

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

Horsefly Irrigation District; Langell Valley Irrigation District; Medford Irrigation District; Rogue River Irrigation District; 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; Berlva Prichard; Don Vincent; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Reames Golf and Country Club; Van Brimmer Ditch Co.; Plevna District Improvement Company; Collins Products, LLC,
Contestants,

AMENDED PROPOSED ORDER

Case Nos. 017 and 018

Claim Nos. 213 and 214

Contest Nos. ~~3201~~, 3202¹, ~~3419~~, 5656²

v.

Horst Forster, Wesley and Cynthia Norton;
Richard and Nancy Martin,
Claimants.

¹ Langell Valley Irrigation District, Horsefly Irrigation District, Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew from Contests 3201 and 3202 on January 8, 2002. *See* VOLUNTARY WITHDRAWAL OF CONTEST BY LANGELL VALLEY, HORSEFLY, MEDFORD AND ROGUE RIVER VALLEY IRRIGATION DISTRICTS.

² Don Vincent voluntarily withdrew from Contests 3419 and 5656 on November 28, 2000. *See* NOTICE OF WITHDRAWAL OF CLAIMANTS. Berlva Pritchard voluntarily withdrew from Contests 3419 and 5656 on June 24, 2002. *See* NOTICE OF WITHDRAWAL OF CLAIMANT.

Klamath Hills District Improvement Company voluntarily withdrew, without prejudice, from Contests 3419 and 5656 on January 16, 2004. *See* VOLUNTARY WITHDRAWAL OF CONTEST BY KLAMATH HILLS DISTRICT IMPROVEMENT COMPANY.

Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland District Improvement Co.; 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 Company; Winema Hunting Lodge, Inc.; Reames Golf and Country Club; Van Brimmer Ditch Company; Plevna District Improvement Company and Collins Products, LLC voluntarily withdrew from Contests 3419 and 5656 on April 7, 2004. *See* NOTICE OF WITHDRAWAL OF CONTEST NOS. 3419 AND 5656.

After fully considering the entire record, the Adjudicator issues this AMENDED PROPOSED ORDER pursuant to OAR 137-003-0655(3). This AMENDED PROPOSED ORDER modifies the PROPOSED ORDER issued on October 16, 2002, by Administrative Law Judge Maurice L. Russell, II, and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130.

This Amended Proposed Order modifies only certain portions of the Proposed Order. The sections of the Proposed Order entitled "History of the Case," "Issues," "Evidentiary Rulings," and "Conclusions of Law" are adopted without modification. The sections entitled "Findings of Fact," "Opinion," and "Order" are modified as described herein.

MODIFICATIONS TO THE "FINDINGS OF FACT"

The Proposed Order's "Findings of Fact" section is modified as shown below. Additions are shown in "underline" text, deletions are shown in "~~striketrough~~" text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding.

Modified Proposed Order Findings of Fact

The fifth paragraph of the "Findings of Fact" is modified as follows:

In 1999, June Young communicated to OWRD that ~~the Nortons and~~ Richard and Nancy Martins had acquired the property that is subject to claim 214. (Ex. 1 at 248). Ms. Young's statement was clarified in testimony. Wes and Cindy Norton, and Richard and Nancy Martin acquired the property that is subject to Claim 214. (Direct Testimony of Wes and Cindy Norton at 2.)

Reason for Modification: The ALJ's finding was not supported by a preponderance of evidence in the record. Wes and Cindy Norton own the property that is subject to Claim 214 along with Richard and Nancy Martin.

Additional Findings of Fact

The following additional findings of fact are made herein:

Certificate 56488, which was submitted as supporting evidence for Claim 213 (OWRD Ex. 1 at 6, 45-50), and Claim 214 (OWRD Ex. 1 at 235-237), provides the best evidence available for the appropriate duty and rate for irrigation, being 1/40 of one cubic foot per second per acre and 3.0 acre feet per acre irrigated. Because there is no evidence on the record to the contrary, the standard rate for dairy livestock use provided by OWRD in its Appendix A to the Preliminary Evaluation applies to the 120 head of dairy livestock claimed. (OWRD Ex. 1 at 4, 317). The standard rate for livestock use is 35 gallons per day per head.

The claimed season of use for irrigation for Claim 213 is "May through November." (OWRD Ex. 1 at 7.) The claimed season of use for 120 dairy livestock for Claim 213 is January 1 through December 31. (*Id.*) The claimed season of use for irrigation for Claim 214 is "April to November." (OWRD Ex. 1 at 215.)

Reason for Additional Finding of Fact: To include a finding regarding a rate and duty for irrigation and a standard rate for livestock use; to include a finding regarding the claimed season of use for irrigation.

MODIFICATIONS TO THE "OPINION"

1. The Proposed Order's "Opinion" section is modified as follows (additions shown in "underline" text; deletions shown in ~~striketrough~~ text).

The first paragraph of the "Opinion" is modified as follows:

This matter is before me as a contest of a claim filed in the Klamath Adjudication, a proceeding under ORS Chapter 539. There are three elements to such a claim: 1) Application of water of the Klamath River or its tributaries to beneficial use at a time period to 1909 or a contemplated time in the future; (2) a diversion

from the natural channel; and (3) application of the water within a reasonable time to some useful purpose. *In re Rights of Deschutes River and Tributaries*, 134 Or 623 (1930); *In Re Water Rights in Silvies River*, 115 Or 27 (1925). 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).

Paragraph three is modified as follows:

There are three primary factual issues ~~that dispose of~~ in this case. First, to what extent were the required fees paid by Ms. Young for the uses claimed in Claim 214? ~~how many acres did Ms. Young claim?~~ Second, has Diversion Point 4 been in continuous use since its development? Third, what priority date has been established in the file?

Paragraphs four through eight are deleted in their entirety and replaced with the following:

ORS 539.081 requires payment of fees for the filing of adjudication claims. The fee for irrigation is “\$2 for each acre of irrigated lands up to 100 acres and \$1 for each acre in excess of 100 acres.” The fee for livestock use fall under the “any other use” category and is “\$200 for the first second-foot or fraction of the first second-foot and \$50 for each additional second-foot.”

With respect to Claim 214, Ms. Young paid \$40.25 in fees for irrigation by the February 1, 1991 claim filing deadline. In addition, Ms. Young had a credit with OWRD of \$33.75. (OWRD Ex. 1 at 216.) The total of the fees paid and the credit are sufficient to cover the fee cost of 37 acres for irrigation. Ms. Young did not pay any fee for the claimed livestock use.

With respect to Claim 213, the original claimants timely filed fees sufficient to cover both the claimed number of acres for irrigation use and the claimed livestock use.

ORS 539.210 provides that “it shall be the duty of all claimants ... to appear and submit proof of their respective claims, *at the time and in the manner required by law....*” ORS 539.210 (Emphasis added). Otherwise they will be “barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings” ORS 539.210. The payment of fees by a set deadline is required by law as a component of a claim in the Klamath Basin Adjudication; therefore, the scope of a claim can only extend to the amount of fees timely paid. See ORS 539.081; OAR 690-028-0028(1); OAR 690-028-0065(5).

Claim 214 is therefore limited to 37 acres for irrigation, and the claim for livestock use is denied.

The final two paragraphs of the “Opinion” are modified as follows:

Once these three questions have been decided, the remainder of the case is essentially determined. The evidence submitted by the claimants supports their contention that the acreage as claimed is correct, with the exception that Claim 214 is limited to 37 acres based on the amount of fees paid for irrigation. While the claimed acreage does not agree with the acreage allowed in the preliminary evaluations, the record does not disclose any clear foundation for the acreage stated in those evaluations. While OWRD notes in its closing argument that the file contains a note that “Aerial photo supports OWRD map:” (Ex. 1 at 179, noted in OWRD’s Closing Statement and Response to Claimant’s Closing Argument, at 10.), the aerial photographs contained in the file do not support the OWRD map. (Ex. 101 at tabs 2, 3, 4, and 5.) It is clear from these

photos, some of which go back to 1980, (Ex. 101 tab 2.) that substantial areas are under irrigation outside the boundaries noted in the map prepared by Don Knauer, the field inspector. (Ex. 1 at 230) Moreover, given that Don Knauer's inspection resulted in the omission of Diversion Point 4, and the acreage irrigated from that diversion point, thereby significantly misstating the amount properly subject to claim, it cannot be said that the map Mr. Knauer prepared and which is, apparently, the OWRD map referred-to, is especially reliable.

On the other hand, the testimony of the witnesses, the photographs and maps submitted, support the conclusion that the amount of acreage is as claimed. This is especially so when the additional acreage irrigated from Diversion Point 4 is added in.

The final issue in the case concerns the appropriate season of use for irrigation for Claims 213 and 214. Both the Preliminary Evaluation and the Proposed Order recognized an irrigation season of March 1 through October 31. These determinations were made without regard to the season of use claimed.

The claimed season of use for irrigation for Claim 213 is "May through November." (OWRD Ex. 1 at 7.) The claimed season of use for irrigation for Claim 214 is "April to November." (OWRD Ex. 1 at 215.) At no point did claimants attempt to expand their claimed season of use, and such expansions are in any event prohibited by ORS 539.210 and OAR 690-030-0085. The appropriate season of use for irrigation under Claim 214 is April 1 through October 31. The appropriate season of use for irrigation under Claim 213 is May 1 through October 31. Even though the Claim 213 claimants claimed a season of use through November 30, the shorter season claimed for Claim 214 (on neighboring property) indicates that an irrigation season through October 31 is

sufficient for beneficial use for irrigation on the Claim 213 place of use.

Reasons for Modifications: To make the Opinion consistent with the additional and modified findings of fact; to clarify the legal standard for the establishment of a pre-1909 water rights claim; to address the effect of failure to pay required fees for an adjudication claim; to limit the season of use for irrigation to the claimed season of use.

MODIFICATIONS TO THE "ORDER"

The Proposed Order's "Order" section is modified as described herein. (additions are shown in "underline" text, deletions are shown in "~~strike through~~" text):

Claim 213

The claim shall be confirmed ~~as stated in the Preliminary Evaluation, except as follows:~~

POINT OF DIVERSION LOCATIONS:

Div. #4, NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, Township 41 South, Range 1 East, W.M., 570 Feet South and 230 Feet East from NW $\frac{1}{4}$ Corner, Section 13, and

Div. #6, NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 11, Township 41 South, Range 1 East, W.M., 1000 Feet South and 3980 Feet West from NE $\frac{1}{4}$ Corner, Section 11.

SOURCES:

Div. #4, West Fork Cottonwood Creek, tributary to the Klamath River
Div. #6, Mill Creek, tributary to Klamath River

USE: Irrigation of 99.4 acres and livestock.

AMOUNT ACTUALLY BENEFICALLY USED: 2.48 cubic feet per second for irrigation, and 4200 gallons per day for dairy livestock, measured at the point of diversion.

PRIORITY DATE: December 31, 1854

PLACE OF USE:

Diversion Point 4: 4.1 acres

2.7 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$

0.8 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$

0.6 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, T 41 S, R 1 E. W.M.

Diversion Point 6: 95.3 acres

16.2 acres SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 11, T 41 S, R 1 E. W.M.

1.5 acres NW $\frac{1}{4}$ SW $\frac{1}{4}$

34.2 acres, SW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 12, T 41 S, R 1 E. W.M.

17.8 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$

21.2 acres, NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, T 41 S, R 1 E. W.M.

4.4 acres, NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 14, T 41 S, R 1 E. W.M.

SEASON OF USE: Irrigation: May 1 through October 31

Livestock Use: January 1 through December 31

RATE FOR IRRIGATION: 1/40 of one cubic foot per second per acre

DUTY FOR IRRIGATION: 3.0 acre feet per acre

RATE FOR DAIRY LIVESTOCK USE: Not to exceed 35 gallons per head per day for a maximum of 120 head from West Fork Cottonwood Creek and/or Mill Creek

Claim 214

The claim shall be confirmed ~~as stated in the Preliminary Evaluation, except as follows:~~

POINT OF DIVERSION LOCATIONS:

Div. #4, NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, Township 41 South, Range 1 East, W.M., 570 Feet South and 230 Feet East from NW $\frac{1}{4}$ Corner, Section 13, and

Div. #5, NW $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 14 11³, Township 41 South, Range 1 East, W.M., 20 Feet North and 1700 Feet West from SE $\frac{1}{4}$ Corner, Section 11.

SOURCES:

Div. #4, West Fork Cottonwood Creek, tributary to the Klamath River

Div. #5, West Fork Cottonwood Creek, tributary to the Klamath River

³ In the Findings of Fact Section, page 5 of the Proposed Order, the ALJ noted that Diversion Point 5 is presently located on or near the boundary between the SW $\frac{1}{4}$, SE $\frac{1}{4}$, Section 11, and the NW $\frac{1}{4}$, NE $\frac{1}{4}$, Section 14, T 41 S, R 1 E, W.M. However, the map the claimants relied on shows the diversion is located within the SW $\frac{1}{4}$, SE $\frac{1}{4}$, Section 11. (Ex. 1 at 218.)

USE: Irrigation of 37.0⁴ ~~41.6~~ acres and livestock

AMOUNT ACTUALLY BENEFICIALLY USED: 0.91 cubic feet per second for irrigation, and ~~1200~~ gallons per day for livestock, measured at the point of diversion.

PRIORITY DATE: December 31, 1854

PLACE OF USE:

Diversion Point 4: 5.7 acres

0.1 acres NW $\frac{1}{4}$ NE $\frac{1}{4}$

4.6 acres, Lot 2 (SW $\frac{1}{4}$ NE $\frac{1}{4}$)

1.0 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, T 41 S, R 1 E. W.M.

Diversion Point 5: ~~35.9~~ 31.3 acres

~~1.6~~ 0.6 acres NE $\frac{1}{4}$ NW $\frac{1}{4}$

10.8 acres NW $\frac{1}{4}$ NW $\frac{1}{4}$

4.2 acres SW $\frac{1}{4}$ NW $\frac{1}{4}$, Lot 4

~~10.5~~ 6.9 acres SE $\frac{1}{4}$ NW $\frac{1}{4}$, Lot 3, Section 13, T 41 S, R 1 E. W.M.

8.2 acres NE $\frac{1}{4}$ NE $\frac{1}{4}$

0.6 acres, SE $\frac{1}{4}$ NE $\frac{1}{4}$, Lot 1, Section 14, T 41 S, R 1 E. W.M.

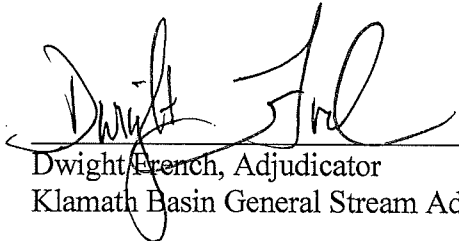
SEASON OF USE: Irrigation: April 1 through October 31

RATE FOR IRRIGATION: 1/40 of one cubic foot per second per acre

DUTY FOR IRRIGATION: 3.0 acre feet per acre

IT IS SO ORDERED.

Dated at Salem, Oregon on February 24, 2012.


Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

⁴ Within Section 14, Township 41 South, Range 1 East W.M., OWRD proposes to eliminate the 1.0 acres within the NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13, T 41 S, R 1 E. W.M. and reduce the 10.5 acres within the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Lot 3, Section 13, T 41 S, R 1 E. W.M. to 6.9 acres thus making up the difference of 4.6 acres. The 0.6 acres within the NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13 is consistent with both Certificate 56488 (Ex. 1 at 237) within NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13 for the Young parcel from Div # 5 (Ex. 1 at 175) and the Final Proof Map submitted by the claimant at Ex. 1 at 218. The 6.9 acres remaining within the SE $\frac{1}{4}$ NW $\frac{1}{4}$, Lot 3, Section 13 the contiguous with the 4.2 acres claimed in the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and the 0.6 acres within the NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 13.

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 parties 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 Department
725 Summer Street N.E., Suite "A"
Salem, Oregon 97301**

CERTIFICATE OF SERVICE

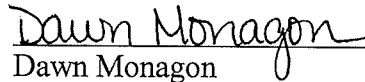
I hereby certify that on February 24, 2012, I mailed a true copy of the foregoing **AMENDED PROPOSED ORDER** (Claim Nos. 213 and 214), by depositing the same in the U.S. Post Office, Salem, Oregon 97301, with first-class postage prepaid thereon, and addressed to:

Jesse D. Ratcliffe
Assistant Attorney General
Oregon Department of Justice, NRS
1162 Court Street NE
Salem, OR 97301-4096

David B. Paradis
Brophy Mills Schmor Gerking & Brophy
PO Box 128
Medford, OR 97501

David Solem, Manager
Klamath Irrigation District
6640 Klamath Irrigation District Lane
Klamath Falls, OR 97603

Horst Forster
2324 Colestin Road
Horn Brook, CA 96044


Dawn Monagon
Adjudications Specialist
Oregon Water Resources Department