

**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.

**AMENDED PROPOSED ORDER**

Case No. 134

Claim: 201

Contests: 36, 3187<sup>1</sup>, 3412,<sup>2</sup> 3843, and 4185<sup>3</sup>

After fully considering the entire record and exceptions filed, the Adjudicator issues this AMENDED PROPOSED ORDER pursuant to OAR 137-003-0655(3). This AMENDED PROPOSED ORDER modifies the PROPOSED ORDER issued on January 9, 2004, by Administrative Law Judge William D. Young, and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130.

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<sup>1</sup> Horsefly Irrigation District, Langell Valley Irrigation District, Medford Irrigation District, and Rogue River Valley Irrigation District voluntarily withdrew, without prejudice, contest 3187 on February 21, 2003.

<sup>2</sup> 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.

<sup>3</sup> The Klamath Tribes voluntarily withdrew Contest 4185 on February 13, 2003.

## HISTORY OF THE CASE

**THIS PROCEEDING** under the provisions of ORS Ch. 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

On ~~November 30, 1990~~ January 24, 1991, 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)<sup>4</sup> 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~~ February 21, 2003. On ~~that same date~~ May 8, 2000, 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

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<sup>4</sup> 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.

D. Young presided. ~~Michael~~ Richard 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.

~~I held~~ The record was held 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 filed its Closing Brief, and KPWU and OWRD filed their ~~and~~ Post Hearing Responses 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 was closed 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 was allowed.

~~I admitted into evidence~~ OWRD's Exhibit 1, was admitted into evidence without objection. ~~I admitted~~ Richard Berg's letters dated February 20, 2003<sup>5</sup> and April 11, 2003 were admitted 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~~ Rulings on KPWU's objections to the attachments to the letter dated April 11, 2003, asserting that the documents were unduly repetitive ~~repetitious~~ were reserved.

After considering OWRD Exhibit 1 and the attachments to the letter dated April 11, 2003, ~~I find it was found~~ that the September 2, 1981 Affidavit of Roy W. Nelson (Ref. No. 134E00020003 and 134E00020004) duplicates documents found in OWRD Exhibit 1 at pages 108 and 109. ~~I hereby sustain~~ KPWU's objection to those documents was sustained and ~~exclude~~ those documents were excluded from being considered separately as unduly repetitive 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) duplicated documents in OWRD Exhibit 1, ~~I cannot~~ Administrative Law Judge Young could not find some of the pages of this lengthy exhibit in OWRD's Exhibit 1. ~~Also,~~ The attachments also provided continuity not easily ascertained from OWRD's Exhibit 1. Even though some of the documents may be duplicative, the exhibit is not unduly repetitive and KPWU's objection is overruled.

<sup>5</sup> This document was inadvertently misdated February 20, 2000.

## 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) 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 containing 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. (OWRD Exhibit 1, page 12.) ~~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) 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.) 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 2<sup>nd</sup> 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 1<sup>st</sup> 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. 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 24 23 acres in Lot 9. OWRD ~~granted~~ issued a certificate to the Bergs for 2.0 acres in the NE<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> of Lot 6, and for 21.0 acres for the NW<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub> of Lot 9<sup>6</sup>. The amount of water granted was

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<sup>6</sup> Permit S-31991 was issued for irrigation from a single point of diversion for 30.9 acres located within Lot 9. A total of 23 acres out of the 30.9 was ultimately certificated (Certificate 40545), being 2 acres in the NE<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> and 21 acres in the NW<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub>. On the Certificate the 2 acres was incorrectly described as being within Lot 6. A comparison of the Final Proof map for Certificate 40545 (OWRD Exhibit 1, page 51) with the Tax Lot map (OWRD Exhibit 1, page 44) clearly shows these 2 acres are within Lot 9.

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,<sup>7</sup> Richard W. Berg filed a Statement and Proof of Claim claiming a pre-1909 water right from 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 the diversion as being located at within the NW¼ SE¼ Section 6, Township 40S, Range 8 E [Willamette Meridian]. (OWRD Exhibit 1, pages 1-5.) On July 29, 1991, Mr. Berg clarified his claim by providing an abstract of title for the land appurtenant to Claim 201, a written statement, and a map (OWRD Exhibit 1, pages 8 - 19). The clarification included the following statement “the only two areas on the map, [sic] I cannot flood from the river I have marked in red. This is about two acres on the eastern corner and about one acre on the western corner of my property” (OWRD Exhibit 1, page 8). On January 13, 1999, Mr. Berg clarified his claim with a second written statement, indicating he wanted “3 acre feet of water, per acre, per year” (OWRD Exhibit 1, page 43).

(8) The 7.92 acres in Lot 9 claimed by Mr. Berg and not included in Certificate 40545 are irrigated by natural overflow from the Klamath River, and not by diversion works. Mr. Berg testified that the documents shown on OWRD Exhibit 1, pages 51 and 58 [Certificate 40545 and final proof map for Certificate 40545] did not include 10 acres “[that I have in pasture and hay that has been since I’ve been there” (TR. pp 14-15)] in the “this here part where they squared me off on the top southeast corner of my place, this is the lowest part of my place. . . the lowest part of my property that floods” (TR. pp 30-32).

(8) (9) 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 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 of moving approximately 0.82 cfs. (OWRD Exhibit 1, pages 94, 95 and 105; TR. Pp 23.)

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

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

\* \* \* contestant alleges:

\* \* \* \* \*

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<sup>7</sup> 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.)

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 within Lot 9. Claim 201 is entitled to diversion for 23 acres at a rate of 0.64 cfs and a duty of 69.0 acre-feet (3.0 acre-feet per acre per year). The remaining 7.92 acres are irrigated by natural overflow. If diversion works are installed to irrigate these acres in the future, they would be subject to a rate of 0.22 cfs and a duty of 23.8 acre-feet. of water from the Klamath River.

- (3) The period of use for irrigation for Claim 201 is April 1 through October 31 of each year.
- (4) The limit for irrigation is 1/40 cfs per acre as evidenced in Certificate 40545 issued for the same lands.
- (5) Livestock watering for 12 horses is incidental to irrigation.
- (6) An irrigation claim based on natural overflow is entitled as a matter of law to a Pre-1909 water right.

### 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 The Administrative Law Judge disagreed.

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 its 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.

*Richard W. Berg (134)*

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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 8.) OWRD Exhibit 1 includes a map "showing lands to be irrigated." (OWRD Exhibit 1, 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.<sup>8</sup> (134F000X0002, Exhibit A.)

Although the United States contested the amount of irrigated acreage stated in the Claim and contested the amount of irrigated acreage 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.

A point of diversion has been developed for irrigation of 23.00 acres in Lot 9<sup>9</sup> as evidenced by Certificate 40545 (OWRD Exhibit 1, page 50.), being 2.00 acres in the NE¼ SW¼, and 21.00 acres in the NW¼ SE¼.

<sup>8</sup> Although Mr. Berg was unable to testify with certainty whether the map was prepared in 1873 or later, I find ALJ Young found that it accurately reflects land ownership in the Spring of 1873.

<sup>9</sup> See Footnote 6

Mr. Berg testified that the documents shown on OWRD Exhibit 1, pages 58 and 51 [Certificate 40545 and final proof map for Certificate 40545] did not include 10 acres [that I have in pasture and hay that has been since I've been there (TR. pp 14-15)] in the "this here part where they squared me off on the top southeast corner of my place, this is the lowest part of my place. . . the lowest part of my property that floods" (TR. pp 30-32). Thus, the remaining 7.92 acres in Lot 9 are found to continue to be irrigated by natural overflow from the Klamath River.

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 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 0.39 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). However, based upon Mr. Berg's statement of use contained in the claim, and upon the evidence of Mr. Berg and OWRD that his system is capable of diverting 0.86 cfs of water, he would be entitled to divert that quantity of water for 30.92 acres. Because the evidence shows that 7.92 acres of the 30.92 acres are presently served by natural overflow, and not his diversion works, the 0.86 cfs quantity must be prorated accordingly. Mr. Berg's claim amounts to 0.0278 cfs/acre. As a result, 0.64 cfs is the appropriate rate for the 23.0 acres. If diversion works to serve the remaining 7.92 acres covered by a pre-1909 right are later constructed, a further 0.22 cfs could be diverted to serve them. 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.<sup>10</sup>

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<sup>10</sup> 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."

Duty. Appendix A assigns a standard duty of three and one-half (3½) acre-feet 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.) The claimant provided clarification of his January 24, 1991 Statement and Proof of Claim (Claim102) on January 13, 1999, where he stated: "All I want is 3 acre feet of water, per acre, per year." (OWRD Exhibit 1, page 43). For the reasons stated in the discussion of possible amendment of the priority date, Mr. Berg's duty may not be established for any volume of water larger than stated his January 13, 1999 clarification of his claim. As a result, Mr. Berg is entitled to a duty of 69.0 acre-feet for the 23.0 acres irrigated by his diversion works (3.0 acre-feet/acre x 23.0 acres = 69.0 acre-feet). Should diversion works be constructed in the future to serve the remaining 7.92 acres covered by a pre-1909 right, these acres would be entitled to a duty of 23.72 acre-feet (3 acre-feet/acre x 7.92 acres = 23.72 acre-feet).

Limit. The only evidence pertaining to a limit is Certificate 40545; beneficial use has been established at a limit of 1/40 cfs per acre irrigated.

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.

Livestock Watering. The record supports livestock watering for 12 horses incidental to irrigation.

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 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 ~~I may not address~~ the issues of abandonment or waiver at this stage of the proceeding and they will not be addressed here.

**ORDER**

A water right for Claim 201 should be confirmed as set forth in the following Water Right Claim Description:

**WATER RIGHT CLAIM DESCRIPTION:**

**CLAIM NO.** 201

**CLAIM MAP REFERENCE:** CLAIM # 201, PAGES 10 and 51

**CLAIMANT:** RICHARD W. BERG  
PO BOX 54  
KENO, OR 97627

**SOURCE OF WATER:** The KLAMATH RIVER, tributary to the PACIFIC OCEAN

**PURPOSE OR USE:**

IRRIGATION OF 23.00 ACRES FROM POD 1; AND IRRIGATION OF 7.92 ACRES BY NATURAL OVERFLOW; LIVESTOCK WATERING OF 12 HORSES INCIDENTAL TO IRRIGATION

**RATE OF USE:**

0.86 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:

0.64 CFS FROM POD 1 FOR IRRIGATION, MEASURED AT THE POINT OF DIVERSION; AND

0.22 CFS FOR IRRIGATION BY NATURAL OVERFLOW

**DUTY:**

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

**LIMIT:**

1/40 CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

**PERIOD OF ALLOWED USE:** APRIL 1 - OCTOBER 31

**DATE OF PRIORITY:** MARCH 30, 1905

**THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:**

POD Name	Twp	Rng	Mer	Sec	Q-Q	GLot	Survey Coordinates
POD 1	40 S	8 E	WM	6	NW SE	9	2510 FEET NORTH AND 1990 FEET EAST FROM SE CORNER, SECTION 6
Natural Overflow	40 S	8 E	WM	6	NW SE	9	No specific point of diversion; Natural Overflow

**THE PLACE OF USE IS LOCATED AS FOLLOWS:**

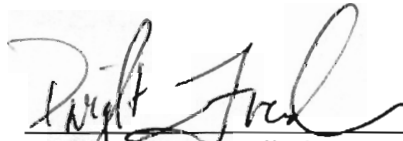
IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING							
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized POD
40 S	8 E	WM	6	NE SW	9	2.00	POD 1
40 S	8 E	WM	6	NW SE	9	21.00	
40 S	8 E	WM	6	NW SE	9	7.92	Natural Overflow

**FURTHER LIMITATIONS:**

THE METHOD OF DIVERSION BY WAY OF NATURAL OVERFLOW IS A PRIVILEGE ONLY AND CANNOT BE INSISTED UPON IF IT INTERFERES WITH THE APPROPRIATION OF THE WATERS FOR BENEFICIAL USE BY OTHERS.

IT IS SO ORDERED.

Dated at Salem, Oregon on July 28<sup>th</sup>, 2009.

  
\_\_\_\_\_  
Dwight French, Adjudicator  
Klamath Basin General Stream Adjudication

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

**EXCEPTIONS:** Parties may file exceptions to this Amended Proposed 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 contained within this Amended Proposed Order. 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 Amended Proposed 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 Amended Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

**Dwight French, Adjudicator  
Oregon Water Resources Department  
725 Summer Street NE, Suite A  
Salem, OR 97301**

CERTIFICATE OF SERVICE

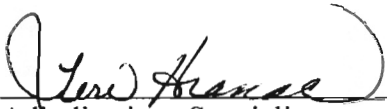
I certify that a true and correct copy of the Amended Proposed Order was served on July 28, 2009, via first-class mail, postage prepaid to the following:

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U.S. Department of Interior  
2800 Cottage Way, Room E-1712  
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\_\_\_\_\_  
Adjudications Specialist