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**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

PROPOSED ORDER

United States of America,
Contestant

Case No. 133

v.

Claim: 200

Kathleen D. Walt; Jennifer J. Walt;
Claimants/Contestants.

Contests: 31, 3411,¹ 3842, and
4184²

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 January 30, 1991, Harold R. Walt (predecessor-in-interest to claimant Jennifer J. Walt) and Kathleen D. Walt filed claim 200 based upon a right to use of water commenced prior to February 24, 1909. The Claim is for a total of 1.3 cubic feet per second (cfs) from two points of diversion located on Keene Creek, Jenny Creek, and unnamed tributaries, which are tributary to Jenny Creek, for irrigation of 104 acres and stock and domestic use. The claimed period of use is April 1 through October 31 for irrigation, with a claimed priority date of 1902.

On October 4, 1999, the Adjudicator of the Klamath Basin General Stream Adjudication, Richard D. Bailey, issued a preliminary evaluation and recommendation regarding the claim based upon the information available at the time. That preliminary evaluation recommended denial of the right claimed, finding that although use of water or construction of works for the application of water occurred around 1900, the record did not contain evidence of completion of works within a reasonable time after commencement of the construction of works or the use of water.

¹ 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.

² On February 13, 2003, the Klamath Tribes withdrew, without prejudice, Contest No. 4184.

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On April 21, 2000, Jennifer J. Walt filed Contest 31 against the Adjudicator's preliminary evaluation of the right claimed. On May 8, 2000, the United States of America (United States) filed contest 3842 against the right claimed, amending that contest on October 3, 2003. On May 8, 2000, the Klamath Tribes filed contest 4184 against the right claimed, withdrawing that contest on February 13, 2003, without prejudice. On May 8, 2000, the individuals and entities commonly referred to as the Klamath Project Water Users³ (KPWU) filed contest 3411 against the right claimed, withdrawing that contest on April 1, 2004.

PROCEDURAL MATTERS

The Water Resources Department (OWRD) referred this matter to the Office of Administrative Hearings (OAH) for a contested case hearing. A prehearing conference was held on March 17, 2003. The participants filed prehearing statements and appeared at the prehearing conference, at which they agreed to a discovery schedule and to a date for the hearing.

Pursuant to a Hearing Notice mailed to all participants by certified mail on October 23, 2003, a hearing was convened on December 16, 2003 for the purpose of admitting evidence into the record and cross-examining witnesses whose direct testimony had previously been filed and whose availability had been requested for cross-examination. The participants took part in the hearing by telephone. William D. Young, Administrative Law Judge, presided. Ms. Walt was represented by her attorney, Michelle Rudd. The United States was represented by Assistant Regional Solicitor, Stephen R. Palmer. The KPWU were represented by their attorney, Dan Kelly. OWRD was represented by Renee Moulun, an authorized agency representative.

ALJ Young held the record open to allow the participants an opportunity to provide written arguments. Claimants filed their Closing Argument on February 2, 2004. The United States filed its Closing Brief and Response to Claimants' Closing Argument on May 13, 2004. Claimants' Reply was filed on June 4, 2004. The record closed the record on that date.

Subsequent to that time, and prior to this proposed order being prepared, ALJ Young retired. Michael Andrew Francis from the Office of Administrative Hearings was assigned to prepare this order based on the review of the record as a whole.

EVIDENTIARY RULINGS

"Although some of the participants had identified individuals to be cross-examined at the time scheduled for hearing the parties were prepared to establish the factual circumstances of the right claimed by stipulation and agreed that cross-examination of witnesses was unnecessary. OWRD, which had not taken part in discussions regarding the stipulation, was allowed until January 2, 2004 to file any objections to the proposed stipulation. On December 31, 2003,

³ The KPWU is comprised of 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.

OWRD informed the OAH that it did not object to the stipulation agreed to by the parties. Based upon the agreement of all parties and the lack of objection by any participant, Judge Young accepted the stipulation.

Before the scheduled hearing the participants identified certain documents as evidence: a copy of OWRD's claim (OWRD exhibit 1); the direct testimony and affidavit of Jennifer Walt (Walt testimony); the direct testimony and rebuttal testimony of Kevin Hatfield (Hatfield testimony); the direct testimony of Mark Boyden (Boyden testimony); the Walt discovery response to the United States (Discovery Response); and the direct and rebuttal testimony of H. Loring Gurney (Gurney Direct and Gurney Rebuttal). The stipulation did not resolve all issues scheduled for hearing. Judge Young admitted each of these exhibits, without objection.

In their Closing Argument of Claimants Jennifer Walt and Kathleen Walt, the Walts objected to evidence offered by the United States, including Gurney Direct and Gurney Rebuttal. Those items had been admitted into evidence at the time scheduled for hearing. The objection is overruled as untimely and the stated grounds related to the qualifications of the witness will be considered only in determining the weight to be given his testimony.

ISSUES

- (1) Did Claimants prove the required pre-1909 elements for Claim 200 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) Does the acreage in the claimed Place of Use exceed the irrigated acreage supported by the evidence?

The parties to the stipulation agreed to limit the issues as follows:

- the priority date for the use of water under Claim No. 200 is no earlier than 1902 and no later than 1908,
- the acreage irrigated is no less than 14 acres and no more than 58 acres, and
- whether the development of acreage in excess of 14 acres occurred with reasonable diligence pursuant to a comprehensive plan of development completed within a reasonable time.

PROCEDURAL FINDINGS OF FACT

1. The Walts filed their Statement and Proof of Claim in this adjudication on January 29, 1991. (OWRD Ex. 1, 133E00020001 at 19-23.) On October 4, 1999, the Adjudicator issued his Preliminary Evaluation of Claim No. 200 and found that the use of water or construction of works for the application of water occurred circa 1900. The Adjudicator preliminarily denied the claim, however, finding that the record at that time did not contain evidence of completion of

works within a reasonable time after commencement of construction or use of water. (OWRD Ex. 1, 133E00020001 at 167-168.)

On April 8, 2000, the Walts filed Contest No. 31 to Claim No. 200, contesting the Adjudicator's Preliminary Evaluation with respect to the Adjudicator's preliminary disapproval of the claim. (OWRD Ex. 1, 133E00020001 at 95.) On May 3, 2000, the United States filed its Statement of Contest, Contest No. 3842. (OWRD Ex. 1, 133E00020001 at 150.) On May 4, 2000, KPWU filed its Statement of Contest, Contest No. 3411. (OWRD Ex. 1, 133E00020001 at 102.)

The KPWU contest alleged insufficient evidence for the right claimed and that the required elements were not established for the claim. (OWRD Ex. 1, 133E00020001 at 104.) The United States' original contest alleged that the total acreage in the place of use exceeded the irrigated acreage supported by the evidence. (*Id.* at 151.) The United States filed an amended contest on October 6, 2003. (Amended Statement of Contest of Claim and/or Preliminary Evaluation of Claim (filed October 3, 2003).) The United States' amended contest alleged that the total acreage in the place of use exceeds the irrigated acreage supported by the evidence and that the claimed priority date is not supported by the evidence. Neither contestant challenged the claimed use for domestic purposes and watering of livestock.

The United States, the Walts, and KPWU filed notices of intent to cross-examine witnesses. (Notice of Intent to Cross-Examine Witnesses, 133F00050008; United States' List of Witnesses, 133F00040006; List of Claimants' Witnesses to be Cross-Examined at Hearing by Klamath Project Water Users, 133F00030003.) These parties agreed by stipulation to forgo the cross-examination hearing. (Stipulation of Claimants Walt and Contestants United States and Klamath Project Water Users Concerning Contests to Claim 200 (filed Dec. 15, 2003).) The OWRD filed Oregon Water Resources Department's Position Regarding Stipulation of Claimants Walt and Contestants United States and Klamath Project Water Users Concerning Contests to Claim 200 on December 31, 2003, providing that it had no objection to the stipulation's terms provided that briefing allowed for the final terms of Claim 200 to be determined with greater specificity.

Preliminary Matters.

The place of use that is the subject of Claim No. 200 is commonly referred to as the Box D Ranch (the "Property"). The Property is located in Jackson County, Oregon, Township 40S, Range 4E, Section 17, SE $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, and SE $\frac{1}{4}$ NE $\frac{1}{4}$ (OWRD Ex. 1, 133E00020001 at 21). While the bulk of the water is used to irrigate pastures, water on the Property is used for domestic purposes, irrigating the pasture and hay and other crops, and watering the livestock. (Direct Testimony of Jennifer Walt, 133F00050004 at 2-3.) There are approximately 119 pair of cattle (238 head), seven bulls and as many as 20 horses currently on the Property. (*Id.*) In the easternmost end of the valley, water is used to irrigate lawns, trees, shrubs, etc. around the ranch house. (*Id.*) The amount of water used or necessary for each claimed use totals 1.3 cubic feet per second (cfs).

On the Merits.

- I. Documents in the record indicate that Springsteen arrived in Oregon around 1898, settled on the Property, and began appropriating water no later than 1902.

1. As the court held in *Oliver v. Skinner and Lodge*, 190 Or 423, 436-37, 226 P2d 507 (1951), “[t]he scope of the first appropriation is the measure of the right.” As noted in the direct testimony of historian Kevin Hatfield, Springsteen arrived in the Greensprings district of Jackson County, Oregon from Dowagiac, Michigan in or around 1898. (Direct Testimony of Kevin Hatfield, 133F00050006 at 7; Twelfth Census: Population Schedule, Michigan, 1900, LDS Family History Center, Eugene, OR, 133E00050033 at 0060; Thirteenth Census: Population Schedule, Michigan, 1910, U.S. Bureau of the Census, Manuscript Census Returns, 133E00050034 at 0065.) Springsteen likely immigrated within a broader kinship and community network of Michigan loggers attracted by the employment opportunities of the lumber industry along the old Applegate Trail route. (Expert’s Report, 133E00050081 at 240; Anne E. Foley, “On the Greensprings,” Ashland: Friends of the Greensprings (1994), 133E00050072 at 0172.)

2. Springsteen’s father, Henry, had operated a small family farm in Michigan, and the evidence suggests that Springsteen applied his agricultural experience soon after reaching Oregon. (Expert’s Report, 133E00050081 at 240; Jackson County Assessment and Tax Rolls, 1910, Jackson County Archives, White City (Ralph H. Springsteen) [digital image], 133E00050012 at 0033; Jackson County Assessment and Tax Rolls, 1911, Jackson County Archives, White City (Ralph H. Springsteen) [digital image], 133E00050013 at 0034; Tenth Census: Population Schedule, Michigan, 1880, U.S. Bureau of the Census, Manuscript Census Returns, 133E00050031 at 0057; Thirteenth Census: Population Schedule, Oregon, 1900, U.S. Bureau of the Census, Manuscript Census Returns, 133E00050035 at 0070.)

3. John Henry Miller stated in his affidavit that Springsteen told him that Springsteen had lived on the Property since approximately 1900. (OWRD Ex. 1, 133E00020001 at 6.) Goldie Miller stated in her affidavit that she had been told by her father that Springsteen was using his main irrigation ditches to irrigate the valley by 1905. (OWRD Ex. 1, 133E00020001 at 99.) The testimony of John and Goldie Miller establishes Springsteen’s early 1900 occupancy and water appropriation.

4. Springsteen filed a Notice of Settlement with the Jackson County Recorder on December 14, 1907. (Direct Testimony of Kevin Hatfield, 133F00050006 at 4.) Despite the official filing date of December 14, 1907 in the Notice, the evidence and historical context indicate that, consistent with the affidavits, Springsteen likely settled on this tract several years earlier, and the Notice functioned as a memorialization of a preexisting relationship between a prospective buyer and seller. (Direct Testimony of Kevin Hatfield, 133F00050006 at 8.) The testimony presented by Springsteen in the Notice—corroborated by two witnesses—implied earlier occupancy and asserted that as of December 14, 1907, Springsteen had actually located, settled upon, and begun to improve the land. (Direct Testimony of Kevin Hatfield, 133F00050006 at 8.) Moreover, the timing of the Notice reflected a larger regional trend precipitated by pending federal litigation against the Oregon and California Railroad Company

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("OCRC"), rather than the personal circumstances of Springsteen. (Direct Testimony of Kevin Hatfield, 133F00050006 at 8.)

II. The historical context indicates that Springsteen settled on the Property and began water appropriation no later than 1902.

1. In 1866 and 1869, Congress approved legislation that would ultimately grant the OCRC more than 4.2 million acres in western Oregon, to subsidize the construction of a rail line from Portland to the Oregon-California border. (Direct Testimony of Kevin Hatfield, 133F00050006 at 8; 14 Stat., 239 (July 25, 1866); 15 Stat., 80 (July 25, 1868); 16 Stat., 41 (April 10, 1869).) The pledged grant lands included 10 miles of alternate sections (odd numbers) paralleling each side of the planned track. (Expert Report, 133E00050081 at 240.) Construction was stalled by financial troubles, however, at Roseburg in 1872 and again at Ashland in 1884. (*Id.*) The Southern Pacific Railroad Company (the "SPRC") acquired the floundering OCRC in 1887 and completed the "O&C Route" to the California border that year. (*Id.*) The 1869 Act stipulated that the continued transfer of grant lands to corporate ownership was contingent on the actual mileage of track constructed. (Direct Testimony of Kevin Hatfield, 133F00050006 at 8.) Therefore, the completion of the 360-mile line in 1887 "earned" the SPRC the remainder of its pledged grant lands through the subsidiary OCRC. The conveyance of patents on these final grant lands in southwestern Oregon to the nominal OCRC continued into the early 20th century, as illustrated by the Springsteen tract, which did not transfer from the United States to OCRC until December 1902. (*Id.*) After its acquisition by the SPRC, the OCRC resumed the processing of administrative matters as a "non-operating subsidiary" until January 3, 1927. (*Id.*, Ex. 2, Robert Bradley Jones, "One by One: A Documented Narrative Based upon the History of the Oregon & California Railroad Land Grant in the State of Oregon," at 3-19, *The Source Magazine* (Marylhurst, Or 1973), at 1-19, Ex. 3, Bert & Margie Webber, *The Siskiyou Line* at 9-82 (Medford, Or: Webb Research Group Publishers 1997), at 1-36; Ex. 3, Ed Austin & Tom Dill, *The Southern Pacific in Oregon* 133F00050006, at 8-29, 248-76 (Edmonds, Wash: Pacific Fast Mail 1987), at 1-38; Ex. 4, James Blaine Hedges, *Henry Villard and the Railways of the Northwest* at 133-44 (New Haven: Yale University Press 1930), at 1-9; Ex. 5 Paul Wallace Gates & Robert W. Swenson, *A History of Public Land Law Development* at 456-57 (Washington, DC: Public Land Law Review Commission 1968; reprint, Holmes Beach, Fla: Wm. W. Gaunt & Sons 1987) at 1-5.)

2. The "homestead clause" of the 1869 Act limited the sale of grant lands to "bona-fide" settlers, in quantities not to exceed 160 acres and at rates restricted to \$2.50 per acre. (Direct Testimony of Kevin Hatfield, 133F00050006 at 9.) The terms of the Act did not mandate the filing of a formal Notice of Settlement with county or state governments, and the OCRC continued to enter into agreements privately with prospective buyers, such as Springsteen, until 1903. (*Id.*) In 1903, the parent SPRC discontinued the liquidation of railroad grant lands in order to retain ownership of the lucrative timber stands on its property. (*Id.*) Oregon's legislature opposed the sudden change in SPRC's corporate policies and argued that cessation of the sale of railroad grant lands to bona-fide homesteaders would hinder the settlement of western Oregon, thereby undermining regional economic development. (*Id.*) The concerns of Oregon's congressional delegation, coupled with growing concerns about the large-scale fraud associated with the management of O&C Route grant lands, ultimately convinced Congress to pass a joint

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resolution on April 30, 1908 ordering the U.S. Attorney to initiate the legal process of recovering these grant lands to the public domain. (Direct Testimony of Kevin Hatfield 133F00050006 Ex. 7, John Tilson Gano, "The History of the Oregon and California Railroad—II," Oregon Historical Quarterly, vol 25, No. 3 at 236-52 (Sept. 1924), at 1-13; Oswald West, "Oregon and California Railroad Land Grant Management," Oregon Historical Quarterly, vol 53, No. 3 at 177-80 (Sept. 1952), at 1-4; Ex. 8, David T. Mason, The Effect of O&C Management on the Economy of Oregon, Oregon Historical Quarterly, vol 64, No. 1, Ex. 9 at 55-67 (Mar. 1963), at 1-8; Ex. 10 "Oregon & California Railroad Grant Lands: Stop, Look and Listen, Watch out for Your Constituents" at 1-16 (Washington, DC: National Information Bureau 1916), at 1-12.)

3. On December 14, 1907, Springsteen appeared before the Jackson County Recorder to file a formal Notice of Settlement (the "Notice") with the OCRC to acquire a tract legally described as S½ of NE¼ and N½ of SE¼, Section 17, Township 40 South, Range 4 East, Willamette Meridian. (Notice of Settlement, December 14, 1907 (Ralph H. Springsteen to Oregon and California Railroad Company), 133E00050027 at 0050.) The public Notice declared Springsteen's intention to "improve [the tract], claim the possession thereof and to reside thereon in good faith as an actual settler." (*Id.*)

4. As Hatfield noted in his direct testimony, the Springsteen filing occurred during an unprecedented flurry of activity in 1907, when the OCRC faced impending forfeiture proceedings and the possible revestment of its remaining unsold company lands to federal ownership. (Direct Testimony of Kevin Hatfield, 133F00050006 at 10.) Thousands of unpatented purchase agreements remained outstanding in 1907, and the OCRC risked losing hundreds of thousands of dollars in revenue if reappropriation by the U.S. Department of the Interior or Department of Agriculture transpired before title transfers. (*Id.*) In preparation for an adverse court ruling, the OCRC tried to expedite the completion, or formalization, of land sales that had been initiated but not perfected before 1903. (*Id.*) It is within this broader corporate and legal context that the Springsteen Notice appears, and it follows that the December 1907 filing date does not necessarily indicate the date of actual "entry" or settlement on this tract of land. (*Id.*)

5. Moreover, the corporate policy of the parent SPRC disallowed the disposal of grant lands after 1903, and therefore Springsteen must have negotiated his original purchase contract before that date. (*Id.*) The omission of an earlier date of "declared" occupancy on the Notice likely exemplified the approach of many early 20th-century homesteaders. (*Id.*) These homesteaders often either attempted to avoid the assessment of back property taxes on improved, undeeded lands, or simply failed to perceive the significance of establishing an earlier "priority" date of settlement in order to vest in them certain land and water rights. (*Id.* at 10-11.)

6. Despite the OCRC's efforts to accelerate the closing of its pre-1903 pending purchase agreements, many prospective buyers such as Springsteen failed to "prove up" land ownership before the Land Office before the U.S. Supreme Court issued an injunction in 1915 that halted the processing of all outstanding settlements between the OCRC and homesteaders. (*Id.* at 11.) The following year, on June 9, 1916, Congress passed the O&C Revestment Act, which reclaimed the remaining O&C Route lands that had not been sold as of July 1, 1913 and returned them to the jurisdiction of the Secretary of Interior. (*Id.*) The O&C Revestment Act did not

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automatically reopen the former grant lands to entry under the Homestead Act of 1862 or the Timber and Stone Act of 1878; instead, it ordered the classification of these lands in order to prevent future fraud and speculation. (*Id.*) Fortunately for Springsteen, Department of the Interior surveyors classified his tract as either "cut-over, pasture, or agricultural" and did not withdraw it from the public domain as a "potential power site" for the Bureau of Reclamation or "timber land" for reservation by the General Land Office. (See Direct Testimony of Kevin Hatfield, 133F00050006 at 11; Ex. 11 U.S. Department of the Interior, General Land Office, "Regulations Governing Opening to Entry of Former Oregon and California Railroad Grant Lands"; 152 (Washington, DC: Government Printing Office 1920), at 1-7; Ex. 12, Sally K. Fairfax & Carolyn E. Yale, *Federal Lands: A Guide to Planning, Management, and State Revenues* at 121-22, 135, 145-46 (Washington, DC: Island Press 1987), at 1-7.) The unreserved status of Springsteen's former OCRC tract allowed him to continue his occupancy of the land after the 1916 O&C Revestment Act and subsequent surveys in 1917. (Direct Testimony of Kevin Hatfield, 133F00050006 at 11.) This tract had officially returned to the public domain by 1918 and been reopened to entry, and Springsteen retained his preferential right of entry based on prior appropriation in the Property, predating 1903. (*Id.*) In sum, the evidence establishes that it is more likely than not that Springsteen entered the property prior to 1903 and the priority date is therefore 1902.

III. The Acreage irrigated is no less than 14 acres and no more than 58 acres.

1. As established below, significant water delivery works on the Walt property were completed by 1930, 28 years after 1902, which under the circumstances and in the historical context was a reasonable time and with reasonable diligence. Springsteen was a single man, digging ditches by hand in part and using horses in part, and steadily increasing the acreage being irrigated. (Homestead Entry Final Proof 133E00050049; OWRD Ex. 1, 133E00020001 at 99.) The pace of development increased as the years passed and again when the Desavedo family came into ownership of the property. (OWRD Ex. 1 133E00020001 at 5.) The 37 year period of time between the priority date of 1902 and the completion of works by the Desavedos in 1939 included the development of at least 58 acres. As discussed below, the evidence submitted by Claimants indicates that development was not suspended on the Property for an extended period of time. In short, the evidence supports the conclusion that it was more likely than not that at least 58 acres, relating back to the 1902 priority date, were developed within a reasonable time and with reasonable diligence.

2. Springsteen filed a homestead application for the property now described as the Box D ranch. Because the land was in two different quarter sections, however, his claim for ownership of a portion of the property was invalid. (Department of Interior Notice, 133E000E0040 at 94.) Nonetheless, the evidence shows that Springsteen constructed improvements within a reasonable time and with reasonable diligence over the entire property. Springsteen built the original irrigation ditches on the property using horses for portions of the ditch and digging other portions by hand. (OWRD Ex. 1, 133E00020001 at 99.) Goldie Miller's affidavit attested that the north and south ditches had been completed by 1905. (OWRD Ex. 1, 133E00020001 at 99.)

3. Springsteen testified that as of September 1908 he had begun improvements on the property, built his house, and established permanent residency there. (Affidavit in Support of Application with Preferential Right, 133E00050041 at 0095.) Three witnesses verified

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Springsteen's assertions, including Eugene C. Bartlett of Ashland, Wade H. Wallis of Ashland, and Charles S. Bartlett of Pinehurst. (Affidavit in Support of Application with Preferential Right, 133E00050041 at 0095.)

4. Springsteen likely developed the "Pearce" section of the present Walt Property (SE $\frac{1}{4}$ of NW $\frac{1}{4}$) in coordination with his coterminous homestead between 1902 and 1924, before John A. Pearce filed his homestead application on this tract. (See Homestead Entry Application, June 10, 1924, NARA-DC, 133E00050057 at 0122.) Maps of irrigation infrastructure dating from the 1920s, prepared by employees of the State Engineers Office with information furnished by Springsteen, suggest a coherent plan of improvement. (Direct Testimony of Kevin Hatfield, 133F00050006 at 20.) The natural geographic features and topography of the public domain in the American West rarely conform to the geometric grid applied by the rectangular survey system. (*Id.*) Most settler-homesteaders established "accustomed" use areas on the surrounding public domain, which use areas, ignored the somewhat arbitrary survey boundaries. (*Id.*) The meander line of Keene Creek and the riparian meadow that Springsteen flood-irrigated to grow hay and other forage crops for his livestock, as well as his vegetable garden, naturally extended into a portion of the 40-acre SE $\frac{1}{4}$ of NW $\frac{1}{4}$. (*Id.* at 20-21.)

5. Although the Jackson County tax appraiser did not begin levying assessments on the undeeded Springsteen homestead until 1910—slightly two years after Springsteen filed the Notice with the Jackson County Recorder's office—Springsteen had documented his improvements back to 1907 and, as explained earlier, had most likely begun work on them in the early 1900s. (*Id.* at 6.) The documents submitted by Springsteen in support of his claim evidenced his construction of improvements on the property that was later included in John A. Pearce's claim. This factual setting in no way results in the exclusion of acreage from the claim.

6. Springsteen originally filed a claim for the land later included in the Pearce Homestead. (Department of the Interior Notice, 133E00050040 at 94.) One and a half acres Springsteen reported in 1918 that he had cultivated were located on the Pearce property. (Rebuttal Testimony of Kevin Hatfield, 133F00050007 at 4.) The documentary evidence provided by the homestead land entry case file for the Pearce claim and the subsequent patent transfers suggest that Springsteen performed most of the irrigation improvements on this tract (SE $\frac{1}{4}$ of NW $\frac{1}{4}$). (*Id.* at 4.) Pearce, who had recently emigrated from Texas, submitted his homestead entry application on June 10, 1924 to the Roseburg office of the General Land Office, and later testified that he had established actual residence on the property on August 25, 1924 and finished erecting his house by that September. (Direct Testimony of Kevin Hatfield 133F00050006 at 13, Homestead Entry Application: Testimony of Claimant, Aug. 25, 1927, NARA-DC, 133E00050060 at 126.) On August 25, 1927 Pearce filed his Final Proof affidavit, contending that by 1927, his total improvements possessed a value of \$1,500 and outlining the annual progress as "1925: 6 acres, in oats, corn, potatoes, fair crop; 1926: 6 acres in timothy, good crop, 3 acres of potatoes, fair crop." Pearce also maintained that the character of his improvements included a "lumber house 12 by 30, floored and roofed, three doors, five windows; barn 16 by 28; 15 acres fenced; three acres cleared; one horse and a dozen chickens, two goats." (Homestead Entry Final Proof, 133E00050060 at 127.) Four witnesses who had known Pearce for only three to four years—Pinehurst residents Cal Johnson, James Bailey, Robert Edsall, and Fred Edsall—affirmed the entryman's testimony. (Notice for Publication,

U.S. Department of the Interior, General Land Office, Sept. 27, 1927, NARA-DC, 133E0050066, at 0138.)

7. Despite having claimed an improvement value of \$1,500 while proving up, Pearce immediately sold his property to John H. Henry for \$50 on April 7, 1928, just nine days after receiving his patent from the federal government. (Direct Testimony of Kevin Hatfield, 133E0050006, Ex. 13, Warranty Deed, recorded Apr. 19, 1928, vol 170, at 560, Jackson County Records (1928).) Nine months later, Henry sold the property to his own business, the Henry Lumber Company, for a token price of \$10. (Direct Testimony of Kevin Hatfield, 133F00050006, Ex. 14, Bargain and Sale Deed, recorded Jan. 2, 1929, vol 175, at 324, Jackson County Records (1929).) These transactions exemplify the pattern of corporate consolidation of valuable natural-resource land in the American West during the late 19th and early 20th centuries. (Direct Testimony of Kevin Hatfield, 133F00050006 at 14.) The use of “dummy entrymen” contravened the original intent of the framers of national homestead legislation, who desired to foster the settlement of bona-fide family farmers. (*Id.*) Pearce most likely functioned as a dummy entryman who negotiated with Henry to enter this homestead claim, with the agreement to transfer title to Henry upon patenting. (*Id.*) Consequently, it remains doubtful that Pearce intended to establish long-term residency, and the ostensibly rapid increase in improvement values may be explained by the calculation’s inclusion of preexisting irrigation works constructed by Springsteen. (*Id.*) No entries for John A. Pearce appear in federal manuscript census returns, county tax rolls, local directories, deed indexes, mortgage records, voter registrations, or the Oregon Death Index. (*Id.*) The probability that Pearce served as a dummy entryman is bolstered by the complete absence of documentary evidence confirming his residency in Jackson County during the early 20th century. (Direct Testimony of Kevin Hatfield, 133F00050006 at 14.)

8. Springsteen elaborated on his application that he had by 1918 “[c]onstructed a two room box house 14 x 24 on the SW¼ of NE¼, also a log stable 18 by 20, a hay shed 16 by 24; have about six acres under cultivation, and about twenty-two acres enclosed with rail and brush fence; on the SE¼ of NE¼, have one-half acre under cultivation and four acres fenced with rail and log fence; have about eighty-five rods of irrigation ditch.” (Application in Support of Application with Preferential Right, 133E00050042 at 98.) In 1921, Springsteen reported having one horse and 12 chickens. (Homestead Entry Final Proof, 133E00050049 at 109.) As previously noted, the assessed value of Springsteen’s “Improvements of Land Not Deeded or Patented” enumerated in the Jackson County tax rolls increased steadily from \$25 in 1911 to \$700 in 1921. (Direct Testimony of Kevin Hatfield, 133F00050006 at 6, Assessment and Tax Rolls, 1911, Jackson County Archives, White City (Ralph H. Springsteen) [digital image], 133E00050013 at 0034, Assessment and Tax Rolls, 1921, Jackson County Archives, White City (Ralph H. Springsteen) [digital image], 133E00050021 at 0042.) The corresponding gross value of Springsteen’s chattel property—livestock, machinery, and implements—also rose consistently during this period, from \$200 in 1910 to \$780 in 1921. (Assessment and Tax Rolls, 1921, Jackson County Archives, 133E00050021 at 0042) The Springsteen entry appearing in the list of Jackson County taxpayers compiled annually by *Polk’s Jackson County Directory*, as well as his profile in the intermittently published *Oregon-California State Farmers Directory*, corroborates the trend of his steadily increasing improvement values reflected in the tax records. (Direct Testimony of Kevin Hatfield 133F00050006 at 6-7, *Polk’s Jackson County Directory*,

133E00050075, at 0214 (Portland: R.L. Polk 1911); *Oregon-California State Farmer's Directory: Jackson Co., Ore.-Siskiyou Co., Cal.*, 133E00050074, at 0211 (Portland: Farmers' Directory Company 1922.) This evidence demonstrates the diligent development of improvements, including waterworks, on the Springsteen homestead from his original occupancy between 1898 and 1902 through his Final Proof under the Homestead Act in 1921. (Direct Testimony of Kevin Hatfield, 133F00050006 at 7.)

9. As opined by Hatfield, Springsteen filed an application for a water right permit with the Oregon State Engineer on June 27, 1925, to memorialize his common-law prescriptive water rights, established through first and consistent use under the doctrine of "prior appropriation" and later statutorily sanctioned by the state Water Appropriation Act of 1909. (*Id.* at 14; OWRD Ex. 1, 133E00020001 at 80.) The application requested official recognition of Springsteen's customary point of diversion and flow volume from Keene Creek into the "Springsteen Ditch," which flood-irrigated the contiguous meadow. (Direct Testimony of Kevin Hatfield, 133F00050006 at 15.) Springsteen prepared his Final Proof for his water rights declaration in November 1929 and received a Certificate of Water Right on December 10, 1929. (*Id.* at 15.) The certificate confirmed a priority date of July 1, 1925 for .26 cubic feet per second for a point of diversion located on the SW¼ of NE¼, Section 17, Township 40 South, Range 4 East, Willamette Meridian, to irrigate five acres on the same subdivision and an additional 16 acres on the adjoining SE¼ of NE¼. (*Id.*) In *In re Hood River, supra*, 30 years was found to be a reasonable time for the completion of the irrigation works given that the claimants had to clear trees and stumps from the property, working during winter was difficult, and the developers were of limited means. Here, Springsteen was a single man of limited means, constructing improvements in part by hand and in part through the use of horses. (OWRD Ex. 1, 133E00020001 at 99.) Given the resources available to Springsteen and his successors in interest at the time, a reasonable amount of time was required for completion of works and roughly 30 years taken by Springsteen to complete his improvements was reasonable, and additional 7 years taken by the Desavedos to exceed 58 acres was reasonable. (Direct Testimony of Kevin Hatfield, 133F00050006 at 17.)

10. At the age of 61, Springsteen sold his 80-acre property (S½ of NE¼) along with the appurtenant water rights to E. T. Mannatt of Los Angeles, California for \$1,300 on July 31, 1933. (Direct Testimony of Kevin Hatfield, 133E00050006 at 15, Ex. 15, Warranty Deed, recorded July 31, 1933, vol 195, at 306, Jackson County Records (1933).) The following year, on September 26, 1934, Max and Elsie Desavedo purchased the property from Mannatt for \$10 and also assumed Mannatt's mortgage of \$750. (Direct Testimony of Kevin Hatfield, 133E00050006 at Ex. 16, Warranty Deed, recorded Sept. 29, 1934 vol 200, at 244, Jackson County Records (1934).) The Desavedo family held the property until January 24, 1973 and continued to expand the irrigation ditch network on the property. (OWRD Ex. 1, 133E00020001 at 5.) Attached as Exhibit 1 is a copy of the Desavedo map showing the irrigation ditches. (OWRD Ex. 1, 133E00020002 at 82.) During the Desavedo's tenure, irrigation on the property increased to over 100 acres. (OWRD Ex. 1, 133E00020001 at 5, 8.) Water certificates were issued for over 83 acres on the Property by 1939. (OWRD Ex. 1, 133E00020001 at 81, 83.) The Walts, United States and KPWU have stipulated, however, that the maximum amount of water under the pre-1909 right is 58 acres.

IV. Whether the development of acreage in excess of 14 acres occurred with reasonable diligence.

1. Pursuant to the stipulation, there is no controversy as to whether the water was put to beneficial use prior to 1909. Rather the issue is the exact date of use and the acreage to be included. Those issues are discussed above. Nevertheless, for purposes of a complete record, the application of water to a beneficial use is discussed below. Water diversion from Keene Creek on the Springsteen homestead was necessary from the beginning of Springsteen's occupancy and improvements around 1902 in order to sustain domestic consumption, crop cultivation, and livestock raising. (Direct Testimony of Kevin Hatfield, 133F00050006 at 6.) Springsteen testified that as of September 1908, he had begun improvements on the property, built his house, and established permanent residency there establishing domestic use. (Homestead Entry Final Proof, 133E00050049 at 0108.) At least eight acres of the claimed place of use had been cultivated prior to 1909. Eugene Bartlett and Wade Wallis affirmed that in November 1918, Springsteen had cultivated eight acres of the 120 acres designated as the claimed place of use. (Affidavit in Support of Application for Preferential Right, 133F00050041 at 96.) The use of water increased as more expansive irrigation improvements were constructed, and cultivation and grazing on the Property increased. In 1921, Springsteen stated that he annually cultivated 14 acres of hay and grain and one acre of "garden, 1 horse and 12 chickens." (Homestead Entry Final Proof, 133E00050049 at 109.) On the SE¼ of NE¼, Springsteen declared 2½ acres in hay and grain. On the adjacent SW¼ of NE¼, Springsteen identified a hay shed, a horse, and chickens. (Homestead Entry Final Proof, 133E00050049 at 109.) Pearce reported one horse, a dozen chickens and two goats on his property in 1927. (Homestead Entry Final Proof, 133E00050060 at 127.)

2. Gurney stated that 12.8 of the claimed acres were part of a homestead residence of Pearce, not established until August 25, 1924. (United States' Direct Testimony and Exhibits, 133F00040004 at 2.) As indicated above, however, the evidence shows that Springsteen was cultivating and fencing a portion of the Pearce property well before 1924. (Affidavit in Support of Application with Preferential Right, 133F00050041 at 96.) As also described below, the land continued to be cultivated under Springsteen's successors in interest.

3. Springsteen sold his 80-acre property (S½ of NE¼) to E. T. Mannatt of Los Angeles, California on July 31, 1933. (Direct Testimony of Kevin Hatfield, 133F00050006 Ex. 15.) The following year, on September 26, 1934, Max and Elsie Desavedo purchased the property from Mannatt. (Direct Testimony of Kevin Hatfield, 133F00050006 Ex. 16.) The Desavedo family held the property until January 24, 1973 and continued to expand the irrigation ditch network on the property. (See OWRD Ex. 1, 133E00020001 at 5, 7; Direct Testimony of Kevin Hatfield, 133F00050006, Ex. 17 Contract of Sale, recorded Jan. 24, 1973, Doc No. 73-01159, Jackson County Records.) During the 1930s, the Desavedos filed water rights applications with the Oregon State Engineer on October 5, 1934 and January 31, 1935 for Keene Creek diversions totaling .63 second/feet for 50 acres and .41 second/feet for 33 acres, respectively. (See OWRD Ex. 1, 133E00020001 at 78, 81, 83.) The Desavedos completed the construction of these waterworks during the late 1930s and received certificates on April 2, 1940. (OWRD Ex. 1, 133E00020001 at 81, 83.)

4. As indicated in the rebuttal testimony of Kevin Hatfield, aerial photography of the Box D Ranch performed by the Soil Conservation Service (the "SCS") in 1952, 1962, and 1967, and by the U.S. Geological Survey (the "USGS") in 1953 and 1983, indicates the continuous diversion of water from Keene Creek and the use of irrigation ditches on the SW $\frac{1}{4}$ of NE $\frac{1}{4}$ and SE $\frac{1}{4}$ of NE $\frac{1}{4}$, Section 17, Township 40 South, Range 4 East, Willamette Meridian. (Rebuttal Testimony of Kevin Hatfield, 133F00050007 at 11.)

5. The two SCS photographs of 1:12,000 scale taken on July 3, 1952 of the Box D Ranch clearly show the location of the northern and southern irrigation ditches diverting water from Keene Creek. (*Id.* at 11-12.)

6. The lineal structure of these features distinguishes the ditches from surrounding topographical landforms and the channel morphology of Keene and Jenny creeks. (*Id.* at 12.) The darker gray tones of the pasture between the irrigation ditches and Keene Creek denote a higher soil moisture content than do the lighter tones predominating in the land outside the ditches. Especially considering the summer season, the sharp boundary between these lighter and darker gray tones delineated by the ditches indicates that the higher soil moisture content was derived from irrigation rather than natural precipitation. (Rebuttal Testimony of Kevin Hatfield, 133F00050007 at 12, U.S. Department of Agriculture, Soil Conservation Service, Aerial Photography Project Name BAX, photograph Nos. 2H-76, 77, scale 1:12,000 (July 3, 1952) [digital images: full print of Section 17 at 800 dpi and enlarged crop of Box D Ranch at 1,200 dpi]; U.S. Department of Interior, Geological Survey, "Parker Mountain" Quadrangle, Oregon-California, 7.5 Minute Series (Topographic), scale 1:24,000 (1988) [Section 17, Township 40 South, Range 4 East, W.M. & Box D Ranch].

7. The 1952 SCS photographs corroborate the water rights applications submitted by Max and Elsie Desavedo to the Oregon State Engineer between 1934 and 1939. (Rebuttal Testimony of Kevin Hatfield, 133F0050007 at 12.) The documentary evidence provided by the Desavedos—including survey maps, proof of appropriation of water, and notices of the beginning and completion of construction—asserted the location of the diversion point in SW $\frac{1}{4}$ of NW $\frac{1}{4}$ Section 17 and the layout of ditches in SW $\frac{1}{4}$ of NE $\frac{1}{4}$ and SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Section 17 that correspond with the SCS photographs. (*Id.*) On December 2, 1939, Max Desavedo testified that the irrigation of the Box D Ranch cultivated "hay and general farm products." (*Id.*) The aerial photographic evidence suggests that the cultivation of hay and forage crops continued into the 1950s and beyond. (*Id.*; Oregon State Engineer, Water Right Application No. 15564, Oct. 5, 1934; Oregon State Engineer, Proof of Appropriation of Water, Oct. 5, 1934.) The smoother, less mottled texture of the irrigated pasture inside the ditches contrasts starkly with the more irregular patterns of the forested area outside the ditches. (Rebuttal Testimony of Kevin Hatfield 133F0050008 at 12.) Although the 1:37,000 scale of the July 20, 1953 photograph taken by the USGS provides relatively less clarity than do the SCS photographs interpreted above, the same general patterns of soil moisture content, forage crop cultivation, and irrigation infrastructure are apparent. (Rebuttal Testimony of Kevin Hatfield, 133F0050008 at 12-13, U.S. Department of the Interior, Geological Survey, Aerial Photography Project Name GS-US, photograph No. 2-127, scale 1:37,000 (July 20, 1953) [digital images: full print of Section 17 at 800 dpi and enlarged crop of Box D Ranch at 1,200 dpi].)

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8. The next series of aerial photographs taken by the SCS of the Box D Ranch, on July 2, 1962, reaffirms the continued diversion of water from Keene Creek and demonstrates an Section 17, Township 40 South, Range 4 East, Willamette Meridian. The aerial photography attached to the Rebuttal Testimony of Kevin Hatfield corroborates the primary sources and documentary evidence analyzed and cited in the original expert's report of Kevin D. Hatfield regarding Klamath Basin Adjudication Case No. 133, Claim No. 200. (Rebuttal Testimony of Kevin Hatfield, 133E00050007.)

9. As indicated in the Affidavit of Kenneth Masters, he owned the property from 1970 to 1977. (OWRD Ex. 1, 133E00020001 at 10.) At the time Masters purchased the property, there were established ditches which provided flood irrigation for the entire pasture. (Id.) "The pasture was approximately 100 acres. The ditches ran on the north and south edges of the pasture and several ditches criss-crossed the pasture as well. The ditches were being utilized when Masters purchased the property." (Id.) Masters' affidavit further asserts that he and his wife continued this use during their ownership tenure. (Id.)

Don Rowlett purchased the property in 1977. (OWRD Ex. 1, 133E00020001 at p. 8.) He testified in his affidavit that "all 85 to 100 acres of the pasture is flood irrigated by a series of ditches located on the north and south edges of the pasture and several which traverse the pasture. (Id.) Water was diverted into the ditches from Keene Creek, either by pump or rock diversion. (Id.) During the time that [Rowlett] owned the Ranch; [he] also irrigated various portions of the pasture by overhead sprinkling, utilizing water from Keene Creek. . . . Water from Keene Creek was also utilized to water stock, including horses, cattle and sheep." (Id.)

10. Jennifer Walt and her parents purchased the property in 1990. In 1994 they conveyed the property to the Box D Ranch, an Oregon partnership. Ms. Walt's father is not deceased. In 2003, Jennifer Walt and her mother continued to own and operate the property which is the subject of the claim.

OPINION

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). The parties have stipulated that the Walts have met their burden of establishing a pre-1909 water right. The questions remaining require determining the priority date within the range agreed to by the parties and the acreage to which the right attaches.

I. Elements of the Claim.

Pursuant to ORS 539.010(4), the Walts have the burden of proving each element of the claim. These elements are:

- (a) a pre-1909 appropriation of water,

- (b) completion of water delivery works within a reasonable time, and
- (c) application of the water to a beneficial use.

ORS 539.010(4); see *Rights to Waters of Silvies River*, 115 Or 27, 64-65, 237 P 322 (1925). The evidence submitted by Walts is sufficient to prove each of these three elements. Pursuant to the stipulation of the parties, however, the issues before the ALJ have been narrowed further. (Stipulation of Claimants Walt and Contestants United States and Klamath Project Water Users (filed December 15, 2003)).

The Walts, the United States, and KPWU have stipulated that the Walts have established that the priority date is no later than 1908 and that the acreage developed within a reasonable time pursuant to a comprehensive plan of development is no less than 14 acres. The 1908 settlement date is reflected in the affidavit submitted by Ralph Springsteen in support of his application with preferential right. (Affidavit in Support of Application With Preferential Right, 133E00050041 at 95). Fourteen acres of hay and grain is stated to be in production in 1921 in the Final Proof filed by Ralph Springsteen. (Homestead Entry Final Proof Testimony of Plaintiff, 133E00050049 at 108.) As shown below, however, the evidence also establishes that it is more likely than not that the priority date is in fact 1902 and that the total acreage developed within a reasonable time pursuant to a comprehensive plan of development is 58 acres, the upper bound stipulated to by the parties.

A. Burden of Proof and Standard of Review.

Based upon documentation filed by the original homesteader, Ralph Springsteen ("Springsteen"), development began, at the latest, in 1908. As the analysis of historian Kevin Hatfield makes clear, however, it is more likely than not that the appropriation date is in fact 1902.

The minimum acreage of 14 acres is based upon the Final Proof papers Springsteen filed with the Roseburg branch of the General Land Office on July 6, 1921. (Homestead Entry Final Proof, 133E00050049 at 109.) Springsteen reported in the proof that he annually cultivated 14 acres of hay and grain and one acre of "garden." (*Id.*). The remaining question is whether it is more likely than not that the total acreage developed in a reasonable time pursuant to the claim is 58 acres.

Whether water delivery works were completed within a reasonable time, with "reasonable diligence," is a question of fact and depends on a claim's particular circumstances. *Silvies River*, 115 Or at 61. "Appreciating the difficulty of getting testimony of all the conditions that existed at the time the lands were first settled on," water rights are awarded "as of a date shown by the evidence, upon which an honest effort was made to occupy or acquire title to the lands and to use the lands for beneficial purposes. In the very nature of things it was impossible for the early settlers to complete their irrigation plans immediately." *Campbell v. Walker*, 137 Or 375, 382, 2 P2d 912 (1931). In *In re Hood River*, 114 Or 112, 136, 27 P 1065 (1924), the court stated that "[r]easonable diligence is exercised in the diversion of the water, if such diversion keeps pace with the additional area of land brought under cultivation, and the latter in turn be done with reasonable diligence." In considering the claims made by an irrigation district,

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the court noted that developing irrigation "was an undertaking of considerable magnitude, one which under the conditions prevailing in that locality would necessarily have taken quite a long time." *Id.* at 133. Little work could be completed during the winter and preparing the land for cultivation required clearing the land and removing stumps and brush. *Id.* The *In re Hood River*, court concluded that 30 years was a reasonable period for development. *In re Hood River* at 121.

"It is well settled that the entryman need not necessarily have a complete title to the land in order to acquire a water right therefore." *Campbell v. Walker* 137 Or 375, 383, 2 P2d 912 (1931), citing *Hough v. Porter*, 51 Or 318, 421. "A mere claim of right to the land, supplemented by a diversion and appropriation of the water is sufficient to entitle him to convey to another such interest as he may have, whether such appropriator be a mere squatter, or lessee, or other person in possession." *Id.*

In this case the evidence supports the conclusion that the development was continuous during the 37 years during which the works were under construction. The evidence also establishes that, notwithstanding the Pierce claim on a portion of the property, the water was appropriated, works constructed and water put to beneficial use on the entire present parcel by Springsteen, and his successors and under a claim of right.

While claimant's objection was overruled as to the testimony of Loring Gurney, the question remains as to what weight to assign to his testimony.

Gurney's qualifications are set forth in the United States' Direct Testimony and Exhibits. (United States Direct Testimony and Exhibits, 133E00040002 at 1-4.) Gurney studied civil engineering technology at Prince George College. He has received training at the American Concrete Institute, OSHA-Hazardous Waste General Site Water Mine Safety and Health Administration, Dispute Review Board, Roller Concrete Seminar and the U.S. Army. (United States Direct Testimony and Exhibits, 133E00040002 at 1.) The record does not establish that Gurney has expertise in the areas of the history of land policy and water development in this country.

The testimony of experts is properly limited to areas in which the expert has expertise. In *Meyer v. Harvey Aluminum*, 263 Or 487, 501 P2d 795 (1972), a plaintiff was allowed to testify that fluorides from the defendant's plant damaged apricots on plaintiff's property. On cross examination, the plaintiff admitted that he was not an expert on fluoride damage. The court held that the testimony of plaintiff on fluoride damage should not have been admitted because no basis was established for his opinion that the fluoride had caused the injury to his plants or to show he had expertise in that arena.

In *Department of Transportation v. Montgomery Ward Co.*, 790 Or App 457, 465 (1986), the court found that a witness qualified only as a real estate appraiser was unqualified to testify on the probability that a street would be vacated as a result of the condemnation. While the real estate appraiser had talked to the county traffic engineer charged with giving recommendations on street vacations, the appraiser had not described the content of his conversation with the traffic engineer or the facts upon which he based his testimony that vacation was likely.

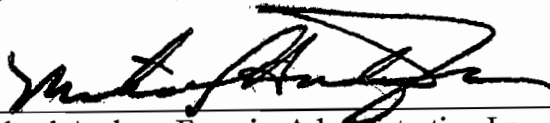
Similarly, the testimony of Gurney on historical issues lacks foundation and is given little weight. Kevin Hatfield is a part-time adjunct professor in the University of Oregon's Department of History. (Direct Testimony of Kevin Hatfield, 133F00050006 at 2) He received his PhD from the University of Oregon in June 2003 and his dissertation explored the legal history of grazing rights and accustomed range use in the interior West between 1890 and 1955. (Curriculum Vitae, 133E00050082 at 245-247.) His research, teaching, and publications have focused on public land and water law, environmental history, and the American West. *Id.* He has studied the development of national public land policy. *Id.* Given his extensive background on the history of American land policy, land use patterns and water law, and is given greater weight than that of Gurney.

ORDER

I propose that the Adjudicator issue the following order:

Claim No. 133 is approved as claimed. The terms of Claim No. 133 and any water right that may be derived there from are as follows:

1. Point of diversion locations:
2. NW ¼ NW ¼ Section 17, T40S, R4E
SE ¼ NW ¼ Section 17, T40S, R4E
3. Sources: Keene Creek, Jenny Creek, and several unnamed tributaries flowing onto the property from the south.
4. Amount Actually Beneficially Held:
5. 1.3 cfs for 58 acres as well as domestic and livestock use.
6. Priority Date: December 1902.
7. Place of Use: Jackson County
SE ¼ NW ¼, SW ¼ NE ¼, and SE ¼ NE ¼, all within Section 17, T40S, R4E.


Michael Andrew Francis, Administrative Law Judge
Office of Administrative Hearings

Dated: April 5, 2005

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SALEM, OREGON**

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. 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 April 5, 2005, 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:

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

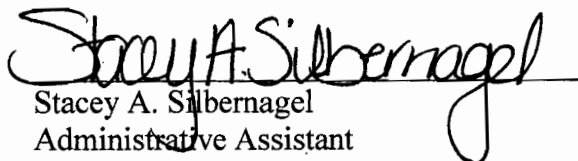
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Stacey A. Silbernagel
Administrative Assistant