

117F00001005
BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

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

United States Bureau of Reclamation; The
Klamath Tribes; WaterWatch of Oregon, Inc.;
Klamath Irrigation District; Klamath Drainage
District; Tulelake Irrigation District; Klamath
Basin Improvement District; Ady Ditch
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;
and Collins Products, LLC,
Contestants

PROPOSED ORDER

Case No. 117
Claim No. 141
Contest No. 002, 2850, 3399, 3825, 4166

vs.

Nancy Charley and Nancy Charley, Trustee of
Nancy Charley Family Trust dated March 26,
1997,
Claimant/Contestant

HISTORY OF THE CASE

This proceeding in the Klamath Basin Water Adjudication was commenced by a claim filed on
October 25, 1990 by Nancy Charley based upon use of water beginning prior to February 24,
1909.

On October 4, 1999, OWRD issued its Preliminary Evaluation concluding that the elements of a
pre-1909 claim had not been established, and preliminarily denying the claim.

On March 31, 2000, Claimant, through her attorney, Richard Stark, Filed Contest 2, objecting to the denial of the claim.

On May 8, 2000, WaterWatch of Oregon, Inc. filed Contest 02850, asserting an interest in water within the Klamath Basin, contesting the assertion of a pre-1909 claim, the rate and duty claimed, the season of use claimed, and the lack of a requirement that headgates to the works be equipped with measuring devices at each point of diversion. This contest was subsequently withdrawn by Contestant.

On May 8, 2000, Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady Ditch 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; and Collins Products, LLC (Klamath Project Water Users), filed Contest Number 3399, asserting that there was insufficient evidence to support the right claimed, and that the Claimant had not established the required elements of the claim.

On May 8, 2000, the United States of America filed Contest Number 3825, asserting that there was insufficient information on the development of water on the claimed Place of Use prior to February 24, 1909, to establish a vested pre-1909 water right.

On May 8, 2000, the Klamath Tribes filed Claim Number 4166, also asserting that there was insufficient information on the development of water on the claimed Place of Use prior to February 24, 1909, to establish a vested pre-1909 water right.

This matter was then referred to the Hearing Officer Panel (now Office of Administrative Hearings) for a contested case hearing. A prehearing conference was conducted by Maurice L. Russell, II, Administrative Law Judge of the Hearing Officer Panel, on June 4, 2002, after which a Pre-Hearing Order was issued, June 6, 2002, listing the issues presented in this case, and setting a schedule for proceedings. This schedule was amended by orders issued September 17, 2002 and December 12, 2002, the latter order setting the matter for hearing on February 4 and 5, 2003. Pursuant to the order of December 12, 2002, a Notice of Hearing was duly served on all participants on May 10, 2002, for a hearing commencing February 4, 2003. OWRD, Claimant, the United States, Klamath Project Water Users, and the Klamath Tribes timely submitted written testimony and exhibits. Waterwatch of Oregon, Inc. submitted written testimony, but withdrew its evidence and contest prior to the hearing for cross-examination.

The hearing for cross-examination of witnesses was convened on February 4, 2003, at 9:00 a.m. in the Conference Room at the offices of the Hearing Officer Panel at 3420 Cherry Ave. NE, Suite 140, Salem, Oregon.

Richard A. Stark appeared as attorney for Claimant. Renee Moulun appeared as Agency Representative for the Oregon Water Resources Department. Stephen R. Palmer appeared as attorney for Protestant, the United States. Lorna K. Babby appeared as attorney for Protestants, Klamath Tribes. Andrew Hitchings appeared as attorney for Protestant Klamath Project Water Users. Maurice L. Russell, II, Administrative Law Judge, presided. Gerald E. Clark, Hugh Charley, Hollie Vern Cannon and Harold Loring Gurney were cross-examined at the hearing.

The parties submitted written argument, and the record closed on May 16, 2003.

EVIDENTIARY RULINGS

Subject to objections that will be addressed herein, the record in this case consists of "OWRD Exhibit 1", (Submission No. 117E00002002), Written Direct Testimony of Gerald E. Clark (Submission No. 117E00002003), including OWRD Exhibit 2, attached thereto, Written Rebuttal Testimony of Gerald E. Clark (Submission No. 117E00002004), OWRD Exhibit 3 (Submission No. 117E00002005), OWRD Exhibit 4 (Submission No. 117E00002006) and OWRD Exhibit 5 (Submission No. 117E00002007); Written Direct Testimony of Hugh Charley (Submission No. 117E00006021), Written Direct Testimony of William C. Rose, (Submission No. 117E00006024), Written Direct Testimony of Holly Cannon (Submission No. 117E00006025), Claimant's Exhibits, Submission Nos. 117E00006010 through 117E00006015, Submission No. 117E00006017 through Submission No. 117E00006020, 117E00006022, 117E00006023, and 117E00006026 through 117E00006028¹; Direct Testimony of Loring Gurney, Submission No. 117E00004001, together with attached exhibits (Submission No. 117E00004003 through Submission No. 117E00004007), and the transcript of record of the hearing. Waterwatch of Oregon, Inc. having withdrawn its contest and exhibits in this case, the evidentiary submissions of Waterwatch of Oregon, Inc. were stricken from the record.

Certain phrases in the testimony of Witness Holly Cannon were stricken on motion of the United States, as are noted in a copy of that testimony marked as 117E0006025A.

OWRD moved to strike the following statement from the Written Direct Testimony of Loring Gurney: "Also, points of diversion were added over the years and these should have their own priority date as there is no evidence supporting these additional points of diversion to the early priority date whether that is in the 1940's or earlier." (Oregon Water Resources Department's Post Hearing Response-117F00020006-at 4.) The United States responds that "Mr. Gurneys' conclusion regarding the points of diversion was based on the evidence in the record and his expertise as a water resource specialist who performs technical studies for water right investigations." (Joint Closing Brief of the United States and the Klamath Tribes-117F000040005-at 7.)

¹ Two exhibits, marked 117E00006024 and 117E00006025, received numbers duplicating the submission numbers for the Direct Written Testimony of William C. Rose, (117E00006024) and Holly Cannon (117E00006025). To avoid confusion, the testimony will keep the same numbers, and the exhibits formerly marked 117E00006024 and 117E00006025 will be marked 117E00006027 and 117E00006028, respectively.

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I find that the passage challenged is relevant and material to the case at hand, and, being based upon the witness' knowledge and expertise is admissible. The challenge really goes to the weight to be afforded the testimony, rather than to its admissibility. Given the testimony of the witness in question that the diversion points "could have all come on line at once" (Tr. 190) the conclusion that they "were added over the years" is not entitled to great weight. Thus, while the Motion to Strike is denied, the evidence will not be considered substantial evidence for the conclusion proffered.

Claimant objected to the evidence attached to the United States' Rebuttal Testimony regarding the circumstances under which an unrelated property was acquired pursuant to the Swamp Act. This objection is overruled. The evidence is relevant to the issues presented in this case, in that Claimant has asserted a specific interpretation of the Swamp Acts as the basis for inference as to the development of the land that is subject to this claim, which the evidence offered by the United States tends to contradict. The objection is overruled.

The United States objected to the Notice of Water Right included in OWRD Exhibit 1 (117E00002002 at 6 *inter alia*), based upon a misspelling of the locator's name in one portion of the document. The report of the OWRD's investigator, Don Knauer, states that this document was found in the county records. In addition, this document does not purport to be the original, but is a handwritten entry in the county records itself. Similar to various deeds and instruments from a later period whose authenticity is not questioned which contain typed signatures and attestations (viz. The Deed from COPCO to William von der Hellen of June 16, 1942-117E00002002 at 82), the signature of the "locator," J.J. Chambers, and of the County Clerk, Jas. H. Driscoll, are in the same hand. Having examined the document in question, for the purposes of these proceedings I conclude that the variant spelling is more likely than not to be a scrivener's error in the County Clerk's office, having no significance to the facts of this case. The document is admitted.

Because this case involves a determination of the application of water prior to February 24, 1909, it is inevitable and necessary that a greater reliance be placed on inference and hearsay than in other administrative cases. It would be a very unusual case where testimony could be taken at hearing from a percipient witness to conditions that obtained 94 years before. Nonetheless, although hearsay is generally admissible in administrative proceedings, (*Pierce v. MVD*, 125 OR App 79,85 (1993)) where hearsay is offered as substantial evidence of a fact at issue, it is necessary to apply the five-part test first stated in *Reguero v. Teacher Standards and Practices*, 312 Or 402 (1991).

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

[1] the alternative to relying on the hearsay evidence; [2] the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy; [3] the state of the supporting or opposing evidence, if any; [4] the degree of lack of efficacy of cross-examination with respect to the particular hearsay statements; and [5] the consequences of the decision either way."

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Reguero, 312 Or at 418.

The Court of Appeals has applied the analysis established in *Reguero* in several cases, including *Cole v. DMV*, 172 Or App 573 (rev. allowed, 2001) and *Dinsmore v. DMV*, 175 Or App 509 (rev. allowed, 2001). As the court noted in *Dinsmore*, accepting hearsay as substantial evidence prevents Protestants from exercising an important right of cross-examination, and should not be done lightly.

In this case virtually all the evidence regarding circumstances prior to the 1970s is hearsay. Even after that time, evidence in the file includes considerable hearsay, although much of it is corroborated by the testimony presented at hearing.

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

First, in all cases the declarant is unavailable. It is likely that the declarant is deceased.² Thus, there is virtually no alternative to consideration of hearsay in some form for the early period.

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

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

Fourth, The efficacy of cross-examination of the witnesses, were they available, is also questionable on the point at issue. For example, Don Lowe's affidavit is based upon his recollection of an event that occurred 90 years ago. If he were still alive, it might be possible to test the quality of that recollection through cross-examination, but it seems unlikely that additional details could be brought to light through cross-examination that would impeach the main point of the statement, that in the early 20th century Lowe saw the property under irrigation during the summer.³

Finally, the consequences of the decision in this case is of the utmost significance, at least as great as that in *Reguero*, and perhaps more so. If the testimony in the record on the need for water to grow grass on the property is accepted (and there is no evidence to the contrary), a decision adverse to claimant could render more than 1400 acres completely unproductive.

² Certain, in the case of Don Lowe (Tr. At 8.)

³ In the case of this document, it is to be noted that while the United States criticizes it for misspellings, corrections and interlineations, it was signed under oath before a notary, and is therefore, contrary to the United States' assertion, "evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs." (OAR 137-003-0610). It is also difficult to take the United States' criticism seriously when it describes this affidavit as "self-serving," considering that the claimant testified he did not know Don Lowe, and there is no evidence as to any interest by Lowe in the property at issue in this case.

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Under the circumstances, I conclude that the hearsay evidence presented in this case for the period before the 1970s meets four of the five standards applicable under *Reguero*, as substantial evidence of the facts that evidence presents. The evidentiary effect of that hearsay will depend on the state of corroborating and contrary evidence in the record, as discussed in greater detail, below.

ISSUES

2. Whether there is insufficient evidence to support the right claimed.⁴
3. Whether the required elements are not established for this claim.
7. Whether there is insufficient information on the development of water on this Place of Use prior to February 24, 1909, to establish a vested pre-1909 water right.

FINDINGS OF FACT

1. In 1871, and again in 1882, a survey was performed of Township 38 S. Range 5 E.W.M., including the dimensions of Buck Lake. (Ex. 117E000060026; 177E000060027; 117E00006028.) Buck Lake itself was described in the 1882 survey as "swamp and overflowed within the meaning of the Swamp Land Act of Congress extended to Oregon March 12, 1860." (Ex. 117E000060027 at 2.)
2. Buck Lake was transferred by the United States to the State of Oregon on June 1, 1888, pursuant to the Swamp Act of 1960. The State of Oregon transferred title to Buck Lake to various individuals between 1880 and 1889 by deeds designating the land as "swamp."
3. On December 2, 1901, J.J. Cambers (or Chambers) filed a Notice of Water Right, purporting to provide notice of the appropriation of all the water in Buck Lake, together with all water running into Buck Lake, for irrigation, power and domestic use, and for a fish pond and fishing. (Ex. 117E2002 at 6.)
4. Beginning before 1905, Benjamin Evenhart Kerns pastured cattle at Buck Lake, possibly for several years. He left the area before 1922, for the health of his wife, Agnes. (Ex. 117E00006023 at 3.)
5. On December 18, 1906, John J. Cambers and May Cambers, his wife, conveyed Buck Lake to W.S. Clay. This deed recited that the land was transferred "Together with all water rights pertinent to and belonging to said described premises and used in the irrigation thereof." (Ex. 117E00006019.)
6. The property was being irrigated for pasture in the summer of 1913. (Ex. 117E00002002 at 54.)

⁴ Which was part of the security for a loan by Clay. (117E00002002 at 96.)

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7. On March 18, 1914, John J. Cambers and May Cambers, his wife, granted a mortgage secured by the same property to Martha A. Barron, in lieu of a Sheriff's Sale Certificate on a suit for foreclosure in which W. S. Clay was plaintiff. This mortgage described the land of Buck Lake, together with " Tenements, hereditaments, water rights, ditch rights and appurtenances thereunto belonging." It made no mention of irrigation. (Ex. 117E00006020)

8. At some time thereafter, the California Oregon Power Company (COPCO) acquired the property including Buck Lake. (Ex. 117E00002002 at 28, 31 and 50-51.) Between 1928 and 1932, Earl Kerns rented Buck Lake from COPCO and began pasturing cattle there. He rented the property from COPCO until it was sold to William von der Hellen some time between 1939 and 1942. (117E00006023; 117E00002002 at 50-51.)

9. Von der Hellen dammed the outlet to Buck Lake, in an effort to raise Muskrats. When that venture failed a short time later, he destroyed the dam he had built, installed an irrigation system, and began irrigating in 1947. Irrigation and grazing on the property has been continuous since that time. The present claimant is a descendent and successor from Von Der Hellen. (Ex. 117E00006021.)

10. At present, the works are composed of a dike, at least four miles long, which diverts the water from several springs and streams into a channel, from which it is directed onto Buck Lake through ditches for irrigation. Water not applied to the land is directed to a drain, then back into Spencer Creek. (Tr. 101-103.)

11. Grass suitable for cattle grazing will not grow in the peat soil of Buck Lake unless water is applied to the land. (Tr. 110.)

CONCLUSIONS OF LAW

2. There is sufficient evidence to support the right claimed.⁵
3. The required elements are established for this claim.
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.

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; and (3)

⁵ The numbering of the Conclusions of Law addressing the remaining issues has been conformed to the numbering of the original statements of issues as retained in the Statement of Issues to avoid confusion. (See fn. 4, above)

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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, Claimant proposes the inference that the former lake-bed of Buck Lake, comprising some 1,448.9 acres, was irrigated prior to 1909, based upon evidence that cattle was grazed at Buck Lake prior to 1905, and that grass suitable for grazing will not grow at Buck Lake unless irrigated. I infer that at least some irrigation was being conducted prior to 1909.

The evidence concerning the application of the Swamp Act of 1850 to this property is not conclusive. Claimant asserts that the transfer of the property compels the conclusion that the property was reclaimed. The United States has presented evidence that this was not always the case. While the evidence on this point may show that the property had been reclaimed, it is not evidence that, as early as the 1880s, the property was being irrigated.

The priority date proposed by Claimant is November 14, 1901, the date the Notice of Water Right (117E00002002 at 6) was signed.

That Notice claimed all the water from and running into Buck Lake, for irrigation, power and domestic use, and for fishing and a fish pond. The proportion of water intended to be applied to each of these various uses, particularly to irrigation, and whether the water was intended to be reused consumptively, i.e., through irrigation, after the non-consumptive uses, is not stated.

There is no evidence relating to the use of water on the particular land in question that directly contradicts the hearsay statements. The only evidence offered as potentially contradicting the early hearsay is a map, itself hearsay, said to be a Klamath Project General Progress Map from 1905. That map shows an unnamed marsh at approximately the location of Buck Lake. However, as is clear from its title, this map was prepared to show the progress of construction of the Klamath Project, not to show the status of the entire watershed. Since Buck Lake is not asserted to be part of the Klamath Project, there is no way of knowing the source of the information regarding Buck Lake, if that is what that feature is, or how current that information was when the map was prepared.

The only other evidence proffered by the United States that contradicts the early hearsay is the opinion of Harold Loring Gurley. As noted above, however, that opinion can only be taken as showing the status of the property in the 1970s, and does not show whether the property was irrigated under a different system 80 years earlier. On the other hand, various items of hearsay from various sources tend to corroborate each other. The items in the record that were extracted from History of Klamath County, show that the property was being used for grazing as early as 1905, and was again used for grazing while owned by COPCO in the 1920s. Oregon (Ex. 117E00006023 at 3.). These statements were made by persons who had no apparent interest in the property in question.

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The standard of evidence applicable to these cases is by a preponderance. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division* 47 Or App 437 (1980); *Metcalfe v. AFSD* 65 Or App 761, (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed. Here, a notice of appropriation of water that included an appropriation for irrigation of Buck Lake was filed in 1901. It is more likely than not that the property was under irrigation at least by 1905, a reasonable time after the filing of the Notice. The evidence, though it has gaps, is sufficient to show that more likely than not Buck Lake was being grazed, and therefore was under irrigation, throughout the period from 1905 through 1939 or 1940, when William von der Hellen dammed the outlet to raise muskrats. That venture failed very soon thereafter, and the land was returned to grass, which required that it be irrigated. It continued under irrigation through the ensuing years up to the present. The fact that the manner of irrigation may have been altered at one point or another in time, does not change the underlying facts. It is more likely than not that the facts necessary to establish a pre-1909 claim, and particularly a claim based on a Notice recorded in 1901, are present.

The record does not show any reason why the standard rate and duty (1/40 cfs per acre, 3.5 acre/feet per acre-cf. Ex. 117E2002 at 164.) should not apply. The season for irrigation claimed (June 1 through October 1, each year) is less than the standard season (*ibid.*), and will not be disturbed. While the claim asserts a single diversion-point, the irrigation system has changed since the claim was filed. The structure of the current system does not facilitate the identification of a single diversion-point, since many of the sources of the water upwell from the bottom of the area where water is impounded by the dike.

ORDER

I propose that the Adjudicator issue the following order:

Claim No. 141 is approved as claimed. The terms of Claim No. 141 and any water right that may be derived therefrom are as follows:

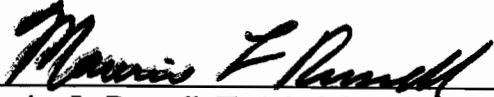
1. Point of Diversion: Commingled Water from various sources, located in Section 11 Township 38 S, Range 5 E., W.M.
2. Source: an unnamed stream, unnamed springs, and Tunnel Creek and spring, tributary to Spencer Creek to irrigate 1448.9 acres.
3. Use: Irrigation.
4. Amount beneficially used: 36.3 cubic feet per second, measured at the points of diversion.
5. Period of Use: June 1 through October 1 of each year.

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6. Priority Date: November 14, 1901.
7. Place of Use: Buck Lake, located in Township 38 South, Range 5 East, Willamette Meridian.



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

Dated: July 9, 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 9, 2003, I mailed a true copy of the following: **PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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Stacey A. Silbernagel
Administrative Assistant

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