, the last hay cut by me and Lloyd L. Hankins being in 1940-41 when we cut about 200 tons; we have always pastured the lands; we have run from 75 to about 700 head of

stock on our lands; we have also planted the lands to such crops as wheat, rye, oats and barley after the water has receded and have produced some very fine crops when there was sufficient water to flood the land in the first instance; if there is no water the crops are not successful; during dry years the land does not produce the usual water grasses and rushes to any great extent, but after a flooding the water plants always come back in great abundance; the lands are now fenced with division fences between myself, Dan and Dave Liskey and Mr. Devencenzi.

To said Statements and Proofs of Claims Nos. 17 to 24 inclusive, H. Douglas Whiteline filed herein Statement of Contest No. 1. The pertinent part of the issues set forth therein is summarized as follows:

Contestees' lands are not within the boundaries of Swan Lake, but far removed therefrom and they are not subject to or capable of irrigation therefrom except in years of extremely high water which occurs not oftener than once in ten years, or such a matter.

Swan Lake, in Sections 25, 26, and 27, Township 37 South, Range 10 East, W. M., is shallow and land locked. Contestees demand that the water from the entire Swan Lake watershed shall flow to and into said Swan Lake, and fill the lake proper so that it will overflow and flood back several miles and upon said lands in a manner to place water thereon in years of extremely high water.

Contestees have never constructed any artificial works, ditches, canals, dykes or the like to control the waters of said lake, but such alleged irrigation as may have been had of said lands during extremely high water years has been affected wholly by natural irrigation and without the intervention of the hand of man, and contestees, in and by such method of irrigation in the past, have not acquired any right or priority in or to the waters of Swan Lake or its tributaries superior to those of contestant, but contestant's rights in and to said waters are prior in time and superior in right to those of contestees.

That it is provided in and by Section 116-437, O.C.L.A., that beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state. And in this connection, contestant here avers that contestees or any of their predecessors in title and interest in and to their lands embraced in said Proof 17, never did make any beneficial use of the waters of Swan Lake or the waters running to or into the same, but the only method of use of water they ever claimed to acquire or make was to have the waters flow to and into Swan Lake so that they would fill the said lake and cause it to flood contestees' said lands, which are far removed from Swan Lake, in extremely wet years. That because of the shallowness of Swan Lake, the major portion of said waters, when applied in the manner claimed by said contestees and here described, evaporate and are wholly lost.

That the said claimed use of the waters of said lake by contestees is extremely wasteful and not beneficial, and if contestees should be permitted to sustain their claim to irrigate their said lands by the method and manner claimed by them, fully 90% of the waters of Swan Lake, and the waters flowing into the same, would be wasted.

The said contestees, in and by their Proofs 17 to 24 inclusive, asked to be awarded water rights on 706 acres of land divided into eight separate tracts of land. In order to irrigate said 706 acres of land divided into eight separate tracts of land, it would be necessary to flood some 8,500 acres of land for which no applications for water rights have been made to the State Engineer in these proceedings, and to flood back the waters in a manner to flood the said 706 acres would be extremely and inexcusably wasteful and violative of Sec. 116-437, O.C.L.A., which provides that beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in this state.

Contestant further avers that contestees, long prior to and at the time contestant commenced the construction of his said dam in said NE $\frac{1}{4}$  SW $\frac{1}{4}$ , said Section 23, had lost and abandoned any alleged right which they had or claim to have in or to the waters of Swan Lake or waters flowing into the same to irrigate their said lands. The said contestees had long since entirely moved out of the country, and they or their predecessors in title and interest did not use any of the waters upon said lands for a period of more than ten years.

The lands of contestees, in their proofs 17 to 24, are more valuable without flooding the waters into the bed of Swan Lake in wet years, and in ordinary dry years not sufficient water flows into Swan Lake to cover the bottom thereof, and said Swan Lake lands are more valuable without, than with, such flooding.

The lands embraced in contestees' said Proof 19 are tax lands which had been foreclosed on by and deeded to Klamath County, Oregon, by deed recorded in January, 1925, for 1916 taxes, and contestees purchased said tract from said county on October 29, 1935. Said lands, like the lands embraced in the other Proofs of said contestees, had never been used by said contestees or anyone else for any purpose for a great number of years, to-wit: for more than twenty years.

To said Statements and Proofs of Claims Nos. 4 to 15 inclusive, H. Douglas Whiteline filed herein Statement of Contest No. 2, wherein the same issues were presented as in Statement of Contest No. 1, except those relating to abandonment, lands acquired from Klamath County, and the area of land that would be flooded, and some new matter summarized as follows:

That, all of the lands for which a water right is asserted in Statements and Proofs of Claims Nos. 4 to 15 except the land in the bed of Swan Lake proper, are far removed therefrom, and they are not subject to or capable of irrigation therefrom except in years of extremely high water which occurs not oftener than once in ten years, or such a matter.

The said contestees, in and by their Proofs 4 to 15 inclusive, asked to be awarded water rights on 1,053.35 acres of land divided into twelve separate tracts of land. In order to irrigate said 1,053.35 acres of land divided into twelve separate tracts of land, it would be necessary to flood some 8,500 acres of land for which no applications for water rights have been made to the State Engineer in these proceedings, and to flood back the waters in a manner to flood the said 1,053.35 acres would be extremely and inexcusably wasteful and violative of Sec. 116-437, O.C.L.A., which provides that beneficial use shall be the basis, the measure, and the limit of all rights to the use of water in this state.

The lands of contestees, in their proofs 4 to 15, are more valuable without flooding the waters into the bed of Swan Lake in wet years, and in ordinary dry years not sufficient water flows into Swan Lake to cover the bottom thereof, and said Swan Lake lands are more valuable without, than with, such flooding.

Swan Lake Valley is oval in shape, its longitudinal axis extending in a general northwesterly direction from its south end. It is surrounded by mountains which rise several hundred feet above the valley floor except at the south end, where there is a relatively low ridge separating Swan Lake Valley from the Lost River drainage.

Swan Lake Valley may properly be considered as the area below elevation 4200 feet mean sea level, being an area about 7 miles long and of a maximum width of about 5 miles containing an area of about 19,000 acres. The topography of the 19,000 acres is quite uniform with a gradual slope from the north, west and south to Swan Lake proper. From the east the lands slope more abruptly from the toe of the adjoining mountain, which at places is within 500 feet of the lake's edge.

Swan Lake proper is located in the south east end of Swan Lake Valley, the largest portion being within Section 26, Township 37 South, Range 10 East, W. M.

The principal tributaries to Swan Lake are Anderson Creek, Edgewood Creek, also known as Helena Creek, Cabin Creek and Brookside Creek.

Anderson Creek, which appears to be the largest of the aforesaid tributaries, enters Swan Lake Valley at the northwest end, and there is one fairly well defined channel extending in an easterly direction to near the southeast corner of the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 21, Township 37 South, Range 10 East, W. M. Below this point the channel divides into several sloughs which extend in a general southeasterly direction, uniting a short distance above Swan Lake proper. From the confluence of these sloughs to the lake, a distance of about 700 feet, there exists a fairly well defined channel.

Cabin Creek enters Swan Lake Valley at a point about one mile south of Anderson Creek. It has a well defined channel at its entrance to the valley, but a short distance below there exists no evidence of any channel or channels leading to Swan Lake.

Brookside Creek enters Swan Lake Valley in a well defined channel about one-half mile south of the entrance of Cabin Creek, and, as Cabin Creek, no channel across the valley floor is evident. It appears from the general topography, that the waters from Brookside Creek intermingle with those from Cabin Creek and spread over lands to the south of Anderson Creek channel, the surplus draining into Swan Lake south of the channel of Anderson Creek.

Edgewood Creek enters Swan Lake Valley east of the entrance of Anderson Creek and has a well defined channel to a place near the east line of Section 7, Township 37 South, Range 10 East, W. M. Below this point several channels branch, and the water naturally and by artificial works, is spread over a considerable area of lands. There exists no well defined channel into Anderson Creek but the topography of the ground is such that the surplus water drains into this stream.

In the eastern and southern part of Swan Lake Valley there exists no well defined stream system. The run-off from the higher ground, which occurs only during the melting of snow or heavy rains, is in numerous gulches and over the lands to the valley floor where it spreads, the surplus draining into Swan Lake proper.

In June, 1947 the State Engineer made a topographic survey of Swan Lake proper and the area adjacent thereto, from which a map was prepared with contour intervals of one foot. This map was introduced in this proceeding as Exhibit No. 12 on behalf of Contestant Whiteline. The elevations shown upon the State Engineer's topographic map are assumed datum. This was tied to a bench-mark established by the United States Bureau of Reclamation and the 100 foot elevation shown upon the State Engineer's map is equal to elevation 4,184.02 mean sea level, U.S.R.S. datum.

Swan Lake proper is a shallow body of water with a fairly well defined shore line and with a maximum depth of about 1.6 feet. The area within the shore line, including an area of approximately 10.2 acres in several small islands, is about 792 acres.

That on years in which there was a good run-off, Swan Lake proper filled and the water spread over a considerable area of lands adjacent thereto, evidence was introduced, showing the area of lands flooded in and adjacent to Swan Lake, and the quantity of water included in the area flooded for the period 1938 to 1947 inclusive.

The report of George Naderman, Assistant State Engineer, shows the maximum elevation of the water surface for the years 1948 and 1949.

The testimony as to the area of lands flooded and quantity of water stored in the flooded area for the period 1938 to 1947, was based upon testimony as to the high water marks and other data which, in some years was not too definite, but the results which are summarized in the following table are believed to be reasonably accurate.

TABLE 1

Showing area of land flooded and pondage in acre-feet at the elevation indicated. The pondage includes water naturally stored within Swan Lake proper.

<u>Year</u>	<u>Elevation of Water Surface</u>	<u>Area of Lands Flooded, in Acres</u>	<u>Total quantity of Water, in Acre-feet</u>
1938	100.5	10,150	22,800
1939	97.5	2,730	1,850
1940	100.0	9,470	18,100
1941	98.5	6,120	6,250
1942	98.5	6,120	6,250
1943	100.5	10,150	22,800
1944	97.7	3,300	2,250
1945	96.2	520	210
1946	97.5	2,730	1,850
1947	96.2	520	210
1948	No pondage in Lake		
1949	97.3	2,130	1,430

Table 2, which follows, shows the area of land flooded and the pondage in and adjacent to Swan Lake with the water surface at the elevation shown therein. The pondage in Swan Lake proper before any appreciable area of lands adjacent thereto is flooded, is about 830 acre-feet.

TABLE 2

Showing pondage in Swan Lake and lands adjacent thereto, at elevations shown therein.

<u>Elevation</u>	<u>Area of Lands flooded in acres</u>	<u>Pondage in Acre-feet</u>
95.4	00	00
96.0	412	109
96.5	714	390
97.0	1,047	830
97.5	2,730	1,850
98.0	4,450	3,650
98.5	6,120	6,250
99.0	7,550	9,700
99.5	8,600	13,600
100.0	9,470	18,100
100.5	10,150	22,800

Table 3, which follows, shows the area of lands for which a water right was asserted by Contestees L. M. Hankins and Lloyd L. Hankins, in Statements and Proofs of Claims Nos. 4 to 15 inclusive, and by Contestees Dave Liskey and D. D. Liskey in Statements and Proofs of Claims Nos. 17, 18, 20 to 24 inclusive, which would be covered with water at the elevations shown therein.

TABLE 3

Claim Nos.	4	5	6	7	8	9	10	11	12	13	14	15	17	18	20	21	22	23	24	TOTALS		
Contour Elevation	Acreage in Hankins' Claims												Acreage in Liskey's Claims							Hankins	Liskey's	
95.5				24.8																	24.8	
96.0		9.2		159.0	0.3																168.5	
96.5		17.6		214.4	2.0																234.0	
97.0		34.8		279.6	19.6																334.0	
97.5		118.4	12.8	352.8	30.0	52.0						0.5			14.2			84.0			566.5	98.2
98.0		148.5	40.0	394.8	36.0	107.2		34.0				1.3			39.9	4.8	119.9	159.6	160.0		761.8	484.2
99.0	4.5	148.5	80.0	401.0	40.0	160.0	39.2	80.0	32.0	2.3	10.0	2.8	60.0	4.8	39.9	24.0	119.9	159.6	160.0		1000.3	568.2
100.0	6.0	148.5	80.0	401.0	40.0	160.0	53.5	80.0	67.6	2.3	10.0	3.0	74.6	8.0	39.9	24.0	119.9	159.6	160.0		1051.9	586.0
100.5	6.0	148.5	80.0	401.0	40.0	160.0	53.5	80.0	69.5	2.3	10.0	3.0	74.6	8.0	39.9	24.0	119.9	159.6	160.0		1053.8	586.0

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From Tables 2 and 3, the following is noted:

That the total number of acres of land lying between elevations 99.0 and 100.5 for which Contestees L. M. Hankins and Lloyd L. Hankins, and Contestees Dave Liskey and D. D. Liskey, are asserting a water right, is 71.3 acres and that the quantity of water required to raise the elevation of the water surface from 99.0 to 100.5 is 13,100 acre-feet.

That the total area of land lying between elevations 98 and 99 for which Contestees Hankins and Contestees Liskeys are asserting a water right is 322.5 acres, and the quantity of water required to raise the water surface from elevation 98 to 99 is 6,050 acre-feet.

That the total area of lands between elevations 97.5 and 98 for which Contestees Hankins and Contestees Liskeys are asserting a water right, is 581.3 acres and the quantity of water required to raise the water surface from elevation 97.5 to 98 is 1,800 acre-feet.

That the total area of land between elevations 97 and 97.5 for which Contestees Hankins and Contestees Liskeys are claiming a water right is 330.7 acres and the quantity of water required to raise the water surface from elevation 97.0 to 97.5 is 1,020 acre-feet.

That none of the lands for which Contestees Liskeys are asserting a water right are below elevation 97.0, and of the 334 acres of land below elevation 97.0 for which Contestees Hankins are asserting a water right, 224.5 acres are in the bed of Swan Lake. The lands in the bed of Swan Lake proper, produce no grasses but on years in which the water recedes sufficiently early so as to seed grains, excellent grain crops appear to have grown.

From Table 1, it is seen that for the period extending from 1938 to 1949 inclusive, there were only two years in which the water surface in Swan Lake reached an elevation of 100.5 feet, and that at this elevation 10,150 acres of land is flooded, of which a water right is claimed by Contestees herein for 1,639.8 acres; and when the water surface of Swan Lake is at elevation 100.5 the pondage is 22,800 acre-feet. Disregarding the effect of winds, to cover Contestees' 1,639.8 acres of lands with water, of which 224.5 acres are in the bed of Swan Lake, and are productive only when the water recedes early in the season, required 22,800 acre-feet of water.

From Table 1, it is seen that during the 12 year period there were two years in which the water surface reached elevation 100.5, one year elevation 100.0, two years elevation 98.5, one year elevation 97.7, two years elevation 97.5, one year elevation 97.3 and three years in which the water surface in Swan Lake did not reach an elevation to flood any of the lands adjacent thereto.

The lands between elevations 100.5 and 97.5, except where cultivated, are covered with a dense growth of small sage brush. The line shown upon the State Engineer's Adjudication Survey map as the line of dead sage is at approximate elevation 97.5, and the lands between that elevation and the lake bed produce some grass commonly called rushes.

Of the 10,150 acres of lands which are covered with water when the water surface of Swan Lake is at elevation 100.5 feet, approximately 3,300 acres are government lands, 2,800 acres owned by Dave and D. D. Liskey, 1,170 acres owned by L. M. and Lloyd L. Hankins, and 1,900 acres owned by Albert R. and Irene J. Devincenzi. Of the 1,900 acres owned by Devincenzis, about 567 acres are in the bed of Swan Lake, which have produced excellent grain crops on years that the lands in the lake bed can be farmed. On years in which the bed of Swan Lake is covered with

water or the water does not recede in time to permit the planting of crops, these lands are of no value for agricultural purposes and as grasses do not grow on these lands, they are also of no value for pasture.

In order to irrigate the 1639.8 acres of land for which a water right is claimed by Contestees in this proceeding by natural irrigation, disregarding the spreading of the water by wind action, it will require a minimum of about 22,800 acre-feet of water to be impounded. If this quantity of water were applied to the 1,639.8 acres of land claimed, it would cover that area to a depth of 13.9 feet, which is about five times the quantity required to irrigate similar lands with a controlled system of irrigation, and allow a reasonable amount for losses.

In order to irrigate the 110 acres of land below elevation 97 and outside of the bed of Swan Lake, for which a water right is asserted in this proceeding, by natural irrigation, disregarding the possible spreading of water by wind, it will require 830 acre-feet of water or approximately 7.6 acre-feet per acre.

It is evident that in order to irrigate the 1,639.8 acres by natural irrigation, about 10,150 acres of land within the 100.5 foot contour will be flooded, of which about 3,300 acres are government lands, and that of the remaining 6,850 acres of land in private ownership, a water right is claimed for only 1,639.8 acres. Also that when there is sufficient water to cover the 10,150 acres so that the 1,639.8 acres claimed may be naturally irrigated, the 792 acres of land within the bed of Swan Lake proper will produce no crops.

It appears reasonable to assume that the lands adjacent to Swan Lake which are flooded when the water surface reaches an elevation of 100.5 feet, have not been considered of much value for agriculture or grazing from the fact that within this area, there is some 3,300 acres of government lands which could have been entered under the public land laws.

Insofar as can be determined, the question as to whether a water right can be initiated in the manner asserted in the Statements and Proofs of Claims filed in this proceeding by Contestees L. M. Hankins and Lloyd L. Hankins and Contestees Dave Liskey and D. D. Liskey, and under conditions existing in the Swan Lake drainage basin, has never been decided or presented to our courts.

In the adjudication of the relative rights to the waters of Warner Lake and its tributaries, Lake County, Oregon, certain owners of lands north of Hart Lake who were using water overflowing from Hart Lake for irrigation, contested the right to the use of the waters naturally stored in the lake on the grounds that any such use would prevent them from securing the water as they have secured it in the past by natural overflow under well established and long continued conditions. In passing on this, the Circuit Court held,

"It would be a step backward to permit them to maintain a large body of water in Hart Lake at a certain level merely for the purpose of continuing the natural flooding system of irrigation. The ease with which contestants have been able to divert their water has been merely their own good fortune. It was not a right, but merely a privilege to be enjoyed only until rendered impractical by a fuller development and use of the unappropriated waters."

Ore., 27, at page 66, relating to the rights to the use of waters from natural irrigation held as follows:

"The rule as to the second requirement or diversion of the water has a special application or exception to much of the land in Harney Valley. It involves the matter of the natural irrigation of the land. Nature has been very generous to Harney Valley in this respect. With practically no artificial works for irrigation, thousands of acres are naturally watered. When will the date of appropriation be fixed in such cases? It would seem to be fair and equitable, if not absolutely essential, that such date be deemed to be when the proprietor of the land accepts the gift made by nature, and garners the produce of the irrigation by harvesting or utilizing the crops grown on the land, or making preparation for so doing, or in some substantial way indicates that it is his intention to reap the benefit of the fruit of the irrigation. When no "ditch, canal or other structure" is necessary to divert the water from its natural channel, the law does not vainly require such works, prior to an appropriation. 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 time as circumstances permit and necessities require, to the end that the greatest practical benefit possible may be obtained by the economical use of the water of the stream. In this way the natural system of irrigation can be changed to a control system."

In applying the principals set forth in the Silvies River case to the Swan Lake adjudication, consideration should be given to the difference in conditions, particularly the method of irrigation. The court described the method of irrigation as used in Harney Valley, as follows:

"The general plan of irrigation has been to let the river channel overflow naturally during extreme floods and then as the flood subsides, place dams, dikes, levees and other obstructions in the channel to raise the water-level and cause further flooding. In the larger sloughs and depressions, these dams and dikes act as reservoirs, storing the water during flood periods to be used for sub-irrigation later in the season. Naturally this is a very wasteful system of irrigation, as a very large surface is exposed to evaporation."

In Hough v. Porter, 51 Ore., 318 at page 420, the Supreme Court said:

"The wasteful methods so common with early settlers can, under the light most favorable to their system of use, be deemed only a privilege permitted because it could be exercised without substantial injury to anyone; and no right to such method of use was acquired thereby."

In Re Water Rights of Deschutes River and Tributaries, 134 Ore., 623 at page 666, the Court said:

"It is the duty of the Court in adjudicating water rights to suppress all wasting of water and the Court may go farther and declare what shall constitute the economic use of the water and to fix its proper duty by a decree awarding the use of a certain amount of water for that purpose. Water is too precious an article in the arid region, or semi-arid region, to be permitted to run to waste."

Decision of the courts of other states have been studied to determine the general trend under similar conditions of fact, and following is a brief statement of the pertinent parts of some of these cases:

In Wash v. Wallace, 67, Pac. 914, the Supreme Court of Nevada was dealing with a fact situation very similar to that existing in Swan Lake. The condition presented in that

case is summarized as follows:

At the time of first settlement upon the lands for which a water right was claimed there was found wild grasses growing, suitable for hay and grazing and these grasses were cut for hay and used for pasture.

That these wild grasses were produced by water naturally overflowing the stream bank, there being no artificial works.

That the owner of these wild meadow lands brought action to refrain and enjoin land owner above from diverting any of the waters from the stream and preventing the usual natural flow of the waters thereof or any portion thereof from flowing to their lands.

The pertinent part of the Court's opinion in this case is summarized as follows:

That the cutting of wild grass produced by the over-flow of the river, or, as expressed by witnesses, by the water of the river coming down and spreading over the land, was not an appropriation of that water within the meaning of that term,

That neither was the grazing of the lands an appropriation of that water, within the meaning of that term,

That, if these facts should be held to constitute a valid appropriation of water, within the meaning of that term, then under the contention of counsel that the river is a well defined stream, with banks, bed and channel, flowing over, through, and upon respondents' lands, would the channel have to run full of water before respondents could obtain the quantity of their appropriations and before subsequent appropriations could acquire rights thereto thus entailing a wasteful use of that which is so essential and necessary to the welfare and development of this state.

In Hardy et al v. Beaver County Irrigation Co., 234 Pac. 524, which is a Utah case, relating to the right to the use of water by flood irrigation during the winter, the Court stated:

"The trial Court, as appears from the records, based its findings and conclusions of law upon the theory that the respondents had acquired a prior right to the use of the water by permitting it to run onto and spread all over their lands as well as adjoining lands, regardless of whether such lands were being irrigated or were ever fit for irrigation. By recognizing that method of using water, the Court necessarily authorized a profligate waste as well as an unlawful use of water as against appellants. Respondents could not legally establish a prior right to the use of water for irrigation by merely flooding their lands and permitting it to gather in pools on the surface or raise the water elevation underneath the surface in the hope of obtaining sufficient moisture to raise crops in the ensuing summer. Such a use of water in this arid region is too wasteful to be tolerated when it can be used in the ordinary way for irrigation and other domestic purposes."

In James H. Van Camp et al v. G. W. Emery, 89 Pac. 752, the Supreme Court of Idaho stated that dams and impediments in a stream holding the water so as to sub-irrigate the adjacent meadows cannot itself justify maintenance of such structures. The Court further stated:

"It would not do to say that a stream must be dammed so as to cause sub-irrigation of a few acres at a loss of enough water to surface irrigate ten times as much by proper appliance."

The State of Colorado has a law which permits the owners of meadow lands, resulting from natural overflow, to construct a ditch to the stream, to convey the waters to the lands, when necessary, without loss of priority.

To hold that Contestees L. M. Hankins and Lloyd L. Hankins and Contestees Dave Liskey and D. D. Liskey have made a lawful appropriation of the waters of Swan Lake and its tributaries as asserted in Statements and Proofs of Claims Nos. 4 to 15, inclusive, and Nos. 17, 18, 20, 21, 22, 23 and 24,

(1) would not be in accordance with the laws of this state in that beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state,

(2) would not be in harmony with the principal established by the Supreme Court of this State that it is the duty of the Court in adjudicating water rights to suppress all wasting of water,

(3) and would establish a principal detrimental to the development and use of the water resources of this state.

The rights to the use of the waters of Swan Lake and its tributaries asserted by Contestees L. M. Hankins and Lloyd L. Hankins in Statements and Proofs of Claims Nos. 4 to 15, inclusive, and by Contestees Dave Liskey and D. D. Liskey, in Statements and Proofs of Claims Nos. 17, 18, 20, 21, 22, 23 and 24, are denied. The right set forth in Statement and Proof of Claim No. 19 was abandoned at the time of taking of evidence on these contests.

14.

CONTEST NO. 2-A

H. Douglas Whiteline,

Contestant

v.

Dave Liskey and D. D. Liskey,

Contestees

Contestees, Dave Liskey and D. D. Liskey, filed herein Statement and Proof of Claim No. 25, wherein a right is asserted to store 500 acre-feet of water flowing into Meadow Lake and water from an unnamed stream, tributary to Swan Lake, in a reservoir located at the south end of Meadow Lake, with a date of priority of Oct. 20, 1917, and a right to use the 500 acre-feet of stored water, together with water flowing into Meadow Lake and water of an unnamed stream, tributary to Swan Lake, for the irrigation of 789.0 acres of land in Meadow Lake, and water for stock use with a date of priority of Oct. 20, 1917 for the stored water and of Dec. 3, 1917 for the use of the direct flow waters.

To said Statement and Proof of Claim No. 25, H. Douglas Whiteline filed herein Statement of Contest No. 2-A, wherein the principal issue was that the waters of Meadow Lake are tributary to Swan Lake.

Meadow Lake is located just west of the southern end of Swan Lake Valley, lying in a trough formed by a high and precipitous ridge which separates it from Swan Lake Valley on the east, and the high mountainous area to the south and west, which also forms the apparent western boundary of the Swan Lake watershed.

Meadow Lake embraces an area of approximately 1,100 acres, being about  $\frac{3}{4}$  mile wide and  $2\frac{1}{4}$  miles long, extending longitudinally from the NW $\frac{1}{4}$  Section 20, northwesterly through Section 18 and the SW $\frac{1}{4}$  Section 7, Township 38 South, Range 10 East, W. M. and terminating within

the NE $\frac{1}{4}$  NE $\frac{1}{4}$  Section 12, Township 38 South, Range 9 East, W. M. The floor of this mountain valley is almost level and is at an approximate elevation of 4,350 feet above mean sea level.

The major portion of the drainage into Meadow Lake is from the area to the south and west which extends several miles back into the adjoining mountains. The run-off is entirely from melting snow, augmented by such rains as may occur over the approximately eight square miles of drainage area tributary to Meadow Lake.

Meadow Lake is not a lake within the accepted meaning of the word. The run-off waters consolidate to inundate the area during the spring and early summer, the extent of inundation depending upon the quantity of run-off. The valley floor, at the time of the adjudication survey, except the area under cultivation, was covered with a light sod of native wild grass, and rush, interspersed with a fairly heavy stand of sage brush.

The natural drainage into Meadow Lake comes from the slopes of the surrounding mountains, principally from the south through three distinct but unnamed watercourses. Two of these enter the valley within Section 20 and the other within Section 19, Township 38 South, Range 10 East, W. M. The run-off from the ridges which border the valley on the east and west apparently enters the valley floor as diffused surface waters although a small channel was observed near the northeast corner of Section 13, Township 38 South, Range 9 East, W. M.

Through the low hill or barrier at the north end of Meadow Lake, there extends for about  $\frac{3}{4}$  mile in a northerly direction to its juncture with Brookside Canyon, a concavity averaging about 400 feet wide, bounded on the west by a quite abrupt rise onto the bench traversed by the original channel of Brookside Creek. On the east the concavity slopes gradually upward to the toe of the adjoining ridge.

The floor of the concavity is rather uneven but with a general slope toward the north. Its elevation is from six to eight feet higher than the floor of Meadow Lake.

The terrane of the concavity is covered with sage brush and some pine timber, left when the area was logged during recent years. The area of pine timber extends from the north end of the valley toward the north for a distance of about  $\frac{1}{4}$  mile.

From evidence introduced in this proceeding, it appears that about 1906 a small ditch, about the size of a plow furrow, was constructed through this concavity and about 1911 work was done on enlarging this ditch and was completed about 1912 or 1913. It also appears from the testimony that the dam across the head of this ditch was constructed in 1918 or 1919.

It appears that the rights, as set forth in Statement and Proof of Claim No. 25, are evidenced by certificates of water rights recorded in Vol. 8, page 8279, and Vol. 10, page 11451, State Records of Water Right Certificates, although the later certificate includes and describes only 598 acres of land, also it is stated in said Proof No. 25 that 598 acres is the maximum area ever irrigated and this is the maximum area for which an irrigation right is claimed.

The right evidenced by Certificate of Water Right recorded in Vol. 8, page 8279, State Records of Water Right Certificates, was initiated by an application for a permit filed by R. C. Short, predecessor in interest to Contestees, on Oct. 20, 1917. This application as approved and for which a permit was issued, was for a right to store 900 acre-feet of water

from Meadow Lake and an unnamed stream, tributary of Swan Lake, in two reservoirs. One of the reservoirs, with a storage capacity of 500 acre-feet, was to be located at the south end of Meadow Lake, within the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 17, and NW $\frac{1}{4}$ , Section 20, Township 38 South, Range 10 East, W. M., and the other at the north end of Meadow Lake within the W $\frac{1}{2}$  NW $\frac{1}{4}$ , Section 7, Township 38 South, Range 10 East, W. M., and the E $\frac{1}{2}$  NE $\frac{1}{4}$ , Section 12, Township 38 South, Range 9 East, W. M.

This application and permit included the construction of a drainage ditch to extend from the north end of Meadow Lake south, through approximately the middle of the valley floor to the reservoir at the south end, for the purpose of carrying the water flowing into Meadow Lake below the south reservoir and waste water, to the reservoir and the delivery of this water into the south reservoir by means of a pumping plant.

The waters of an unnamed stream, tributary to Swan Lake, as set forth in the application and permit, was to be diverted by means of a dyke, within the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 12, Township 38 South, Range 9 East, W. M., and conveyed in a canal about  $\frac{1}{4}$  mile in length, terminating within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 12.

The water right evidenced by Certificate of Water Right recorded in Vol. 10, page 11451, State Record of Water Right Certificates, was initiated by the filing of an application for a permit by R. C. Short, predecessor in interest of Contestees, on December 3, 1917. This application was for the appropriation of the water to be stored in the above described reservoirs, the water of the unnamed stream, tributary to Swan Lake through the same works to be constructed for conveying the waters of this stream for storage, and waters tributary to Swan Lake, for the irrigation of 601 acres of lands, of which 598 acres are described in the above described Water Right Certificate, and water for stock.

It appears that all of the work, above described, was constructed, with the exception of the storage reservoir at the north end of Meadow Lake, and beneficial use made of the available water in the irrigation of the 598 acres of lands described in Certificate of Water Right recorded in Vol. 10, page 11451, State Records of Water Right Certificates.

A large amount of evidence was introduced relating to the question as to whether or not water collected in Meadow Lake is tributary to Swan Lake and the testimony as to this is conflicting, however it appears that a determination as to this is not material, as the claims to the use of the water of Swan Lake and its tributaries by natural overflow have been denied and there are no other rights asserted in this proceeding to those waters and for the further reasons which are summarized as follows:

That in order to cultivate the lands in the bed of Meadow Lake it is necessary to remove the surplus water and that this has been the practise for many years.

That, considering the small drainage area tributary to Meadow Lake together with the large quantity of water necessary to raise the water surface to an elevation to flow through the concavity at the north end, it would be necessary that there be considerable pondage in Meadow Lake. To hold that this pondage must be maintained so that water would overflow once in several years and then for what appears to have been, at most, very short periods of time, would constitute the approval of a very wasteful use of water.

It appears that the Certificate of Water Right recorded in Vol. 10, page 11451, State Records of Water Right Certificates, is in error as to the date of priority of the use of the storage water. The date of priority should be Oct. 20, 1917, the same date of priority as the right to store water, as evidenced by Certificate of Water Right recorded in Volume 8, page 8279, State Record of Water Right Certificates.

Contestees Dave Liskey and D. D. Liskey, in accordance with the provisions of Certificate of Water Right recorded in Vol. 8, page 8279, State Record of Water Right Certificates, hereby are allowed a right to store 500 acre-feet of water flowing into Meadow Lake and water from an unnamed stream, tributary to Swan Lake, in a reservoir located at the south end of Meadow Lake, within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  Section 17, and NW $\frac{1}{4}$  Section 20, Township 38 South, Range 10 East, W. M., including waste water collected in a drainage ditch hereinbefore described, and to deliver water into said reservoir by means of a pumping plant, with a date of priority of October 20, 1917, and further:

In accordance with the provisions of Certificate of Water Right recorded in Vol. 10, page 11451, State Record of Water Right Certificates, to use said stored water in the irrigation of 598.0 acres of land as described in said Certificate of Water Right and in the tabulation herein, with a date of priority of October 20, 1917, and to use the waters flowing into Meadow Lake and diverted from said unnamed stream during the irrigation season, including waste water flowing into said drainage ditch, in the irrigation of said 598.0 acres of land, with a date of priority of December 3, 1917. Contestees shall also have the right to deliver said waters during the irrigation season into the reservoir by means of a pumping plant. The total quantity of water used for irrigation during any irrigation season shall not exceed three acre-feet per acre.

15.

CONTEST NO. 3

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd  
L. Hankins,

Contestants

v.

Albert R. Devincenzi and  
Irene J. Devincenzi,

Contestees

Contestees, Albert R. Devincenzi and Irene J. Devincenzi, filed herein Statement and Proof of Claim No. 2, wherein they assert a right to the use of the waters of Edgewood or Helena Creek, and its tributaries, Anderson Creek and all waters that flow into or upon Swan Lake, for the irrigation of 557 acres of lands, within Sections 22, 23, 26, 27 and 35, Township 37 South, Range 10 East, W. M., practically all of which lies within the bed of Swan Lake, and water for domestic and stock use with a date of priority of about 1863.

To said Statement and Proof of Claim is attached an agreement between Contestees and H. Douglas Whiteline, the pertinent part of which is summarized as follows:

That H. Douglas Whiteline is justly entitled to store the water of Anderson Creek in the reservoir for which he initiated a right for the storage of water by filing an application with the State Engineer and Contestees waive all claims to such water, but assert their ownership to any surplus waters.



That if the right to store the waters of Anderson Creek be denied and the waters of Anderson Creek be divided on an acreage basis, that Contestees are to share in all such waters.

To said Statement and Proof of Claim, Contestants Dave Liskey, D. D. Liskey, L. M. Hankins and Lloyd L. Hankins filed herein Statement of Contest No. 3 denying the right claimed by Contestees on grounds that:

Contestees deny the beneficial application and use of waters on their lands, and claim that they would be better off if Mr. Whiteline is permitted to take the water. They concede and attempt to transfer their rights to Mr. Whiteline and at the same time claim rights to other waters to take the place of the waters they desire to go to Mr. Whiteline, to the loss and injury of Contestants. They have appropriated and are using water from Edgewood Creek which would otherwise flow on into Swan Lake, yet they claim full right to Swan Lake waters despite the fact that they have already taken water on other lands that would, if unhindered and left in state of nature, flow into Swan Lake and onto the lands herein in question. Any transfer of water from Swan Lake to Mr. Whiteline would prove highly harmful and injurious to the Contestants and would not prove a benefit to Mr. Whiteline in its use as contemplated by him. If Mr. Whiteline were permitted to take the water as proposed by him and Contestees, there would be no remaining water to which Contestees would have any right. Contestees claim of priority of 1863 is denied by Contestants.

The pertinent evidence relating to the irrigation of lands in and adjacent to Swan Lake has been considered in Contest No. 1 herein and, based upon the finding in said Contest No. 1, the right to the use of water, as asserted in Statement and Proof of Claim No. 2, by Contestees Albert R. Devincenzi and Irene J. Devincenzi, is denied.

16.

CONTEST NO. 4

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L.  
Hankins,

Contestants

v.

Albert R. Devincenzi and  
Irene J. Devincenzi,

Contestees

Contestees, Albert R. Devincenzi and Irene J. Devincenzi, filed herein Statement and Proof of Claim No. 3, wherein they assert a right to the use of the waters of Edgewood Creek, sometimes called Helena Creek, and its tributaries, and all of the water of an unnamed stream rising in the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 7, and flowing through the W $\frac{1}{2}$  SW $\frac{1}{4}$  of Section 8, and flowing through and into the NW $\frac{1}{2}$  of Section 17, Township 37 South, Range 10 East, W. M., for the irrigation of 5.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$ , 13.4 acres in NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 5.0 acres in NW $\frac{1}{4}$  SW $\frac{1}{4}$ , 8.6 acres in SW $\frac{1}{4}$  SW $\frac{1}{4}$ , 18.4 acres in NE $\frac{1}{4}$  SE $\frac{1}{4}$ , 30.0 acres in NW $\frac{1}{4}$  SE $\frac{1}{4}$ , 11.2 acres in SW $\frac{1}{4}$  SE $\frac{1}{4}$ , 39.4 acres in SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 8; 5.0 acres in SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 9; 18.0 acres in NE $\frac{1}{4}$  NW $\frac{1}{4}$ , 40.0 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$ , 40.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$ , 5.0 acres in SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 16; 39.3 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$ , 16.5 acres in NW $\frac{1}{4}$  NE $\frac{1}{4}$ , 35.0 acres in SE $\frac{1}{4}$  NE $\frac{1}{4}$ , 15.1 acres in NE $\frac{1}{4}$  NW $\frac{1}{4}$ , 18.0 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$ , 23.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$ , 12.1 acres in SE $\frac{1}{4}$  NW $\frac{1}{4}$ , 30.0 acres in NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 17; Township 37 South, Range 10 East, W. M., and water for domestic and livestock use with a date of priority of about 1863.

Hankins and Lloyd L. Hankins filed herein Statement of Contest No. 4, the pertinent part of which is as follows:

That the Contestees claim an appropriation of water "upon actual appropriations and uses since times immemorial dating back to about 1863", for irrigation of 80.7 acres and 160 acres, and for domestic use and live stock from Edgewood Creek, and its tributaries and an unknown (unnamed?) creek with a priority from about 1863. They further claim an appropriation by permit from the State Engineer's office for 160 acres of the same lands with a priority of September 26, 1924, and claim that such appropriation was "merely in conformation of the previously acquired water right".

That Contestants contest the rights claimed by the Contestees for the following reasons:

Edgewood Creek and its tributaries are tributary to Swan Lake. No lands other than as described in said water permit of September 26, 1924, have ever been irrigated by the Contestees.

Two appropriations for the same water with different dates of priority cannot exist. Contestees waived any right or claim of priority appropriation when they appropriated under the State Engineer's permit in 1924. Contestees have no priority of 1863 or otherwise than of 1924.

At the concluding of the hearing of this contest, Contestees filed a petition to amend Statement and Proof of Claim No. 3. The pertinent part of this petition is as follows:

Come now Albert R. Devincenzi and Irene J. Devincenzi, his wife, who filed herein Statement and Proof of Claim No. 3, embracing lands now in Sections 8, 17 and 16, Township 37, South, Range 10, East, W. M., and hereby respectfully show to the Engineer:

That he does hereby desire to amend said statement and proof to conform with the evidence and testimony adduced at the hearing of the above entitled matter in the following particular:

I claim all of the waters of Edgewood Creek, sometimes called Helena Creek, together with its tributaries, and the streams flowing into it. Also all waters of that un-named creek arising in the NW $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 7, flowing through the W $\frac{1}{2}$  of the SW $\frac{1}{4}$  of Section 8, and flowing through and into the NW $\frac{1}{4}$  of Sec. 17, T 37 S., R. 10 E., W. M., as shown by the State Engineer's map; also that certain un-named creek arising in the NW of the NE of Section 18, and flowing through the SE of the NW of Section 18, and into and upon the SW $\frac{1}{4}$  of Section 17, T 37 S., R. 10 E., W. M.; also all surface water running into and upon the lands owned by me and called by me the "Upper Edgewood Ranch", from whatever source or direction; also all surface run-off waters or drainage and all seepage which run into, upon or in any way effect my so-called "Upper Edgewood Ranch" from any of its surrounding drainage area.

By actual appropriation and use since approximately 1873.

Approximately 1873.

428 acres.

The hatched area shown on the State Engineer's map shows the portion of the Upper Edgewood Ranch which is irrigated by natural flow of Edgewood Creek by ditches and checks late in the Fall of the year after the irrigation season has closed, to make a green meadow for late Fall and Winter feed.

The lands, the 428 acres upon which water right is claimed with a priority of 1873, are lands upon which a regular irrigation is completed and performed a number of times each year, said waters being controlled by dikes, ditches, checks and natural spreading and flooding therefrom.

The lands included in this amended application, upon which a water right is claimed from approximately 1873, are lands upon which, in each and every year, at least one irrigation is performed during the growing season of grasses and grains from any surplus water of Edgewood Creek, un-named creek, natural water courses running into and

upon the land and being spread and flooded therefrom, and from natural seepage and drainage from the surrounding natural drainage area into the Upper Edgewood Ranch.

In addition to the lands set forth in the answer to Question 18, in said original statement of proof, I claim a water right from the waters as set forth in the answer to Question 2 hereof, upon the following additional acreage:

In Section 9, Township 37, South, Range 10 E., W. M.:

7 acres in the NW of SW  
35 acres in the SW of SW  
33 acres in the SE of SW  
20 acres in the SW of SE

In Section 16, Township 37, South, Range 10 E., W. M.:

10 acres in the NW of NE  
22 acres in the NE of NW  
15 acres in the SE of NW  
80 acres in the  $W\frac{1}{2}$  of SW

In Section 17, Township 37, South, Range 10 E., W. M.:

4 acres in the SE of NE  
40 acres in the SW of NE  
28 acres in the SE of NW  
40 acres in the NE of SW  
15 acres in the NW of SW  
10 acres in the SW of SW  
40 acres in the SE of SW  
10 acres in the NE of SE  
40 acres in the NW of SE  
40 acres in the SW of SE  
40 acres in the SE of SE

In Section 21, Township 37, South, Range 10 E., W. M.:

80 acres in the  $W\frac{1}{2}$  of  $NW\frac{1}{4}$

In Section 20, Township 37, South, Range 10 E., W. M.:

80 acres in the  $E\frac{1}{2}$  of the  $NE\frac{1}{4}$ ,

as shown upon the accompanying and attached map.

I make this Petition to Amend for the reason I have ascertained the facts set forth herein since the time I made my said statements and proofs of claim and I have exercised all due diligence in this matter.

Edgewood Creek rises on the south slope of Edgewood Mountain, within the North half of Section 6, Township 37 South, Range 10 East, W. M., and flows in a general southerly direction, in a fairly well defined channel, to the head of a ditch near the south line of the  $NW\frac{1}{4}$   $NW\frac{1}{4}$ , Section 21, of the aforesaid township and range. This ditch extends south about  $\frac{1}{4}$  mile, terminating in a cultivated field about 700 feet from the channel of Anderson Creek. While there exists no evidence of a channel into Anderson Creek, it is evident from the topography and slope of the lands through which Edgewood Creek flows, that the drainage is toward the south and into Anderson Creek.

Near the center of Section 6, Township 37 South, Range 10 East, W. M., is an area of about one acre in which there arise many small springs, the combined flow of which, on October 16, 1946, was 0.163 cubic foot per second, or about 73 gallons per minute; and on June 15, 1949, 0.296 cubic foot per second, or about 133 gallons per minute. These springs are tributary to Edgewood Creek, the largest arising in the bed of this stream.

Water flowing in Edgewood Creek above the aforesaid springs is derived wholly from melting snows during the late winter and early spring, and occasional small flows following heavy rain storms which may occur during the summer months.

To the east of Edgewood Creek there exists two channels which might be classified as natural watercourses and will be so considered herein. One of these channels crosses the east and west center line through Section 8, Township 37 South, Range 10 East, W. M., a short distance east of the center of said Section 8, and the other crosses said center line about  $\frac{1}{4}$  mile east of the center of said Section 8. The channels of these two watercourses disappear upon reaching the irrigated lands below. The water flowing in these two channels is derived wholly from the melting of snow in the early spring, which is used to irrigate a small area and to supplement the water of Edgewood Creek for the irrigation of lands hereinafter described.

The lands for which a water right is claimed in Statement and Proof of Claim No. 3, are in a compact body extending south from the foot of the mountains which bound Swan Lake Valley on the north and on the east. The topography of this area, with the exception of a relatively small rocky ridge located in the northwest portion, is fairly uniform with a slope south toward Swan Lake.

Edgewood Creek flows into this area near the west line of the  $\text{SW}\frac{1}{4}$   $\text{NW}\frac{1}{4}$ , Section 8, Township 37 South, Range 10 East, W. M., and the channel, which is relatively small, extends in a general southeasterly direction to near the southeast corner of said Section 8, thence in a general southerly direction to the head of the ditch hereinbefore described. Near the northeast corner of the  $\text{NW}\frac{1}{4}$   $\text{SW}\frac{1}{4}$  of said Section 8, there is a small channel leading from the main channel, which extends in a general southeasterly direction about  $\frac{3}{4}$  mile to the head of a ditch located near the center of the  $\text{NW}\frac{1}{4}$   $\text{NE}\frac{1}{4}$  of Section 17, Township 37 South, Range 10 East, W. M. This ditch extends in a general southeasterly direction for a distance of about one mile, joining the main channel of Edgewood Creek near the northwest corner of the  $\text{NW}\frac{1}{4}$   $\text{NW}\frac{1}{4}$  of Section 21, of the aforesaid township and range.

It appears from the testimony submitted in this proceeding that possibly the aforesaid channel was originally constructed as a ditch to convey water for the irrigation of lands now owned by Contestees.

The waters of Edgewood Creek and that of the two unnamed natural channels in the  $\text{SE}\frac{1}{4}$  of Section 8, Township 37 South, Range 10 East, W. M., together with the water of the unnamed stream arising in the  $\text{NW}\frac{1}{4}$   $\text{NE}\frac{1}{4}$  of Section 7, said township and range, are diverted for irrigation of Contestees' lands, hereinafter described, by means of small ditches and temporary dams.

It appears that, due to the limited carrying capacities of the natural channels and the fact that these do not extend through Contestees' lands, during high water a considerable area of Contestees' lands are flooded. The lands irrigated by Contestees with water conveyed through ditches, are located so that the waste and seepage waters therefrom flow upon other lands of Contestees for which a water right is claimed in this proceeding.

Water from Edgewood Creek is diverted at a point near the center of the  $\text{NE}\frac{1}{4}$   $\text{NE}\frac{1}{4}$  of Section 7, Township 37 South, Range 10 East, W. M., into a steel pipe line with a diameter of 2 inches, and conveyed for a distance of about 1600 feet to the residence and buildings of the Contestees and used for domestic, stock, fire protection and for the irrigation of a lawn and domestic garden. The difference in elevation of the water surface at the intake of the pipe line

and that at the place of use, is about 82 feet.

It appears that the lands for which Contestees Albert R. Devincenzi and Irene J. Devincenzi are asserting a water right in Statement and Proof of Claim No. 3, were originally owned by a number of different parties, having been acquired under Federal land laws or from the State of Oregon.

The following table, which has been compiled from data submitted in this proceeding, shows the name of the original entryman, the character and the date of entry, and description of the lands for which a water right is claimed in Statement and Proof of Claim No. 3, and the petition to amend the same. The date for lands acquired from the State of Oregon is the date deed was issued. No evidence was introduced showing the dates of entry or settlement on State Lands.

<u>Name of Entryman</u>	<u>Character of Entry</u>	<u>Date of Entry</u>	<u>Description of Land</u>
Thomas R. Patterson	Homestead	June 29, 1891	SW $\frac{1}{4}$ SE $\frac{1}{4}$ , SE $\frac{1}{4}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SW $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 9, T. 37 S., R. 10 E., W. M.
Philip W. Snyder	Timber and Stone Act	July 12, 1907	NE $\frac{1}{4}$ SE $\frac{1}{4}$ , Section 8, T. 37 S., R. 10 E., W. M.
Oliver C. Applegate	Preemption	Oct. 13, 1873	S $\frac{1}{2}$ SE $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 8, NE $\frac{1}{4}$ NE $\frac{1}{4}$ , Section 17, T. 37 S., R. 10 E., W. M.
Oliver C. Applegate	Homestead	Oct. 28, 1873	E $\frac{1}{2}$ SW $\frac{1}{4}$ , Section 8, E $\frac{1}{2}$ NW $\frac{1}{4}$ , Section 17, T. 37 S., R. 10 E., W. M.
Ivan D. Applegate	Timber and Stone Act	Aug. 5, 1887	SW $\frac{1}{4}$ NW $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 8, T. 37 S., R. 10 E., W. M.
E. E. White	Indemnity School Land	Dec. 12, 1901	SW $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 8, T. 37 S., R. 10 E., W. M.
Frank E. Applegate	Preemption	Dec. 30, 1886	W $\frac{1}{2}$ NW $\frac{1}{4}$ , NW $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 17, T. 37 S., R. 10 E., W. M.
Philip W. Snyder	Isolated Tract Purchase	Nov. 30, 1911	NW $\frac{1}{4}$ NE $\frac{1}{4}$ , NE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 17, T. 37 S., R. 10 E., W. M.
James D. Fay	Preemption Entry	Oct. 20, 1888	S $\frac{1}{2}$ SW $\frac{1}{4}$ , S $\frac{1}{2}$ SE $\frac{1}{4}$ , Section 17, T. 37 S., R. 10 E., W. M.
Estella O. Moore	Preemption Entry	Oct. 12, 1887	N $\frac{1}{2}$ SE $\frac{1}{4}$ , S $\frac{1}{2}$ NE $\frac{1}{4}$ , Section 17, T. 37 S., R. 10 E., W. M.
Ole Applegate	State School Land	Mar. 25, 1880	W $\frac{1}{2}$ NW $\frac{1}{4}$ , Section 16, T. 37 S., R. 10 E., W. M.
I. D. Applegate	State School Land	Apr. 16, 1885	W $\frac{1}{2}$ SW $\frac{1}{4}$ , Section 16, T. 37 S., R. 10 E., W. M.
Ella A. Applegate	State School Land	Apr. 11, 1883	SE $\frac{1}{4}$ NW $\frac{1}{4}$ , Section 16, T. 37 S., R. 10 E., W. M.
Margaret Applegate	State School Land	Apr. 27, 1888	NE $\frac{1}{4}$ NW $\frac{1}{4}$ , NW $\frac{1}{4}$ NE $\frac{1}{4}$ , Section 16, T. 37 S., R. 10 E., W. M.

The testimony as to the irrigation of lands for which a water right is claimed in Statement and Proof of Claim No. 3 and in the petition to amend, is indefinite as to area and location, although it appears that in 1888 or 1889 water was used for irrigation and some hay from the irrigated lands was cut and stacked. It also appears that some of the lands were under fence. It also appears that the water was used in the irrigation of different tracts, possibly depending upon the available water supply. It appears that there is not sufficient water to irrigate all of the lands for which a water right is claimed except in those years when there is an exceptionally heavy snowfall and the melting of snow favorable.

Contestees Albert R. Devincenzi and Irene J. Devincenzi, in accordance with the provisions of paragraph 27 herein, are allowed a right to the use of the waters of Edgewood or Helena Creek, an unnamed stream rising in NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 7, Township 37 South, Range 10 East, W. M., and two unnamed streams flowing across the east and west line through the center of Section 8, east of the center thereof, Township 37 South, Range 10 East, W. M., for the irrigation of the following described lands, and water for stock use as follows: 13.4 acres in NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 30.0 acres in NW $\frac{1}{4}$  SE $\frac{1}{4}$ , 11.2 acres in SW $\frac{1}{4}$  SE $\frac{1}{4}$ , 39.4 acres in SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 8, and 39.3 acres in NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 17, Township 37 South, Range 10 East, W. M., with a date of priority of 1873; 40.0 acres in NW $\frac{1}{4}$  NW $\frac{1}{4}$ , 40.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 16, Township 37 South, Range 10 East, W. M., with a date of priority of 1880; 5.0 acres in SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 16, Township 37 South, Range 10 East, W. M., with a date of priority of 1883; 40.0 acres in NW $\frac{1}{4}$  SW $\frac{1}{4}$ , 30.0 acres in SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 16, Township 37 South, Range 10 East, W. M., with a date of priority of 1885; 5.0 acres in SW $\frac{1}{4}$  NW $\frac{1}{4}$ , 5.0 acres in NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 8, 40.0 acres in SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 40.0 acres in SE $\frac{1}{4}$  NE $\frac{1}{4}$ , 40.0 acres in NE $\frac{1}{4}$  SE $\frac{1}{4}$  and 40.0 acres in NW $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 17, Township 37 South, Range 10 East, W. M., with a date of priority of 1887; 18.0 acres in NE $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 16, 40.0 acres in SE $\frac{1}{4}$  SW $\frac{1}{4}$ , 40.0 acres in SW $\frac{1}{4}$  SE $\frac{1}{4}$ , 40.0 acres in SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 17, Township 37 South, Range 10 East, W. M., with a date of priority of 1888; 5.0 acres in SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 9, Township 37 South, Range 10 East, W. M., with a date of priority of 1891; 8.6 acres in SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 8, Township 37 South, Range 10 East, W. M., with a date of priority of 1901; 18.4 acres in NE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 8, Township 37 South, Range 10 East, W. M., with a date of priority of 1907.

Said Contestees are also allowed a right to the use of water of Edgewood Creek, in accordance with the provisions of paragraph 27 herein, for domestic use within the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 8, Township 37 South, Range 10 East, W. M., with a date of priority of 1887, to be diverted in a pipe line hereinbefore described and water for stock use and to fill a stock pond located in NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 8, Township 37 South, Range 10 East, W. M., not exceeding 0.5 acre-foot.

Said Contestees have asserted a right to the use of water flowing onto their lands in no well defined channels. The owner of the lands upon which waters of this class exist has the legal right to make beneficial use of the same. Contestees have also asserted a right to the use of waste and seepage water arising upon their own lands and for use upon their lands. The owner of lands upon which seepage and waste water arises has the legal right to use the same before it leaves his lands or enters the channel of a stream.

Right to the use of the waters of Edgewood Creek, sometimes called Helena Creek, and unnamed stream arising in the NW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 7, Township 37 South, Range 10 East, W. M., for uses for which a water right was asserted in this proceeding and not granted, and which were included in the application and permit recorded in Volume 38, page 15676, State Records of Permits, shall be that as perfected in the manner provided by law for the perfection of such rights.

It appears that of the lands for which a water right for irrigation was allowed and evidenced by Certificate of Water Right recorded in Vol. 6, page 6131, State Record of Water Right Certificates, certain lands have never been irrigated and the remainder are allowed an earlier date of priority herein, therefore it is held that said water right, evidenced by certificate recorded in Vol. 6, page 6131, State Record of Water Right Certificates, hereby is declared cancelled and of no further force or effect.

17.

CONTEST NO. 5

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L.  
Hankins,

Contestants

v.

H. Douglas Whiteline, Albert  
R. Devincenzi and Irene J.  
Devincenzi,

Contestees

H. Douglas Whiteline filed herein Statements and Proofs of Claims Nos. 33 and 34.

In Statement and Proof of Claim No. 33, there is asserted a right to the use of the surface waters rising and falling on lands owned and controlled by claimant, and to the waters of Anderson Creek, to be impounded by a dam and reservoir to be constructed under State Engineer's Permit No. R-801. The date of initiation of such right is stated as October 1943, when construction work on the dam was commenced; claimant further states that the water was first beneficially used in 1888 or prior thereto.

In Statement and Proof of Claim No. 34, a right is asserted to the use of the waters of an unnamed gulch, sometimes called Anderson Creek, and run-off waters from lands owned and controlled by claimant, for the irrigation of 655.9 acres of land, domestic and stock use, with a date of priority of 1888. For a specific description of the lands for which a water right is claimed herein, reference is made to Statement and Proof of Claim No. 34, wherein such lands are tabulated.

To said Statements and Proofs of Claims Nos. 33 and 34, Contestants Dave Liskey, D. D. Liskey, L. M. Hankins and Lloyd L. Hankins filed herein Statement of Contest No. 5, wherein they deny each and every statement set forth in said Proofs of Claims upon which the appropriations are based, except that Contestee Whiteline is entitled to irrigate 90.7 acres of land above a certain dike on his premises and that he may utilize to the fullest extent, in their natural state, any and all surface waters flowing over his lands, but without any artificial control which may

tend to prevent such waters from flowing into Anderson Creek and on into Swan Lake.

#### STATEMENT AND PROOF OF CLAIM NO. 33

The rights asserted by Contestee in Statement and Proof of Claim No. 33 are based primarily upon his application to the State Engineer for a permit to construct a reservoir and to store for beneficial use the unappropriated waters of an unnamed dry gulch, tributary to Swan Lake. Said application was received in the office of the State Engineer on October 11, 1944, was filed and recorded in the records of the State Engineer as Application No. R-20521. Permit therefor was issued on December 11, 1944 and the right therein granted was limited to the construction of the Whiteline Reservoir and the storage of 2,692 acre-feet of water from an unnamed dry gulch to be diverted under Application No. 20522, Permit No. 16023.

Said reservoir and storage permit is recorded in State Record of Permits, Vol. 3, Page R-801.

The "unnamed dry gulch" designated as the source of appropriation in the above mentioned Permit No. R-801 appears to be the same watercourse which elsewhere in this proceeding is called Anderson Creek.

From the testimony adduced during the hearing herein, it appears that Contestee commenced construction of the dam during October 1943, and had progressed to about 70 percent of completion when he was served with an injunction issued out of the Circuit Court of the State of Oregon for Klamath County, which resulted in Suit in Equity No. 7222.

Since the rights claimed by Contestee under Statement and Proof of Claim No. 33 were initiated subsequent to the adoption of the Oregon Water Code, Contestee must rely upon the perfection of such rights in the manner provided by law for the completion thereof.

#### STATEMENT AND PROOF OF CLAIM NO. 34

The lands for which a water right is asserted under Statement and Proof of Claim No. 34, except the 11.0 acres in Sections 5, 8 and 9, Township 37 South, Range 9 East, W. M., are located in a small valley along the channel of Anderson Creek, known as Two Mile Valley. This valley extends longitudinally from a point near the northwest corner of Section 15, to near the center of Section 23, Township 37 South, Range 9 East, W. M., its eastern edge bearing almost due southeast diagonally through Section 15 and the NW $\frac{1}{4}$  of Section 23. Two Mile Valley widens quite abruptly to about  $\frac{1}{2}$  mile near its northern end and continues to almost one mile near its southern end where it narrows very abruptly to the location of the Whiteline Dam near the center of said Section 23. Two Mile Valley embraces an area of approximately 712 acres within Sections 15, 16, 22, 23 and 27, Township 37 South, Range 9 East, W. M.

The channel of Anderson Creek enters Two Mile Valley about 800 feet east of the northwest corner of Section 15, traverses the valley near its eastern edge to near the center of Section 23, where it enters a canyon in its course toward Swan Lake Valley.

Anderson Creek is not a perennial stream, its flow being derived almost wholly from melting snow and precipitation during the spring months and an occasional small flow following heavy rain storms which may occur during the summer. During the remainder of the year its channel is dry except for certain short sections where a small amount of water seeps into the channel, but not sufficient to produce a flow.



Near the center of the  $W\frac{1}{2}NW\frac{1}{4}$  of Section 23, Township 37 South, Range 9 East, W. M., there exists across the channel of Anderson Creek and extending onto the adjacent valley floor, a low earth dike, approximately 700 feet long and a maximum of about  $3\frac{1}{2}$  to 4 feet high. Above the dike, an area of 90.7 acres of meadow hay land is well defined within the apparent flow line of the waters impounded by the dike when filled to capacity.

It appears that beneficial use of the water for the irrigation of the following described land has been made. Therefore, in accordance with the provisions of paragraph 27 herein, Contestee H. Douglas Whiteline hereby is allowed a right to the use of the water of Anderson Creek for the irrigation of 4.0 acres in the  $NW\frac{1}{4}SE\frac{1}{4}$ , 12.4 acres in the  $SE\frac{1}{4}SE\frac{1}{4}$ , 17.6 acres in the  $SW\frac{1}{4}SE\frac{1}{4}$ , Section 15; 35.1 acres in the  $NE\frac{1}{4}NE\frac{1}{4}$ , 5.2 acres in the  $NW\frac{1}{4}NE\frac{1}{4}$ , 0.8 acre in the  $SE\frac{1}{4}NE\frac{1}{4}$ , Section 22; 13.9 acres in the  $NW\frac{1}{4}NW\frac{1}{4}$ , 1.7 acres in the  $SW\frac{1}{4}NW\frac{1}{4}$ , Section 23; Township 37 South, Range 9 East, W. M., and water for stock, with a date of priority of 1888.

Contestee's claim for domestic use under Statement and Proof of Claim No. 34 hereby is denied.

As for the other lands for which Contestee Whiteline has asserted a water right under Statement and Proof of Claim No. 34, it appears that the waters utilized under such asserted claim are diffused surface waters. While this class of water is not included in this proceeding, Contestee has a legal right to make beneficial use of the same before they enter the channel of Anderson Creek or the channel of a tributary thereof.

18.

CONTEST NO. 6

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L.  
Hankins,

Contestants

v.

H. Douglas Whiteline,

Contestee

Contestee H. Douglas Whiteline filed herein Statement and Proof of Claim No. 35, wherein he has asserted a right to the use of the waters of Anderson Creek and the waters to be stored in the Whiteline Reservoir in Sections 15, 22 and 23, Township 37 South, Range 9 East, W. M., for the irrigation of 13.8 acres in the  $SE\frac{1}{4}NE\frac{1}{4}$ , 1.2 acres in the  $NE\frac{1}{4}SE\frac{1}{4}$ , Section 19; 6.0 acres in the  $SW\frac{1}{4}NW\frac{1}{4}$ , 0.2 acre in the  $SE\frac{1}{4}NW\frac{1}{4}$ , 27.5 acres in the  $NE\frac{1}{4}SW\frac{1}{4}$ , 30 acres in the  $NW\frac{1}{4}SW\frac{1}{4}$ , Section 20; all within Township 37 South, Range 10 East, W. M., and water for domestic and stock use, with a date of priority of 1940.

To said Statement and Proof of Claim No. 35, Contestants Dave Liskey, D. D. Liskey, L. M. Hankins and Lloyd L. Hankins filed herein Statement of Contest No. 6 wherein, as a basis for contest, they allege that the claim shows or attempts to show an appropriation of public water without permit and contrary to law, in that no permit from the State Engineer is alleged or shown to so appropriate such waters.

CONTEST NO. 8

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L.  
Hankins,

Contestants

v.

H. Douglas Whiteline,

Contestee

Contestee H. Douglas Whiteline filed herein Statement and Proof of Claim No. 37, wherein he asserted a right to the use of the waters of Whiteline Spring for the irrigation of 1.0 acre in the NE $\frac{1}{4}$  NE $\frac{1}{4}$ , and 10.0 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 22, Township 37 South, Range 9 East, W. M., and domestic and livestock use with a date of priority of 1888.

To said Statement and Proof of Claim No. 37, Contestants Dave Liskey, D. D. Liskey, L. M. Hankins and Lloyd L. Hankins filed herein Statement of Contest No. 8, wherein they concede that Contestee owns the land upon which the spring arises. As a basis for contest they allege that the waters of said spring are tributary to Anderson Creek, that no waters thereof are applied to any land within the NE $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 22 as claimed by Contestee, and that the priority date of any water rights under said Claim No. 37 should be as of July 20, 1908, the date of Homestead Entry thereon by Will Neubert.

It appears that the Whiteline Spring arises within the SW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 22, Township 37 South, Range 9 East, W. M., and water is diverted at the source of the spring into a pipe line of 2 inch diameter, through which it is conveyed to the vicinity of the ranch house and to stock watering troughs nearby, and is used for stock and domestic purposes. It also appears that the surplus waters of the spring have been used for the irrigation of 10.0 acres of meadow hay and pasture land.

Contestee hereby is allowed a right to the use of the waters of Whiteline Spring, subject to the provisions of paragraph 27 herein, for the irrigation of 10.0 acres within the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 22, Township 37 South, Range 9 East, W. M., and water for domestic and stock use, with a date of priority of 1888. The right for stock and domestic use hereunder to be diverted directly from the spring, shall be limited to not to exceed 0.02 cubic foot per second, measured at the point of diversion.

21.

CONTEST NO. 9

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L.  
Hankins,

Contestants

v.

H. Douglas Whiteline,

Contestee

Contestee H. Douglas Whiteline filed herein Statement and Proof of Claim No. 38, wherein he asserted a right to the use of the waters of a certain spring located in the northeasterly part of the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 16, Township 37 South, Range 9 East, W. M. for stock use and the

irrigation of 3.0 acres of land in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 15, and 3.0 acres of land in the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 16, same township and range, with a date of priority of about 1888.

To said Statement and Proof of Claim No. 38, Contestants Dave Liskey, D. D. Liskey, L. M. Hankins and Lloyd L. Hankins filed herein Statement of Contest No. 9, wherein they contest the rights claimed by Contestee, particularly in that they assert that the waters of said spring are tributary to Anderson Creek and are public waters, subject to appropriation.

It appears that the spring in question, known as the Whiteline Upper Spring, is a small spring flowing normally less than 0.02 cubic foot per second and the waters thereof do not reach the channel of Anderson Creek except when augmented by surface run-off waters from heavy rains or melting snow. That beneficial use has been made of the waters of said spring in the irrigation of the lands claimed by means of a small ditch diverting within the SE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 16, and in the maintenance of a stock water trough within the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 16, water being piped thereto directly from the spring through a 1 inch pipe.

Contestee hereby is allowed a right to the use of the waters of Whiteline Upper Spring, subject to the provisions of paragraph 27 herein, for the irrigation of 3.0 acres in the SW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 15, 3.0 acres in the SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 16, Township 37 South, Range 9 East, W. M., and for stock use within the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 16, Township 37 South, Range 9 East, W. M., as above described, with a date of priority of 1888. The right for stock use by diversion herein shall be limited to the diversion from the spring of not to exceed 0.01 cubic foot per second.

22.

CONTEST NO. 10

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L.  
Hankins,

Contestants

v.

H. Douglas Whiteline,

Contestee

Statement and Proof of Claim No. 39 was filed herein by H. Douglas Whiteline, wherein he asserted a right to the use of the waters of Anderson Creek for the irrigation of 29.2 acres of land, with a priority date of 1888. The land lies along the channel of Anderson Creek and is more particularly described as 3.2 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 0.2 acre in Lot 2 (SW $\frac{1}{4}$  NW $\frac{1}{4}$ ), 12.2 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , 4.1 acres in the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 6.9 acres in Lot 3 (NW $\frac{1}{4}$  SW $\frac{1}{4}$ ), and 2.6 acres in the NW $\frac{1}{4}$  SE $\frac{1}{4}$ , all within Section 19, Township 37 South, Range 10 East, W. M.

To said Statement and Proof of Claim No. 39, Contestants Dave Liskey, D. D. Liskey, L. M. Hankins and Lloyd L. Hankins filed herein Statement of Contest No. 10, wherein they contest the rights claimed by Contestee on the basis that any irrigation of the lands claimed has long since been discontinued and no water has been beneficially applied to said lands during past years.

It appears that one of the early settlers upon the land, Lucian V. Applegate, constructed a dam across the channel of Anderson Creek near the east line of the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 19, Township 37 South, Range 10 East, W. M., however the testimony is silent as to the date of construction, purpose and period of time in use of said dam.

It appears that the dam was washed out prior to the year 1935 and has not been reconstructed. It further appears that the channel of Anderson Creek, through the lands claimed as irrigated under Statement and Proof of Claim No. 39, is deeply eroded and at the present time is a gully varying in depth up to 10 feet and in width up to 20 feet, and that the waters of Anderson Creek are confined within the banks of this gully.

It therefore appears that beneficial use of the waters of Anderson Creek has not been made in the irrigation of the lands as claimed, at least since the year 1935. The rights claimed under Statement and Proof of Claim No. 39 herein hereby are denied.

23.

CONTEST NO. 11

Dave Liskey, D. D. Liskey,  
L. M. Hankins and Lloyd L.  
Hankins,

Contestants

v.

Katie E. Whiteline,

Contestee

Contestee Katie E. Whiteline filed herein Statement and Proof of Claim No. 40, wherein there is asserted a right to the use of the waters of Cold Springs for the irrigation of 5.0 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , 5.0 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , domestic and stock use, all being within Section 23, Township 37 South, Range 9 East, W. M., under a date of priority of 1888.

To said Statement and Proof of Claim No. 40, Contestants Dave Liskey, D. D. Liskey, L. M. Hankins and Lloyd L. Hankins herein filed Statement of Contest No. 11, wherein they concede that Contestee is entitled to a water right for the irrigation of 10 acres of land as claimed, but assert that the priority date therefor is of August 7, 1901, the date of Homestead Entry upon said lands. As a basis of contest they allege that the waters of Cold Springs are tributary to Anderson Creek and Swan Lake and that Contestants have prior use to said waters.

It appears that Cold Springs consists of two separate springs which are located within the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 23, Township 37 South, Range 9 East, W. M., near the south quarter corner of said Section 23, that the waters of said springs do flow through a natural course and into the channel of Anderson Creek near the center of the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 23. It further appears that the normal flow of said springs, during the dry season of the year, is insufficient to flow down the channel of Anderson Creek beyond the formation of a few pools for a short distance below its confluence with Anderson Creek, and that only during the wet season when the flow of Cold Springs intermingles with run-off waters from heavy rains and melting snow do the waters from this source ever reach Swan Lake.

Contestee is allowed a right to the use of the waters of Cold Springs, subject to the provisions of paragraph 27 herein, for the irrigation of 5.0 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , 5.0 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 23, Township 37 South, Range 9 East, W. M., with a date of priority of 1888.

The right for domestic use asserted by Contestee in Statement and Proof of Claim No. 40 hereby is denied.

R. D. DEHLINGER, RT. 2, BOX 711, KLAMATH FALLS, OREGON

Claimant filed herein Statement and Proof of Claim No. 1, wherein he asserts a right to the use of the waters of Anderson Creek and Yellow Jacket Spring for stock use upon lands owned by claimant, described as Lot 1, Lot 2,  $S\frac{1}{2}$  Lot 3,  $S\frac{1}{2}$  NE $\frac{1}{4}$ , SE $\frac{1}{4}$  NW $\frac{1}{4}$ , and SE $\frac{1}{4}$ , Section 4; SW $\frac{1}{4}$  NW $\frac{1}{4}$ , W $\frac{1}{2}$  SW $\frac{1}{4}$ , SE $\frac{1}{4}$  SW $\frac{1}{4}$ , SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 3; NW $\frac{1}{4}$  NE $\frac{1}{4}$ , S $\frac{1}{2}$  NE $\frac{1}{4}$ , and NW $\frac{1}{4}$ , Section 10, all within Township 37 South, Range 9 East, W. M., with a date of priority of 1880 or thereabout.

It appears that beneficial use has been made of the waters of Anderson Creek and Yellow Jacket Spring for stock purposes by means of a small stock pond of approximately 0.10 acre-foot capacity, constructed in the channel of Anderson Creek just below Yellow Jacket Spring, about 700 feet south of the north line of Lot 2, Section 4, Township 37 South, Range 9 East, W. M.

It further appears that no contest has been filed herein to said Statement and Proof of Claim, therefore, subject to the provisions of paragraph 27 herein, claimant is allowed a right for the storage for stock purposes of not to exceed 0.10 acre-foot of the waters of Anderson Creek and Yellow Jacket Spring in a certain stock pond hereinabove described, with a priority date of 1880.

25.

CORNELIUS L. JANSSEN, OLENE, OREGON

Claimant filed herein Statement and Proof of Claim No. 16, wherein he asserts a right to the use of the waters of Janssen Spring for the irrigation of 5.0 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 11, and 1.0 acre in the NE $\frac{1}{4}$  NW $\frac{1}{4}$ , 2.8 acres in the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 14, Township 37 South, Range 9 East, W. M., stock and domestic use by appropriation, with a date of priority of 1898.

Janssen Spring arises within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of Section 11, Township 37 South, Range 9 East, W. M., upon land owned by claimant. The stream formed by the waters of this spring flows in a general southwesterly direction for approximately 1/2 mile down a steep hillside and past the Janssen residence and buildings, to emerge in a small valley where the channel turns northwesterly for about 3/4 mile to its confluence with Anderson Creek about 500 feet north of the center of Section 10, Township 37 South, Range 9 East, W. M. The stream flows in a well defined channel throughout its entire course, except for a short section within the SW $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 11, through an irrigated area where the channel separates into several branches for a distance of about 1,000 feet, again joining into one channel near the lower end of the irrigated area.

A stock water trough has been maintained just below the spring within the NW $\frac{1}{4}$  SE $\frac{1}{4}$  of said Section 11, into which water is diverted directly from the spring through a short section of pipe, the overflow from the stock trough returning to the stream a short distance below the spring.

A shallow well or cistern has been constructed near the channel of the stream within the SE $\frac{1}{4}$  SW $\frac{1}{4}$  of said Section 11, into which part of the water of the stream infiltrates, from which water is conveyed in a pipe line to the residence and buildings located within the S $\frac{1}{2}$  SW $\frac{1}{4}$  of said Section 11, where it is used for domestic purposes.

A garden area of about 1.0 acre within the NE $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 14 and a meadow pasture area of 5.0 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 11, and 2.8 acres in the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 14, Township 37 South, Range 9 East, W. M., is irrigated by diverting the waters of the stream by means of small, temporary dams and ditches. (See Report of Geo. V. Naderman on Water Supply and Water Use, Page 10, Volume III of this proceeding.)

It appears that beneficial use of the waters of Janssen Spring and spring stream has been made and no contest has been filed herein to said Statement and Proof of Claim. Therefore, in accordance with the provisions of paragraph 27 herein, claimant hereby is allowed a right to the use of the water of Janssen Spring and spring stream for the irrigation of 5.0 acres in the SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 11, 1.0 acre in the NE $\frac{1}{4}$  NW $\frac{1}{4}$  and 2.8 acres in the NW $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 14, Township 37 South, Range 9 East, W. M., and water for domestic use within the S $\frac{1}{2}$  SW $\frac{1}{4}$  of said Section 11, and water for stock at the stock trough above described, with a date of priority of 1898. Said right for domestic use and water for stock use in the above described stock trough shall be limited to a diversion for each use of not to exceed 0.01 cubic foot per second, also that the overflow from said stock trough shall be returned to the stream so as to prevent any unnecessary waste of water.

26.

HATTIE E. MARSHALL, RT. 2, BOX 809, KLAMATH FALLS, OREGON

Claimant Hattie E. Marshall filed herein Statements and Proofs of Claims Nos. 26 to 32, inclusive.

STATEMENT AND PROOF OF CLAIM NO. 26

In Statement and Proof of Claim No. 26, there is asserted a right to the use of the waters of Brookside Spring for the irrigation of 9.0 acres in the NE $\frac{1}{4}$  SW $\frac{1}{4}$ , 8.0 acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , 18.0 acres in the NE $\frac{1}{4}$  SE $\frac{1}{4}$ , 15.0 acres in the NW $\frac{1}{4}$  SE $\frac{1}{4}$ , 29.0 acres in the SW $\frac{1}{4}$  SE $\frac{1}{4}$ , and 1.0 acre in the SE $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 31, Township 37 South, Range 10 East, W. M., and water for domestic and stock use, with a date of priority of 1870.

It appears that beneficial use has been made of the waters flowing from said spring for domestic purposes at the ranch buildings within the SE $\frac{1}{2}$  NE $\frac{1}{4}$ , Section 36, Township 37 South, Range 9 East, W. M., and in the irrigation of the lands claimed and that no contest has been filed herein to said Statement and Proof of Claim No. 26, therefore, subject to the provisions of paragraph 27 herein, claimant is allowed a right to the use of the waters of Brookside Spring for the irrigation of 80.0 acres of land as hereinbefore described, and water for domestic use, with a date of priority of 1870. The right for domestic use hereunder shall be limited to the diversion of not to exceed 0.01 cubic foot per second and shall be appurtenant to the SE $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 36, Township 37 South, Range 9 East, W. M.

STATEMENT AND PROOF OF CLAIM NO. 27

In Statement and Proof of Claim No. 27, claimant has asserted a right to the use of the waters of Cabin Creek for the irrigation of 2.0 acres in the SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 25; 8.0 acres in the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 36, Township 37 South, Range 9 East, W. M.; 9.0 acres in Lot 4 (SW $\frac{1}{4}$  SW $\frac{1}{4}$ ), 4.0

acres in the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , 15.0 acres in the SW $\frac{1}{4}$  SE $\frac{1}{4}$ , Section 30, 38.0 acres in the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , 9.0 acres in the SW $\frac{1}{4}$  NE $\frac{1}{4}$ , 38.0 acres in the NE $\frac{1}{4}$  NW $\frac{1}{4}$ , 2.0 acres in Lot 1 (NW $\frac{1}{4}$  NW $\frac{1}{4}$ ), 17.0 acres in the SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 31, Township 37 South, Range 10 East, W. M., and for domestic and stock use, with a date of priority of 1870.

It appears that beneficial use of the waters of Cabin Creek has been made to the extent of the irrigation of 70.0 acres of land, and that no contest has been filed herein to said Statement and Proof of Claim No. 27, therefore, subject to the provisions of paragraph 27 herein, a right is allowed to the use of the waters of Cabin Creek for the irrigation of 9.0 acres in Lot 4 (SW $\frac{1}{4}$  SW $\frac{1}{4}$ ), 4.0 acres in SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 30; 38.0 acres in NE $\frac{1}{4}$  NW $\frac{1}{4}$ , 2.0 acres in Lot 1 (NW $\frac{1}{4}$  NW $\frac{1}{4}$ ), 17.0 acres in SE $\frac{1}{4}$  NW $\frac{1}{4}$ , Section 31, Township 37 South, Range 10 East, W. M., with a date of priority of 1870.

The right asserted for domestic use in Statement and Proof of Claim No. 27 is denied.

#### STATEMENT AND PROOF OF CLAIM NO. 28

Claimant filed herein Statement and Proof of Claim No. 28, wherein there is asserted a right to the use of the waters of Spear Spring course for the irrigation of 10.0 acres of land in Lot 2 (NW $\frac{1}{4}$  NE $\frac{1}{4}$ ), Section 6, Township 38 South, Range 10 East, W. M., stock and domestic purposes by appropriation and use, with a priority date of 1870.

It appears that beneficial use has been made of the run-off waters from said watercourse in the irrigation of the lands claimed and that no contest has been filed herein to said Statement and Proof of Claim, therefore, subject to the provisions of paragraph 27 herein, claimant is allowed a water right from said Spear Spring course for the irrigation of 10.0 acres within Lot 2 (NW $\frac{1}{4}$  NE $\frac{1}{4}$ ), Section 6, Township 38 South, Range 10 East, W. M., with a date of priority of 1870.

The right of domestic use asserted herein is denied.

#### STATEMENT AND PROOF OF CLAIM NO. 29

Statement and Proof of Claim No. 29 was filed herein by claimant, wherein a right is asserted to the use of the waters of Chitwood Spring course, located near the center of the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 6, Township 38 South, Range 10 East, W. M., for stock and domestic purposes by appropriation and use, with a priority of 1870.

It appears that said Chitwood Spring arises near the center of the SE $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 6, Township 38 South, Range 10 East, W. M., upon land owned by claimant and by reason of seepage and evaporation, does not flow in any channel upon adjacent property, therefore the water of this spring belongs to the owner of the land upon which the spring arises.

#### STATEMENT AND PROOF OF CLAIM NO. 30

In Statement and Proof of Claim No. 30 herein filed, there is asserted a right to the use of the waters of Hovey Spring course, formerly known as Surveyor Spring, for domestic and stock purposes by appropriation and use, with a date of priority of 1870.

It appears that said Hovey Spring arises within the NE $\frac{1}{4}$  SE $\frac{1}{4}$ , and near the NE corner thereof, of Section 27, Township 37 South, Range 9 East, W. M., upon land owned by claimant and, by reason of seepage and evaporation, does not flow in any channel upon adjacent property, therefore the waters of this spring belong to the owner of the land upon which the spring arises.

STATEMENT AND PROOF OF CLAIM NO. 31

In Statement and Proof of Claim No. 31 filed herein, claimant has asserted a right to the use of the waters of Edgewood Spring for stock and domestic use by appropriation, with a date of priority of 1870.

It appears that Edgewood Spring is the larger of a group of springs which arise on the southern slope of Edgewood Mountain, near the center of Section 6, Township 37 South, Range 10 East, W. M., upon lands owned by claimant herein, and that the waters thereof unite to form Edgewood Creek which does flow off of property of claimant.

It further appears that claimant has made no diversion of said waters for any purpose but that stock drink directly from the springs and stream. Claimant has the legal right to water stock from the springs and stream formed by waters flowing from the springs, upon her lands.

STATEMENT AND PROOF OF CLAIM NO. 32

In Statement and Proof of Claim No. 32 filed herein, there is asserted a right to the use of the waters of Deer Spring for domestic and stock purposes by appropriation and use, with a priority date of 1870.

It appears that Deer Spring is in reality two springs which arise within the SW $\frac{1}{4}$  NE $\frac{1}{4}$  and near the NW corner thereof, of Section 35, Township 37 South, Range 9 East, W. M., upon lands owned by claimant herein, and by reason of seepage and evaporation, the waters thereof do not flow in any channel upon adjacent property, therefore the waters of these springs belong to the owner of the land upon which the springs arise.

27.

DUTY OF WATER, HEAD OF WATER FOR IRRIGATION USE

The right to the use of water for irrigation purposes, as herein defined, except where the right was initiated by application to the State Engineer for a permit under the 1909 Water Code, shall entitle the owner thereof to the diversion of a quantity of water which may be applied to a beneficial use upon his lands to which such rights are appurtenant; provided that the quantity of water diverted, except when storage water is being used, shall not exceed one-fortieth of a cubic foot per second per acre of land irrigated, prior to June 15, and one-eightieth of a cubic foot per second per acre of land irrigated after June 15, of each year; with a total limitation during each irrigation season of three acre feet per acre; all to be measured at the point of diversion from the stream or source of supply, or the nearest practicable place thereto.

DOMESTIC USE

Where a claimant in this proceeding asserted a right to the use of water for domestic purposes and the same was allowed as domestic use or for domestic purposes, it is to be understood that the claimant has a right to the use of water for household purposes, the irrigation of a lawn, and water for such animals as are required for proper sustenance of the family, and where a right was allowed herein for domestic use and a definite quantity of water was not allowed in the specific finding herein the claimant is allowed not to exceed 0.01 cubic foot per second.



#### STOCK USE BY DIVERSION

Where a claimant asserted a right to the use of water for stock use or stock purposes by diversion and it was allowed herein, it is to be understood that the claimant has a right to the use of water for such animals as are essential for the proper sustenance of the family and also water for stock when the claimant is engaged in the raising of livestock or when the claimant takes in livestock for pasturage. Where a definite quantity is not set forth in the specific finding herein, the claimant is allowed a right to divert for this use not to exceed 0.015 cubic foot per second; provided, that where a right was allowed herein for irrigation purposes through the same ditch, pipe-line or other means of conveyance, no additional water shall be diverted for stock use while water is being diverted for irrigation purposes.

#### DOMESTIC AND STOCK USE

Where a claimant asserted a right to the use of water for both domestic and stock purposes and it was allowed herein, it is understood that domestic use includes only water for household use and for the irrigation of a lawn, and where a definite quantity is not set forth in the specific finding herein the claimant is allowed not to exceed 0.02 cubic foot per second for both domestic and stock purposes.

#### STOCK USE WHERE NO ARTIFICIAL DIVERSION IS MADE

In this proceeding, several claims have been filed asserting rights by appropriation to the use of waters for stock purposes where no diversion is made but stock drink directly from the stream or other waters as they exist upon claimant's land.

No specific findings have been made herein to such asserted rights for the reason that livestock raising is one of the principal industries of this vicinity and it has always been the practice for stock to drink directly from the waters as they flow through or exist upon lands being used for the pasturing of stock. Anyone owning lands upon which there exists water naturally, has the right to use such water, as long as it is naturally available, for stock use by allowing stock to drink directly therefrom.

#### DUTY OF WATER FOR RIGHTS EVIDENCED BY CERTIFICATES OF WATER RIGHT OR BY PERMITS

Claimants who have asserted rights to the use of water evidenced by certificates of water right, as allowed herein, or based upon a permit which right has not been perfected, are limited to the diversion of the quantity of water at the rate set forth in the respective certificates and permits; provided, that the total quantity for irrigation use unless otherwise provided in the certificate of water right or permit is limited to 3.0 acre-feet per acre during any irrigation season.

The quantity of water which any claimant herein is entitled to divert for any use, which right is vested, is limited to the present capacity of the ditch, canal, or conduit used to convey the water.

ROTATION

To get a sufficient rate of flow or head of water, the water master may arrange such system or systems of rotation as may be best applicable: (1) By giving a greater amount of water to a water user for a proportionately less time; provided, that the giving of such greater amount does not infringe upon any of the rights affirmed by this proceeding or any rights subsequently initiated; (2) where two or more water users agree as between themselves as to the manner of said rotation in the use of water and such agreement is in writing and filed by such water users with the water master, and such rotation system shall not interfere with the prior rights of any water user not included in the rotation plan, the water master shall distribute the water according to such agreement.

To get a sufficient head of water where there is no agreement providing for a system of rotation, the water master may arrange such water users in groups or systems of rotation; first, giving the water user who is first in priority in such group a quantity of water equal to the combined appropriations of all water users in said group or system for a length of time bearing the same ratio to the whole time required to make the complete rotation of the whole group of water users as the said appropriation of said water user bears to the combined appropriations of said group, and next, serving another water user with a like quantity for his proportionate time, and so on until all the water users of the said group or system are served; then the distribution of water shall be repeated in the same manner throughout the irrigation season; provided, that no system of rotation shall be established by the water master without the consent of the water users, except by order of the Circuit Court after an opportunity to be heard; provided, always, that such arrangement of groups or systems of rotation shall not interfere with prior rights of any water user not a member of such group or system.

The total quantity of water measured at the source of supply where rotation is practiced shall not exceed, except where otherwise provided herein, 3.0 acre-feet per acre during any irrigation season.

29.

IRRIGATION SEASON

The irrigation season hereby is fixed as beginning on March 15, and ending on September 30, of each year.

30.

DOMESTIC USE, DOMESTIC AND STOCK USE, STOCK USE

The right to divert and use the waters of Swan Lake and its tributaries as allowed herein for domestic, domestic and stock, or stock purposes shall continue throughout the year.

31.

RIGHTS APPURTENANT TO LANDS

The rights to the use of water for irrigation purposes as hereby confirmed are appurtenant to the lands herein described, and the rights to the use of the waters of Swan Lake

and its tributaries by virtue of such rights are limited and confined to irrigation of the lands described herein to the extent of said lands herein set forth, and the priorities of rights herein confirmed confer no right of use of the waters of said lake and its tributaries on any lands other than those specified tracts to which such rights are herein set forth as appurtenant, and each and every person, association, or corporation shall be and hereby is prohibited, restrained, and enjoined from diverting and using water from said lake or its tributaries on such other lands without lawful permit first obtained from the State Engineer.

The rights to the use of water for other useful and beneficial purposes as hereby confirmed are appurtenant to the lands herein described, and the priorities of rights herein confirmed confer no right of use of the waters of said lake and its tributaries on any lands other than those specified tracts to which such rights are set forth herein as appurtenant, and each and every person, association, or corporation shall be and hereby is prohibited, restrained, and enjoined from diverting and using water from said lake or its tributaries on such other lands without lawful permits or licenses first obtained from the State Engineer or Hydroelectric Commission of Oregon.

32.

#### DIVERSIONS GOVERNED BY PRIORITIES AND BENEFICIAL USE

Except as otherwise determined herein, the order of the rights of the respective claimants of the waters of Swan Lake and its tributaries, and in which order they are entitled to divert and use said water, shall be and is according to the date of the relative priority of the rights as herein set forth and determined, and the first in order of time according to the date of relative priority shall be and is the first in order of right, and so on, down to the date of the latest priority, and those having prior rights are entitled to divert and use the waters of said lake and its tributaries, when necessary for beneficial use in connection with the irrigation of their respective lands, or other useful and beneficial purposes for which they are allowed a right of use at all times against those having subsequent rights, without let or hindrance, and whenever the water is not required by the claimant having a prior right to its use for the purposes for which said water was appropriated, he must and shall permit it to flow down the natural channel of the stream as it was wont to flow in its natural course, without hindrance or diversion thereof, and those having subsequent rights are entitled to the use of such water and to divert the same to the extent of their rights, according to the order of priority of their rights; and at all times the waters diverted shall be beneficially, economically, and reasonably used without waste by those having a right to the use of such water, and no rights of appropriation are hereby confirmed to divert a greater quantity of water into the head of the ditch, canal, or conduit of the claimant having a valid right to divert the water than such claimant can beneficially use for the purposes to which the water is to be put.

33.

To summarize and supplement the specific findings herein, the rights of the claimants to the use of the waters of Swan Lake and its tributaries, as determined herein, are arranged

in tabulated form with the dates of relative priority of such appropriations, the quantity of water allowed, the number of acres to which such appropriations are applied, the use or uses to which said water is applied, the name of ditch or other means by which the water so appropriated has been diverted, the name of the stream or other source from which the water has been used and the description of the lands upon which water has been used; the tabulated rights of each appropriator being set opposite and following his name and post office address, as follows, to-wit:

Name and Postoffice Address of Appropriator	Date of Relative Priority	Amount Cubic Feet Per Second	Number Acres	Use	Name of Ditch	Stream	Description of Land or Place of Use
Dehlinger, R. D. Rt. 2, Box 711 Klamath Falls, Oregon Proof No. 1 (See Findings, Paragraph 24)	1880	0.10 acre- foot Storage		Stock	Stock pond	Yellow Jacket Spring and Anderson Creek	Lot 2 (NW $\frac{1}{4}$ NE $\frac{1}{4}$ ) Section 4, T. 37 S., R. 9 E., W. M.
Devincenzi, Albert R. and Irene J. P. O. Box 44 Olene, Oregon Proof No. 2 (See Findings, Paragraph 15)	Claim denied.						
Devincenzi, Albert R. and Irene J. P. O. Box 44 Olene, Oregon Proof No. 3 (See Findings, Paragraph 16)	1873		133.3	Irrigation and Stock	Unnamed	Edgewood Creek and three unnamed streams	13.4 acres in NE $\frac{1}{4}$ SW $\frac{1}{4}$ 30.0 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ 11.2 acres in SW $\frac{1}{4}$ SE $\frac{1}{4}$ 39.4 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 8, 39.3 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 17, T. 37 S., R. 10 E., W. M.
	1880		80.0	Irrigation and Stock	Unnamed	Edgewood Creek and three unnamed streams	40.0 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$ 40.0 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T. 37 S., R. 10 E., W. M.
	1883		5.0	Irrigation and Stock	Unnamed	Edgewood Creek and three unnamed streams	5.0 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, T. 37 S., R. 10 E., W. M.
	1885		70.0	Irrigation and Stock	Unnamed	Edgewood Creek and three unnamed streams	40.0 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ 30.0 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 16, T. 37 S., R. 10 E., W. M.
	1887		170.0	Irrigation and Stock	Unnamed	Edgewood Creek and three unnamed streams	5.0 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ 5.0 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 8, 40.0 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$ 40.0 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$ 40.0 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ 40.0 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 17, T. 37 S., R. 10 E., W. M.
	1888		138.0	Irrigation and Stock	Unnamed	Edgewood Creek and three unnamed streams	18.0 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 16, 40.0 acres in SE $\frac{1}{4}$ SW $\frac{1}{4}$ 40.0 acres in SW $\frac{1}{4}$ SE $\frac{1}{4}$ 40.0 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 17, T. 37 S., R. 10 E., W. M.
	1891		5.0	Irrigation and Stock	Unnamed	Edgewood Creek and three unnamed streams	5.0 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 9, T. 37 S., R. 10 E., W. M.

Name and Postoffice Address of Appropriator	Date of Relative Priority	Amount Cubic Feet Per Second	Number Acres	Use	Name of Ditch	Stream	Description of Land or Place of Use
Devincenzi, Albert R. and Irene J. Proof No. 3 (Continued)	1901		8.6	Irrigation and Stock	Unnamed	Edgewood Creek and three unnamed streams	8.6 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 8, T. 37 S., R. 10 E., W. M.
	1907		18.4	Irrigation and Stock	Unnamed	Edgewood Creek and three unnamed streams	18.4 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 8, T. 37 S., R. 10 E., W. M.
	1887			Domestic	Pipe line	Edgewood Creek	SW $\frac{1}{4}$ NW $\frac{1}{4}$ , Section 8, T. 37 S., R. 10 E., W. M.
	1887	0.5 acre-foot Storage		Stock and Stock pond		Edgewood Creek and unnamed stream	NW $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 8, T. 37 S., R. 10 E., W. M.
Hankins, L. M., and Hankins, Lloyd L. Route 1 Bonanza, Oregon Proofs Nos. 4 to 15, inc. (See Findings, Paragraph 13)	Claims denied.						
Janssen, Cornelius L. Olene, Oregon Proof No. 16 See Findings, Paragraph 25)	1898		8.8	Irrigation	Unnamed	Janssen Spring Creek	5.0 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 11, 1.0 acre in NE $\frac{1}{4}$ NW $\frac{1}{4}$ 2.8 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 11, T. 37 S., R. 9 E., W. M.
	1898	0.01		Domestic	Cistern beside creek	Janssen Spring Creek	S $\frac{1}{2}$ SW $\frac{1}{4}$ , Section 11, T. 37 S., R. 9 E., W. M.
	1898	0.01		Stock	Pipe from spring	Janssen Spring	NW $\frac{1}{4}$ SE $\frac{1}{4}$ , Section 11, T. 37 S., R. 9 E., W. M.
Liskey, D. D., and Liskey, Dave - Maude E. 1945 Auburn St., Klamath Falls, Oregon Proofs Nos. 17, 18, 20-24, inc. (See Findings, Paragraph 13)	Claims denied.						

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Name and Postoffice Address of Appropriator	Date of Relative Priority	Amount Cubic Feet Per Second	Number Acres	Use	Name of Ditch	Stream	Description of Land or Place of Use
Liskey, D. D., and Liskey, Dora Maude E (Continued) Proof No. 25 (See Findings, Paragraph 14)	Oct. 20, 1917	500.0 acre- feet		Storage		Meadow Lake Drainage and a Tributary to Swan Lake diverted in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 12, T. 37 S., R. 9 E., W. M.	Reservoir located within SE $\frac{1}{4}$ SW $\frac{1}{4}$ , Section 17, and NW $\frac{1}{4}$ , Section 20, T. 38 S., R. 10 E., W. M.
							Note: The above right is in conformity with Certificate of Water Right recorded in Vol. 8, page 8279, State Record of Water Right Certificates.
	Oct. 20, 1917	500.0 acre- feet	598.0	Irrigation	Unnamed	Reservoir Storage	14.0 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$ 40.0 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ 40.0 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 12, T. 38 S., R. 9 E., W. M.
	Dec. 3, 1917			Irrigation	Unnamed	Direct flow of Meadow Lake drainage and a tributary to Swan Lake, as above described.	17.0 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ 40.0 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ 40.0 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ 33.0 acres in SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 7, 27.0 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ 38.0 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 17, 31.0 acres in NW $\frac{1}{4}$ NE $\frac{1}{4}$ 40.0 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$ 30.0 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$ 40.0 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$ 40.0 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$ 40.0 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ 40.0 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ 40.0 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 18, 8.0 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 20, T. 38 S., R. 10 E., W. M.
							Note: This right is in conformity with Certificate of Water Right recorded in Vol. 10, page 11451, State Record of Water Right Certificates, except in that priority date of right to use of stored water is herein changed to conform with priority date of right to store said water.
Marshall, Hattie E. Rt. 2, Box 809 Klamath Falls, Oregon Proof No. 26 (See Findings, Paragraph 26)	1870		80.0	Irrigation	Unnamed	Brookside Spring and Creek	9.0 acres in NE $\frac{1}{4}$ SW $\frac{1}{4}$ 8.0 acres in SE $\frac{1}{4}$ SW $\frac{1}{4}$ 18.0 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ 15.0 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ 29.0 acres in SW $\frac{1}{4}$ SE $\frac{1}{4}$ 1.0 acre in SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 31, T. 37 S., R. 10 E., W. M.
20692	1870	0.01		Domestic		Brookside Creek	SE $\frac{1}{4}$ NE $\frac{1}{4}$ , Section 36, T. 37 S., R. 9 E., W. M.
Proof No. 27 See Findings, Paragraph 26) Amended By Decree Vol. 14, p. 562	1870		70.0 132.0	Irrigation	Unnamed	Cabin Creek	9.0 acres in Lot 4 (SW $\frac{1}{4}$ SW $\frac{1}{4}$ ) 4.0 acres in SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 30, 38.0 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$ 2.0 acres in Lot 1 (NW $\frac{1}{4}$ NW $\frac{1}{4}$ ) 17.0 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 31, T. 37 S., R. 10 E., W. M.
Proof No. 28 (See Findings, Paragraph 26)	1870		10.0	Irrigation		Spear Spring Course	10.0 acres in Lot 2 (NW $\frac{1}{4}$ NE $\frac{1}{4}$ ) Section 6, T. 38 S., R. 10 E., W. M.

Name and Postoffice Address of Appropriator	Date of Relative Priority	Amount Cubic Feet Per Second	Number Acres	Use	Name of Ditch	Stream	Description of Land or Place of Use
Marshall, Hattie E. (Continued) Proof No. 29 (See Findings, Paragraph 26)							Note: Spring rising on claimant's land and not flowing off in well defined channel.
Proof No. 30 (See Findings, Paragraph 26)							Note: Spring rising on claimant's land and not flowing off in well defined channel.
Proof No. 31 (See Findings, Paragraph 26)							Note: Spring rises on claimant's land, no actual diversion of water has been made.
Proof No. 32 (See Findings Paragraph 26)							Note: Spring rising on claimant's land and not flowing off in well defined channel.
Whiteline, H. Douglas P. O. Box 42 Olene, Oregon Proof No. 33 (See Findings, Paragraph 17)							Application No. R-20521 Permit No. R-801
Proof No. 34 (See Findings, Paragraph 17)	1888		90.7	Irrigation and Stock	Pondage above old Whiteline dike	Anderson Creek	4.0 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ 17.6 acres in SW $\frac{1}{4}$ SE $\frac{1}{4}$ 12.4 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 15, 35.1 acres in NE $\frac{1}{4}$ NE $\frac{1}{4}$ 5.2 acres in NW $\frac{1}{4}$ NE $\frac{1}{4}$ 0.8 acre in SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 22, 13.9 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$ 1.7 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 23, T. 37 S., R. 9 E., W. M.
Proof No. 35 (See Findings, Paragraph 18)							Application No. 19705 Permit No. 15316
Proof No. 36 (See Findings, Paragraph 19)							Claim denied.
Proof No. 37 (See Findings, Paragraph 20)	1888		10.0	Irrigation	Unnamed	Whiteline Spring Creek	10.0 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 22, T. 37 S., R. 9 E., W. M.
20694	1888	0.02		Domestic and Stock	Pipe line	Whiteline Spring	SE $\frac{1}{4}$ NW $\frac{1}{4}$ , Section 22, T. 37 S., R. 9 E., W. M.
Proof No. 38 (See Findings, Paragraph 21)	1888		6.0	Irrigation	Unnamed	Whiteline Upper Spring Creek	3.0 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 15, 3.0 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 16, T. 37 S., R. 9 E., W. M.
20694	1888			Stock	Pipe line	Whiteline Upper Spring	NW $\frac{1}{4}$ NE $\frac{1}{4}$ , Section 16, T. 37 S., R. 9 E., W. M.
Proof No. 39 (See Findings, Paragraph 22)							Claim denied.
Whiteline, Katie E. Rt. 1, Box 1116 Klamath Falls, Oregon Proof No. 40 (See Findings, Paragraph 23)	1888		10.0	Irrigation	Unnamed	Cold Springs	5.0 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ 5.0 acres in SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 23, T. 37 S., R. 9 E., W. M.



And the State Engineer of Oregon, being fully advised in the premises, it is hereby CONSIDERED AND ORDERED that the relative rights of the various claimants to the use of the waters of Swan Lake and its tributaries be and the same are hereby determined and settled as set forth in the foregoing Findings and Order of Determination.

Dated at Salem, Oregon, this 28th day of July, 1949.

*Chas. E. Stricklin*  
CHAS. E. STRICKLIN

State Engineer

I N D E X

<u>Name</u>	<u>Proof No.</u>	<u>Paragraph No.</u>	<u>Findings Page No.</u>	<u>Tabulation Page No.</u>
Dehlinger, R. D.	1	24	38	46
Devincenzi, Albert R. and Irene J.	2	15	24	46
	3	16	25	46
Hankins, L. M. and Lloyd L.	4-15 inc.	13	8	47
Janssen, Cornelius L.	16	25	38	47
Liskey, D. D. and Dave	17-24 inc.	13	8	47
	25	14	21	48
Marshall, Hattie E.	26	26	39	48
	27	26	39	48
	28	26	40	48
	29	26	40	49
	30	26	40	49
	31	26	41	49
	32	26	41	49
Whiteline, H. Douglas	33	17	31	49
	34	17	31	49
	35	18	33	49
	36	19	34	49
	37	20	35	49
	38	21	35	49
	39	22	36	49
	40	23	37	49