

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

~~WaterWatch of Oregon, Inc.~~; Horsefly Irrigation  
District; Langell Valley Irrigation District;  
~~Medford Irrigation District; Rogue River Valley  
Irrigation District~~; United States of America;  
The Klamath Tribes;  
Contestant(s)

**PROPOSED ORDER**

Case No. 137

Claim(s): 205

Contest(s): 2856<sup>1</sup>, 3191<sup>2</sup>, 3846, and  
4188

vs.

Robert Flowers; Martin Scull; Flowers Bros.  
Inc.; Sandral Tucker; Karen Tucker;  
Claimant(s).

**HISTORY OF THE CASE**

On January 25, 1991, Robert Flowers, Flowers Bros. Inc., and Martin Scull filed Claim 205 based upon use of water commenced prior to February 24, 1909. Claim 205 was subsequently transferred to Robert Flowers, Flowers Bros. Inc., Martin Scull, Sandy Tucker and Karen Tucker (Claimants). Claim 205 is for a total of 3.0 acre-feet of water per acre from six points of diversion located on the Klamath River, tributary to the Pacific Ocean, for irrigation of 557.7 acres. The claimed priority date is December 1, 1858.

The claim also asserts a water right to water beneficially used under contracts with the United States (180 acres) and the Ady District Improvement Co. (435.1 acres) derived from the appropriation of Klamath River water for the Klamath Project in 1905 and applied, at least in part, to property that was not originally subject to natural overflow. This part of the claim is conditional on the United States Bureau of Reclamation having failed to establish its right to this water.

On October 4, 1999, the Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation of Claim 205 recommending that the claim for 557.7 acres be granted

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<sup>1</sup> WaterWatch of Oregon, Inc.'s Contest 2856 was dismissed on May 20, 2003. See Order Dismissing WaterWatch of Oregon, Inc.'s Contests (5/20/03).

<sup>2</sup> Medford Irrigation District and Rogue River Valley Irrigation District withdrew from Contest 3191 on May 1, 2003.

and finding that portions of Claim 205 had established a priority date of August 31, 1869, while other portions of Claim 205 had established a priority date of December 1, 1858. The Preliminary Evaluation did not address the portion of the claim for Klamath Project water with a claimed 1905 priority date.

On May 8, 2000, WaterWatch of Oregon filed Contest 2856; Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District, and Medford Irrigation District (hereinafter the “Districts”) filed Contest 3191; the United States of America filed Contest 3846; and the Klamath Tribes filed Contest 4188. The matter was then referred to the Office of Administrative Hearings (OAH) for hearing.

On May 14, 2003, Claims 142, 143, 144, 186, 205 and 286 were consolidated in Lead Case 003 for a determination as to whether the United States was the proper holder of the right to the water in the Klamath Project. After Administrative Law Judge (ALJ) Maurice L. Russell, II, determined that the United States is the proper holder of all water rights appropriated in 1905 for the Klamath Project,<sup>3</sup> he terminated the consolidated proceedings and the individual claims were activated for further proceedings. In his Amended Interim Order, ALJ Russell ordered that the determination that the United States is the proper holder of all water rights under the appropriation for the Klamath Project be the law of the case for the individual claims.

On January 12, 2006, Langell Valley and Horsefly Irrigation Districts, and OWRD filed a Joint Motion for Order Confirming Scope of Proceedings (Joint Motion), requesting that an order be entered in this case providing that the Order on Motion to Clarify Scope of Proceedings entered in Case No. 003 on April 7, 2004, constitutes the law of the case in the post-consolidation proceedings in Case No. 137. Claimants did not oppose this motion. On January 20, 2006, the United States of America (United States) filed a Response to Joint Motion for Order Confirming Scope of Proceedings, objecting to the Joint Motion on the grounds that the facts and issues in both cases are not the same. On February 8, 2006, ALJ Dove L. Gutman denied the motion.

On May 3, 2006 Langell Valley Irrigation District and Horsefly Irrigation District (the Districts), Claimants and OWRD, renewed their Joint Motion for Order Clarifying Scope of Proceedings, requesting that an order be entered in this case providing that:

The Klamath Basin Adjudication, of which Case No. 137 is a part, does not include a determination of the relative rights to the use of waters of the Lost River basin, as opposed to waters of the Klamath River basin. Therefore, any proposed order in Case No. 137 shall provide that nothing in such order shall constitute or be construed as a finding or determination with respect to the rights of any claimant, contestant, party, person or agency (collectively the “Parties”) to the right to use the waters of the Lost River, including but not limited to the Lost River, Clear Lake, Gerber Reservoir, and their tributaries, nor will any proposed order in Case No. 137 affect any of ‘the Parties’ rights to the use of waters of the Lost River

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<sup>3</sup> Klamath Adjudication Case No. 003, Amended Interim Order at 40, May 23, 2006.

or its tributaries. Any proposed order in Case No. 137 shall further provide that nothing in such order is intended to prevent any of the parties from filing exceptions, should the Adjudicator's findings of fact and order of determination deviate from any such proposed order in this regard. This order, however; shall not preclude the introduction of evidence necessary to determine the beneficial use of Klamath River basin waters.

On May 12, 2006 ALJ Dove L. Gutman granted the motion.

A Notice of Hearing was duly served on all participants on June 21, 2006, for a hearing commencing July 27, 2006. An Amended Notice of Hearing was duly served on the participants on June 26, 2006. The participants timely submitted written testimony and exhibits.

Prior to July 27, 2006, the date set for the hearing, the participants filed a Stipulation to Admit Testimony and Set Briefing Schedule, which was approved by ALJ Dove L. Gutman. With the participants' agreement, the hearing was cancelled and the case submitted on the record.

Pursuant to an order setting Post Hearing Schedule, the participants timely filed closing, responsive and reply briefs. The record closed on November 29, 2006.

After the record closed, the case was assigned to me to prepare this Proposed Order. I have reviewed the entire record, including all argument, prior to preparation of this order.

### **EVIDENTIARY RULINGS**

Pursuant to stipulation, the following evidence is admitted into the record.

OWRD Exhibit 1.

Written Direct and Rebuttal Testimony of Robert Flowers.

Written Direct Testimony of Ronald Yockim, with attached Exhibits C-1 through C-29.

Written Direct Testimony of Cecil Lesley.

Written Direct and Rebuttal Testimony of Loring Gurney, with attached Exhibits U1 through U5.

In the course of briefing, the United States objected to references in Claimants' opening brief to documents not admitted into the record of this case, but on file in other cases in the Klamath Adjudication. Although this case was, for a short time, consolidated along with other cases in Klamath Adjudication Case 003, that consolidation was for a specific and very limited purpose. Only the holding in the Amended Interim Order in Case 003 that the United States is the proper holder of the water right for the 1905 appropriation for the Klamath Project is the law

of the case in these proceedings. The evidence in the record in Case 003 has not been incorporated into the record of this case. To the extent Claimants' references seek to introduce factual matter from the other cases, the objection is well taken. I will disregard all references in Claimant's briefing to documents contained in the record of other cases, and not this case, where they are cited in connection with a question of fact.

### **ISSUES PRESENTED**

- 1. Whether waters originating within the Lost River Basin are subject to appropriation in the Klamath Adjudication.**
- 2. Whether there is insufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right.**
- 3. Whether any vested water right on all or a portion of the claimed place of use is included in the claims of the United States for the Klamath Project.**

### **FINDINGS OF FACT**

1) This claim is for 3.0 acre-feet of water per acre from six points of diversion located on the Klamath River, tributary to the Pacific Ocean, for irrigation of 557.7 acres. The claimed priority date is December 1, 1858. The diversion points are located as follows:

Diversion Point #1:

Lot 4, SW  $\frac{1}{4}$  SW  $\frac{1}{4}$  Section 15 T40S R8E.W.M.

Diversion Point #2:

SE  $\frac{1}{4}$  SE  $\frac{1}{4}$  Section 16 T40S R8E.W.M.

Diversion Point #3:

SW  $\frac{1}{4}$  SE  $\frac{1}{4}$  Section 16 T40S R8E.W.M.

Diversion Point #4:

SW  $\frac{1}{4}$  SW  $\frac{1}{4}$  Section 16 T40S R8E.W.M.

Diversion Point #5:

NE  $\frac{1}{4}$  NW  $\frac{1}{4}$  Section 22 T40S R8E.W.M.

Diversion Point #6:

Lot 4, NE  $\frac{1}{4}$  NW  $\frac{1}{4}$  Section 23 T40S R8E.W.M.

Water from Diversion Points #1 through #5 is intermingled so that the places of use for these Diversion Points overlap. The places of use for these Diversion Points are described as follows:

Lot 4 SW ¼ SW ¼ Section 15 T40S R8E.W.M.	14.2 acres irrigation
Lot 5 SE ¼ SW ¼ Section 15 T40S R8E.W.M.	4.4 acres irrigation
Lot 6 SE ¼ SE ¼ Section 15 T40S R8E.W.M.	5.1 acres irrigation
Lot 7 SE ¼ SE ¼ Section 15 T40S R8E.W.M.	1.0 acres irrigation
SW ¼ SE ¼ Section 16 T40S R8E.W.M.	2.5 acres irrigation
SE ¼ SE ¼ Section 16 T40S R8E.W.M.	0.7 acres irrigation
Lot 5 SW ¼ SE ¼ Section 16 T40S R8E.W.M.	15.3 acres irrigation
Lot 6 SE ¼ SE ¼ Section 16 T40S R8E.W.M.	9.8 acres irrigation
NE ¼ NE ¼ Section 21 T40S R8E.W.M.	40.0 acres irrigation
Lot 2 SE ¼ NE ¼ Section 21 T40S R8E.W.M.	1.8 acres irrigation
Lot 3 SE ¼ NE ¼ Section 21 T40S R8E.W.M.	8.0 acres irrigation
Lot 4 NW ¼ NE ¼ Section 21 T40S R8E.W.M.	17.6 acres irrigation
NE ¼ NE ¼ Section 22 T40S R8E.W.M.	12.4 acres irrigation
NW ¼ NE ¼ Section 22 T40S R8E.W.M.	37.9 acres irrigation
NE ¼ NW ¼ Section 22 T40S R8E.W.M.	38.5 acres irrigation
NW ¼ NW ¼ Section 22 T40S R8E.W.M.	40.0 acres irrigation
SE ¼ NW ¼ Section 22 T40S R8E.W.M.	40.0 acres irrigation
SW ¼ SE ¼ Section 22 T40S R8E.W.M.	3.6 acres irrigation
Lot 1 SW ¼ NW ¼ Section 22 T40S R8E.W.M.	0.4 acres irrigation
Lot 3 SE ¼ NE ¼ Section 22 T40S R8E.W.M.	0.1 acres irrigation
Lot 3 NW ¼ SE ¼ Section 22 T40S R8E.W.M.	1.8 acres irrigation
Lot 5 SE ¼ NE ¼ Section 22 T40S R8E.W.M.	11.2 acres irrigation
Lot 6 SW ¼ NE ¼ Section 22 T40S R8E.W.M.	36.8 acres irrigation
Lot 7 NW ¼ SE ¼ Section 22 T40S R8E.W.M.	25.1 acres irrigation
Lot 8 NE ¼ SW ¼ Section 22 T40S R8E.W.M.	12.5 acres irrigation
Lot 9 SW ¼ NW ¼ Section 22 T40S R8E.W.M.	30.0 acres irrigation
Lot 10 SE ¼ NE ¼ Section 22 T40S R8E.W.M.	15.1 acres irrigation
Lot 10 NE ¼ SE ¼ Section 22 T40S R8E.W.M.	12.7 acres irrigation
Lot 11 SE ¼ SE ¼ Section 22 T40S R8E.W.M.	1.3 acres irrigation
SE ¼ SW ¼ Section 23 T40S R8E.W.M.	0.3 acres irrigation
Lot 6 NE ¼ SW ¼ Section 23 T40S R8E.W.M.	8.7 acres irrigation
Lot 7 NW ¼ SW ¼ Section 23 T40S R8E.W.M.	38.0 acres irrigation
Lot 8 SW ¼ NW ¼ Section 23 T40S R8E.W.M.	3.3 acres irrigation
Lot 9 SW ¼ SW ¼ Section 23 T40S R8E.W.M.	33.5 acres irrigation
Lot 3 NW ¼ NW ¼ Section 26 T40S R8E.W.M.	<u>7.2 acres irrigation</u>
Total:	530.8 acres irrigation

(OWRD Ex. 1 at 78, 167-168.)

The places of use for water from Diversion Point #6 are described as follows:

Lot 4 NE ¼ NW ¼ Section 23 T40S R8E.W.M.	15.2 acres irrigation
Lot 4 NW ¼ NW ¼ Section 23 T40S R8E.W.M.	0.6 acres irrigation
Lot 5 SE ¼ NW ¼ Section 23 T40S R8E.W.M.	<u>11.1 acres irrigation</u>
Total:	26.9 acres irrigation

(OWRD Ex. 1 at 100, 166-167.)

The following parcels listed in the places of use, above, are outside the meander line for the Klamath River:

Lot 2 SE ¼ NE ¼ Section 21 T40S R8E.W.M.	1.8 acres irrigation
SW ¼ SE ¼ Section 22 T40S R8E.W.M.	3.6 acres irrigation
Lot 1 SW ¼ NW ¼ Section 22 T40S R8E.W.M.	0.4 acres irrigation
Lot 3 NW ¼ SE ¼ Section 22 T40S R8E.W.M.	<u>1.8 acres irrigation</u>
Total:	7.6 acres irrigation

(OWRD Ex. 1 at 100.)

The remaining parcels listed in the places of use, above, are within the meander line for the Klamath River. (*Id.*) Because they are within the Klamath River's meander line, those parcels were subject to seasonal flooding until dams and levies were constructed on the Klamath River, beginning in the early 1900s. (Direct Testimony of Robert Flowers at 4, 5; Ex. U1 at 7.)

An additional water right was claimed based upon application of water from the Ady District Improvement Co. and Warren Act contracts with the United States for use of water from the Klamath Project, having a priority date of 1905. This portion of the claim was conditional on the United States failing to establish that it was the proper holder of the water right appropriated for the Klamath Project. The area in question in these additional properties was not defined with particularity in the original claim document. (OWRD Ex. 1 at 4.) The holding in the Amended Interim Order in Klamath Adjudication Case 003 that the United States is the proper holder of the water right for the 1905 appropriation for the Klamath Project is the law of the case for this proceeding. Klamath Adjudication Case 003, May 23, 2006, at page 35.

2) Prior to European settlement, the Klamath River was subject to seasonal flooding, during which the property subject to this claim that is within the meander line was seasonally inundated. (Direct Testimony of Robert Flowers at 4, 5; Ex. U1 at 7.) As floodwaters receded in the spring, the land would be exposed, and, since it was still saturated with water for some time after exposure, would produce an abundant crop of vegetation suitable for cattle feed. (*Id.*) When the river was at high flood, water would pass into Lower Klamath Lake through the Klamath Straits, raising the water level in Lower Klamath Lake, and in the straits. As the water receded in the river, water would drain back into the river through the straits, and the overflowed land would be exposed. (OWRD Ex. 1 at 10.)

3) Beginning in the 1850s, European settlers began coming into the area. They grazed cattle in the area of the land in question, and, perhaps, harvested hay there. (Direct Testimony of Robert Flowers at 3-5.) The land in question in this case was immediately South of and adjoined the Klamath Straits, and was overflowed seasonally by high water from the Klamath River and Lower Klamath Lake. (OWRD Ex. 1 at 10, 100.) There is no record, however, that this land was taken into exclusive ownership by any person until the 1870s.

4) On January 16, 1872, Quincy Brooks applied to purchase a parcel of land in Section 16, T40S R8E.W.M. which included all the place of use within Section 16 in this case. *Corpe v.*

*Brooks*, 8 Or 222 (1880).<sup>4</sup> Brooks paid 20% of the purchase price, or 20 cents per acre for the property in question. The sale was subsequently approved by the Board of Commissioners on April 4, 1872 as a sale under the Swamp Act of 1870. *Id.*

5) On February 16, 1876, Brooks conveyed the subject property in Section 16, together with property subject to this claim in the NE  $\frac{1}{4}$  NE  $\frac{1}{4}$  and Lots 3 and 4, Section 21 T40S, R8E.W.M. to John H. Miller, who operated a substantial cattle ranch in the area. (Ex. C-13. OWRD Ex. 1 at 18.) The State of Oregon conveyed this latter property in Section 21 to Brooks on February 1, 1886, also under the Swamp Act of 1870. In this same sale under the Swamp Act of 1870, the State of Oregon conveyed to Brooks Lots 4, 5, 6, and 7, Section 15 and the N  $\frac{1}{2}$  NW  $\frac{1}{4}$ , the SE  $\frac{1}{4}$  NW  $\frac{1}{4}$ , and lots 8 and 9 in Section 22 T40S R8E.W.M., also subject to this present claim. Consideration for the sale by the State of Oregon was one dollar per acre. (Ex. C-2.)

6) On December 19, 1888 the State of Oregon conveyed to H.C. Wortman property including Lot 3, Section 26 T40S R8E.W.M. included in the present claim. It is unclear what consideration was paid for this lot.<sup>5</sup>

7) Also on December 19, 1888, the State of Oregon conveyed to A. McKinnie by Swamp Act deed 240 acres including the SE  $\frac{1}{4}$  SW  $\frac{1}{4}$  Section 23, T30S R8E.W.M. Consideration for this sale by the State of Oregon was one dollar per acre. (Ex. C-3.)

8) On December 20, 1888, the State of Oregon conveyed to N.C. Strong by Swamp Act deed property including Lot 10, Section 22 and Lots 4, 5, 6, 7, 8, and 9, Section 23 T40S R8E.W.M. Consideration for this sale by the State of Oregon was one dollar per acre. (Ex. C-4.)

9) The title to Lot 11, Section 22 T40S R8E.W.M. was patented to the State of Oregon on February 26, 1889, but the chain of title thereafter is not of record in this case. (Ex. C- 22.) There are no title documents in the record related to property in the NE  $\frac{1}{4}$  NE  $\frac{1}{4}$  Section 22 T40 S. R8E.W.M. (Ex. C-2 through C-24.)

8) On October 30, 1889, the State of Oregon conveyed to W.L. Garretson a parcel of swamp land, including the following property subject to this claim: NW  $\frac{1}{4}$  NE  $\frac{1}{4}$  and Lots 5, 6 and 7, Section 22, T40S R8E.W.M. Consideration for this sale was one dollar per acre. (Ex. C-17.)

9) The evidence in the record establishes that most of the property subject to this claim (that portion within the meander line of the Klamath River) was under private ownership no later

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<sup>4</sup> While Claimants state in their reply brief that this application was “for the majority of the claimed lands,” in fact it was only for the acreage in Section 16, amounting to 26.9 acres. Brooks did apply for Swamp Act deeds to a large part of the property subject to this claim, but it was apparently by a separate application, as the State’s conveyance of that latter property does not describe the property purchased in 1872.

<sup>5</sup> Claimants state in their reply brief that Wortman and Garretson, among others, paid one dollar per acre for the land. It is clear that Garretson did so. The exhibit reciting Wortman’s purchase includes the subject property “with other land” with total acreage unspecified. It is, therefore, impossible to determine the price per acre from this exhibit.

than the 1880s. Natural grass was harvested from the land, either through grazing or as hay, from at least the time that it was in private hands. (OWRD Ex. 1 at 16-29; Rebuttal Testimony of Robert Flowers at 2.)

10) Beginning in the early 1900s, various facilities were built on the Klamath River to control the flow of the river. Link River Dam controlled flooding, so that the upper areas previously subject to seasonal inundation were no longer covered with water. From 1930 on, the California-Oregon Power Company raised the level of the river in the area subject to this claim, by building a dam downstream at Keno. This maintained the level of water in the river and Klamath Straits at a point where the land within the meander line of the river would be continually flooded without control structures. As dikes and levies were built along the Klamath River, and the Klamath Straits was blocked, Claimants built head-gates through the structures to allow water to flood the subject property for irrigation. (OWRD Ex. 1 at 11, 12, 15.)

### CONCLUSIONS OF LAW

- 1. Waters originating within the Lost River Basin are not subject to appropriation in the Klamath Adjudication.**
- 2. There is sufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right.**
- 3. The pre-1909 water right on the claimed place of use that is within the meander line of the Klamath River is prior to the claims of the United States for the Klamath Project. The United States is the proper holder of the water right for water obtained from the Klamath Project through contracts with the United States and the Ady District Improvement Company.**

### OPINION

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. The standard of evidence applicable to these cases is by a preponderance. *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). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

In order to establish the claim, Claimants must show (1) an intent to apply the water to some beneficial use existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, channel or other structure; and (3) the application of the water within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930). Where the claim is based on natural overflow, the appropriation may be established by evidence that the “proprietor of the land accepts the gift made by nature and garners the produce of the irrigation by harvesting or utilizing the crops grown on the land\*\*\*.” *In re Silvies River*, 115 Or 27, 66 (1925).



It is also the Claimants' burden to prove the terms of the right, such as the priority date, amount claimed, season of use and number and location of irrigated acres.

**1. Waters originating within the Lost River Basin are not subject to appropriation in the Klamath Adjudication.**

The parties stipulated that this order should contain the following provision:

Nothing in this order shall constitute or be construed as a finding or determination with respect to the rights of any claimant, contestant, party, person or agency (collectively the "Parties") to the right to use the waters of the Lost River, including but not limited to the Lost River, Clear Lake, Gerber Reservoir, and their tributaries, nor does this proposed order affect any of the Parties' rights to the use of waters of the Lost River or its tributaries.

Nothing in this order is intended to prevent any of the parties from filing exceptions, should the Adjudicator's findings of fact and order of determination deviate from any such proposed order in this regard.

This order does not preclude the introduction of evidence necessary to determine the beneficial use of Klamath River basin waters in any later proceedings.

This stipulation resolves this issue.

**2. There is sufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right.**

The United States has sought to show that the property was unreclaimed swamp land until after 1909, and that the previous owners therefore did not accept the benefit of the natural overflow of the Klamath River, so as to appropriate the water. The gravamen of the United States' argument is that the conveyances of property by the State of Oregon under Swamp Act deed did not necessarily mean that the land had been reclaimed or that water was being beneficially used by the time those deeds were given.

In the first place, reclamation itself is not the issue in this case. Claimants assert that the property could be profitably used for grazing or hay without construction of any works until control facilities were constructed on the Klamath River in the 20<sup>th</sup> century. The evidence supports this assertion. Thus, no active efforts at reclamation were required. Indeed, the Act of 1870 supports this assertion, as it treated land as reclaimed which had been "successfully cultivated in either grass, the cereals or vegetables for three years." 1870 General Laws of Oregon §4, p. 56. Since the properties in question were already planted in grass, it only remained to harvest the crop for three years for reclamation to be complete.

The United States also argued that the evidence of pre-1909 use of the water was hearsay, and therefore not substantial evidence. Hearsay evidence may be substantial evidence for purposes of an administrative hearing if it is shown to be of sufficient reliability to meet the test provided by ORS 183.450: It must be “of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs \* \* \*.” The Oregon Supreme Court has discussed the standard for evaluating the reliability of such evidence in a number of cases, notably *Reguero v. Teacher Standards and Practices*, 321 Or 402 (1991) and *Cole v. Driver and Motor Vehicle Services Branch*, 336 Or 565 (2004). In those cases, the Court enunciated a series of factors that were to be considered in deciding whether a particular item of hearsay should be treated as substantial evidence, although in *Cole* the Court emphasized that these factors were not exclusive, and should not be “treated as a checklist.” *Id.* at 585 note 18. In this case, as discussed further below, I conclude that at least some of the hearsay information contained in the file qualifies as substantial evidence.

*Cole v. DMV* was a consolidated decision on two separate cases that had previously been considered by the Court of Appeals. Those cases involved two drivers whose licenses had been suspended under different statutory provisions, after administrative hearings at which hearsay evidence was a significant part of the case.

In one case, Cole’s driver license was suspended after he was arrested for Driving Under the Influence of Intoxicants, based in part on a police report that was admitted at hearing. The report had been prepared by a police officer in the regular performance of his duty and, although Cole objected to admission of the report at hearing, Cole did not put on any evidence that contradicted the report. In these circumstances, the Court held that the report was substantial evidence, especially where the driver had the right to subpoena the author of the report if cross-examination was desired. However, since the identity of the author of the report was unknown to Cole prior to the hearing, Cole was deprived of a reasonable opportunity to subpoena the officer, which, the Court concluded, was a violation of Due Process.

In the second case, Dinsmore’s driver license was alleged to be subject to suspension because her driving caused or contributed to a death due to recklessness or criminal negligence. Two police officers who prepared reports of the incident were subpoenaed by the agency, but did not appear. The Court concluded that the reports could not be treated as substantial evidence because they were the only evidence supporting the agency’s action and Dinsmore had submitted evidence that contradicted them in important respects. Significantly, the Court noted that the expert opinion contained in one of the reports was open to question because Dinsmore had submitted evidence contrary to the facts that served as the foundation for that opinion.

In this case, the United States objected to admission of hearsay. However, the findings of fact that are supported by hearsay in this case, contained in Findings of Fact Paragraphs 1, 2, 3 and 10, provide general information as to the seasonal overflow of the property, and the development of dams and control structures on the Klamath River. None of these facts is contradicted in the United States’ presentation, or seriously open to question. Consequently, under *Cole*, the hearsay evidence used to support those findings of fact is substantial evidence.

In this regard, the situation in this case is similar to that confronting the Oregon Supreme Court in 1931, when that court reviewed the decree in the Sprague River Adjudication in *Campbell v. Walker*, 137 Or 375 (1931). There, the court said the following:

Appreciating the difficulty of getting testimony of all the conditions that existed at the time the lands were first settled on, the trial court awarded the water rights as of the date shown by the evidence, upon which an honest effort was made to occupy or acquire title to the lands and to use both the lands and waters 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 at 393.

The record of Swamp Act deeds is chiefly significant as an aid to determining the priority dates for the water rights. The Swamp Act of 1870 did not place a limitation on the number of acres acquired, and set the purchase price at one dollar per acre, with a 20% down payment, but required proof that the property was reclaimed prior to conveyance by the state. 1870 General Laws of Oregon §§3, 4 at pages 55, 56. In 1878, however, the law was amended, to allow purchase without reclamation for \$2.50 per acre, but limiting purchases of swamp land after 1878 to 320 acres or less. 1878 General Laws of Oregon §§4, 10, pages 42, 46. The statute was again amended in 1887 to allow those who had filed their application prior to 1878 to complete the purchase of the property without reclamation for the payment of the remaining 80% of the purchase price prior to 1889, but limited the purchase in that instance to 640 acres. General Laws of 1887 §5, pages 9, 10. The 1887 statute also provided that actual settlers on properties of less than 320 acres who had paid the 20% down payment could perfect title without reclamation if they paid the remainder of the purchase price before January 1, 1889. *Id.* at §2, page 10. Thus, if a Swamp Act Deed was for more than 320 acres, it must have been based on an application filed before the Act of 1878. If it was for less than 320 acres, it could be based on a later application. However, if the deed was dated before 1887, and recited the purchase price at one dollar per acre, then the actual occupation of the property must have commenced at least three years earlier. This is not necessarily the case after 1887, since the property could then be purchased by payment of the balance of the purchase price until January 1, 1889 without proof of reclamation.

Taken together, the preponderance of the evidence in the record in this case establishes that hay was harvested or cattle grazed on the property at least as early as the date individuals held the property under claim of right. Likewise, the fact that crops watered by natural overflow were being harvested from the properties is sufficient to establish the intent to accept the bounty of the natural overflow at least as of the date the property passed into private ownership. *In re Silvies River*, 115 Or at 66.

The record shows that works of some sort were constructed early in the 20<sup>th</sup> century, including ditches and dikes to control the flow of water across the property. There is no evidence from which it can be determined that an unreasonable time passed before works were constructed to more efficiently use the water.

The evidence shows directly that grass was harvested from the properties in the early 20<sup>th</sup> century, under conditions identical with those that had been present since before European settlement. Given the pattern of use in the record, and the evidence of similar practices from the mid-1800s in similar properties in the area, I conclude that water could have been put to beneficial use on the properties in question as early as 1868. As Robert Flowers testified, the area subject to overflow provided grass that was preferred by cattle. John Miller is known to have run a large cattle ranch in the area, and at one point owned part of the land in question. I therefore conclude that it is more likely than not that water was put to beneficial use immediately after the land went into private ownership, if not before. Nonetheless, this use could not form the basis for a water right until it coincided with evidence of a claim of right in the land. *Hough v. Porter* 51 Or 318, 421 (1909).

Here, that evidence appears in the record beginning January 16, 1872, when Quincy Brooks applied for a Swamp Act purchase of a parcel of land in Section 16, T40S R8E.W.M. that included all the place of use within Section 16 in this case. That purchase was recited by the Oregon Supreme Court in *Corpe v. Brooks*, 8 Or 222 (1880), and formed the basis for the decision in Brooks' favor in that case. On February 16, 1876, Brooks conveyed this property in Section 16, together with property subject to this claim in the NE ¼ NE ¼ and Lots 3 and 4, Section 21 T40S, R8E.W.M. to John H. Miller. The property in Section 21 was apparently part of a different Swamp Act application, since the Swamp Act deed for that property by the State of Oregon in 1886 did not include the property in Section 16. That state deed, however, included other property that is subject to this claim: Lots 4, 5, 6, and 7, Section 15 and the N ½ NW ¼, the SE ¼ NW ¼, and lots 8 and 9 in Section 22 T40S R8E.W.M. Because all of this property was subject to seasonal flooding at the time, I conclude that it was used, at least for grazing, as of the earliest date that Brooks could be shown to be occupying it. In the case of the property in Section 16, that date was January 16, 1872, which should be the priority date for that property. As to the remaining property, Brooks purported to convey a portion of it to John Miller on February 16, 1876. I infer that the property conveyed to John Miller was occupied under claim of right on that date. I also infer that the other property that was conveyed by the state with Miller's property in 1886 was part of the same application for Swamp Act purchase, suggesting that it is more likely than not that Brooks occupied this additional property as well on February 16, 1876. February 16, 1876 should therefore be the priority date for the water rights to these properties.

The deed dated December 19, 1888 from the State of Oregon to H.C. Wortman conveyed property including Lot 3, Section 26 T40S R8E.W.M. that is part of the present claim. Although Claimants suggested that this was a Swamp Act deed, the deed itself is not in evidence, and the abstract included in the record does not disclose enough about the transaction to show the basis for the transfer. Insofar as the evidence shows, this could have been an outright transfer giving possession to the property on the date of its execution. Consequently, the evidence does not establish a date of possession for the property earlier than December 19, 1888, which should be the priority date of the water right for this parcel.

The Swamp Act deed to N.C. Strong of December 20, 1888 for Lot 10, Section 22 and Lots 4, 5, 6, 7, 8, and 9, Section 23 T40S R8E.W.M. showed that consideration for this sale was

one dollar per acre. Because this sale totaled more than 320 acres, such a consideration could only have been accepted by the state if Strong had applied to purchase the property prior to the effective date of the Swamp Act of 1878. Thus, the priority date of the water right to this parcel should be December 31, 1878.

Although the Swamp Act sales to W.L. Garretson on October 30, 1889, for NW ¼ NE ¼ and Lots 5, 6 and 7, Section 22, T40S R8E.W.M. and to A. McKinnie on December 19, 1888 for SE ¼ SW ¼ Section 23, T40S R8E.W.M. were also for one dollar per acre, the number of acres in both sales were less than 320, and the deeds were after 1887. Consequently, these sales could have been under the Swamp Act of 1878, or 1887, unlike the sale to Strong, and could have occurred without reclamation. The only evidence for a date of occupation is the deeds themselves. October 30, 1889 should be the priority date for Garretson's parcel and December 19, 1888 for McKinnie's.

Although the United States conveyed Lot 11, Section 22 to the State of Oregon by patent on February 26, 1889, the record does not contain any conveyance from the State of Oregon, or any other instrument of transfer of this lot. It is therefore impossible to determine when it went into private ownership. Likewise, there is no evidence of title at all to property in the NE ¼ NE ¼ Section 22. Consequently, the claim to 1.3 acres of irrigation for Lot 11 and to 12.4 acres of irrigation in the NE ¼ NE ¼ Section 22 cannot be allowed.

The Rate and Duty claimed (1/40<sup>th</sup> cfs per acre and 3 acre-feet per acre per year) are not challenged by the other parties, and therefore will be allowed. The claim asserts a year-round season of use, describing flood-irrigation of the fields three times per year, beginning during the winter. However, there is no evidence for this practice prior to 1909, and it was likely not possible until the dam was built at Keno to maintain a constant high level in the river. Prior to that point, the land was inundated during the spring floods, and the water gradually receded during the remainder of the spring and summer. Consequently, a Season of Use of April 1 through October 31 is appropriate.

- 3. None of the pre-1909 water right on the claimed place of use is included in the claims of the United States for the Klamath Project. The United States is the proper holder of the water right for water obtained from the Klamath Project through contracts with the United States and the Ady District Improvement Company.**

In addition to the claim for irrigation within the meander line, the claim included the following:

We wish to Reserve the Right to extend this claim the rest of this property described in att deeds if Bureau of Rec. fails to establish claim and Attach Rights on all Real Property for ADY Dist. Imp. Co. and Warren Act. Lands. [sic]

(OWRD Ex. 1 at 4.)

Robert Flowers, in his Direct Testimony, characterized this portion of the claim as 180 acres under the Warren Act contract and 435.1 acres under contract with the Ady District Improvement Company. Flowers also indicated that both the Warren Act contract and the Ady District Improvement Company contract are part of the Bureau of Reclamation's Klamath Project, with a priority date of 1905. As noted in the History of this case, above, this case was consolidated with Klamath Adjudication Case 003 for a determination of the ownership of the water right in the Klamath Project. The decision in that case that the United States was the legal owner of that water right, is law of the case for this matter. Moreover, because the Bureau of Reclamation did *not* fail to establish its claim, the condition for application of this portion of the claim has not been met.

### **SUMMARY**

Except for the 7.6 acres outside the meander line, and the 13.7 acres in the NE ¼ NE ¼ and Lot 11, Section 22, T40S R8E.W.M. the remainder of the land inside the meander line is subject to the natural overflow claim which should be included in an allowed pre-1909 water right, with various priority dates. The rest of the claim should be denied.

### **ORDER**

I propose that the Adjudicator issue the following order:

Nothing in this order shall constitute or be construed as a finding or determination with respect to the rights of any claimant, contestant, party, person or agency (collectively the "Parties") to the right to use the waters of the Lost River, including but not limited to the Lost River, Clear Lake, Gerber Reservoir, and their tributaries, nor does this proposed order affect any of the Parties' rights to the use of waters of the Lost River or its tributaries.

Nothing in this order is intended to prevent any of the parties from filing exceptions, should the Adjudicator's findings of fact and order of determination deviate from any such proposed order in this regard.

This order does not preclude the introduction of evidence necessary to determine the beneficial use of Klamath River basin waters in any later proceedings.

Claim 205 should be allowed as follows:

Rate: 13.41 cfs  
Duty: 1609.2 acre-feet per year  
Season of Use: April 1 through October 31  
Purpose of Use: Irrigation  
Source: Klamath River, Tributary to Pacific Ocean.

Diversion point 1: Lot 4, SW ¼ SW ¼ Section 15 T40S R8E.W.M.

Diversion point 2: SE ¼ SE ¼ Section 16 T40S R8E.W.M.

Diversion Point 3: SW ¼ SE ¼ Section 16 T40S R8E.W.M.

Diversion Point 4: SW ¼ SW ¼ Section 16 T40S R8E.W.M.  
 Diversion Point 5: NE ¼ NW ¼ Section 22 T40S R8E.W.M.

Places of Use for Diversion Points 1 through 5:

Location:	Acreage	Priority
Lot 4 SW ¼ SW ¼ Section 15 T40S R8E.W.M.	14.2 acres	February 16, 1876
Lot 5 SE ¼ SW ¼ Section 15 T40S R8E.W.M.	4.4 acres	February 16, 1876
Lot 6 SE ¼ SE ¼ Section 15 T40S R8E.W.M.	5.1 acres	February 16, 1876
Lot 7 SE ¼ SE ¼ Section 15 T40S R8E.W.M.	1.0 acres	February 16, 1876
SW ¼ SE ¼ Section 16 T40S R8E.W.M.	2.5 acres	April 4, 1872
SE ¼ SE ¼ Section 16 T40S R8E.W.M.	0.7 acres	April 4, 1872
Lot 5 SW ¼ SE ¼ Section 16 T40S R8E.W.M.	15.3 acres	April 4, 1872
Lot 6 SE ¼ SE ¼ Section 16 T40S R8E.W.M.	9.8 acres	April 4, 1872
NE ¼ NE ¼ Section 21 T40S R8E.W.M.	40.0 acres	February 16, 1876
Lot 3 SE ¼ NE ¼ Section 21 T40S R8E.W.M.	8.0 acres	February 16, 1876
Lot 4 NW ¼ NE ¼ Section 21 T40S R8E.W.M.	17.6 acres	February 16, 1876
NW ¼ NE ¼ Section 22 T40S R8E.W.M.	37.9 acres	October 30, 1889
NE ¼ NW ¼ Section 22 T40S R8E.W.M.	38.5 acres	February 16, 1876
NW ¼ NW ¼ Section 22 T40S R8E.W.M.	40.0 acres	February 16, 1876
SE ¼ NW ¼ Section 22 T40S R8E.W.M.	40.0 acres	February 16, 1876
Lot 3 SE ¼ NE ¼ Section 22 T40S R8E.W.M.	0.1 acres	December 19, 1888
Lot 5 SE ¼ NE ¼ Section 22 T40S R8E.W.M.	11.2 acres	October 30, 1889
Lot 6 SW ¼ NE ¼ Section 22 T40S R8E.W.M.	36.8 acres	October 30, 1889
Lot 7 NW ¼ SE ¼ Section 22 T40S R8E.W.M.	25.1 acres	October 30, 1889
Lot 8 NE ¼ SW ¼ Section 22 T40S R8E.W.M.	12.5 acres	February 16, 1876
Lot 9 SW ¼ NW ¼ Section 22 T40S R8E.W.M.	30.0 acres	February 16, 1876
Lot 10 SE ¼ NE ¼ Section 22 T40S R8E.W.M.	15.1 acres	December 31, 1878
Lot 10 NE ¼ SE ¼ Section 22 T40S R8E.W.M.	12.7 acres	December 31, 1878
SE ¼ SW ¼ Section 23 T40S R8E.W.M.	0.3 acres	December 19, 1888
Lot 6 NE ¼ SW ¼ Section 23 T40S R8E.W.M.	8.7 acres	December 31, 1878
Lot 7 NW ¼ SW ¼ Section 23 T40S R8E.W.M.	38.0 acres	December 31, 1878
Lot 8 SW ¼ NW ¼ Section 23 T40S R8E.W.M.	3.3 acres	December 31, 1878
Lot 9 SW ¼ SW ¼ Section 23 T40S R8E.W.M.	33.5 acres	December 31, 1878
Lot 3 NW ¼ NW ¼ Section 26 T40S R8E.W.M.	<u>7.2 acres</u>	December 19, 1888
Total:	509.5 acres	

Diversion Point 6: Lot 4, NE ¼ NW ¼ Section 23 T40S R8E.W.M.

Places of Use for Diversion Point 6:

Lot 4 NE ¼ NW ¼ Section 23 T40S R8E.W.M.	15.2 acres	December 31, 1878
Lot 4 NW ¼ NW ¼ Section 23 T40S R8E.W.M.	0.6 acres	December 31, 1878
Lot 5 SE ¼ NW ¼ Section 23 T40S R8E.W.M.	<u>11.1 acres</u>	December 31, 1878
Total:	26.9 acres	

The remainder of the claim should be denied.

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

Dated: April 13, 2007

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



## CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2007, 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  
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Sacramento, CA 95825  
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Misty Fragua  
Administrative Assistant