

**BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON**

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of)	PARTIAL ORDER OF
DAVID P. FAIRCLO, AND)	DETERMINATION
JELD-WEN, INC.)	
_____)	Water Right Claim 78

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

A. FINDINGS OF FACT

1. On January 17, 1991, RICHARD FAIRCLO timely submitted a Statement and Proof of Claim (Claim 78), for both private and public lands, to the Oregon Water Resources Department (OWRD) pursuant to ORS Chapter 539 in the Klamath Basin Adjudication as follows:
 - a. as a non-Indian successor to allotted Klamath Reservation lands claiming a vested Indian reserved water right (Walton claim) under the Treaty of October 14, 1864, 16 Stat. 707, for private lands; and
 - b. as a non-Indian successor to unallotted Klamath Indian Reservation lands claiming a vested Indian reserved water right under the Treaty of October 14, 1864, 16 Stat. 707, pursuant to the Klamath Tribes Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. § 564 et seq. (Klamath Termination Act claim), for public lands.
2. Claim 78 was submitted for a total of 4.81 cfs of water, being 3.63 cfs from Blue Creek, a tributary of the Sycan River, and 1.18 cfs from Corner Creek (natural overflow), a tributary of the Blue Creek, for irrigation of 183.9 acres and livestock watering of 200 - 800 head. The claimed period of use is March 15 to December 1. The claimed priority date is "1864."
3. RICHARD FAIRCLO signed Claim 78 attesting that the information contained in the claim is true.
4. On January 9, 1997, RICHARD FAIRCLO assigned one-half interest in the title to the property associated with Claim 78 to DAVID P. FAIRCLO and the other one-half interest to JELD-WEN, INC. *See* ASSIGNMENT OF WATER RIGHTS (CLAIM # 78, PAGE 013). *See*

also COUNTY OF KLAMATH RECORDS, VOL. M97, PAGE 762. Claimants in Claim 78 are DAVID P. FAIRCLO AND JELD-WEN, INC (Claimants).

5. On October 4, 1999, following investigation of the evidence submitted, the Adjudicator issued a Summary and Preliminary Evaluation of Claims (Preliminary Evaluation) stating the claim was approved for irrigation and livestock watering, but for a smaller quantity of water than claimed, and with a longer season of use for livestock watering than claimed.
6. On May 8, 2000, the following parties, hereinafter collectively referred to as the "Klamath Project Water Users," filed Contest 3469: 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.¹, Malin Irrigation District, Midland District Improvement Company, Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Bradley S. Luscombe, Berlva Pritchard², Don Vincent³, Randy Walthall, Inter-County Title Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Plevna District Improvement Co., and Collins Products, LLC.
7. On May 8, 2000, the United States of America timely filed Contest 3807 to the Claim and/or Preliminary Evaluation of Claim 78.
8. On May 8, 2000, the Klamath Tribes timely filed Contest 4126 to the Claim and/or Preliminary Evaluation of Claim 78.
9. These matters were referred to the Office of Administrative Hearings for a contested case hearing which were designated as Case 205.
10. On April 8, 2004, the Klamath Project Water Users withdrew Contest 3469. *See* NOTICE OF WITHDRAWAL OF CONTEST NO. 3469 (Apr. 8, 2004).
11. On April 7, 2005, the Klamath Tribes withdrew Contest 4126. *See* KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST (April 7, 2005).
12. On February 2, 2006, Claimants, DAVID P. FAIRCLO AND JELD-WEN, INC., conditionally assigned the portion of Claim 78 appurtenant to the Fremont National Forest, located within the NW $\frac{1}{4}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 33, Township 34 South, Range 12 East, W.M., to the UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE (USFS). *See* PARTIAL ASSIGNMENT OF CLAIM; KLAMATH BASIN ADJUDICATION CLAIM 78 (Feb. 2, 2006).

¹ Klamath Hills District Improvement Company voluntarily withdrew from Contest 3469 on January 16, 2004. *See* VOLUNTARY WITHDRAWAL OF CONTEST BY KLAMATH HILLS DISTRICT IMPROVEMENT COMPANY

² Berlva Pritchard voluntarily withdrew from Contest 3469 on June 24, 2002. *See* NOTICE OF WITHDRAWAL OF CLAIMANT.

³ Don Vincent voluntarily withdrew from Contest 3469 on November 29, 2000. *See* NOTICE OF WITHDRAWAL OF CLAIMANTS.

13. On February 28, 2006, the Claimants, OWRD, and the United States of America executed a STIPULATION TO RESOLVE CONTEST 1714 (Settlement Agreement) thereby resolving the remaining contest to Claim 78.
14. On March 1, 2006, the Adjudicator withdrew Case 205 from the Office of Administrative Hearings.
15. The terms of the Settlement Agreement specify the water right claim is to be adjudicated to two separate ownership groups, being (1) DAVID P. FAIRCLO AND JELD-WEN, INC., and (2) the USFS. Therefore, OWRD finds it practical to bifurcate Claim 78; OWRD has retained the designation of Claim 78 for the portion of the claim pertaining to DAVID P. FAIRCLO AND JELD-WEN, INC., and has designated the portion of the claim pertaining to the USFS as Claim 732.
16. OWRD prorated the 800 head as originally claimed in Claim 78 for incidental livestock watering, based on grazing acres available within the two bifurcated portions⁴. OWRD finds the number of head for incidental livestock watering is limited to 720 head for Claim 78, and 80 head for Claim 732.

B. DETERMINATION

1. The Settlement Agreement executed between the Claimants, OWRD, and the United States of America is adopted and incorporated as if set forth fully herein.
2. Incidental livestock watering is limited to 720 head as described in Finding 16, above.
3. A portion of the claimed place of use is subject to natural irrigation from Corner Creek, tributary to the Blue Creek. The Settlement Agreement states that the privilege to use water as described herein does not constitute a water right. OWRD will not issue a certificate for this portion of Claim 78 subject to natural overflow. This privilege cannot be insisted upon if it interferes with the appropriation of the waters for beneficial use by others, and no priority date, season of use, rate or duty shall attach to such privilege. This privilege may not be transferred to any other property, and may not be altered by the use of any physical means to modify the manner in which natural irrigation occurs, to contain or further distribute water or to increase in any other way the consumption which takes place from natural irrigation. Any such alteration shall require the filing with OWRD of an application for a permit to appropriate water under ORS 537.150. This privilege will not modify any rights that the Claimant may have to allow livestock watering pursuant to ORS 537.141(2). In addition, the stipulation states that this privilege allows for managing the flow of naturally occurring overflow in a manner consistent with their historic control of the overflow, so long as such management does not include the use of head gates, dams or other structures for the appropriation of water from the source. Such management activities may include, but are not limited to, the maintenance of canals or

⁴ 17.2 acres / 179.5 acres = 10% for Claim 732; and 162.3 acres / 179.5 acres = 90% for Claim 78

channels to help spread the overflow water across the stipulated place of use. The stipulated place of use for acceptance of natural irrigation is located as follows:

IRRIGATION BY NATURAL OVERFLOW WITH INCIDENTAL LIVESTOCK WATERING						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
35 S	12 E	WM	4	NW NE	2	9.8
35 S	12 E	WM	4	SW NE		18.5
35 S	12 E	WM	4	SE NE		8.4
35 S	12 E	WM	4	NE NW	3	2.0
35 S	12 E	WM	4	SE NW		6.8

See CLAIM # 78 SETTLEMENT MAP (Feb. 22, 2006)

4. Based on the file and record herein, IT IS ORDERED that a portion of Claim 78 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 78
FOR A VESTED WATER RIGHT

CLAIM MAP REFERENCE: CLAIM # 78 SETTLEMENT MAP (Feb. 22, 2006)

CLAIMANT: DAVID FAIRCLO
20751 AMBER WAY
BEND, OR 97701

JELD-WEN, INC.
401 HARBOR ISLES BVLD.
KLAMATH FALLS, OR 97601

SOURCE OF WATER: BLUE CREEK, tributary to the SYCAN RIVER

PURPOSE OR USE:
IRRIGATION OF 116.8 ACRES, AND

INCIDENTAL LIVESTOCK WATERING UP TO 720 HEAD, FOR THE PORTION OF THE CLAIM THAT IS ACKNOWLEDGED AS A PRIVILEGE ONLY COMBINED WITH THE PORTION THAT IS A VESTED WATER RIGHT

RATE OF USE:
2.92 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINT OF DIVERSION

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:
3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

PERIOD OF ALLOWED USE: MAY 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

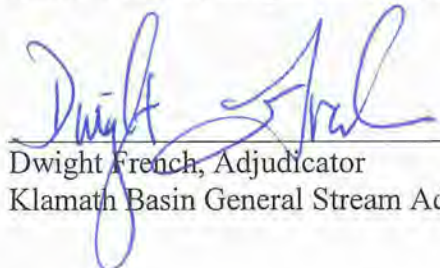
Twp	Rng	Mer	Sec	Q-Q	Measured Distances
34 S	12 E	WM	32	NE SE	2100 FEET NORTH AND 400 FEET WEST FROM SE CORNER, SECTION 32

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
35 S	12 E	WM	4	NE NW	3	20.4
35 S	12 E	WM	4	NW NW	4	37.2
35 S	12 E	WM	4	SW NW		25.2
35 S	12 E	WM	4	SE NW		3.6
35 S	12 E	WM	5	NE NE		1.6
35 S	12 E	WM	5	SW NE		1.2
35 S	12 E	WM	5	SE NE		27.6

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013


Dwight French, Adjudicator
Klamath Basin General Stream Adjudication