

130F00010004
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; Horsefly Irrigation District;
Langell Valley Irrigation District; Medford
Irrigation District; Rogue River Valley
Irrigation District,
Contestants

PROPOSED ORDER

Case No. 130

Claim No. 193

Contest No. 3183, 3838, 4180.

vs.

Collins Products, LLC; Allan Moates;
Harold & Maria Moates; Trustees, Pentail
Company,
Claimants

HISTORY OF THE CASE

This proceeding in the Klamath Basin Water Adjudication was commenced by a claim filed on February 1, 1991 by Richard S. Baldwin, based upon use of water beginning prior to February 24, 1909.

On October 4, 1999, OWRD issued its Preliminary Evaluations of the claim, concluding that the elements of pre-1909 claims had been established, and preliminarily approving the claim. The claim as approved was for a lesser amount of water than that claimed. (130E00002002 at 1, 131.)

Claimants did not file contests against the Preliminary Evaluation.

Contests were timely filed by Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District, Medford Irrigation District, The United States of America and the Klamath Tribes asserting an interest in water potentially subject to the claim, and seeking to bar the claim to the extent it would affect the water rights of these contestants. (130E00002002 at 107 ff.; 130E00002002 at 114; 130E00002002 at 118.)

This matter was then referred to the Office of Administrative Hearings for a contested case

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hearing. Contestants Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District, Medford Irrigation District, and the Klamath Tribes withdrew their contests prior to the hearing in this matter. 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 December 12, 2002, after which a Pre-Hearing Order was issued, January 2, 2003, listing the issues presented in these cases, and setting a schedule for proceedings. This schedule was amended by an order issued April 17, 2003 setting the matter for hearing on August 26, 2003. Pursuant to the order of April 17, 2003, a Notice of Hearing was duly served on all participants on July 21, 2003, for a hearing commencing August 26, 2003. The participants timely submitted written testimony and exhibits.

The hearing for cross-examination of witnesses was convened on August 26, 2003, at 9:00 a.m. in the Conference Room at the offices of the Office of Administrative Hearings at 3420 Cherry Ave. NE, Suite 140, Salem, Oregon.

Cliff Bentz appeared as attorney for claimants. Kimberly Grigsby appeared as Agency Representatives for Oregon Water Resources Department (OWRD). Stephen Palmer and Barbara Scott-Brier appeared for Contestant, United States. Allan Moates appeared and submitted to cross-examination on behalf of claimant. Maurice L. Russell, II, Administrative Law Judge for the Office of Administrative Hearings, presided. Claimant Collins Products LLC did not appear and presented no evidence.

Pursuant to an order setting Post Hearing Schedule, the participants filed additional matter, closing, responsive and reply briefs. The evidentiary record closed September 8, 2003. The briefing record closed December 1, 2003.

EVIDENTIARY RULINGS

Exhibit 130#00002001 and 130E00002002, offered by OWRD, 130E00003001 through 130E00003020, offered by Claimants and 130E00004001 through 130E00004013 offered by the United States were received into the record without objection. Exhibits 130E00006000 through 130E00006056, which had previously been offered by Contestants Horsefly Irrigation District and Langell Valley Irrigation District were not received, as those contestants withdrew their contests.

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).

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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."

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 1995, when the property passed to the current claimant, 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, the declarant is unavailable. It is likely that the declarant is deceased. 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, the Largent's statement, Ex. 130E00002002 at 21, is based upon his recollection of circumstances spanning 45 years, and ending in 1966 when the statement was submitted. If the Largents 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 as early as 1921 the Largents saw the property being irrigated from the Klamath River.

Finally, the consequences of the decision in this case is of the utmost significance, at least as

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great as that in *Reguero*, and perhaps more so. The determination of this case will establish or dispense with the existence of a right appurtenant in the land in perpetuity.

Under the circumstances, I conclude that the hearsay evidence presented in this case for the period before 1995 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.

ISSUES¹

1. Whether flooding/sub-irrigation/natural overflow creates a valid water right.
2. Whether the record contains sufficient information to establish a vested pre-1909 claim.
3. Whether the evidence supports the total irrigated acreage included in the Place of Use.
4. Whether the diversion rate exceeds the amount of water that can be beneficially used at the Place of Use.
5. Whether there is sufficient evidence to support a period of use for irrigation outside of March 1 to October 31.

FINDINGS OF FACT

1. The land (the property) subject to the claimed water right includes 6 parcels totaling 40.6 acres as follows:

In the Southeast quarter of Section 18, T. 39 S., R. 9 E.W.M., that portion of Lot 11 west of Highway 97, 4.5 acres.

In the Northwest quarter of the Northeast quarter of Section 19, T. 39 S., R. 9 E.W.M., either part of Lot 7 west of the quarter-quarter line or Lot 8, 2.2 acres².

In the Northeast quarter of the Northeast quarter of Section 19, T.39 S., R. 9 E.W.M., Lot 7, 10.6 acres.

¹ Additional issues were raised by Contestants Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District, and Medford Irrigation District. Those contests were withdrawn prior to the hearing. Consequently, the additional issues asserted by those contestants will not be addressed further.

² The mapping is unclear, but there is a 2.2 acre parcel immediately west of the division line between the Northeast Quarter of the Northeast Quarter of Section 19, and the Northwest Quarter of the Northeast Quarter of Section 19. that is either part of lot 7 west of the quarter-quarter line or comprises the entirety of lot 8. The participants agreed that for the purposes of this order, such an alternative description would be acceptable. (Ex. 130E00002002 at 95, (Transcript at 32, 44.)

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In the Southeast quarter of the Northeast quarter of Section 19, T. 39 S., R. 9 E.W.M., Lot 6, 13.1 acres.

In the Southeast quarter of the Northeast quarter and the Northeast quarter of the Southeast quarter of Section 19, T. 39 S., R. 9 E.W. M., Lot 2, 10.2 acres³. (Ex. 130E00002002 at 95, Transcript at 31-32.)

Claimant Allen Moates holds the entire parcel, comprising 40.6 acres. (Direct Test. of Allen Moates, at 5; Ex. 130E00002002 at 75.)

Collins Products, LLC holds a portion of lot 10, comprising 2.1 acres, located in the East Half of Section 18, and the Northeast Quarter of Section 19, T. 39 S., R. 9 E.W.M. Although Collins Products, LLC has been treated throughout these proceedings as a proper claimant, the property held by Collins Products, LLC and listed as subject to the claim was not acquired from Richard S. Baldwin, but was transferred from Weyerhaeuser Company in 1996. (Ex. 130E00002002 at 75-81.) The property held by Collins Products was acquired by Weyerhaeuser Company from Ed Sutton and Mary J. Sutton in 1923, and was expressly excluded from the property conveyed to Richard S. and Florence Baldwin in 1960. (Ex. 130E00002002 at 38.) Richard S. Baldwin was the original claimant, but is not in the chain of title for the property now held by Collins Products, LLC.

2. The area in which the property was located was settled by 1858. At that time, the property was subject to annual flooding, and at least portions of it were considered to be within the meander of the Klamath River. (Ex. 130E00003004, 130E00003001 at 4.) The area was resurveyed in 1872, at which point almost all the property was considered to be outside the meander line. (Ex. 130E00003001 at 2, 4.) The lowest portions of the property may still have been wet enough to support tule and swamp grass throughout the year. (Ex. 130E00003005.)
3. On October 6, 1875 Lots 10, 11 and 7 of the property were listed in a federal patent as having been conveyed to James Tobin. (Ex. 130E000030014.)
4. In 1882 the same lots were listed in the Minutes of the Board of Commissioners of the State Land Board as having been reclaimed by John F. Miller.
5. In 1890, or shortly thereafter, a levy was built running generally southwest to northeast across the northern part of the property, to prevent the Klamath River from overflowing directly down Lost River Slough to Tule Lake during periods of high water. (Ex. 13 at 8.) That levy, presently referred to as the "Adams Levy," still exists, and has the effect of diverting river overflow onto

³ The original claim filed by Richard S. Baldwin was for 75 irrigated acres. Subsequently, the property was transferred to several parties. Lot 10, erroneously treated as subject to this claim, is held by Collins Products, LLC, which did not appear in these proceedings but relied upon the evidence in OWRD's file, now Ex. 130E00002002. The property now owned by Allan Moates, was stated at hearing to total 40.6 acres irrigated. (Transcript, at 30.)

the property. (Direct Testimony of Allan Moats, at 7, 8.) Until 1917, water flowed around the south end of the Adams Levy during periods of high water, flowing over the entire property before draining into Lost River Slough. (Direct Testimony of Allan Moates, at 8, Ex. 130E00003007.) Subsequently, (between 1917 and 1936, compare Ex. 130E00003008, 130E00003009.) a "control levy" was built, trending generally east-west across Lot 7, with an extension of Joe Wright Road running on top of it. A headgate has been placed through this levy to allow water to come into the southerly portion of the property. (Ex. 130E00003001 at 4, 130E00003003, Direct Test. of Allen Moates at 3.) The entire parcel has been under cultivation for grass and pasture, and been irrigated from the Klamath River. (Ex. 130E00002002 at 21.)

6. Water is diverted from the Klamath River through a ditch running across Lot 10 (pursuant to an easement with the present owners). in the SE ¼ SE ¼, Section 18, T 39 S, R 9 E. W. M. (Trans. at 35.) It then runs south across Lot 11 through ditches, and along the western face of the Adams Levy to the intersection of the Adams Levy and the Joe Wright Road control levy. It passes through the headgate in the Control Levy, and is conducted by ditches throughout the southern part of the property. As it passes through these ditches, water "subirrigates" (that is, soaks into the soil) into the adjacent area, providing moisture for growing pasture grass. During periods of high water, between October and March each year, the property north of the control levy and west of the Adams levy is subject to flooding. During this time, water soaks (or "subirrigates") through the soil under the Adams Levy and wets the part of the property to the east of that levy. Between March 1 and October 31, water flows from the Klamath River through the diversion point, filling ditches and ponds north of the Control Levy and West of the Adams Levy to the headgate through the Control Levy. Claimant Moates opens this headgate periodically beginning in March to allow water to flow to the remainder of the property. Water subirrigates from ditches throughout the property, providing moisture for grass and pasture. (Direct Test. of Moates, at 5.)

7. Water from the Klamath River was beneficially used for irrigation of grass for pasture on lots 2, 6, 7, 8,⁴ and 11 from October 6, 1875 through the present.

8. The appropriate rate, duty and season for all parcels subject to this claim are as follows:

RATE: 1/40 cfs/acre DUTY: 3.5 af/acre SEASON: January 1 to Dec. 1.

CONCLUSIONS OF LAW

1. Flooding/sub-irrigation/natural overflow creates a valid water right.
2. The record contains sufficient information to establish a vested pre-1909 claim respecting the property, with the exception of that portion of lot 10 presently held by Collins Products, LLC. The Collins Products, LLC property is not subject to this claim, and Collins Products, LLC is not

⁴ Or additional acreage in Lot 7, cf. fn 1, above.

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a proper claimant in these proceedings.

3. The evidence supports 40.6 acres to be included in the Place of Use.
4. The diversion rate allowed in the Preliminary Examination does not exceed the amount of water that can be beneficially used at the Place of Use.
5. There is sufficient evidence to support a period of use for irrigation outside of March 1 to October 31.

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) 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.

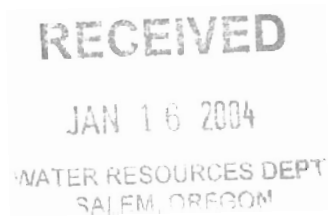
1. Flooding/sub-irrigation/natural overflow creates a valid water right.

In *Warner Valley Stock Company v. Lynch*, 215 Or 523 (1959), the court stated:

It should be emphasized that the objectors whose lands are irrigated by the waters from Hart Lake have acquired a vested right in waters of Warner Valley. By their original application of water to a beneficial use, subsequently recognized by the adjudication of 1929, the objectors acquired a right to irrigate 6,532.15 acres. These rights they still have. The fact that they no longer have the privilege of a natural overflow method of diversion does not mean that their right to the waters in Warner Valley exists only if the water in fact overflows Hart Lake.

Warner Valley Stock Company at 538.

The court in that case expressly stated that, notwithstanding the characterization of the natural overflow method as a *privilege*, the parties held *a vested right to the water*. That is precisely the issue presented here. While Claimant may no longer have the privilege to irrigate by natural overflow, as being a wasteful use of a scarce and fully appropriated resource, this does not mean that Claimant does not have a vested right to the water. I conclude that Natural Overflow irrigation can be the basis for a pre-1909 water right.



2. The record contains sufficient information to establish a vested pre-1909 claim respecting the property, with the exception of that portion of lot 10 presently held by Collins Products, LLC. The Collins Products, LLC property is not subject to this claim, and Collins Products, LLC is not a proper claimant in these proceedings.

The evidence establishes that the properties in question were seasonally inundated by the natural rise of the Klamath River. Between 1858 and 1875, the properties began to be cultivated, making use of this natural flooding to irrigate the land. By 1882, a significant portion of the property had been reclaimed.

In 1890, after a season of severe flooding, the Adams Levy was built to cut the flow of water from Klamath River down the Lost River Slough to Tule Lake. This diverted the water onto most of the property during seasonal high water. After 1909, a second "control" levy was also placed across the property, with a headgate to control the flow of water around the southern end of the Adams Levy. Given the statement of Mildred and Herbert Largent that the property was irrigated in 1921⁵ it is appropriate to infer that it was irrigated, either by inundation or subirrigation up to that date, at least.

A peculiarity of this case is the situation of Lot 10. Collins Products, LLC, owner of Lot 10, declined to appear in these proceedings, relying on the evidence in OWRD's file, included in the record as Ex. 130E00002001 and 130E00002002, to prove up that portion of the claim. However, closer consideration of that file shows that the property held by Collins Products, LLC was not in the chain of title from the original claimant, Richard S. Baldwin. Indeed, it was expressly excluded in the deed to the Baldwins. Instead, that property was transferred to Weyerhaeuser Company in 1923 by a predecessor in title to the Baldwins. As a result, although Collins Products, LLC has been treated as a proper claimant in these proceedings and Lot 10 has been treated as part of the claim, this was erroneous. The property owned by Collins Products, LLC is not subject to the claim filed by the Baldwins, and Collins Products, LLC is not a proper claimant in these proceedings⁶.

3. The evidence supports 40.6 acres to be included in the Place of Use.

Although the original claim was for 75 acres, Claimant Allen Moates conceded that this should be reduced to 40.6 acres. The evidence supports irrigation of at least this much property.

4. The diversion rate allowed in the Preliminary Examination does not exceed the amount of water that can be beneficially used at the Place of Use.

⁵ In 1966 the Largents stated that they had observed irrigation on the property "for a period of forty-five, 45, years."

⁶ This conclusion does not mean that there is no claim for a water right by Collins Products, LLC. However, any such claim would need to be considered in a different case, perhaps one in which Weyerhaeuser was the original claimant. That claim, if any, is not before me in this case.

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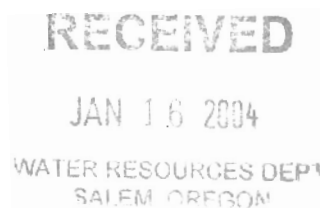
The diversion rate allowed by the Preliminary Examination is 1/40th cfs/acre. This is the standard rate established for this area, according to Appendix A of the Preliminary Evaluation. Although the Preliminary Examination allowed 49.5 acres and 1.24 cfs, the acreage subject to this claim has been reduced to 40.6 acres, and the total amount actually used should be reduced accordingly, to 1.02 cfs.

5. There is sufficient evidence to support a period of use for irrigation outside of March 1 to October 31.

According to Appendix A of the Preliminary Evaluation, the accuracy of which has not been challenged, the standard period of use for irrigation by water artificially diverted is March 1 through October 31. Claimant testified that he opens the floodgate on the Control Levy in March, and irrigates the property artificially from the diversion point throughout the season. However, the testimony also establishes that much of the property is flooded during periods of high water, and that this flooding naturally irrigates the property. According the Appendix A, noted in the Preliminary Evaluation, when property is subject to “natural irrigation” the season of use is considered to be “the period of use claimed” unless the evidence does not support that allowance. In this case, given the periodic flooding reported by the witnesses, the period claimed stated in the Preliminary Evaluation, January 1 to December 1, is supported in the evidence.

SUMMARY

A preponderance of the evidence establishes that the elements of a pre-1909 appropriation have been met respecting Claim 193, as provided in the Preliminary Evaluation, except as to the property designated as Lot 10, held by Collins Products, LLC, which is not properly part of this claim.



ORDER

I propose that the Adjudicator issue the following order:

Claim 193:

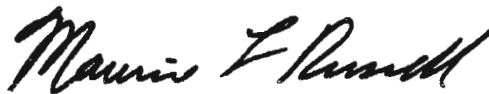
The claim shall be allowed as stated in the Preliminary Evaluation except as follows:

Lot 10, owned by Collins Products, LLC shall be deleted from the claim.

With respect to the property held by Allen Moates, described as Lots 2, 6, 7 8 and 11;

Use: Irrigation of 40.6 acres.

Amount Actually Beneficially Used: 1.02 cfs, measured at the point of diversion.



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

Dated: January 15, 2004

APPEAL PROCEDURE

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:

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Richard D. Bailey
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2004, 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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