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WATER RESOURCES DEPT
SALEM OREGON

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; 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; 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,

v.

Richard Taylor,
 Claimant/Contestant

PROPOSED ORDER

Case No. 132

Claim No. 199

Contest Nos. 11, 3410, 3831, and 4183

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 December 11, 1990 Cecilia Taylor (now deceased) and Richard Taylor submitted a Statement and Proof of Claim based upon use of water vested before February 24, 1909. The claim was filed for approximately 7.5 cubic feet per second (cfs) from one point of diversion located on Spring Creek, a tributary of Jenny Creek, for irrigation (7.44 cfs), stock (0.02cfs), and domestic uses (0.02 cfs). The claimed period of use was from April through October, with a claimed priority date of December 20, 1887.

On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin General Stream Adjudication, issued a Summary Preliminary Evaluation indicating potential approval of the claim for irrigation of 143.4 acres at a rate of 1/40th cfs/acre (3.59 cfs, measured at the point of diversion), less than the quantity of water claimed and for fewer acres than had been claimed. The Preliminary Evaluation stated a priority date of December 20, 1887, with a period of use from

Richard Taylor (132)

March 1 to October 31. The Preliminary Evaluation did not determine whether Mr. Taylor was entitled to a pre-1909 water right for domestic or stock uses because Mr. Taylor did not pay the fee necessary to establish those rights.

On April 7, 2000, the claimant, Mr. Taylor, filed contest 11 to the Preliminary Evaluation, contending that the acreage and the amount of water stated in the Preliminary Evaluation were incorrect. He also contested the Adjudicator's failure to address domestic and stock uses, contending that he had not withdrawn his claims for stock and domestic uses, but could not afford to pay the fee required to pursue those aspects of the claim.

On May 8, 2000, Klamath Project Water Users¹ (KPWU) filed Contest 3410 against the claim and against the Adjudicator's Preliminary Evaluation. On that same date the United States of America (United States) filed contest 3841 against the claim and against the Adjudicator's Evaluation. On May 8, 2000 the Klamath Tribes filed Contest 4183 against the claim and against the Adjudicator's Preliminary Evaluation. The Klamath Tribes withdrew Contest 4183 on February 13, 2003.

A prehearing conference was held on January 2, 2003. All participants filed prehearing statements and appeared at the prehearing conference, at which the participants agreed to a discovery schedule and dates for hearing.

Pursuant to a Notice of Hearing mailed to all participants by certified mail on August 1, 2003, a hearing was held September 16 and 17, 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. Taylor appeared and represented himself. The United States was represented by Stephen R. Palmer. The KPWU were represented by their attorney, Dan Kelly. The Water Resources Department (OWRD) was represented by Renee Moulun, an authorized agency representative. Richard Taylor, Patrice Ward, Clover Leonard, Stephanie Odom, Robert Taylor, William Miller, Frank Norris, Frank Beacham, Edward Botiller, Christine Miller, and Jerry Barry

¹ The entities and individuals comprising the Klamath Project Water Users are 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 Pritchard; 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. On November 28, 2000, Contestant Don Vincent informed the Adjudicator that he had sold his interest in property giving rise to his claims and this contest and was no longer a participant in this contested case. On June 24, 2002, Contestant Berlva Pritchard informed the Office of Administrative Hearings that she had sold her interest in property giving rise to her claims and contests and was no longer a participant in this contested case. On January 16, 2004 Contestant Klamath Hills District Improvement Co. withdrew its contest to this claim, without prejudice.

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were witnesses and testified on Mr. Taylor's behalf. Ralph Saunders and H. Loring Gurney testified on behalf of the United States.

The hearing record was held open until November 7, 2003 to allow Mr. Taylor an opportunity to obtain additional evidence that he had been unable to obtain from government archives before the hearing. The other participants were allowed until December 8, 2003 to file written objections to any additional evidence filed in this case and to file rebuttal evidence, including additional testimony, regarding any new evidence. After close of the hearing record in December 2003, the record remained open to permit Mr. Taylor to file a closing memorandum and to allow the Contestants and OWRD an opportunity to file written responses, to which all participants might reply.

The United States filed its Closing Brief and Response to Claimant's Closing Argument on April 29, 2004. OWRD filed its Response Memorandum on May 10, 2004. KPWU elected to not file written argument in this proceeding, relying on the memoranda filed by the other participants. Mr. Taylor was allowed until May 28, 2004 to file his reply to the responses filed by the other participants. He filed his written reply on May 27, 2004. In his reply Mr. Taylor asked that the hearing record be reopened. That request is hereby denied.

After the hearing record closed on May 27, 2004 the United States filed Objections to Claimant's Reply Brief, noting that an order directing that reply memoranda be limited to no more than ten pages had been made at the hearing. Mr. Taylor responded to that Objection, which I hereby overrule for the reasons stated in the February 5, 2004 Order Allowing Consideration of Richard Taylor's Exhibit 12 and Rescheduling Briefing Schedule.

EVIDENTIARY RULINGS

All evidentiary rulings were made on the record or in writing, except the following: (1) On March 4, 2004 OWRD filed a written objection to pages 1-18 and pages 21-25 of claimant's Taylor Ranch Closing Arguments, which was joined by KPWU. That objection is overruled. (2) Subsequently, the United States filed an Objection to Claimant's Reply Brief. That objection is overruled.

ISSUES

- (1) Whether there is sufficient evidence on the development of water in this place of use prior to February 24, 1909 to establish a vested pre-1909 water right;
- (2) Whether the record supports the rate, duty, actual use, points of diversion, seasonal limitations, capacity of the diversion works, or acreage claimed;
- (3) Whether the diversion rate exceeds what can be beneficially used at the Place of Use.
- (4) Whether the period of use for irrigation in the preliminary evaluation exceeds the period of use claimed and, if so, does OWRD have the authority to make such a change?

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FINDINGS OF FACT

(1) On December 21, 1887 Lewis A. Allen applied for a patent for 160 acres at E $\frac{1}{2}$ of the SW $\frac{1}{4}$ and W $\frac{1}{2}$ of the SE $\frac{1}{4}$, section 34 township 40S, Range 4E. Because the land was not suitable for cultivation, the patent was granted by purchase on April 4, 1896. (Taylor Exhibit 7.) The day before, on December 20, 1887, Mr. Allen had filed the following Notice of Water Right:

Notice is hereby given that the undersigned, a native born citizen of the United States, have this the 20th day of December A.D. 1887 located a water right described as follows: Commencing at a Spring at or near the center of Section 34 in Township 30 South of Range 4 East and running in a Southerly course crossing the center line of said Section running North and South twice or three times and terminating at Township line between 40 + 41 South of Range 4 East W.M. and that I intend to use said water for domestic, irrigating and milling purposes.

Dated this December 20th 1887

(OWRD Exhibit 1, page 23.)

(2) In June 1892 Coleman Noonan, one of Mr. Taylor's predecessors-in-interest, filed homestead application 7206 for Lot 1 and the S $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Section 4, Township 41S, Range 4E, containing 118.45 acres. Mr. Noonan had settled on that property on June 8, 1892 and quickly built a small house and started fencing the property. He started farming and over the next few years had cleared and cultivated about 15 acres including a small orchard, and used the remainder of the property for grazing. Mr. Noonan's patent was granted on July 13, 1897. (Taylor Exhibit 5.)

(3) In the early 1890s a ditch was dug from Spring Creek to irrigate the Noonan Ranch and additional property appurtenant to this claim. (OWRD Exhibit 1, pages 22-24). Within a decade or so, water was diverted from Spring Creek to irrigate the following property:

Township	Range	Section	Tract	Acres
40S	4E	33	N $\frac{1}{2}$ of SE $\frac{1}{4}$	7
			NW $\frac{1}{4}$ of SE $\frac{1}{4}$	28
			SE $\frac{1}{4}$ of SE $\frac{1}{4}$	35
41S	4E	3	NW $\frac{1}{4}$ of NW $\frac{1}{4}$	28
			SW $\frac{1}{4}$ of NW $\frac{1}{4}$	20
		4	NE $\frac{1}{4}$ of NE $\frac{1}{4}$	16
			SE $\frac{1}{4}$ of NE $\frac{1}{4}$	1

(Taylor Exhibit 2, document 6.)

(4) No further improvements or changes were made to the irrigation system from the early 1900s until the 1950s when a subsequent owner, Mr. Fox, expanded the ditching system and the land irrigated by water drawn from Spring Creek. (Taylor Exhibit 2, document 6.) Cecilia Taylor, now deceased, and her son Mr. Taylor, the claimant in this contested case, bought the ranch in

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1975 and have continued to expand and improve the irrigation system and the amount of land irrigated. (Taylor testimony.)

(5) The Taylor Ranch consists of approximately 317 acres of land in Klamath County, Oregon. (Taylor Exhibit 3, doc 12.) On December 11, 1990, Mr. Taylor filed a Statement and Proof of Claim for waters of Spring Creek, tributary to Jenny Creek, for irrigation of crops, stock and domestic purposes (Claim 199). He claimed sufficient water to feed 150-200 pair of cattle or 300 feeders, and 5-10 horses; irrigation of 7.44 cfs; and a priority date of December 20, 1887. He described the location of the point of diversion as the NW ¼, SE ¼, Section 34, Township 40S, Range 4E, and stated that the area of land for which the distribution system as originally constructed was intended to irrigate 152.5 acres. Mr. Taylor stated that the irrigation season began in April and went through November, but water for domestic, stock, and trout propagation uses was year-round. The application noted that water for irrigation was needed year-round because a 10" pipe needed to be kept full during winter months to prevent freeze damage. (OWRD Exhibit 1, page 5.)

(6) The legal description of the land appurtenant to Claim 199 was stated as:

PARCEL A: N½ of SE¼ : & SE¼ of SE¼ of section 33, Twnshp. 40S, Rng 4E;
PARCEL B: Govrnmnt. [sic.] lot 4; & SW¼ of NW¼ of section 3, Twnshp. 41S,
Rng. 4E

PARCEL C: NE¼ of NE¼: & S½ of NE¼ of section 4, Twnshp. 41S, Rng 4E,
Willamett [sic.] Meridian, Jackson County, Oregon.

(OWRD Exhibit 1, page 5.)

(7) On January 18, 1991 Mr. Taylor wrote a note to OWRD, which stated in relevant part:

* * * [A]fter considering or [sic.] financial position at this time, [we] will change our "Purpose for which water is used or claimed" to 7.5 cfs for irrigation only. This change should be noted and placed on record as a financial one and not one based on what we believe to be a rightful claim which would allow for stock and domestic use. This as we cannot afford the \$200.00 for each additional claim and believe this and absorbent [sic] fee for the additional .02 cfs additional uses. We therefor enclose \$272 for 171.1 acres irrigation * * *

(OWRD Exhibit 1, page 112.)

(8) Mr. Taylor has not paid any fees related to his claim for domestic or stock use.

(9) The property appurtenant to Claim 199 uses more than 3.38 cfs for irrigation during the growing season.

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CONCLUSIONS OF LAW

(1) There is sufficient evidence on the development of water in this place of use prior to February 24, 1909 to establish a vested pre-1909 water right for 135 acres.

(2) The record supports point of diversion located at NW¼, SE¼, Section 34, Township 40S, Range 4E, Willamette Meridian; a rate of 3.38 cfs; a duty of three and one half acre-feet per year; actual use of not less than 3.38 cfs; and irrigated acreage of not less than 135 acres.

(3) The diversion rate does not exceed the amount that can be beneficially used at the place of use.

(4) The period of use for irrigation in the preliminary evaluation impermissibly exceeds the period of use claimed.

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

Claimant has 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).

The United States maintained that the evidence did not establish any of the elements required to establish a pre-1909 water right. Mr. Taylor, an unrepresented claimant, filled the hearing record with pages of documentation, some of which was evidence, some of which was argument, and some of which was unintelligible. His claim covered significant property, some of which was owned by the United States, and much of the evidence more directly concerned properties that were not a part of his claim. To describe the evidentiary record as confusing does a disservice to the jumbled state of the record. Nonetheless, the greater weight of the persuasive evidence established the existence of a pre-1909 water right

The United States pointed out that the Notice of Water Right filed by Allen for a ditch in Section 34, T40S, R4E (OWRD Exhibit 1, pages 141-142) does not identify the place of use or the amount of water claimed in that Notice. The Allen homestead affidavit is difficult to decipher but establishes that the Allen claim was upon hilly land with poor quality, very rocky soil. (Taylor Exhibit 7, pages 20 and 21.) The supporting affidavit of his neighbor, Thomas Wright, established

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(in a more legible hand) that the land Mr. Allen owned was not considered fit for cultivation, except for less than two acres on the creek near Mr. Allen's house. (Taylor Exhibit 7, pages 14 and 15.) It seems likely, since he did not claim a lesser amount, that Mr. Allen sought to claim all the waters of Spring Creek with his Notice of Water Right.

The 1897 Noonan homestead is less problematic than the Allen property. Noonan's property was clearly suitable for farming and grazing and had been used for those purposes since June 1892, although cultivation of the property was limited to about 15 acres in 1897, as with the Allen property (Taylor Exhibit 5.)

Mr. Taylor does not contend that the Allen land was cultivated at the time of initial settlement, except in small areas. He contends, however, that shortly after settlement the land was irrigated to provide provender for stock and to allow the regular growth and harvest of hay, which can grow without "cultivation" so long as there is adequate water.

Mr. Taylor's deceased mother, who filed Claim 199 with him, showed unusual foresight in obtaining Mr. Wright's statement, which he wrote from firsthand knowledge. That February 1976 letter from George F. Wright, son of the Thomas Wright who bought the property and water right from Mr. Allen (Taylor Exhibit 4, document 2) was written by the same George F. Wright who filed an affidavit in support of Mr. Greive's homestead claim. The letter was especially persuasive on the issue of the ditch in place behind Mr. Taylor's house. (OWRD Exhibit 1, page 22; Taylor Exhibit 3, doc 9.) It is worth noting that according to testimony he gave in Mr. Grieve's patent application, Mr. Wright was 29 years old in October 1926. He was, therefore, born not later than 1897 and was competent to testify to the pre-1909 status of the land in question from personal knowledge as well as from the hearsay statements he would have overheard during his youth. (Taylor Exhibit 5.)

According to Mr. Wright, the ditch behind Mr. Taylor's house was used for irrigating the ranch years before 1909, using water from Spring Creek. He described the water coming by ditch from Spring Creek down the hill and crossing Jenny Creek in a flume at the upper end of the ranch, then in the ditch down to the house. He noted that Mr. Fox laid pipe to replace the ditch in the 1960s, emphasizing personal knowledge of continuous use of the ditch from the earliest days of the 1900s to the present.

Mr. Wright's written statement established that the water right claimed by Mr. Allen on December 20, 1887 was put to beneficial use within a reasonable time after the Notice was published, and that water was actually diverted and applied to beneficial use prior to 1909. To the extent that Mr. Taylor's claim derives from the right claimed by Mr. Allen, he has met his burden of proving a priority date for Claim 199 of December 20, 1887.

POINT OF DIVERSION. No party contested Mr. Taylor's claim of the point of diversion's location at the NW $\frac{1}{4}$, SE $\frac{1}{4}$, Section 34, Township 40S, Range 4E, Willamette Meridian.

PLACE OF USE. The record regarding use of water on the properties affected by Claim 1999 is more difficult to interpret than the record regarding the priority date. The United States, while not conceding that the record establishes any pre-1909 use, contends that the record cannot possibly

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be interpreted as supporting a pre-1909 water for more than 95 acres. Mr. Taylor contends that the record establishes water use for the entire acreage claimed, an amount nearly double that. The controlling statute, ORS 539.010, states, in part:

- (3) Nothing contained in the Water Rights Act (as defined in ORS 537.010) shall affect relative priorities to the use of water among parties to any decree of the courts rendered in causes determined or pending prior to February 24, 1909.
- (4) The right of any person to take and use water shall not be impaired or affected by any provisions of the Water Rights Act (as defined in ORS 537.010) where appropriations were initiated prior to February 24, 1909, and such appropriators, their heirs, successors or assigns did, in good faith and in compliance with the laws then existing, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecuted such work diligently and continuously to completion. However, all such rights shall be adjudicated in the manner provided in this chapter.
- (5) The director shall, for good cause shown upon the application of any appropriator or user of water under an appropriation of water made prior to February 24, 1909, or in the cases mentioned in subsections (2) and (4) of this section, where actual construction work was commenced prior to that time or within the time provided in law then existing, prescribe the time within which the full amount of the water appropriated shall be applied to a beneficial use. In determining said time the director shall grant a reasonable time after the construction of the works or canal or ditch used for the diversion of the water, and in doing so, the director shall take into consideration the cost of the appropriation and application of the water to a beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demands therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment. For good cause shown the director may extend the time.
- (6) Where appropriations of water attempted before February 24, 1909, were undertaken in good faith, and the work of construction or improvement thereunder was in good faith commenced and diligently prosecuted, such appropriations shall not be set aside or voided in proceedings under this chapter because of any irregularity or insufficiency of the notice by law, or in the manner of posting, recording or publication thereof.

ORS 539.010.

Given the poor soil quality and the uneven terrain, I am convinced that Mr. Taylor's predecessors-in-interest, including Mr. Allen, intended to irrigate as much of the property included in Claim 199 as possible. Mr. Wright's statement, referred to above, shows that water was appropriated and works begun long before the February 24, 1909 date. The question is what water

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was appropriated or contemplated to be appropriated and what works were completed or diligently prosecuted before February 24, 1909. OAR 690-028-0045 provides guidance on this issue. That rule states:

- (1) The complete beneficial use of all the water for a proposed purpose does not have to be made in its entirety prior to February 24, 1909, to claim a vested water right. All persons, including persons who acquire formerly reserved land shall be allowed to develop their claim with reasonable diligence.
- (2) Reasonable diligence in the construction of the system of works necessary to fully accomplish appropriation of the water does not require unusual or extraordinary effort. Reasonable diligence is that which is usual and ordinary with persons performing similar projects. The water user must demonstrate a genuine intent to complete the appropriation in a timely manner. The question is one of fact, to be determined from the circumstances on case-by-case basis.

OAR 690-028-0045

I note that Mr. Taylor points to development and diligence by "every owner" in various documents he filed in this contested case. "Reasonable diligence" under the statute and rule does not and cannot include ongoing efforts nearly a century after the asserted right. While evidence of recent improvements may be helpful in determining past use, the notion of appropriation in a timely manner does not permit holders of putative water rights to delay development indefinitely.

The greater weight of the persuasive evidence established that Spring Creek was an active source of irrigation by all of Mr. Taylor's predecessors-in-interest. (OWRD Exhibit 1, page 22; Taylor exhibit 8, page 3.) The greater weight of the persuasive evidence also established the existence of a ditch diverting water from Spring Creek to irrigate properties appurtenant to Claim 199 sometime in the early 1890s. The obvious use for such a ditch was to move water from Spring Creek to the present-day Taylor Ranch. As Mr. Taylor testified:

MR. TAYLOR: There is nothing to irrigate until that ditch hits our ranch. There is a little portion of government land just before it hits the ranch, and then there is the ranch. Spring Creek to the east is only about 50 feet away to 150 feet away. There is no reason irrigate that land. It's all timberland. The purpose that ditch would be to irrigate something. Otherwise, they wouldn't have been purchasing it or diverting it. When they transferred the deeds —

THE HEARING OFFICER: "They" being?

MR. TAYLOR: The predecessors to the Greives and Greives to Noonan, they presented not only a right of way, but the right of the use of 300 inches of water. That use would have to be for something. There is no other purpose to acquire that right except to use it. We know that there is a ditch dug and a water right of way through what was once known as the Wright, or the Lewis A. Allen property heading south, and you needed to have that right of way. He reserved it, even when

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he sold the land to a Doughty, and he sold the rights separately from the land to a Wright, and then a Wright to a Greives, and then Greives transferred the rights to Noonan, which owned the ranch, and this was all done prior to 1899.

(Taylor Cross-examination Tr. 268 and 269).

That testimony, although not based on first-hand knowledge (the acts occurred more than 100 years ago) or the historical record, is a common sense statement regarding the commitment of time, labor and money necessary to dig the ditch, the existence of which is confirmed by the September 25, 1899 Greive family transfer to Mr. and Mrs. Noonan of the following:

The right of way for the ditch now built across the lands formerly owned by the [Greives], in Section Thirty-four (34) Township Forty (40) South of Range Four (4) East of the Willamette Meridian and the use of three hundred (300) inches of water; which said right of way and water were reserved in a certain deed made by the grantors herein to Benjamin Doughty of Oshkosh Wisconsin.

(Taylor Exhibit 3, document 5 pages 4 and 6.)

The existence of the ditch prior to 1909 is further confirmed by the 1951 application for water permit affecting what is now the Taylor Ranch, which includes a statement by the applicant, Mr. McGregor, that the 2½ mile ditch "is perhaps 1/3 size of original ditch" and that it "has been in operation and use for some 50 years." (Taylor Exhibit 2, document 6.)

Although the presence of an irrigation system and beneficial use of water was established by these Mr. Taylor's documents, the extent of the irrigation system and beneficial use prior to February 24, 1909 was more difficult to ascertain. Determining the circumstances of the Taylor Ranch on and after that crucial date may best be determined by reference to acts of subsequent owners who formalized and updated water rights Mr. Taylor claims in this proceeding.

Mr. McGregor's 1951 application for permit 20466 to provide water to irrigate grain, hay and grass was referenced above, and shows the existence of the ditch for the previous 50 years or so. That application showed irrigation of approximately 135 acres. (Taylor Exhibit 2, document 6.)

In November 1956 Mr. Fox, who had bought the Taylor Ranch in the early 1950s, filed a request for an extension of time regarding water permit 21416, in which he had applied for water of Jennie Creek to supplement waters of Spring Creek while he replaced a portion of the Spring Creek ditch with a siphon.² The application included a request for irrigation of 135 acres. In the request for extension Mr. Fox reported that he had constructed 1¼ miles of ditch, a reservoir, and had used water on 127 acres under this permit application and under application 29537. (Taylor Exhibit 2, document 6.)

² There is an earlier Application for Extension of Time dated September 22, 1953, but the copy in the record is unintelligible.

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In October 1963 Mr. Fox applied for an extension of time regarding a water permit 27413. In this request for an extension he reported that he had constructed approximately 1,500 feet of the main ditch and approximately 3,000 feet of lateral ditches, and had cleared approximately 10 acres of brush land to be irrigated. He also reported that he had irrigated approximately 60 acres under that permit. I understand that statement to mean 60 acres that had not previously been irrigated based upon an undated letter from the State Engineer to Mr. Fox indicating that not all the land had been irrigated at their last conversation in 1965. (Taylor Exhibit 2, document 6.)

I infer from my review of all the evidence,³ that it is more likely than not that Mr. Fox substantially improved the irrigation system that had been in place for more than 50 years and that the amount of land irrigated before 1950 was not more than 135 acres. The circumstances suggest that Mr. McGregor did not make significant improvements to the irrigation system when he applied for permit 20466, but that he did make significant expenditures to maintain the irrigation system around 1950 and sought protection for a water right that had not previously been documented. The finding regarding the places of use reflects the items stated in Mr. McGregor's current places of use.

DIVERSION RATE.

The United States asserted that Mr. Taylor presented no evidence of the actual rate and duty of water used for irrigation. Mr. Taylor credibly testified (and the documentary record reflects, *see generally* OWRD Exhibit 1, pages 47-59) that flow from Spring Creek at the point of diversion is approximately 7.5 cfs. Mr. Taylor provided expert evidence regarding his water needs, establishing his peak irrigation flow needs of 15 cfs for 300 acres of pasture. (Taylor Exhibit 2, document 7.) That amount may be reduced proportionally to establish the rate for the 135 acres for which a pre-1909 water right was established, roughly the 3.38 cfs claimed by Mr. McGregor in his 1951 permit application. (OWRD Exhibit 1, page 17.) This amount almost exactly equals the amount to which he would be limited by OWRD's Appendix A of $1/40^{\text{th}}$ of one cubic foot per second for each acre irrigated. ($1/40^{\text{th}}$ of 1 cfs per acre x 135 acres = 3.375 cfs.). Although the United States' contest included an assertion that the diversion rate exceeded the amount that could be beneficially used at the place of use, the evidence overwhelmingly established that the Taylor Ranch uses that amount and more for irrigation.

DUTY. The Standard Duty under Appendix A is three and one half acre-feet for each acre irrigated. Mr. Taylor testified that his ranch has higher irrigation needs than are standard within the Klamath Basin so that his duty should be increased. Despite his persuasive testimony, the expert evidence he presented (Taylor Exhibit 2, document 7) established no higher duty than would be established under the standard adopted by OWRD. He has not met his burden of proving that he is entitled to a higher duty.

³ Expert evidence provided by the United States was of little help in determining what property was actually irrigated or could have been irrigated before expansion of the irrigation system in the 1960s and thereafter.

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PERIOD OF USE. When Mr. Taylor filed his claim he reported that the irrigation season began and ended "April through October." He also reported that the "10" PIPE NEEDS TO BE KEPT FULL DURING WINTER MONTHS TO PREVENT FREEZE DAMAGE." The Preliminary Evaluation awarded a period of use for irrigation of "March 1 - October 31," expanding the period of use by one month from the period claimed.

OWRD now argues that neither the Adjudicator's recommendation in the Preliminary Evaluation⁴ nor Mr. Taylor's testimony may amend this claim to establish or assert a longer season of use than was claimed in the Statement and Proof of Claim. The Department correctly points out that ORS 539.210 and OAR 690-030-0085 prohibit amendments that expand a claim. By attempting to amend his claim for a longer period of use, Mr. Taylor is effectively making a new claim – outside the claim period – and therefore contrary to the time limits or in the manner required by law. ORS 539.210 states, in part:

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.

OWRD's position is buttressed by its rule, which clearly prevents amendment of the claim at this late date. OAR 690-030-0085 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 permissible season of use for irrigation begins no earlier than was claimed by Mr. Taylor when he filed his claim, April 1 of each year.

WITHDRAWAL OF CLAIM FOR STOCK AND DOMESTIC USES. Mr. Taylor's Statement of Contest asserts that the amount of water, the purposes for which water was allowed, and the acreage recommended in the Preliminary Summary Evaluation were incorrect and that claim should be allowed as originally filed: for a total 175.1 acres for irrigation and for domestic purposes and stock. He contended that he had not withdrawn claims for stock and domestic uses, but was unable to afford to pay the fee required to pursue those aspects of the claim. The controlling statute, ORS 539.210, states in relevant part:

⁴ Appendix A, The Department's "Standards for Rates, Duties and Seasons of Use Within Previously Unadjudicated Areas of the Klamath Basin" is the result of the studies conducted and hearings held regarding the appropriateness of those limitations. (OWRD Exhibit 1 pgs. 255-256.) As such, it is persuasive evidence of the appropriate season of use for all claims in the Klamath Basin Adjudication. The standard season of use for irrigation each year begins March 1. Appendix A was the apparent source of the Adjudicator's recommendation.

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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**. Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant. * * *

(Emphasis added.)

The provisions of ORS 539.081 in effect when Mr. Taylor filed the Statement and Proof of Claim on December 11, 1990, stated in relevant part:

(1) At the time the owner or registrant submits a registration statement under ORS 539.240 or, if a registration statement is not filed, when a statement and proof of claim is filed pursuant to notice by the Water Resources Director under ORS 539.030, the owner or registrant shall pay a fee as follows:

(a) If for irrigation use, \$2 for each acre of irrigated lands up to 100 acres and \$1 for each acre in excess of 100 acres. The minimum fee for any owner or registrant for irrigation use shall be \$30.

(b) If for power use, \$2 for each theoretical horsepower up to 100 horsepower, 50 cents for each horsepower in excess of 100 up to 500 horsepower, 35 cents for each horsepower in excess of 500 horsepower up to 1,000 horsepower and 25 cents for each horsepower in excess of 1,000 horsepower, as set forth in the proof. The minimum fee for any owner or registrant for power use shall be \$200.

(c) If for mining or any other use, \$200 for the first second-foot or fraction of the first second-foot and \$50 for each additional second-foot.

* * *

(3) If the registration statement shows that the water right was initiated by making application for a permit under the provisions of ORS chapter 537, the owner or registrant shall be given credit for the money paid as examination and recording fees. A credit under this subsection shall be allowed only if the application under ORS chapter 537 was for a permit to appropriate water to be applied to the same parcel of land or for the same use as set forth in the registration statement.

* * *

(5) Claimants in any adjudication proceeding initiated before September 27, 1987, shall be subject to fees set in subsection (1) of this section. Such fees shall be

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payable at the time of submission of proof of appropriation, or at the time of taking testimony for determination of the rights to the use of the water of a stream.⁵

Former ORS 539.081; *see also* 1989 Oregon Laws Ch. 691, §8. (Emphasis added.)

Mr. Taylor forcefully argues that his "exclusion" of domestic and stock claims because he could not afford to pay required fees did not result in "relinquishment" of those claims and that this adjudication is required to determine his right to those claims despite his failure to pay required fees. Issues raised by Mr. Taylor regarding nonpayment of fees were decided against his position shortly after the 1909 Water Act went into effect. In *Pacific Livestock Co. v Cochran*, 73 Or 417 (1914), the court determined that requiring payment of fees by claimants of water rights as a condition precedent to their right to having claims adjudicated did not deprive claimants of due process or violate equal protection rights guaranteed under the Constitutions of the State of Oregon and of the United States. That judicial determination, which the legislature has had ninety years to correct had it not reflected the legislature's intent, effectively answers all of Mr. Taylor's arguments regarding this issue.

Mr. Taylor's other arguments regarding his "excluded" claims present such a hodgepodge as to prevent effective discussion. Addressing his two main points, Mr. Taylor has made no claim of riparian rights, and patents issued to his predecessors-in-interest conveyed no right to the use water. *See California Oregon Power Company v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935); *Hough v. Porter*, 51 Or 382 (1908).

Mr. Taylor did not contend and the evidence did not establish that he paid required fees for consideration of his domestic and stock claims "at the time and in the manner required by law." He is now "barred and estopped" from asserting any rights for which required fees were not paid. Under the statute, Mr. Taylor has forfeited his right to claim a pre-1909 water right for domestic and stock purposes.

ORDER

I recommend that 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:

The elements of a pre-1909 right are established for Claim 199 and the claim is approved as follows:

POINT OF DIVERSION: NW¼, SE¼, Section 34, Township 40S, Range 4E, Willamette Meridian.

⁵ Although this provision of the statute was deleted in 1993, the Klamath Adjudication was initiated in 1975, *see U.S. v. State of Oregon*, 44 F.3d 758, 762, (9th Cir. 1994), so it was in effect at the time this claim was filed.

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SOURCE: Spring Creek, tributary to Jenny Creek.

USE: irrigation of 135 acres.

RATE: 3.38 cubic feet per second, measured at the point of diversion.

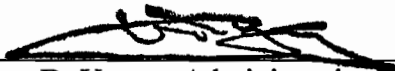
DUTY: 472.5 acre feet.

PERIOD OF USE: April 1 through October 31 of each year.

PRIORITY DATE: December 20, 1887

PLACE OF USE:

Township	Range	Section	Tract	Acres
40S	4E	33	N $\frac{1}{2}$ of SE $\frac{1}{4}$	7
			NW $\frac{1}{4}$ of SE $\frac{1}{4}$	28
			SE $\frac{1}{4}$ of SE $\frac{1}{4}$	35
41S	4E	3	NW $\frac{1}{4}$ of NW $\frac{1}{4}$	28
			SW $\frac{1}{4}$ of NW $\frac{1}{4}$	20
		4	NE $\frac{1}{4}$ of NE $\frac{1}{4}$	16
			SE $\frac{1}{4}$ of NE $\frac{1}{4}$	1


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

Date: August 24, 2004

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 Administrative Law Judge. 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.

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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:

Richard D. Bailey
Klamath Basin Adjudication
Oregon Water Resources Dept
725 Summer Street N.E., Suite "A"
Salem OR 97301

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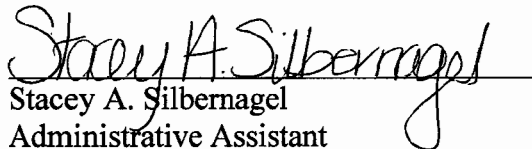
CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2004, I sent 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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