134F0010002

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River, a Tributary of the Pacific Ocean

United States of America; Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Klamath Hills District Improvement Co.; Malin Irrigation District; Midland District Improvement Company; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S Luscombe; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Reames Golf and Country Club; Van Brimmer Ditch Co.; Plevna District Improvement Company; and Collins Products, LLC;

Contestants

v.

Richard W. Berg;

Claimant/Contestant.

PROPOSED ORDER

Case No. 134

Claim: 201

Contests: 6, 3187, 3412,[1] 3843, and 4185

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.

[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.

On November 30, 1990, Richard W. Berg filed a Statement of Claim (Claim 201) based upon use of water commenced before February 24, 1909, for 0.89 cfs for irrigation of 30.92 acres and livestock watering from one point of diversion located on the Klamath River. The claimed priority date is March 30, 1905.

On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin General Stream Adjudication, issued a Summary Preliminary Evaluation recommending approval of the claim, but for a lesser amount (0.53 cfs) and fewer acres (21.0 acres) than claimed. The claimant, Mr. Berg, filed contest 36 to the Preliminary Evaluation on April 27, 2000.

On May 8, 2000, the individuals and entities referred to in this proceeding as the Klamath Project Water Users (KPWU)[2] filed Contest 3412 against the claim and against the Preliminary Evaluation. On that same date the United States of America (United States) also filed Contest 3843 against the claim and against the Preliminary Evaluation.

On May 8, 2000, the Horsefly, Langell Valley, Rogue River Valley, and Medford Irrigation Districts (Districts) filed Contest 3187 against the right claimed. The Districts withdrew their contest on March 26, 2002. On that same date the Klamath Tribes filed Contest 4185 against the claim and against the Preliminary Evaluation. The Klamath Tribes withdrew their contest on February 13, 2003.

PROCEDURAL MATTERS

The Water Resources Department (OWRD) referred this matter to the Office of Administrative Hearings 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 the participants agreed to a discovery schedule and to dates for hearing.

Pursuant to a Notice of Hearing mailed to all participants by certified mail on July 16, 2003, a hearing was convened on September 9, 2003, for the purpose of admitting evidence into the record and cross-examining witnesses whose direct testimony had previously been filed and whose attendance had been requested for cross-examination. Administrative Law Judge William D. Young presided. Michael Berg appeared for the hearing and represented himself. The United States and KPWU took part in the hearing by telephone. The United States was represented by its attorney, Steven R. Palmer. The KPWU was represented by its attorney, Andrew M. Hitchings. OWRD was represented by Kimberly Grigsby, an authorized agency representative.

---

[2] 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.

I held the record open to allow the participants an opportunity to provide written closing arguments. Mr. Berg filed a letter constituting his closing argument on October 17, 2003. The United States field its Closing Brief and KPWU filed their and Post Hearing Response on November 7, 2003. On November 26, 2003, OWRD filed a Reply to the United States' Closing Brief. Mr. Berg was allowed until December 5, 2003 to file a reply to arguments raised by the other participants, but did not file a reply. I closed the hearing record on December 5, 2003.

EVIDENTIARY RULINGS

No party presented documents identified as written direct testimony, nor did any party identify individuals they wished to cross-examine, although the KPWU, the United States, and OWRD reserved the right to cross-examine any witness who testified at the hearing. During the discussion before the hearing, Mr. Berg indicated that he had intended letters he had filed with the Office of Administrative Hearings to be considered his direct testimony. Because he was representing himself and was present for cross-examination, and because Mr. Berg had served the other participants when he filed the documents, I allowed his request.

I admitted into evidence OWRD's exhibit 1, without objection. I admitted Richard Berg's letters dated February 20, 2003[3] and April 11, 2003 as pre-filed written testimony, overruling KPWU's objection to the attachments to the letter dated February 20, 2003, asserting that the documents had an inadequate foundation or were not sufficiently reliable to be admitted. I reserved ruling on KPWU's objections to the attachments to the letter dated April 11, 2003, asserting that the documents were unduly repititious.

After considering OWRD exhibit 1 and the attachments to the letter dated April 11, 2003, I find that the September 2, 1981 affidavit of Roy W. Nelson (Ref. No. 134E00020003 and 134E00020004) duplicate documents found in OWRD exhibit 1 at pages 108 and 109. I hereby sustain KPWU's objection to those documents and exclude those documents from being considered separately as unduly repetitious under ORS 183.450(1). Although many pages of Mr. Berg's exhibit, Abstract of Title, Wilson Abstract Company, Abstract No. 11227 (Ref. No. 134E00020002) duplicate documents in OWRD exhibit 1, I cannot find some of the pages of this lengthy exhibit in OWRD's exhibit. Also, the attachments provide continuity not easily ascertained from OWRD's exhibit. Even though some of the document may be duplicative, the exhibit is not unduly repetitious and KPWU's objection is overruled.

ISSUES

(1) Does the record for Claim 201 establish the required elements of a pre-1909 water right?

(2) Does the record for Claim 201 support the claimed rate, duty, actual use, points of diversion, seasonal limitations or acreage claimed?

[3] This document was inadvertently misdated February 20, 2000.

(3) What is the appropriate period of use for irrigation?

FINDINGS OF FACT

(1) On September 16, 1882, the United States transferred title to approximately 380.64 acres situated in Lot 9, Section 6 (and other property immaterial to identification of the property), Township 40S, Range 8E, [Willamette Meridian], to the State of Oregon. The transfer, in fee simple, was made at the July 18, 1881 request of the Governor of the State of Oregon. (OWRD exhibit 1, page 40.)

(2) On July 28, 1882, the State of Oregon entered into an agreement with Quincy A. Brooks in which the State sold property approximating 777.55 acres of Swamp Land located in "Lot 9 of Sec.6 in Twp. 40S. R.8E. W.M." The deed, dated July 28, 1882, was recorded November 1, 1884. Over the years, the property passed through a number of hands until C.V. Nelson became the sole owner in December 1904. (Berg exhibit 2, pages 4 and 24.)

(3) The property appurtenant to Claim 201 is part of a larger property acquired by Frank T. Nelson in 1897. The lowland property owned by Nelson, including the property appurtenant to Claim 201, was a source of hay irrigated by natural overflow or flooding. When Nelson acquired the property, it included three canals that had been constructed earlier in the 1890s to deal with a prolonged drought, but these canals did not serve the property appurtenant to Claim 201. Dikes were constructed beginning in 1907 to reduce the annual overflow so that other crops could be grown. Shortly after, another canal was dug to a pumping station to lift water from the river to the higher portions of the property. (OWRD Exhibit 1, pages 13, 108, 109 110.)

(4) On March 30, 1905, a subsequent landowner, C.V. Nelson, entered into a Stock Subscription and Contract with the Klamath Water Users Association in which Mr. Nelson agreed to take 147 shares of stock in the Klamath Water Users Association:

> Said shares and all rights and interests represented thereby to be appurtenant to the following real estate:
>
> Description: Lot 9 of Sec. 6, of Twp. 40 S.R. 8EWM (And other property immaterial to this examination.) containing 147 acres, more or less.
> * * *
> Further recites in effect that rights to any water heretofore appropriated shall become appurtenant to said lands; that first party [C.V. Nelson] shall be entitled to delivery of water to said lands, provided the amount shall not exceed the amount necessary; transfer of title to operate as transfer of rights hereunder; first party to make application to the United States for water rights, etc.

(OWRD exhibit 1, page 15.)

(5) On July 15, 1905, C.V. Nelson and the United States entered into an agreement pertaining to Lot 9 of Sec. 6, Township 40S, Range 8, Willamette Meridian.

> . . . whereas the party of the 2nd part [United States] has undertaken to construct a reclamation project located partly in the county and State above mentioned and known as Klamath River project the construction and operation of which will greatly benefit the lands above described and owners thereof . . . all right, title and interest of the party of the first part [C.V. Nelson] of whatever nature, in and to the waters of Lower Klamath Lake and Klamath or Link River, bordering on the above described lands, and all right, title and interest vested or that might hereafter in any way accrue to the party of the 1st part as owner of the lands above described, in and to any lands now under water and adjoining or contiguous to lands above described . . . and the party of the first part, as owner of the lands first above described, hereby waives and renounces to the uses and benefit of the party of the second part, any and all riparian rights appurtenant or incident to the lands first above described, and waives and renounces any and all claims for damages consequent upon or arising from any change of the course of water level of said Lower Klamath Lake and Klamath or Link River, due to the operation of the party of the second part

(OWRD exhibit 1, page 14.)

(6) In September 1966 Mr. and Mrs. Anderson, who sold the property appurtenant to Claim 201 to Mr. and Mrs. Berg, applied for a water permit for the property now appurtenant to the claim. They requested a permit for 0.39 cfs from the Klamath River for irrigation of 30.9 acres. After the property was sold to Mr. and Mrs. Berg, a Final Proof Survey was prepared by OWRD, showing irrigation of 21 acres in lot 9. OWRD granted a certificate to the Bergs for 2.0 acres in the NE¼ SW¼ of Lot 6, and for 21.0 acres for the NW¼ SE¼ of Lot 9. The amount of water granted was one-fortieth cfs for each acre irrigated, and was further limited to not more than three acre feet per acre. (OWRD exhibit 1, pages 50, 51-52, 54, 58.)

(7) On January 24, 1991,[4] Richard W. Berg filed a Statement and Proof of Claim claiming a pre-1909 water right waters of the Klamath River for irrigation and watering 35 head of livestock. He claimed a March 30, 1905 priority date for .86 cfs for irrigation of 30.92 acres from April 1 through October 31 of each year, and .03 cfs for livestock year-round. Mr. Berg identified a single point of diversion located at the NW¼ SE¼ Section 6, Township 40S, Range 8 E [Willamette Meridian]. (OWRD exhibit 1, pages 1-5.)

(8) Mr. Berg's property totals 34.18 acres. He now owns only about a dozen horses and has not had a significant number of cattle since 1992. During the irrigation season the horses drink from a ditch. During the rest of the years, they are watered from a well. He did not pay fees for that portion of the claim related to livestock use. His irrigation water is pumped from a

[4] Although initially not signed before a notary, OWRD returned the document to Mr. Berg who returned it in a timely enough manner to allow the January 1991 filing date. (OWRD exhibit 1, pages 1-4 and page 25.)

single point of diversion located at the NW¼ SE¼ Section 6, Township 40S, Range 8E, WM. His pump and water distribution are capable of moving 0.876 cfs. Before the new pump was installed, the system in place was capable was capable of moving approximately 0.82 cfs. (OWRD exhibit 1, pages 94, 95 and 105.)

(9) The Open Inspection period for the Klamath Basin General Stream Adjudication was scheduled to begin in October 1999. (OWRD exhibit 1, page 56.)

(10) On May 8, 2000, the United States filed a Statement of Contest of Claim and/or Preliminary Evaluation that stated in part:

* * * contestant alleges:

* * * * *

3.

That the above-named contestant contests the right claimed by the above-named contestee for the following reasons (fill in if you are contesting the right claimed):

The total acreage in the Place of Use exceeds the irrigated acreage supported by the evidence.

4.

That the above-named contestant contests the Adjudicator's Preliminary Evaluation of the right claimed by the above-named contestee for the following reasons (fill in if you are contesting the Preliminary Evaluation of the right claimed):

The total acreage in the Place of Use exceeds the irrigated acreage supported by the evidence.

The period of use for irrigation in the preliminary evaluation exceeds the period of use claimed.

5.

Wherefore, contestant demands that a hearing of said contest be had, and testimony taken therein, and that it be determined by the Water Resources Adjudicator in the above-entitled proceeding that the contestee is entitled to have the following water right adjudicated (if none, so state):

The place of use should be no greater than 21 acres and the diversion rate and quantity allowed should be no more than the acreage multiplied by the diversion rate and water duty allowed for the basin.

The period of use for irrigation should be as claimed.

(OWRD Exhibit 1, pages 170-173.)

CONCLUSIONS OF LAW

(1) The record for Claim 201 establishes the required elements of a pre-1909 water right with a priority date of March 30, 1905.

(2) The record establishes that Claim 201 is entitled to a pre-1909 water right for irrigation of 30.92 acres at a rate of 0.77 cfs and a duty of 108.22 acre feet, from one point of diversion on the Klamath River.

(3) The period of use for irrigation for Claim 201 is April 1 through October 31 of each year.

OPINION

Pre-1909 Water Right. To establish a claim for a pre-1909 water right in the Klamath Basin General Stream Adjudication, a claimant must prove the following elements: (1) a *bona fide* intent prior to February 24, 1909, to apply the water to a currently existing or currently contemplated future beneficial use; (2) diversion from the natural channel; and (3) application of the water within a reasonable time to some useful purpose. ORS 539.010; *In Re Water Rights to Waters of Silvies River*, 115 Or. 27 (1925); *In Re Rights of Deschutes River and Tributaries*, 134 Or. 623 (1930).

Mr. Berg has the burden of establishing the existence of his claimed water right 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). He met his burden.

KPWU contended that Mr. Berg has not submitted evidence demonstrating that water was put to beneficial use on the subject property before 1909, and that even if he established beneficial use of water before 1909, there is insufficient evidence to support beneficial use of water on the lands appurtenant to Claim 201 by March 30, 1905. KPWU interpret the evidence as establishing the earliest possible priority date as some time in 1908. I disagree.

The greater weight of the evidence established that lowland property owned by Nelson, including the property appurtenant to Claim 201, was annually flooded by the seasonal flow of the Klamath River, and that it dried out in the summer sufficiently to permit harvesting of hay. This situation is virtually identical to that addressed in the Oregon Supreme court's decision in *In re Silvies River*, 115 Or 27 (1925) regarding waters in the Harney Valley.

> The rule as to the second requirement or diversion of the water has a special application or exception to much of the land in Harney Valley. It involves the matter of the natural irrigation of the land. Nature has been very generous to Harney Valley in this respect. With practically no artificial works for irrigation, thousands of acres are naturally watered. When will the date of appropriation be fixed in such cases? It would seem to be fair and equitable, if not absolutely essential, that such date be deemed to be when 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, or making preparation for so doing, or in some substantial way indicates that it is his intention to reap the benefit of the fruit of the irrigation. When no "ditch, canal, or other structure" is necessary to divert the water from its natural channel, the law does not vainly require such works, prior to an appropriation.

Silvies River at 66.

In it's Closing Brief, the United States contended Mr. Berg had not proven the existence of a pre-1909 water right because no artificial irrigation works had been manufactured before 1909. Relying largely on the letter from Mr. Nelson (OWRD exhibit 1, page 110), but also on exhibits that the United States argued as discrediting Mr. Berg's position, the greater weight of the evidence established that the low lying land owned by Nelson, of which Mr. Berg's claim is a part, was seasonally flooded but became dry enough to permit the gathering of a regular hay crop not later than the 1890s. That actual beneficial use of water before the property was diked and pumped and before other works were manufactured created a right to water on the property appurtenant to Claim 201. That water right predates February 24, 1909. Mr. Berg has proven that he has a pre-1909 water right.

Mr. Berg's decision to use a 1905 priority date was apparently based on documentation related to his predecessor-in-interest's decision to participate in the Klamath Water Users Association offering and a quit-claim deed to the United States to obtain the benefits of the contemplated reclamation project. (*Berg* cross-examination testimony at 25:1-19; OWRD exhibit 1, pages 14 and 15.) The most reasonable interpretation of this evidence is consistent with Mr. Berg's claimed priority date.

Priority Date. The United States interpreted Mr. Berg's letter dated October 14, 2003, as an attempt to assert an earlier priority date than had previously been claimed. I did not interpret Mr. Berg's letter in the same manner as the United States. Nonetheless, the United States correctly pointed out that Mr. Berg is not entitled to a priority date earlier than claimed in the Statement and Proof of Claim.

ORS 539.210 and OAR 690-030-0085 prohibit claim amendments that would expand a claim. If Mr. Berg were attempting to amend his claim to a priority date earlier than originally claimed, he would basically be making a new claim — outside the claim period — and therefore outside the time limits and not in the manner required by law. ORS 539.210 states, in part:

> Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law.
>
> The position of OWRD and the United States is based upon that statute and upon OAR 690-030-0085, which clearly prevents amendment of the claim at this late date. The rule states:
>
> The Water Resources Director shall not permit any alteration or amendment of the original claim after the period for inspection has commenced; but any new matter which the claimant may wish to set forth shall be set forth in the form of an affidavit, regularly verified before a proper officer and filed with the Water Resources Director prior to the close of the period for public inspection.

The period for public inspection has long since passed. The opportunity to amend the claim, even with regard to new matters, ended after the period for inspection commenced in October 1999. Mr. Berg is entitled to the priority date claimed in his Statement and Proof of Claim, March 30, 1905.

Acreage entitled to the pre-1909 water right. Mr. Berg's claim of irrigation 30.92 acres is consistent with his a 34 acre property and with correspondence to OWRD in July or August 1991 in which he stated that he was unable to flood "about two acres on the eastern corner and about one acre on the western corner of my property." (OWRD exhibit 1, page 37.) OWRD exhibit 1 includes a map "showing lands to be irrigated." (At page 65.) That map, prepared by William L. Wales Jr., a Consulting Engineer, in August 1966 showed that 30.9 acres of the property appurtenant to the application for the water permit, which is virtually identical to the property appurtenant to Claim 201, was irrigable. (OWRD exhibit 1, page 65.) It is also consistent with a map Mr. Berg provided as an attachment to his February 20, 2003 letter. That township map, "Superseding old plat of said Tp. Approved April 18, 1873," identifies Lot 9 as consisting of 30.92 acres.[5] (134F000X0002, Exhibit A.)

Although the United States contested the amount of irrigated acreage stated in the Claim and recommended in the Preliminary Evaluation, it produced no evidence to contradict Mr. Berg's credible testimony regarding the amount of land he irrigates and the possibility of error regarding the 1966 water certificate. The record does not establish why OWRD reduced the amount of land permitted water under the 1966 application from the amount claimed. Although not challenged at the time, the impact of that 1966 water certificate is of little consequence when determining the amount of land that Mr. Berg's pre-1909 water right entitles him to irrigate. The greater weight of the evidence, including his testimony at cross-examination, establishes that Mr. Berg is entitled to the 30.92 acres claimed.

Rate. Mr. Berg claimed a rate of 0.86 cfs for irrigation. Although he testified that he estimated that amount by using a bucket, notes from OWRD show that his present system is capable of

[5] Although Mr. Berg was unable to testify with certainty whether the map was prepared in 1873 or later, I find that it accurately reflects land ownership in the Spring of 1873.

moving that amount of water. (OWRD exhibit 1, page 105.) The evidence is otherwise silent on Mr. Berg's actual use of water, except for the certificate of water right issued by OWRD in 1974 with a priority date of September 12, 1966. That certificate limits the rate of water to .39 cfs for 23.0 acres, two acres of which lie outside the acreage claimed for this pre-1909 water right. (OWRD Exhibit 1, page 50.)

Considering the lack of other persuasive evidence, the most reliable method of determining the quantity of water to which Mr. Berg is entitled under his pre-1909 water right is by reference to Appendix A, the Department's "Standards for Rates, Duties and Seasons of Use Within Previously Unadjudicated Areas of the Klamath Basin." (OWRD Exhibit 1 pages. 188-190.) That document is the result of studies conducted and hearings held regarding the appropriateness of those limitations. *See* OAR 690-028-0040. As such, it is persuasive evidence of the appropriate rates and duties for all claims in the Klamath Basin Adjudication.

Appendix A assigns a standard rate of one-fortieth of one cubic foot per second for each acre irrigated and a standard duty of three and one-half (3½) acre-feet for each acre irrigated. Using that formula, Mr. Berg is entitled to a rate of water for irrigation of 0.77 cfs (1/40 cfs x 30.92 = 0.773 cfs) during the irrigation season.

When Mr. Berg filed his claim he had about 35 head of livestock, including cattle. He testified that he no longer raises any cattle, and has about a dozen horses. He did not pay fees regarding his claim for livestock and OWRD did not process his claim for livestock. (OWRD exhibit 1, page 107.) ORS 539.081 establishes fees for filing claims in this adjudication. It also requires OWRD not to accept any Statement and Proof of claim for filing unless the statement or claim is accompanied by the fee in the amount set forth in the statute. ORS 539.081(5). Mr. Berg is not entitled to determination of his livestock claim.[6]

Duty. Appendix A assigns a standard duty of three and one-half (3½) acre-fee for each acre irrigated. The evidence suggests no other standard. Mr. Berg is entitled to a duty of 108.22 acre feet. (3½ af x 30.92 = 108.22 acre feet.)

Period of Use. The United States correctly pointed out that the period of use for irrigation must be limited to April 1 through October 31, as claimed in the Statement and Proof of Claim. For the reasons stated in the discussion of possible amendment of the priority date, Mr. Berg's pre-1909 water right may not be established for any period longer than claimed.

Waiver. Finally, the United States argued that Mr. Berg's predecessor in interest relinquished any rights he may have had to the waters of the Klamath River. (United States' Closing at 9-11.) This issue may not be raised or considered now.

ORS 539.100 requires contestants to state "with reasonable certainty the grounds of the proposed contest." Although abandonment (and presumably waiver) is among the permissible

[6] ORS 539.081 does not specifically set fees for livestock claims, but authorization for the fee may be found in subsection (1)(c), which states "If for mining or any other use, $200 for the first second-foot or fraction of the first second-foot and $50 for each additional second-foot."

grounds for a contest, *see* OAR 690-028-0075(3)(f), the United States' contest merely challenges the sufficiency of the evidence regarding the acreage claimed and an error by OWRD in its determination of the Period of Use. If the United States had wished to contest Claim 201 on the grounds of waiver, it should have done so in its original contest or not later than August 15, 2003, the date agreed to by the parties and memorialized in the Scheduling Order as the final date for amending contests. (Prehearing Order, page 2.) Additionally, ORS 539.110 states that the "evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest." Neither the United States' Statement of Contest nor the Hearing Notice identifies abandonment or waiver as issues in this case. The United States may not raise and I may not address issues of abandonment or waiver at this stage of the proceeding.

ORDER

I recommend that that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as specifically set out below:

The elements of a pre-1909 right are established for Claim 201 and the claim is approved as follows:

POINT OF DIVERSION: Government Lot 9, NW¼ SE¼ Section 6, Township 40S, Range 8 E, WM

SOURCE: Klamath River, tributary to the Pacific Ocean

USE: irrigation of 30.92 acres

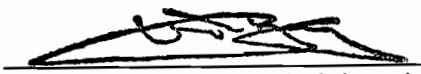
RATE: 0.77 cubic feet per second, measured at the point of diversion

DUTY: 108.22 acre feet

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

PRIORITY DATE: March 30, 1905

PLACE OF USE: Lot 9, NW¼ SE¼ Section 6, Township 40S, Range 8 E, WM



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

Date: January 9, 2004

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Hearing Officer. 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:

Dick Bailey
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 January 9, 2004, 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

Carl V. Ullman
Water Adjudication Project
The Klamath Tribes
PO Box 957
Chiloquin, OR 97624
Phone: 541-783-3081
Fax: 541-783-2609
bullman@internetcds.com

Walter Echo-Hawk/Lorna Babby
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Phone: 303-447-8760
Fax: 303-443-7776
wechohwk@narf.org
babby@narf.org

Renee Moulun/Kimberly Grigsby
Oregon Water Resources Dept.
725 Summer Street N.E., Suite "A"
Salem, OR 97301
Phone: (503) 378-8455
Fax: (503) 378-6203
Renee.m.moulun@wrd.state.or.us
Kimberly.j.grigsby@wrd.state.or.us

Richard W. Berg
PO Box 54
Keno, OR 97627

Richard D. Bailey
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301
richard.d.bailey@wrd.state.or.us

Paul S. Simmons/Andrew M. Hitchings
Somach, Simmons & Dunn
Hall of Justice Building
813 Sixth Street, Third Floor
Sacramento, CA 95814-2403
Phone: 916-446-7979
Fax: 916-446-8199
psimmons@lawssd.com
ahitchings@lawssd.com

Walter Perry/Justin Wirth
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-378-4009
Fax: 503-378-3802
walter.perry@doj.state.or.us
justin.wirth@doj.state.or.us

William M. Ganong
Attorney at Law
514 Walnut Street
Klamath Falls, OR 97601
Phone: 541-882-7228
Fax: 541-883-1923
wganong@aol.com

Shannon K. DeMello
Administrative Assistant