

**BEFORE THE OFFICE OF ADMINSTRATIVE 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,

Contestants

v.

Christopher Dobson and Stephen Kuhler,  
Claimants

**PROPOSED ORDER**

Case No. 125

Claim: 178

Contests: 3168, 3833, and 4175

**HISTORY OF THE CASE**

**THIS PROCEEDING** under the provisions of ORS Ch. 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

On November 8, 1990, Frank W. Borges and Hazel L. Borges submitted a Statement and Proof of Claim for 6.66 cubic feet per second (cfs) from one point of diversion located on the Klamath River for irrigation of 266.4 acres and 2,250 gallons per day (0.0035 cfs) for livestock. The Borges indicated that the basis for the claim was appropriation of water since the spring of 1906, with a claimed period of use from March through September. On April 25, 2002, Chris Dobson and Steven Kuhler provided Richard D. Bailey, the Adjudicator of the Klamath Basin General Adjudication, with a Change of Ownership form and a copy of deeds showing that the original claimants no longer owned an interest in the property appurtenant to the claim and that ownership had been transferred to Christopher M. Dobson and Stephen Kuhler (Claimants), as tenants in common.

On October 4, 1999, the Adjudicator of the Klamath Basin General Adjudication issued a Summary Preliminary Evaluation recommending approval of the claim and indicating that it appeared that Claimants had established the elements of a pre-1909 claim to the extent of use claimed, with a priority date of June 21, 1906, and with a period of use from March 1 through October 31 of each year.

On May 8, 2000, Horsefly Irrigation District, Langell Valley Irrigation District, Medford Irrigation District, and Rogue River Valley Irrigation District (Irrigation Districts) filed Contest No. 3168 against the water right claimed and against the Adjudicator's Preliminary Evaluation.

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Contestant Irrigation Districts voluntarily withdrew Contest 3168, without prejudice, on August 29, 2002.

Also on May 8, 2000, the United States of America (United States) filed Contest 3833 against the claim and against the Adjudicator's Preliminary Evaluation. The Klamath Tribes filed Contest 4175 on that same date, also contesting the claim and the Adjudicator's Preliminary Evaluation.

### PROCEDURAL MATTERS

The Water Resources Department (OWRD) referred this matter to the Office of Administrative Hearings for a contested case hearing. A prehearing conference was held on September 5, 2002. The participants filed prehearing statements and appeared at the prehearing conference, at which the participants agreed to a discovery schedule and to dates for hearing.

Pursuant to a Notice of Hearing mailed to all participants by certified mail on April 10, 2003, a hearing was convened on June 3, 2003 for the purpose of admitting evidence into the record and cross-examining witnesses whose direct testimony had previously been filed and whose presence had been requested for cross-examination. William D. Young, Administrative Law Judge, presided. Mr. Dobson appeared and was represented by his attorney, Greg D. Corbin. The United States was represented by Assistant Regional Solicitor, Stephen R. Palmer. The Klamath Tribes were represented by their attorney, Lorna Babby. OWRD was represented by Renee Moulun, an authorized agency representative. The attorney for the Klamath Tribes had not previously received copies of documentary evidence offered by Claimants and by the United States. It was necessary to continue the case to allow the Klamath Tribes an opportunity to review that documentary evidence.

The hearing reconvened on June 18, 2003. Mr. Dobson appeared for the hearing with his attorneys, Greg D. Corbin and Beverly Pearman. The United States was represented by Assistant Regional Solicitor, Stephen R. Palmer. The Klamath Tribes were represented by their attorney, Lorna Babby. OWRD was represented by Renee Moulun, an authorized agency representative. Chris Dobson and Loring Gurney appeared as witnesses for cross-examination.

I held the record open to allow the participants an opportunity to provide written closing arguments. Claimants filed their Closing Argument on July 18, 2003. The Klamath Tribes elected not to file a closing argument but relied on the United States' Closing Brief. The United States filed its Closing Brief on September 25, 2003. Also on September 25, 2003, OWRD filed its Response to Claimant's Closing Argument and a Motion to Re-Open the Record to Enter Additional Evidence, asking to enter additional evidence to respond to assertions made by Claimants in their closing arguments. That request was unopposed and was allowed. On October 6, 2003, Claimants filed a Motion for Extension of Time to File Reply to allow additional time to review the new evidence and determine whether to object to any of the newly offered evidence. Pursuant to an order granting that motion, Claimants filed their Reply on November 3, 2003. I closed the record on that date.

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## EVIDENTIARY RULINGS

At the cross-examination hearing I admitted OWRD's case file (OWRD exhibit 1) into evidence, without objection. After the record closed OWRD sought permission to reopen and supplement the hearing record with additional exhibits. That request was granted, allowing Claimants additional time to file written objections. Claimants did not object to inclusion of the additional documents in the record. No other party objected to the exhibits and I admitted OWRD's exhibits 2-8, without objection.

I admitted the evidence offered by Claimants, overruling objections to the relevance and materiality of certain portions of the exhibits regarding the priority date that should be recognized if the claim were proven. Claimants' evidence included the Direct Testimony and Affidavit of Christopher M. Dobson – Witness for Claimants with accompanying exhibits (Dobson Direct), the Direct Testimony and Affidavit of Frank W. Borges – Witness for Claimants (Borges Testimony), and the Rebuttal Testimony and Affidavit of Christopher M. Dobson – Witness for Claimants with accompanying exhibit (Dobson Rebuttal).

I admitted the evidence offered by the United States, overruling objections to the relevance and materiality of the direct testimony of Loring Gurney (Gurney Direct), with attached photographs, maps, and record of a telephone conversation (reference numbers 125E 40001 through 125E40005), and rebuttal testimony of Mr. Gurney (Gurney Rebuttal). Claimants also objected to the timeliness of submission of the rebuttal testimony of Mr. Gurney, basing their objection on the Scheduling Order in this case. I overruled that objection as well.

## LEGAL ISSUES

At the hearing and in their Closing Argument, Claimants identified a significant legal issue that had not been resolved in this case, whether Claimants were entitled to a priority date earlier than claimed in the Statement and Proof of Claim. To clarify its position regarding this issue, OWRD successfully moved to reopen the hearing record to supplement the evidentiary record regarding this issue. On this issue, I make the following:

### FINDINGS:

(1) OWRD required claims in the Klamath Basin General Adjudication to be filed between October 15, 1990 and December 7, 1990 (in Klamath Falls), and December 17, 1990 and February 1, 1991 (in Salem). (OWRD Exhibit 2.)

(2) In their Statement and Proof of Claim, filed on November 8, 1990, Frank and Hazel Borges, the original claimants, claimed as a priority date "spring of 1906." (OWRD Exhibit 1 page 8.) When he prepared the claim Mr. Borges simply "spoke with neighbors who had lived in the area for a long time" to determine what priority date to claim. He did not conduct an extensive investigation of the initiation and development of the water right. (Borges Testimony page 3.)

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(3) Notice of public inspection of Klamath claims was given on September 16, 1999. Open Inspection of claims was held in Klamath Falls from October 4, 1999 to November 5, 1999, and in Salem between November 15, 1999 and January 14, 2000. The Salem portion of Open Inspection was subsequently extended to run through March 31, 2000. (OWRD Exhibits 3 and 4.)

(4) When Claimants purchased the property on July 31, 2001, they were unaware of any information concerning the Claim other than what the Borges had included with the Claim. After OWRD activated this case and it was set for hearing, Claimants began investigating the history of water use on the property. In their research Claimants discovered that Orson Avery Stearns filed a homestead claim on a portion of the property in March or April of 1867 and that by the end of July 1867 he was using the property for agricultural purposes. (Dobson Direct pages 2-3.)

#### **DISCUSSION AND RULING:**

Claimants contend that equitable principles permit them to establish a priority date earlier than originally claimed. They assert that the Oregon Supreme Court has repeatedly acknowledged that water adjudications, as proceedings in equity, observe a liberal pleading rule, and that in conjunction with that rule claimants may establish a priority date earlier than originally claimed. They cite several cases in which the Supreme Court indicated that the Circuit Court may treat proceedings under the Water Code as if they were suits in equity. *E.g., Hough v. Porter*, 51 Or 318, 439, (1908); *Turvey v. Kincaid*, 111 Or 237, 238 (1924); *In re Water Rights in Silvies River*, 115 Or 27, 91 (1925). *Warner Val. Stock Co. v. Lynch*, 215 Or 523, 559 (1959); *etc.* They also cite ORS 539.150(1), which states "From and after the filing of the evidence and order of determination in the circuit court, the proceedings shall be like those in an action not triable by right to a jury \* \* \* ." Finally, they argue that they are entitled to an earlier priority date than originally claimed because no party to this contested case is prejudiced.

OWRD and the United States argue that Claimants' position is contrary to the statutes and administrative rules that govern this basin-wide adjudication. ORS 539.210; OAR 690-030-0085. They also argue against the claimed lack of prejudice to participants in this contested case,

In response to arguments by OWRD and the United States, Claimants clarified that were not arguing that the ALJ or the Adjudicator should determine that the priority date for Claim 178 is July 31, 1867. Instead, they assert that the ALJ and the Adjudicator should make appropriate findings of fact that would support such a determination by the circuit court, apparently recognizing that the cited cases permit the court to exercise equitable powers but make no mention of equitable powers being available to the executive branch of government.

I agree with OWRD and the United States that ORS 539.210 and OAR 690-030-0085 prohibit claim amendments that would expand a claim. By attempting to amend their claim to a priority date earlier than originally claimed, Claimants are basically making a new claim — outside the claim period — and therefore outside the time limits and not in the manner required by law. ORS 539.210 states, in part:

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Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law.

The position of OWRD and the United States is based upon that statute and upon OAR 690-030-0085, which clearly prevents amendment of the claim at this late date. The rule states:

The Water Resources Director shall not permit any alteration or amendment of the original claim after the period for inspection has commenced; but any new matter which the claimant may wish to set forth shall be set forth in the form of an affidavit, regularly verified before a proper officer and filed with the Water Resources Director prior to the close of the period for public inspection.

The period for public inspection has long since passed. The opportunity to amend the claim, even with regard to new matters, ended after the period for inspection commenced on October 4, 1999. I may not recommend that the Adjudicator enter an earlier priority date than was claimed in the original Statement and Proof of Claim. To do so would permit amendment of any aspect of the claim, including the acreage claimed, the period of use, the amount of water claimed, or the point of diversion, thereby negating the specific language of upon OAR 690-030-0085 and making a shambles of this basin-wide adjudication. I will, as I would in any case, make findings of historical fact regarding early settlement and beneficial use of water.<sup>1</sup>

### ISSUES

1. Did Claimants prove the required pre-1909 elements for Claim 178 and, if so, what is the appropriate priority date?
2. Did Claimant's predecessors-in-interest complete irrigation works within a reasonable time after commencement of construction or use of water?
3. Have Claimants and their predecessors-in-interest continuously diverted water for beneficial use on this property since the claimed date of appropriation?
4. What is the total number of acres to which this claim, if established, applies?
5. What is the appropriate period of use?

### FINDINGS OF FACT

(1) In March or April of 1867, Orson Avery Stearns filed a homestead claim on 120 acres that are part of the property appurtenant to Claim 178. (Dobson Direct exhibit 2 and exhibit 3 at page 1.) Stearns eventually expanded his homestead to 417 acres. (Dobson Direct exhibit 3 at

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<sup>1</sup> I reject Claimant's argument that they are entitled to an earlier priority date than claim because of an asserted lack of prejudice to parties to the Adjudication. To consider this basis for effectively amending the Statement and Proof of Claim I would have to find that I had the equitable authority to do so.

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page 1 and exhibit 4 at page 12.) The State of Oregon conveyed to Stearns 262.1 acres by State Warranty Deed, recorded June 24, 1878, all of which is part of the Property. (Dobson Direct Exhibit 5 and Exhibit 8 at page 1, item 1.) The State of Oregon conveyed the remainder of the Property to William P. Miller by a Deed recorded January 12, 1883. (Dobson Direct exhibit 6 and exhibit 8 at page 1, item 2.) Miller then conveyed the remaining portion of the property to Stearns by Quitclaim Deed, recorded March 10, 1883. (Dobson Direct exhibit 7 and exhibit 8 at page 1, item 3.)

(2) Within weeks after being mustered out of the First Regiment of Oregon Volunteers on July 19, 1867, Stearns settled on his homestead claim and immediately began mowing grass to provide winter hay for fifty head of horse. (Dobson Direct exhibit 3 at pages 1 and 5, and exhibit 31 at page 2.) Stearns continued to use the land for a variety of agricultural uses after 1867. (Dobson Direct exhibit 4 at pages 12-13.) He was the second person to establish an orchard, mostly of apple and pear trees, in the Klamath Basin. (Dobson Direct exhibit 4 at page 13.) Stearns also continued to harvest hay and grasses, raise cattle, and grow crops, including potatoes, and is generally recognized as the first person to establish a dairy farm in the Klamath Basin, which he operated until 1903. (Dobson Direct exhibit 3 at pages 1-2, exhibit 4 at pages 12-13, and exhibit 31 at page 1.) By 1870, Stearns had "twelve acres of land plowed," in addition to his ranching activities. (Dobson Direct exhibit 3 at page 3.)

(3) From the time the property appurtenant to Claim 178 was first homesteaded, until at least 1905, the use of water for hay and livestock pasture was by natural irrigation. (Dobson Direct exhibit 13.) Much of the area around the property was naturally irrigated marshlands. (Dobson Direct exhibit 11 and exhibit 24 at pages 4-6.) Stearns' homestead included a slightly elevated peninsula bordered on the East, West, and South by marshlands. The land was mostly natural meadow that could be "made to overflow" with surrounding water. (Dobson Direct exhibit 3 at 4.) The prairie and meadow grasses that naturally grew in these marshlands were particularly valuable as hay. (Dobson Direct exhibits 3 at 5 and exhibit 16.)

(4) Almost immediately after Stearns settled on his homestead, he and others began reclaiming the surrounding marshlands. Within five years a significant amount of marshland had been reclaimed. (Dobson Direct exhibit 16.) Some of these private reclamation activities included building dikes. One of these dikes was built in the early 1900s by Benjamin Shuster Kerns, a neighboring landowner, to reclaim marshlands around the property appurtenant to Claim 178. (Dobson Direct exhibit 10 at page 2; exhibit 32 at page 1.) They included the eastern boarder of the property appurtenant to Claim 178 along the Klamath River. (Dobson Direct exhibit 20.) In 1905, the United States began plans to construct the Klamath Project and reclaim additional lands from Lower Klamath Lake. (Dobson Direct exhibit 21 at pages 1-3.) In 1912, the California Northeastern Railroad completed an extensive dike that cut off much of Lower Klamath Lake's water supply and allowed additional lands to be reclaimed. (Dobson Direct exhibit 21 at page 12.)

(5) In 1912, Hiram Franklin Murdoch purchased the Stearns property. (Dobson Direct exhibit 4 at page 10.) Sometime before 1915, the point of diversion, ditch system, and some of the other irrigation works that are in place today had been built. (OWRD Exhibit 1 at page 64; Exhibit 23 at 2-3; Exhibit 28; Exhibit 29; Exhibit 30.) Since then the system has been upgraded

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with pumps and other improvements but otherwise the diversion and basic ditch system has remained the same as when first constructed. (Borges Testimony; OWRD Exhibit 1 at page 50.)

(6) The property appurtenant to Claim 178 has been continuously used for agriculture and livestock since homesteading. (Dobson Direct and various exhibits; Borges testimony.)

(7) Frank W. Borges and Hazel L. Borges filed the Statement and Proof of Claim for Claim 178 on November 8, 1990. (OWRD Exhibit 1 page 8.) The claim is for a total of 6.66 cubic feet per second (cfs) for irrigation of 266.4 acres and a total of 0.0035 cfs (2250 gallons per day) for 150 head of livestock. The claimed priority date is spring of 1906. The claimed season of use is April 1-October 31. (OWRD Exhibit 1 pages 8-18.) After several intervening owners, Claimants purchased the property to which Claim 178 is appurtenant on July 31, 2001. (OWRD Exhibit 1 pages 1-7.)

(8) The property appurtenant to Claim 178 is located south of State Highway 66 between Klamath Falls and Keno, Klamath County, Oregon, and lies within sections 27, 34, and 35 of Township 39 South, Range 8 East of the Willamette Meridian. Much of the eastern border of the property lies along the Klamath River. On all other sides the property is surrounded by lands used primarily for agriculture and livestock. Water is diverted at the NE¼, NE¼, Section 34, Township 39S, Range 8E of the Willamette Meridian. The property is approximately 300 acres in size. (Dobson Direct exhibit 1; OWRD Exhibit 1 pages 8 and 10.)

### CONCLUSIONS OF LAW

1. Claimants proved the required pre-1909 elements for Claim 178 with a priority date of June 21, 1906, the date claimed in the Statement and Proof of Claim.
2. Claimant's predecessors-in-interest completed irrigation works within a reasonable time after commencement of construction or use of water.
3. Claimants and their predecessors-in-interest have continuously used or diverted water for beneficial use on this property since July 1867.
4. Claim 178 applies to 266.4 acres, the amount claimed in the Statement and Proof of Claim.
5. The appropriate period of use is April 1 through October 31, the period claimed in the Statement and Proof of Claim.

### OPINION

Pre-1909 Water Right. To establish a claim for a pre-1909 water right in the Klamath Basin General Stream Adjudication, a claimant must prove the following elements: (1) a *bona fide* intent prior to February 24, 1909, to apply the water to a currently existing or currently contemplated future beneficial use; (2) diversion from the natural channel; and (3) application of the water within a reasonable time to some useful purpose. ORS 539.010; *In Re Water Rights to*

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*Waters of Silvies River*, 115 Or. 27 (1925); *In Re Rights of Deschutes River and Tributaries*, 134 Or. 623 (1930).

Claimants have the burden of establishing the claim by a preponderance of the evidence. ORS 539.110; ORS 183.450(2); see *Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact-finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). Claimants have met their burden.

There is overwhelming evidence that as early as 1867 Claimants' predecessors-in-interest applied water to beneficial use and no party seriously contests Claimants' entitlement to a pre-1909 priority date to at least a portion of the property appurtenant to Claim 178. Although the United States seeks to limit the pre-1909 claim to the 20 acres referred to in O.A. Stearns January 1, 1870 letter, neither common sense nor the evidence supports such a limitation. Claimants' evidence includes the results of thorough research documenting the initial settlement of the property appurtenant to Claim 178 and development of water use on the property. Mr. Dobson's testimony and attached exhibits established initial settlement in 1867, application of water to beneficial use in that same year, and increasing beneficial uses to which water was put by way of an orchard, cattle ranching, and a dairy farm, with a concomitant growth in the lands affected. Although the water was at first exploited by natural irrigation, actual use of the water is sufficient to establish a pre-1909 priority date. *In re Silvies River*, 115 Or 27, 66 (1925).

The greater weight of the evidence also shows that shortly after the property was homesteaded, O.A. Stearns and his neighbors began reclaiming the surrounding marshlands by building dikes. On the record in this case, I believe that the owners of the property prior to 1909 contemplated use of the entire property appurtenant to Claim 178 prior to 1909. This is specifically evidenced by the fact that the present point of diversion, ditch system, and some of the other irrigation works that are in place today had been built by 1915.

Finally, the greater weight of the evidence, including testimony provided by Mr. Borges and the exhibits attached to Mr. Dobson's testimony, established that the water claimed has been put to beneficial use continuously since the initial appropriation. Claimants have met their burden of proving all the elements of a pre-1909 water right to all the property appurtenant to Claim 178.

Acreage entitled to the pre-1909 water right. Although not argued by the United States, evidence presented by the United States suggests that even if Claimants are entitled to a water right of more than 20 acres, they are not entitled to a water right affecting more than 258 acres, the amount of land it believes was irrigated in 1993. (Gurney Rebuttal Testimony.) The evidence suggests that the entire ranch of approximately 300 acres was irrigated immediately subsequent to 1909 and that irrigation was contemplated for any portion of the ranch not irrigated prior to 1909. (Borges Direct Testimony; Dobson Cross-examination Testimony.) The testimony of both Mr. Dobson and Mr. Borges was entirely credible on the amount of land actually irrigated and provides a basis for the lesser amount claimed. On this record, Claimants are entitled to a pre-1909 water right on the entire acreage claimed, 266.4 acres.

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Quantity of Water. The United States contends that the record does not support the quantity of water claimed for the entire place of use. According to the United States, the quantity of water for irrigation should be no greater than 3.4 cfs, basing its argument on certificates of water right issued by OWRD in 1920 limiting the amount of water to 4.85 cfs for 382.73 acres, and reduction of that amount to 3.98 cfs when a portion of that water right was canceled reducing the place of use to 313.83 acres. (OWRD Exhibit 1, pages 61 and 63.)

OWRD investigated the claim and determined that the diversion and works are capable of delivering 6.66 cfs of water, an amount consistent with the basin-wide rate limit OWRD applies in the Klamath adjudication for irrigation of 266.4 acres.<sup>2</sup> (OWRD Exhibit 1 at 53; OWRD Exhibit 1 at 100.) There is no evidence of waste or that Claimants use less than the amount claimed. That their 1920 water right is at a lower rate than their pre-1909 water right is anomalous, but is not persuasive on the issue of the amount of water to which this pre-1909 water right is entitled.

The United States also contends that the maximum amount of livestock water that can be awarded to claimants under a pre-1909 water right is the amount claimed, or 0.0035 cfs. Although the Preliminary Evaluation recommended the amount for livestock as .01 cfs for convenience of the database, for the reasons stated in the discussion of Unresolved Legal Issues, the United States' position is correct. Claimants are entitled to no more water than claimed in the Statement and Proof of Claim.

Abandonment or Waiver. The United States contend that Claimant's predecessors-in-interest relinquished any pre-1909 water right that may have been found to be valid, or at a minimum, have waived their right to assert any priority date they may be awarded in this adjudication against the United States. They base this contention on a Waiver of Riparian Rights executed by the Stearns in July 1905. (OWRD Exhibit 1, page 13.)

The relevant portions of the United States Statement of Contest state the reasons for the contest:

\* \* \* contestant alleges:

That the above-named contestant contests the right claimed by the above-named contestee for the following reasons (fill in if you are contesting the right claimed):

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.

The period of use for irrigation in the preliminary evaluation exceeds the period of use claimed.

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<sup>2</sup> According to Appendix A, the basin-wide rate limit is one-fortieth of one cubic foot per second for each acre irrigated. (OWRD Exhibit 1 at 100.) Application of that limit to 266.6 acres (266.4 divided by 40) equals exactly 6.66 cfs.

That the above-named contestant contests the Adjudicator's Preliminary Evaluation of the right claimed of the above-named contestee for the following reason. (fill in if you are contesting the Preliminary Evaluation of the right claimed):

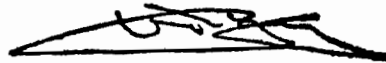
There is insufficient information on the development of water on this Place of Use prior to February 24, 1909, to establish a vested pre-1909 water right.

ORS 539.100 requires contestants to state "with reasonable certainty the grounds of the proposed contest." Although abandonment is among the permissible grounds for a contest, *see* OAR 690-028-0075(3)(f), the United States' contest merely challenges the sufficiency of the evidence to meet the elements of the claim. (OWRD Exhibit 1 at 79-80.) If the United States had wished to contest Claim 178 on the grounds of abandonment, it should have done so in its original contest or not later than March 19, 2003, the date agreed to by the parties and memorialized in the Scheduling Order as the final date for amending contests. (Prehearing Order at 2.) Additionally, ORS 539.110 states that the "evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest." Neither the Hearing Notice nor the Notice of Continued Hearing identifies abandonment as an issue in this case. The United States may not raise and I may not address issues of abandonment or waiver at this stage of the proceeding.

### ORDER

I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as specifically set out below:

1. The elements of a pre-1909 right are established for Claim 178 and the claim is approved as filed.



William D. Young, Administrative Law Judge  
Office of Administrative Hearings

Date: December 8, 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.

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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  
725 Summer Street N.E., Suite "A"  
Salem OR 97301

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2003, I sent a true copy of the following: **PROPOSED ORDER**, and deposited the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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