

113F00001007
BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River a
Tributary of the Pacific Ocean

United States of America; The Klamath
Tribes; Klamath Irrigation District;
Klamath Drainage District; Tulelake
Irrigation District; Klamath Basin
Improvement District; Ady Ditch
Improvement Co.; Enterprise Irrigation
District; Klamath Hills District
Improvement Co.; Malin Irrigation District;
Midland District Improvement Co.; Pine
Grove Irrigation District; Pioneer District
Improvement Co.; Poe Valley Improvement
District; Shasta View Irrigation District;
Sunnyside Irrigation District; Don Johnston
& Son; Bradley S. Luscombe; Randy
Walthall; Inter-County Title Co.; Winema
Hunting Lodge, Inc.; Reames Golf and
Country Club; Van Brimmer Ditch Co.;
Plevna District Improvement Co.; and
Collins Products, LLC,
Contestants

PROPOSED ORDER

Consolidated

Case Nos. 113, 114, 115

Claim Nos. 134, 135, 136

Contest Nos. 3395, 3396, 3397, 3821,
3822, 3823, 4162, 4163,
and 4164

vs.

Glenda J. Buchanan; Robert Buchanan;
Dorothy Buchanan; Lewis Hagelstein; Ruth
Hagelstein; C. Marie Suiter,
Claimants

HISTORY OF THE CASE

This proceeding in the Klamath Basin Water Adjudication was commenced by three claims filed on November 14, 1990 by Glenda Buchanan as to Case 113 (Claim 134), December 4, 1990 filed by Robert Buchanan as to Case 114 (Claim 135), and November 14, 1990 by Glenda Buchanan, Dorothy Buchanan, Lewis Hagelstein, Robert Buchanan, C. Marie Suiter and

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Ruth Hagelstein, as to Case 115 (Claim 136), based upon use of water beginning prior to February 24, 1909.

On October 4, 1999, OWRD issued its Preliminary Evaluations of each of the claims, concluding that in each case the elements of pre-1909 claims had been established, and preliminarily approving the claim. In each case, the claim as approved was for a lesser amount of water than that claimed. (113E00002002 at 106; 114E00002002 at 144; 115E00002002 at 133.)

Claimants did not file contests against the Preliminary Evaluation.

On May 8, 2000, Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District and Medford Irrigation District, filed Contests Number 03132, 03133, and 03134 respecting cases 113, 114, and 115, respectively, asserting an interest in water potentially subject to the claim, and seeking to bar the claim to the extent it would effect the water rights of these contestants. (113E00002002 at 58 ff.; 114E00002002 at 96; 115E00002002 at 82.)

On May 8, 2000, Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Klamath Hills District Improvement Co.; Malin Irrigation District; Midland District Improvement Company; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S. Luscombe; Berlva Prichard; Don Vincent; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Reames Golf and Country Club; Van Brimmer Ditch Co.; Plevna District Improvement Company; Collins Products, LLC; otherwise known as Klamath Project Water Useres, (KPWU), filed Contests 3395, 3396 and 3397, respecting cases 113, 114 and 115, respectively. (113E00002002 at 63; 114E00002002 at 101; 115E00002002 at 88.)

On May 8, 2000, the United States of America file Contests 3821, 3822, and 3823, respecting cases 113, 114, and 115, respectively. (113E00002002 at 89; 114E00002002 at 127; 115E00002002 at 116.)

On May 8, 2000, the Klamath Tribes filed Contests 4162, 4163 and 4164, respecting Cases 113, 114, and 115, respectively. (113E00002002 at 93; 114E00002002 at 131; 115E00002002 at 120.)

This matter was then referred to the Office of Administrative Hearings for a contested case hearing. Thereafter, Contestants Langell Valley, Horsefly, Medford and Rogue River Valley Irrigation Districts withdrew Contests Number 03132, 03133, and 03134. These participants made no further appearance in these cases. A prehearing conference was conducted by Maurice L. Russell, II, Administrative Law Judge of the Office of Administrative Hearings, on May 2, 2002, after which a Pre-Hearing Order was issued, May 23, 2002, ordering that Cases 113, 114, and 115 be consolidated for hearing, listing the issues presented in these cases, and setting a schedule for proceedings. This schedule was amended by orders issued July 23, 2002

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and November 22, 2002, the latter order setting the consolidated matter for hearing on March 5, 2003. Pursuant to the order of November 22, 2002, a Notice of Hearing was duly served on all participants on January 28, 2003, for a hearing commencing March 5, 2003. The participants timely submitted written testimony and exhibits.

The hearing for cross-examination of witnesses was convened on March 5, 2003, at 10:30 a.m. in the Conference Room at the offices of the Office of Administrative Hearings at 3420 Cherry Ave. NE, Suite 140, Salem, Oregon.

Christopher Cauble appeared as attorney for claimants. Kimberly Grigsby and Renee Moulun appeared as Agency Representatives for Oregon Water Resources Department (OWRD). Stephen Palmer appeared for Contestant, United States. Lorna Babby appeared by telephone for Contestant, Klamath Tribes. Andrew Hitchings and Dan Kelly appeared by telephone for Contestant Klamath Project Water Users. Maurice L. Russell, II, Administrative Law Judge for the Office of Administrative Hearings, presided.

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

EVIDENTIARY RULINGS

Exhibits 113E00002002, 114E00002002 and 115E00002002, offered by OWRD, Consolidated Exhibits (Cons. Ex.) 40001-40030 offered by Contestant the United States of America, Exhibits 50001-50005, offered by Contestant, Klamath Tribes, and Consolidated Exhibits 60001 through 60013 offered by Claimants were marked and received into the record. The record was held open for Claimants to file Exhibit 60014, and for the other participants to file rebuttal to this additional exhibit, as well as to Consolidated Exhibits 50001 through 50005 filed by Contestants, the Klamath Tribes. The participants having advised that no further rebuttal evidence would be filed, and briefing having been completed, the record closed on June 16, 2003.

ISSUES

1. Whether there is sufficient evidence to support the right claimed.
2. Whether the required elements are established for this claim.
3. Whether the record does support the rate, duty, actual use, points of diversion, seasonal limitations and/or acreage claimed.
4. Whether the diversion rate exceeds the capacity of the ditch system used to serve the Place of Use.
5. Whether there is sufficient information to support a period of use for irrigation outside of March 1, to October 31.

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6. Whether the period of use for irrigation in the preliminary evaluation exceeds the period of use claimed.
7. Whether there is sufficient information on the development of water on this Place of Use prior to February 24, 1909, to establish a vested pre-1909 water right.
8. Whether there is insufficient information to establish continuous use of water as claimed.

FINDINGS OF FACT

1. The properties involved in these consolidated cases are three parcels next to Klamath Lake. Claim 134 (Case 113) involves 47 acres located within Section 13, Township 37 S, Range 8 E W.M. Claim 135 (Case 114) involves 78 acres located within Section 7, Township 36 S, Range 9 E W.M. Claim 136 (Case 115) involves 305.4 acres located in Sections 13, Township 36 S, Range 8 E W.M., and Sections 17 and 18, Township 36 S, Range 9 E W.M.

2. John Hagelstein, Claimants' ancestor, homesteaded in the area in 1894. The property he originally homesteaded is not within the properties subject to these claims. (Cons. Ex. 6004.) Between 1894 and 1908, Hagelstein acquired properties within the present claims.

3. Prior to 1908, the properties were in separate ownerships, and were subject to seasonal inundation by the waters of the Upper Klamath Lake. They may have been subjected to grazing as the waters receded each year. A crop was planted on at least part of the property in 1908. (Cons. Ex. 60014.)¹ In May, 1908, the several property owners, A.G. Cox, J.C. Beach, Fred Melhase and John Hagelstein, agreed to joint construction of the "dredger cut"² to control the water on the tracts and provide a basis for an irrigation system.³ The dredger cut, itself was completed by 1909. (Cons. Ex. 60008.) The dredger cut when finished isolated Claim 134 from Klamath Lake. No arrangement was made to supply irrigation water to that claim until the 1940s. (Tr. at 133.)

¹ On May 25, 1908, John Hagelstein entered a "lease with option to purchase" which reserved to the present lessees the crops then in the ground. (Cons. Ex. 60014.)

² The "dredger cut" was a large ditch, with embankments on both sides, resembling a canal, constructed by a drag line working from a barge.

³ The precise chronology of this arrangement is unclear. Claimants filed a newspaper article, (113E0002002 at 13, among others) purporting to have been published in 1907, and describing development efforts by the various landowners noted above. However, on close examination, it would appear that this article was written *after* the article (Cons. Ex. 60002.) printed on May 17, 1908. The 1907 date is derived from a reference to the assessment of certain land "for this year (1907)" in a legal notice appearing on the same page as the article relating to development of the lands subject to these claims. However, it is apparent that the two articles were not originally published in the same editions of the newspaper. For one thing, there is no continuity in the language between the columns, and the type-face varies from column to column. For another, the purported 1907 article refers to transactions between Cox, Beach, Melhase and Hagelstein as having occurred in the past that were mentioned in the 1908 article as having occurred on "Tuesday," apparently within the past week. Under the circumstances, it cannot be held that the agreement among the owners for development of the property occurred much before May 27, 1908.

4. Thereafter, the properties subject to claims 135 (Case 114) and 136 (Case 115) were continuously cultivated and under irrigation (except for a short time in the 1940s after an embankment broke, flooding the property in Claim 135). (Cons. Ex. 60009.) The property subject to Claim 134 (Case 113) was sold to the Algoma Lumber Company in approximately 1914, and was largely occupied by a sawmill until the 1940s, when the land was purchased by the Hagelstein family and placed back in cultivation. (Tr. At 133.)⁴

CONCLUSIONS OF LAW

1. There is sufficient evidence to support the right claimed in Claims 135 and 136, with modification as to priority date.
2. The required elements are established for claim 135 and 136. The required elements are not established for Claim 134.
3. The record supports the rate, duty, actual use, points of diversion, seasonal limitations and/or acreage stated in the Preliminary evaluation of Claims 135 and 136. The record does not support Claim 134.
4. The diversion rate does not exceed the capacity of the ditch system used to serve the Place of Use.
5. There is sufficient information to support a period of use for irrigation outside of March 1, to October 31 as to Claims 135 and 136.
6. The period of use for irrigation in the preliminary evaluation exceeds the period of use claimed in Claim 135 and 136.
7. There is sufficient information on the development of water on this Place of Use prior to February 24, 1909, to establish a vested pre-1909 water right for Claims 135 and 136.
8. There is insufficient information to establish continuous use of water as claimed as to Claim 134. Information is sufficient as to Claims 135 and 136.

OPINION

The burden of proof to establish a claim by a preponderance of the evidence is on the claimant. ORS 539.110; OAR 690-028-0040. In order to meet that burden, Claimant must show (1) an intent to apply the water to some beneficial use existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, channel or other structure;

⁴ Claimants asserted in their brief that part of Claim 134 was irrigated throughout the period, citing the testimony of Robert Buchanan at Tr. Page 133. A review of that testimony, however, discloses that the banks of the dredger cut actually cut claim 134 from the lake until 1940, when artificial irrigation started.

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and (3) the application of the water within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930).

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

In this case, there are three separate parcels that were in separate ownership for much of the period, and that have significantly different histories.

Although the claim documents indicated that John Hagelstein had homesteaded part of the property in 1894, a review of the description of the property disclosed that his homestead was on another parcel, unconnected with this case.

The evidence establishes that the properties in question were seasonally inundated by the natural rise of Klamath Lake. At some point, the properties began to be cultivated, making use of this natural flooding to irrigate the land. However, the evidence is not sufficient to establish that these particular parcels were under cultivation as early as 1894. Indeed, a newspaper article from May 25, 1908, offered in evidence by Claimants, (Cons. Ex. 6003.) described plans then being made to reclaim the property, and stated that the property would be "practically worthless" until reclaimed. Under the circumstances, it is not established that the property was in cultivation, before 1908. On May 25, 1908, a part of the property was leased by Beach to Hagelstein, with an option to purchase. That lease document reserved to the previous lessee the right to crops then in the ground, indicating that at least part of the property was under cultivation at that time.

In 1908, several property owners in the area entered a joint agreement to construct the dredge cut, which separated Claims 134 and 136 from the lake, and provided a mechanism for controlling the water, and channeling it to a point from which it could be directed to the different properties. The dredge cut was completed in 1909, and a pump was installed at the diversion point, and used to irrigate Claims 135 and 136.

CASE 113, CLAIM 134

The property subject to Claim 134, Case 113, was subject to seasonal inundation by the waters of Klamath Lake, at least until the Dredge Cut was built. Claimants assert that the property was grazed by cattle, or otherwise cultivated; taking advantage of the water that remained in the soil as the lake receded. When the dredger Cut was built, however, the property subject to this claim was cut off from the waters of the lake, and would have had to be irrigated by pumping from the diversion point on the dredger Cut. Robert Buchanan testified, however, that no system of irrigation to replace the seasonal natural flooding was built for this property, because the land was sold to a lumber company and used as the site for a sawmill.⁵

⁵ Although Buchanan testified to his belief that this occurred in 1911, the deed for the sale of the parcel is dated 1914.

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The land was not restored to agriculture until the sawmill was removed in the 1940s.⁶

Since one of the issues presented by this case is whether the water has been continuously used for the requisite period, the question of abandonment is fairly raised by the facts of this case. "Abandonment" is a question of fact, requiring evidence of an intentional forsaking or desertion, as well as a failure to use the water. *In re Willow Creek*, 74 Or 592 (1914); *Wimer v. Simmons*, 27 Or 1, 12 (1895).

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

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

In the present case, the property was isolated from its previous source of irrigation when the Dredge Cut was built, in about 1909. No alternative arrangement for delivering irrigation water to the property was installed until the 1940s. In the meantime, the property changed ownership, was taken out of cultivation, and used as the site for a sawmill. I infer from these facts the intention to abandon the water right.

CASE 114, CLAIM 135

There was a period in the 1940s when the property subject to Claim 135 was flooded after a dike washed out, engendering a civil action evidenced by Cons. Ex. 60009. However, the evidence of the civil action itself establishes that Claimants' predecessor did not intend to abandon cultivation of the property. In any event, the flooding was abated and the property placed back in cultivation. Given the evidence of the existence of irrigation works as early as May 25, 1908, it is more likely than not that, except for the gap during the flooding of the 1940s, this property was under cultivation from at least May 25, 1908.

⁶ Claimants asserted in their brief that the evidence established that some of the property was irrigated even when the sawmill was operating, but a review of the portion of transcript that is cited does not support this conclusion. At Tr. page 133, the page Claimants cite, Robert Buchanan testified the claim 134 could not have been irrigated from the Dredge Cut. Instead, he said: "No, they would have to open a gate in the log pond. The mill went in in 1911, I believe, which was, to my knowledge, before an irrigation system was developed for it." Tr. at 133. Buchanan later agreed with counsel's summary as follows: " Q. BY MR. KELLY: So what you are saying, the lands on Claim 134, then, were naturally flooded until the point where the dredger cut was put in. That land was essentially, then, cut off from the lake. The mill went in. When the mill was abandoned, it started to be irrigated again around 1940 by artificial irrigation? A. Right." While this is evidence that the property could have been irrigated from the log pond, it is by no means evidence that it was so irrigated.

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CASE 115, CLAIM 136

Unlike the other two claims, there is no evidence for a break in the cultivation of Claim 136. Given the large expense involved in developing the irrigation system, building the dredge cut and pumps, and the evidence that the property was "practically worthless" when not reclaimed, it is more likely than not that the property was under cultivation from at least May 25, 1908 until the present.

SUMMARY

A preponderance of the evidence establishes that Claim 124 (Case 113) was abandoned.

A preponderance of the evidence establishes that the elements of a pre-1909 appropriation have been met respecting Claims 135 and 136, as provided in the Preliminary Evaluation, except that the priority date should be May 25, 1908.

ORDER

I propose that the Adjudicator issue the following order:

Claim 134:

The claim is denied.

Claim 135:

The claim shall be as stated in the Preliminary Evaluation, except as follows:

PRIORITY DATE: May 25, 1908.

Claim 136:

The claim shall be as stated in the Preliminary Evaluation, except as follows:

PRIORITY DATE: May 25, 1908



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

Dated: July 30, 2003

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Hearing Officer. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

Exceptions must be in writing and must clearly and concisely identify the portions of this Order excepted to and cite to appropriate portions of the record to which modifications are sought. Parties opposing these exceptions may file written arguments in opposition to the exceptions within 45 days of service of the Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

Dick Bailey
Klamath Basin Adjudication
Oregon Water Resources Dept
158 12th Street NE
Salem OR 97301

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2003, I served by a true copy of the following: **PROPOSED ORDER**, and by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

Stephen R. Palmer, Attorney
US Department of the Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825
Phone: 916-978-5683
Fax: 916-978-5694

Walter Perry/Justin Wirth
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-378-4009
Fax: 503-378-3802
walter.perry@doj.state.or.us
justin.wirth@doj.state.or.us

Walter Echo-Hawk/Lorna Babby
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Phone: 303-447-8760
Fax: 303-443-7776
wechohwk@narf.org
babby@narf.org

Carl V. Ullman
Water Adjudication Project
The Klamath Tribes
PO Box 957
Chiloquin, OR 97624
Phone: 541-783-3081
Fax: 541-783-2609
bullman@internetcds.com

Paul S. Simmons/Andrew M. Hitchings
Somach, Simmons & Dunn
Hall of Justice Building
813 Sixth Street, Third Floor
Sacramento, CA 95814-2403
Phone: 916-446-7979
Fax: 916-446-8199
psimmons@lawssd.com
ahitchings@lawssd.com

Richard D. Bailey
Oregon Water Resources Department
158 12th St NE
Salem, OR 97301
Phone: 503-378-8455
Fax: 503-378-6203
richard.d.bailey@wrd.state.or.us

Richard M. Glick/Nanci Klinger
Davis Wright Tremaine
1300 SW 5th Ave., Ste 2300
Portland, OR 97201
Phone: 503-778-5210
Fax: 503-778-5299
rickglick@dwt.com

Michael P. Rudd
Brandsness & Rudd, P.C.
411 Pine Street
Klamath Falls, OR 97601
Phone: 541-882-6616
Fax: 541-882-8819
Mike@brandsnessrudd.com

Richard S. Fairclo
Attorney at Law
280 Main Street
Klamath Falls, OR 97601
Phone: 541-882-4436
Fax: 541-882-4437
rfair@cdsnet.net

Michael Ratliff
Ratliff & Witney-Smith
905 Main Street, Suite 200
Klamath Falls, OR 97601
Phone: 503-241-2300
Fax: 503-778-5299
dmratlif@aol.com

James R. Uerlings
Boivin, Uerlings & DiIaconi
803 Main St., Ste. 201
Klamath Falls, OR 97601
Phone: 541-884-8101
Fax: 541-884-8498
jruerlin@cdsnet.net

Laura A. Schroeder
Schroeder Law Offices, P.C.
PO Box 12527
Portland, OR 97212
Phone: 503-281-4100
Fax: 503-281-4600
las@water-law.com

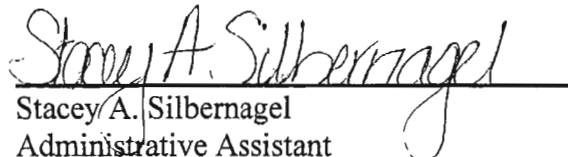
Christopher L. Cauble
Schultz, Salisbury, Cauble & Dole
111 SE Sixth St., PO Box 398
Grants Pass, OR 97528
Phone: 541-476-8825
Fax: 541-471-1704
Clcauble@quest.net

William M. Ganong
Attorney at Law
514 Walnut Street
Klamath Falls, OR 97601
Phone: 541-882-7228
Fax: 541-883-1923
wganong@aol.com

B.J. Matzen
435 Oak Street
Klamath Falls, OR 97601
Phone: 541-850-9284
Fax: 541-882-2029
bjmatzen@msn.com

Mary Cheyne
Klamath Drainage District
280 Main Street
Klamath Falls, OR 97601
kdd280@cvc.net

David Solem, Manager
Klamath Irrigation District
6640 Klamath Irrigation District Lane
Klamath Falls, OR 97603
Kidhq@cdsnet.net


Stacey A. Silbernagel
Administrative Assistant

Case 113; Claim 134