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BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON

WATER RESOURCES DEPT
SALEM, 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.

Richard Taylor,
Contestant

AMENDED PROPOSED ORDER

Case No. 019

vs

Claim No. 218

Pacificorp,
Claimant

Contest No. 12

HISTORY OF THE CASE

Pacificorp (Claimant), doing business as Pacific Power and Light Company, filed its claim (Claim 218) on January 29, 1991, in the Klamath Basin Water Adjudication based upon Claimant's use of water beginning before February 24, 1909.

On October 4, 1999, OWRD issued its Preliminary Evaluation concluding that the elements of a pre-1909 claim had been established, and preliminarily approving both claims, with the following changes:

Deleting a diversion point in Fall Creek, which is located in California.

On April 7, 2000, Richard Taylor (Contestant) filed Contest Number 00012, asserting an interest in water potentially subject to claim 218, seeking to bar the claim as abandoned or forfeited by non-use or failure to pay required fees, and contesting the description of the source of the water claimed.

The matter was then referred to the Hearing Officer Panel for a contested case hearing. Maurice L. Russell, II, Administrative Law Judge of the Hearing Officer Panel, conducted a prehearing conference and issued a Prehearing Order on January 14, 2002, listing the issues presented in this case and setting a schedule for proceedings. Pursuant to the order, Claimant submitted a Motion for Ruling on Legal Issues, and, after briefing, an Order on Motion for Ruling on Legal Issues was issued on July 9, 2002, removing certain issues from further consideration. Pursuant to the order of January 14, 2002, a Notice of Hearing was duly served on all participants for a hearing commencing July 18, 2002, to cross-examination of witnesses concerning the remaining issues presented by

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the case. OWRD, Claimant, and Contestant timely submitted written testimony and exhibits.

The hearing for cross-examination of witnesses convened on July 18, 2002, starting at 9:00 a.m. in the Conference Room at the offices of the Hearing Officer Panel at 3420 Cherry Ave. NE, Suite 140, Salem, Oregon.

Kimberly Grigsby appeared as Agency Representative for Oregon Water Resources Department (OWRD). Jennie L. Bricker and Beverly Pearman, appeared for Claimant. Richard Taylor, Contestant, appeared *pro se*. The following witnesses testified on July 18, 2002:

Judith Troutman, for Contestant
Vernon James Hopkins, for Contestant
Richard Barney, for Claimant
John Richards, for Claimant

The hearing for cross-examination reconvened at 9:00 a.m., July 19, 2002, at which time the following witnesses testified:

Gerald Barry, for Contestant
Richard Taylor, for Contestant
Christine Miller, for Contestant
Donna Taylor, for Contestant
Robert Taylor, for Contestant

Maurice L. Russell, II, Administrative Law Judge for the Hearing Officer Panel, presided.

On December 31, 2002, ALJ Russell issued a Proposed Order (Proposed Order). On January 29, 2003, Contestant filed Exceptions to the Hearing Panel's Proposed Order (Exception). On February 9, 2006, OWRD referred Contestant's Exception to the ALJ pursuant to OAR 137-003-0650(3).

OWRD's referral requested, pursuant to OAR 137-003-0655(2), that the ALJ reopen the record and consider the further evidence submitted with the Exception in light of the Proposed Order's Issue No. 3 ("[w]hether [Claimant] has diverted the claimed amount of water") and determine whether the evidence affected the outcome of the ALJ's findings and conclusions. In particular, OWRD requested the ALJ to determine whether Claimant has historically diverted the entire 16.50 cfs from Spring Creek as claimed, or if Claimant was diverting and beneficially using a lesser amount.

On June 12, 2007, ALJ Russell reopened the record and on June 21, 2007, held a telephone conference at which Contestant and counsel for Claimant agreed that Claimant may submit additional evidence by July 23, 2007, to respond to the evidence submitted with the Exception. Claimant did not submit any new evidence but submitted a Response to Contestant's Evidence. On August 1, 2007, the Office of Administrative Hearings

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(OAH)¹ received Contestant's reply to Claimant's response and a "request to accept further evidence in reply to Claimant's response" (Exception Exhibit 3).

On August 1, 2007, ALJ Russell, Contestant, and Claimant's counsel conferred by telephone to discuss whether cross-examination of any witnesses would be necessary and to develop a further schedule in this case. Contestant and Claimant's counsel agreed that there was no need for a further hearing or further argument. Claimant objected to Exception Exhibit 3 and the ALJ informed the parties that he would review Exception Exhibit 3 but probably would not consider any additional evidence besides that which Contested submitted originally with the Exception.

ALJ Russell passed away on April 27, 2008. This matter was reassigned to James W. Han, Administrative Law Judge, Office of Administrative Hearings, who reviewed the testimonies, evidentiary documents, transcripts of the July 18 and 19, 2002, cross-examination hearings, the parties' written arguments, the Exception, and the recordings of the June 21, 2007, and August 1, 2007, telephone conferences regarding the Exception.

ISSUES

1. Whether rights prior to this claim exist, and if so, does that defeat this claim.
2. Whether Claimant has failed to use the water claimed.
3. Whether Claimant has historically diverted the entire 16.50 cfs from Spring Creek as claimed, or if Claimant was diverting and beneficially using a lesser amount

EVIDENTIARY RULINGS

Exhibits 20002, 60001, 60002, 60003, 60004, 60005, 60006, 60007, 60008, 60009, 60010, 60011, 60012, 80001, 80002, 80003, 80004, 80005, 80006, 80007, were offered and admitted into the record. The record also includes motions and responses, argument, and exhibits attached to such filings.

The record was held open until August 2, 2002, for submission of additional evidentiary materials. The participants submitted such additional materials, which were included in the record. The record closed on August 2, 2002. Thereafter, the participants submitted written argument. The record for argument closed on October 15, 2002.

On January 29, 2003, Contestant submitted two proposed exhibits with the Exception. Exception Exhibit 1 consisted of certified copies of OWRD Discharge Measurement Notes taken on November 19, 2002, at Fall Creek at Copco, California, and at the Oregon state line. Exception Exhibit 2 consisted of certified copies of United States Geological Survey (USGS) hydrologic records from the gaging station at Fall Creek at Copco, California, from October 1928 to September 1959.

¹ Between the issuance of the Proposed Order and the reopening of the record, the Hearing Officer Panel's name was changed to the Office of Administrative Hearings.

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Claimant did not object to Exception Exhibit 1 and it is hereby received into the record. Claimant objected to Exception Exhibit 2 on the grounds that (1) the ALJ may not take judicial notice of the USGS documents; (2) Contestant did not justify his failure to present the documents before the hearing record closed; and (3) the documents are irrelevant to the outcome of this proceeding. Although the information in the USGS documents may not be subject to judicial notice, they are admissible under OAR 137-003-0610 because they appear to be of a type that may be relied on by reasonably prudent persons in the conduct of their serious affairs. Moreover, although Contestant submitted them after the record closed, OAR 137-003-0655(2) authorized OWRD to request the ALJ conduct a "further hearing" to consider them. A further hearing implies that the record may be reopened to receive additional evidence. ALJ Russell did reopen the record and Claimant was not unduly prejudiced because the ALJ gave Claimant the opportunity to present rebuttal evidence. Finally, the USGS documents are relevant under the broad statutory definition of relevance in ORS 40.150. Accordingly, Claimant's objections are overruled and Exception Exhibit 2 is hereby received into the record.

On August 1, 2007, more than four years after filing the Exception, Contestant submitted Exception Exhibit 3, consisting of correspondence and station analyses purportedly of or relating to the USGS gaging station at Fall Creek at Copco, California, for the period from July 1928 through September 1959. Contestant requested that the exhibit be received as "further evidence in reply to Claimant's response."

Contestant's Exception Exhibit 3 is outside the scope of OWRD's request to reopen the hearing—OWRD authorized the ALJ to consider Exception Exhibits 1 and 2 only. Claimant submitted no evidence in response to the Exception and so did not open the door for Contestant to submit yet another exhibit. Exception Exhibit 3's probative value appears to be small. It is also cumulative—the assertion on page 2 of the proposed exhibit ("Power company diverts about 4 cfs to Fall Creek (above station) from Spring Creek (tributary to Jenny Creek)" appears on other evidence in the record. Therefore, Exception Exhibit 3 will not be received into the record.

The reopened record and the record for argument on the Exception are hereby closed.

FINDINGS OF FACT

1. On September 23, 1902, E.H. Steele posted a notice of appropriation of "1500 inches" of water from Spring Creek, on Government Lot 3, Section 3, Township 41 S, Range 4 E W.M. to be conducted to Fall Creek, from which the water would be used in Northern California for the generation of electric power. (Ex. 20002, at 11.)

2. An earthen dam and ditch were constructed on Spring Creek, a tributary of Jenny Creek, a tributary of Klamath River, located in Jackson County, Oregon, to divert all the flow of Spring Creek to a 24-inch culvert, which conveyed the water to Fall Creek,

where, in combination with water from Fall Creek not a subject to this proceeding, the water was carried into a power station in Northern California. (Trans. 128-129; Ex. 60007, at 2; Ex. 80001 at 5, 6.)

3. The maximum discharge of water measured at Claimant's power station during 1928 through 1959 often approached and exceeded 200 cfs. For example, the maximum discharge during 1947-1948 and 1949-1950, was 350 cfs. In 1955-1956, the maximum discharge was 875 cfs. The mean annual discharge during 1928 through 1959 also fluctuated widely between about 30 cfs to over 60 cfs. These measurements included the water flows from Spring Creek and Fall Creek.

4. By the early 1980s, the diversion was in significant disrepair, leaking a considerable amount of water from the ditch back into the natural channel. (Ex. 80001 at 7; Ex. 60004; Ex. 60005; Ex. 60007 at 3; Ex. 60001 at 12.) At one point, the dam itself developed a significant leak, which was hastily repaired. (Trans. 110-111.) Nonetheless, the culvert, which when full and with a head of water over the upper portion carried at least 16.5 cfs, was observed to be full with a head on occasions between 1981 and 1987. (Ex. 80009. Trans. 80, 81, and 132.) While it is possible that there were obstructions in the pipe at the time of some of these observations, the evidence does not establish that this culvert was obstructed during the entire period, or at any particular time when it was observed to be full with a head. (Trans. 137.)

5. In 1987, Contestant filed for a water right, essentially for water leaking from Claimant's ditch back into the natural stream. (Ex. 60001 at 23-24; Trans. 239-240.) Beginning in 1987, Claimant conducted a significant renovation of the diversion works, constructing a new dam, rebuilding the ditch, and replacing the 24-inch metal culvert with a cut-ditch to conduct the water to Fall Creek. (Ex. 80001 attachment-Affidavit of Jenny Bricker, Ex. 8.) After this renovation, the amount of water flowing to the power house was noticeably increased. (Trans. 177.) Soon thereafter, Contestant began interfering with the diversion. Contestant cut the chain securing the controls for the dam, placed his own lock next to Claimant's lock on the controls, and changed the headgate from time to time to allow water to flow down the natural channel. This action was done without Claimant's permission. (Trans. 241.) Contestant also changed the ditch below the diversion so that water from Claimant's ditch could be diverted into Contestant's works. (Ex. 80001 at 12, 13.) Claimant objected, but was unable to obtain assistance from the watermaster, or prevent Contestant from changing the headgate. Claimant eventually acquiesced in Contestant's actions, after which water was diverted to the powerhouse or to Contestant's works essentially at Contestant's sole discretion. (Ex. 80001 at 14.) By 1994, all of the water in Spring Creek was being directed either back into the natural stream-bed through the dam, or down a 12- inch pipe through the side of Claimant's ditch. No water from Spring Creek was available to Claimant for the generation of electric power after February 24, 1994. (Trans. 183.)

6. Contestant has also filed a claim for a pre-1909 water right in the Klamath Adjudication. The details of that claim are not contained in the record of these proceedings. (Trans. 150, 151.)

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CONCLUSIONS OF LAW

1. Although rights prior to this claim may exist, this does not defeat this claim.
2. Claimant has used the water claimed.
3. Claimant has diverted the claimed amount of water from Spring Creek.

OPINION

This matter involves a contest of a claim filed in the Klamath Adjudication, a proceeding under ORS Chapter 539. There are three elements to such a claim: 1) Application of water of the Klamath River or its tributaries to beneficial use at a time prior to 1909 or a contemplated time in the future; (2) a diversion from the natural channel; and (3) application of the water within a reasonable time to some useful purpose. *In Re Rights of Deschutes River and Tributaries*, 134 Or 623 (1930); *In Re Water Rights in Silvies River*, 115 Or 27 (1925). It is Claimant's burden to establish the elements of the claim. ORS 539.110. Claimant satisfied its burden of proof.

The system of appropriation of water in effect prior to the Water Rights Act of 1909 was summarized by the Supreme Court in *Porter v. Pettengill* 57 Or 247 (1910) as follows:

A settler upon the public domain, by diverting water from a natural stream for domestic use, irrigation, or manufacturing purposes, may acquire a right to the use of the amount of water thus diverted to the extent that it is put to a beneficial use for actual needs. Where several rights are acquired from the same stream, they will have priority in the order of the time of their diversion. If more water is diverted by a settler than is needed for the purpose intended, or is actually used for such need, he acquires a right only to the amount so needed and used. [citations omitted] The water right is appurtenant to the land for which it is diverted. [cit. om.] And the quantity of water acquired by appropriation must be determined by the amount of land irrigated and the quantity of water needed therefor.

Porter v. Pettengill 57 Or at 249.

Thus, if there are other water rights in the same stream that may be earlier in time to the right that is the subject of this claim, those senior rights do not defeat the present right. Instead, if there is not enough water in the stream to satisfy both claims in any given year, the junior right must give way until the senior right is satisfied.

The remainder of this case turns on Contestant's position that Claimant has lost its right by nonuse.

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There is some question whether this issue involves the law of abandonment or of forfeiture.² OWRD has noted that ORS 540.610(1)—a statute providing for “forfeiture” of a water right that lies unused for five consecutive years—does not apply to these proceedings because the water right in question is not based on a certificate or court decree, as provided under that statute.³ OWRD also noted that its own regulation, OAR 690-028-0075(3), while using the term “forfeiture,” was not referring to the “forfeiture” provided in ORS 540.610(1), but the “plain, ordinary and common meaning” provided in *Webster's Third New International Dictionary*: “divesting of ownership***on account of the breach of a legal duty.” OWRD also cautions that this rule should not be treated as nullifying any exceptions or excuses recognized for non-use. Claimant questions OWRD's authority to provide for forfeiture by rule.

Whether a water right is subject to forfeiture or abandonment for nonuse is irrelevant, if nonuse, itself, is not found. Here, the evidence did not support Contestant's contention that Claimant did not use the water for 5 years, or for any substantial period, before 1988. As to Claimant's nonuse of water after 1994, this occurred after the claim was filed in this case, and, at all events, is not a proper ground for avoidance of the right, under the facts in this case.

Nonuse before 1988

At the outset it should be noted that those portions of Contestant's argument dealing with failure of Claimant to comply with various provisions of Oregon law are without merit for several reasons.

First, Contestant is limited to the terms of his contest. Nowhere in the contest document does Contestant refer to a failure by Claimant to comply with those laws as a basis for invalidating the claim. However, even if Contestant had raised that argument, the statutes he cites did not establish the exclusive process for appropriating water at the time. *State ex rel Van Winkle v. People's West Coast Hydroelectric Corp.* 129 Or 475 (1929). So long as the three standards stated in *In re Deschutes River*, *ibid.* are met, the appropriation is completed.

Claimant, as the proponent of the claim, bears the burden of showing that it diverted and put to beneficial use the claimed amount of water at least once during the applicable period. Claimant satisfied its burden. Contestant, as the party asserting

² “Abandonment “involves both nonuse and an intent to abandon. *In re Willow Creek* 74 Or 592 (1914). “Forfeiture” is the involuntary loss of the water right caused by nonuse for the statutory period. Forfeiture does not require intent. If both nonuse and intent to abandon are present, then abandonment may occur even before the expiration of the forfeiture statute. *Rencken v. Young*, 300 Or 352, 361 (1985).

³ Contestant's Exception asserted that under ORS 539.010(1) two years nonuse is the applicable time to establish abandonment in this case. That statute relates to the circumstances in which a riparian proprietor may establish a vested right to water based on the proprietor's use, or his predecessor's use, of water before 1909. The statute does not apply here because Contestant has not argued that the original riparian proprietor's claim never vested because of two years' nonuse. Contestant has asserted that *Claimant* abandoned or forfeited its claim.

forfeiture or abandonment, had the burden to prove by reliable, probative, and substantial evidence, ORS 183.450(5), that Claimant failed to divert and use the claimed water right. *Rencken v. Young*, 300 Or 352, 364-365 (1985). Contestant did not satisfy its burden of proof.

Contestant argued at great length concerning the amount of water that leaked from Claimant's works before the renovation in 1988, arguing that there was not 16.5 cfs left in the works for at least the 5 years before that renovation. The evidence did not support Contestant's position.

Most of Contestant's argument was based upon Contestant's opinion, from measurements that Contestant conducted along the ditch. Contestant argued that those measurements demonstrate that the ditch, especially when leaking, was not capable of carrying 16.5 cfs. Contestant also argued from the measurement of water that was carried in the natural stream into Contestant's own works, that there was not sufficient water left to satisfy Claimant's claim.

The most telling evidence contradicting Contestant's position is the testimony of John Richards that the upper end of the 24-inch culvert was always under water. Exhibit 8009, an excerpt from the *Handbook of Steel Drainage & Highway Construction Products* (American Iron and Steel Institute, 3rd Ed. 1983) shows that the culvert would carry 17 or 18 cfs when a head of water above the upper end of the culvert is 12 inches. Richard Barney testified that when there was a head of water above the culvert, it would be carrying 16.5 cfs, and that he observed such a head of water himself.

Contestant argued that the culvert must have been obstructed to produce such a head of water. However, this is an inference based upon Contestant's opinion, and is not supported by any direct evidence of such an obstruction. To the contrary, John Richards testified that he never observed a large obstruction in the culvert. The record contains no evidence that any large obstruction was present in the culvert for more than a short time. Richard Barney testified that the slope of the culvert was such as to scour any sand or silt out of the culvert.

Contestant also argued that, given the amount of water he was removing from the ditch, there was not enough water left to allow 16.5 cfs to be diverted to the powerhouse. However, the evidence he presented did not go so far.

In the first place, Contestant assumed that the total amount of water coming from the springs was a constant 18 cfs, and, subtracting his withdrawal from that figure, derived a balance less than 16.5 cfs. However, Richard Barney testified that Spring Creek was a spring-fed stream that did not have as much seasonal variation as a stream fed by snow-melt, but still varied "maybe as much as 10 cfs, plus or minus" from the general rate of 17 to 18 cfs. Thus, to show that it was impossible for Claimant to draw 16.5 cfs at any time during the period in question, which is essentially what Contestant argued, it would be necessary to subtract Contestant's use from 28 cfs, not 18.

In the second place, the evidence did not show that Contestant's withdrawal was constant. To the contrary, until 1987 Contestant was not diverting water from the ditch to supply his aquaculture facility. Even after the renovation, the evidence suggested Contestant would vary his withdrawal from the ditch to meet the requirements of his system.⁴ It would thus be necessary to show that Contestant's use never dropped below 11.5 cfs during the entire period at issue. Contestant's evidence did not approach this showing.

Finally, Contestant argued that before the renovation Claimants diversion did not have a carrying capacity of 16.5 cfs. This is, however, not based on any measurements that withstand scrutiny.⁵

Exception Exhibits 1 and 2

Contestant also argued that Fall Creek's "normal" flow was about 31 cfs and that Spring Creek's and Fall Creek's combined flow averaged about 31 to 35 cfs. Contestant argued that Spring Creek contributed only 0 to 4 cfs to the total flow at Claimant's power station. (Exception at 69.)

Contestant offered Exception Exhibits 1 and 2 in support of this argument. Exception Exhibit 1 is OWRD's discharge measurements taken at Fall Creek, near the California border, on one day in November 2002. According to Contestant, Exception Exhibit 1 "proves that Fall Creek historically was the major and sometimes only source available to [Claimant's] Fall Creek facility providing 31+ cfs of the 35 cfs [Claimant] has claimed to have diverted." (Exception at 70.) Contrary to Claimant's argument, one day's measurements taken at a point past the confluence of two creeks does not "prove" the "historical" flow of either of the creeks.

Contestant argued that Exception Exhibit 2—records of the water flow at Fall Creek at Copco, California, from 1928 to 1959—"only registered 31-35 cfs average summer levels for 29 years. *** This proves that the 16.5 cfs from 'Spring Creek' claimed to have been diverted and used by [Claimant] never made it to the Fall Creek basin. [Claimant] can't claim to use what isn't there." (Exception at 70.) According to Contestant, if Fall Creek's natural flow was 31+ cfs, then adding 16.5 cfs of water from Spring Creek would have resulted in total water flow of 47.5 cfs at the Fall Creek gage, which is "12.5 cfs to 16.5 cfs more than historically present within the Fall Creek basin ***." (Exception at 72 to 73.)

⁴ The log entries placed in evidence as part of John Richards' direct testimony include several where Contestant or his mother changed the amount being diverted to the former channel. See e.g. entry for August 12, 1991, "Yesterday Mrs. Taylor requested that we turn out more water from the Spring Creek Canal into the old channel."

⁵ For example, Contestant estimated the width of the pond as shown in one photograph by comparing it to the width of a nearby cattle trail. (Trans. 202.)

Exception Exhibit 2 did not support Contestant's argument. The exhibit showed that the flow at the Fall Creek power station varied widely during each year, often exceeding 200 cfs. Even the mean flow fluctuated between 30 cfs to 60 cfs during the years represented by the exhibit. Therefore, this exhibit did not establish that Spring Creek provided only 0 to 4 cfs to Claimant's power station. Further, proof of nonuse during the period covered by Exception Exhibit 2 does not make a valid contest, because the records relate to a period more than 15 years before Contestant filed his contest. Under OAR 690-0028-0075(3)(e), a valid contest ground is that the Claimant's claim had been "forfeited by five or more consecutive years of non-use *less than fifteen years previously.*" (Italics added.)

Starting with the 1950-1951 record, Exception Exhibit 2's records contained the remark that "Power company diverts about 4 cfs to Fall Creek (above station) from Spring Creek (tributary to Jenny Creek)." The remark is repeated verbatim in each record through 1958-1959. Again, the remark relates to a period more than 15 years before Contestant's contest. Claimant objected to the hearsay. The exhibit does not disclose the source of the information or the method or circumstances under which the information was obtained. In view of the evidence of wide variation in the creeks' flows, the repeated verbatim remark about a constant 4 cfs diversion from Spring Creek does not appear to be trustworthy and does not constitute substantial evidence for that proposition. *See Reguero v. Teacher Standards and Practices*, 312 Or 402, 418 (1991).

In administrative proceedings, each fact must be proved by a preponderance of the evidence. In other words, it must be shown that each fact is more likely than not to be true. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division* 47 Or App 437 (1980); *Metcalf v. AFSD* 65 Or App 761 (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548 *rev den* 308 Or 660 (1989). Considering the evidence on that basis, it is more likely than not that—at least up to the time of the renovation—no five year period elapsed during which 16.5 cfs of water never flowed from the Spring Creek diversion to Claimant's powerhouse.

Nonuse after 1994

The evidence after 1994 is much different. It is uncontested that Contestant diverted the entire stream to his own works starting in 1994. It is also uncontested that Claimant acquiesced in this diversion. The question remaining is the legal significance of this state of affairs.

It should be noted that, although Claimant's personnel testified that they felt uneasy about Contestant's action of "self-help." There is no substantial evidence of an overt show or threat of force. It is apparent, however, that Claimant's acquiescence was not consensual. To the contrary, when Claimant protested Contestant's actions to the watermaster, and received no assistance, Claimant was left with no apparent recourse short of a breach of the peace.

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On the other hand, Contestant entered on and tampered with Claimant's diversion works, under the apparent impression that, because the works had lain unrepaired for a considerable period before the renovation, Claimant's claim to the water had been extinguished. As discussed above, this impression was mistaken, or, at least, not supported by the record in this case.

As OWRD has noted in a different context, this proceeding is in the nature of an equitable proceeding. OWRD has also noted that the provisions of OAR 690-028-0075(3) relating to "forfeiture" are not intended to import the terms of ORS 540.610 into the adjudication process. Consequently, it is possible to recognize, in these proceedings, some equitable principles that might not otherwise apply. One of these principles is the requirement of "clean hands."

"Unclean hands" is an equitable doctrine under which the court, in order to protect its own integrity, will deny equitable relief to a party in a transaction if that party, relative to the same transaction, is "guilty of improper conduct no matter how improper the [other party's] behavior may have been." [Citation omitted.] Several limitations restrict application of the doctrine. First, "the misconduct must be serious enough to justify a court's denying relief on an otherwise valid claim. Even equity does not require saintliness." [Citation omitted.] Examples of serious misconduct include crimes, fraud, disloyalty to an employer, and bad faith. [Citation omitted.] Second, a court will not invoke the maxim if doing so will work an injustice. [Citation omitted.] Third, the party in favor of whom the maxim is invoked must prove that he or she has suffered actual injury due to the alleged misconduct. [Citation omitted.]

Welsh v. Case, 180 Or App 370, 385 (2002).

The circumstance presented here is precisely that for which application of the clean hands doctrine was intended. Contestant entered upon Claimant's property, and interfered with Claimant's headgate, to the point where Claimant was prevented from using its water for more than five years.

There is some question as to whether, even if he had a superior right to the water, Contestant could change Claimant's headgate without violating ORS 540.710.⁶ Here, as has been discussed above, Contestant's belief that Claimant's water right had been extinguished by nonuse prior to the renovation was not correct. Thus, Contestant's actions constitute "improper conduct."

That improper conduct, being a violation of law, was sufficiently serious to justify denying relief. Moreover, denial of relief to Contestant in this case will not work an injustice on Contestant. To the contrary, allowing Contestant to extinguish Claimant's

⁶ 540.710 provides in pertinent part: "No person shall willfully open, close, change, or interfere with any lawfully established headgate or water box without authority****."

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water right by expropriating Claimant's water for five years would clearly be unjust to Claimant.

Finally, if Contestant were permitted to prevail under these circumstances, Claimant would lose its water right on Spring Creek, as well as the benefit of the works constructed there. Claimant has clearly suffered an injury because of Contestant's conduct.

Contestant is barred by his unclean hands from asserting that Claimant's nonuse of water after 1994 extinguished Claimant's water right.

Summary:

A preponderance of the evidence in this case establishes that Claimant used the water claimed without a break of five years, until 1994. Although Claimant has not used the water claimed since that time, this nonuse is excused Contestant's improper conduct. The claim is valid.

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ORDER

I propose that the Adjudicator issue the following order:

Claim No. 218 is established on the terms stated in the Preliminary Evaluation.


James W. Han, Administrative Law Judge
Office of Administrative Hearings

Date: June 19, 2008

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:

Dwight W. French
Klamath Basin Adjudication
Oregon Water Resources Dept
725 Summer Street N.E., Suite "A"
Salem OR 97301

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CERTIFICATE OF SERVICE

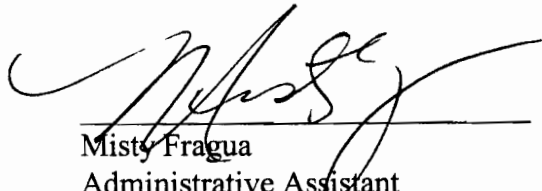
I hereby certify that on June 19, 2008, I mailed by a true copy of the following: **AMENDED PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

Richard Taylor
PO Box 637
Ashland, OR 97520
Admin@pacificwestcom.com

Jesse D. Ratcliffe
Oregon Dept. of Justice
1162 Court St NE
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Dwight W. French/Teri Hranac
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