

**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; United States of America; The Klamath Tribes, Contestants, vs.	AMENDED PROPOSED ORDER Case No. 136 Claim: 203
Barney Calmes and Daisy Calmes; Claimants/Contestants. vs.	Contests: 35, 3189 ¹ , 3413 ² , 3845, and 4187 ³ Case No. 138
Larry E. Peacore and Carolyn F. Peacore, Trustees of the Peacore Family Trust; Claimants. vs.	Claim: 206 Contests: 3192, ⁴ 3847, and 4189 ⁵ Case No. 139
Kite Ranches, Inc., Claimant/Contestant.	Claims: 207 Contests: 34, 2857, ⁶ 3193 ⁷ , 3414, ⁸ 3848, and 4190

¹ On May 1, 2003, Medford Irrigation District and Rogue River Irrigation District withdrew from participation in Contest 3189.

² On March 25, 2003, Klamath Irrigation District *et al*, commonly referred to as the Klamath Project Water Users, withdrew their Contest 3413 to claim 203.

³ On March 25, 2003, the Klamath Tribes withdrew their contest 4187 to claim 203, without prejudice.

⁴ On June 9, 2003, Medford Irrigation District and Rogue River Irrigation District withdrew from participation in contest 3192.

⁵ On May 20, 2003, the Klamath Tribes withdrew Contest 4189, without prejudice.

⁶ On June 9, 2003 Contestants Medford Irrigation District and Rogue River Valley Irrigation Districts withdrew their contests to Claim 207.

⁷ On June 9, 2003, Contestants Medford Irrigation District and Rogue River Valley Irrigation Districts withdrew from participation in Contest 3193.

⁸ On March 21, 2003, Contestants Klamath Irrigation District, *et al.*, commonly referred to as Klamath Project Water Users, withdrew contest 3414.

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 August 30, 2005, by Administrative Law Judge Michael Andrew Francis, 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,” and “Evidentiary Rulings” are adopted without modification. The sections entitled “Preliminary Matters,” “Findings of Fact,” “Opinion,” and “Proposed Order” are modified as described herein.

MODIFICATIONS TO THE “PRELIMINARY MATTERS”

The second paragraph of the Proposed Order’s “Preliminary Matters” section for Claim 203 is modified as shown below. Additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text. Reasons for the modification of each modified finding of fact are provided beneath the modified portions.

On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin General Stream Adjudication, issued a Preliminary Evaluation recommending approval of a pre-1909 water right with a portions (4.2 acres) of Claim 203 from one point of diversion (POD 1) having a priority date of October 28, 1897, and ~~another~~ the remaining portions of Claim 203 from POD 1 and another point of diversion (POD 2) having a priority date of December 31, 1908. For that portion ~~with a recommended priority date of October 28, 1897,~~ irrigated from POD 1 the Adjudicator recommended reducing the irrigation and stock acreage to 30.1 acres at a rate of 0.75 cfs, with a period of use from March 1 through October 31 for irrigation, and year-round for livestock use, ~~;~~ and From the second point of diversion with a recommended priority date of December 31, 1908, the Adjudicator recommended reducing the irrigation and stock acreage to 72.5 acres at a rate of 1.64 cfs, with a period of use from March 1 through October 31 for irrigation, and year-round for livestock use.

Reasons for Modifications: To correct the “Preliminary Matters” so that it accurately states the contents of the Preliminary Evaluation.

The first paragraph of the Proposed Order's "Preliminary Matters" section for Claim 207 is modified as shown below. Additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text.

Claim 207. On January 31, 1991, Kite Ranches, Inc. filed a Statement and Proof of Claim for Claim 207 based upon use of water commenced before February 24, 1909. The claim is for a total of 3 acre-feet per acre from six points of diversion located on the Klamath River for irrigation of 771.6 acres and livestock use for 600 cow-calf pairs. The claimed period of use is ~~May 1 through October 31~~ April 15 to November 15 for irrigation. ~~and year round for livestock.~~ The claimed priority date is October 28, 1897.

Reasons for Modifications: To accurately state the claimed season of use.

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 "~~strikethrough~~" text. Reasons for the modification of each modified finding of fact are provided beneath the modified finding.

Modified Proposed Order Findings of Fact

The Proposed Order's Finding of Facts #2, #3, and #6 are modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

2. Beginning in the 1850s, European settlers began coming into the area. They grazed cattle on the land in question, and, perhaps, harvested hay there. (Ex. 139E00020001, also referred to herein as Case 139 OWRD Ex. 1.) There is no record, however, that the land was taken into exclusive ownership or possession by any person at the time. (Ex. 139E00020001.)

Reason for Modification: To clarify the citation to the record; to more fully set forth the evidence in the record.

3. On October 28, 1897, J.S. Rogers conveyed by deed to Frank T. Nelson, *et ux.*, most of the land included in these consolidated cases. (Testimony of Calmes, Ex. B-9.) At the time Frank T. Nelson purchased the property, the land below the Klamath River meander

line was subject to seasonal flooding from the Klamath River. (Affidavit of Roy W. Nelson, Exh. C, pg.1.) The property had been improved with three canals. (Affidavit of Roy W. Nelson, Exh. C, pg.1.) Mr. Nelson thereafter built a levee between his land and the river, some three miles in length. (~~Ex.~~ Affidavit of Roy W. Nelson, Exh. C, pg.1.) He also constructed additional canals and drains on the land and then in 1908, installed a pump to lift water to a portion of his land lying above the meander line of the Klamath River. (Case 136 OWRD Exhibit 1, page 60.) The remainder of the land was conveyed by Dennis Small and Sarah Small to F.T. Nelson by deed dated February 2, 1904 (this land is known as the Small Ranch). The Small Ranch lands are surrounded by the other claimed lands and by the Klamath River. As a result, the Small Ranch lands are likely to have had a history of development similar to the other claimed lands. (Exhibit A to Direct Testimony of Barney Calmes).

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to provide additional citations to the record.

6. The record does not establishes a beneficial use of water for a season beginning in March and ending in November for each parcel of property. Claimants claimed a season of April 1 to November 15 for Claim 203, May 1 through October 31 for Claim 206, and April 15 to about November 15 for Claim 207. (Case 136 OWRD Ex. 1 at 7; Case 138 OWRD Ex. 1 at 15; Case 139 OWRD Ex. 1 at 4.)

Reason for Modification: The ALJ's proposed finding of fact is not supported by the evidence on the record.

Additional Proposed Order Findings of Fact

The Proposed Order's Finding of Facts #8 through #14 are added as follows (additions are shown in "underline" text):

8. The majority of the claimed lands were first conveyed out of public ownership from the State of Oregon to private individuals from 1871 to 1883. The remainder of the claimed lands were conveyed out of public ownership from the United States to private individuals in 1890 and 1893. (Direct Testimony of Barney Calmes at 2; Exhibits A and B to Direct Testimony of Barney Calmes.)

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

9. Within the SE¼ NE¼, Section 17, Township 40 S, Range 8 E, W.M., OWRD mapped a total of 14.6 acre based on field inspections. (OWRD Field Investigation Map T 40 S, R 8 E, W.M., Case 136, OWRD Exhibit 1 at 38.) The 1.5 acres located in the northwest corner (within Government Lot 2) and 0.1 acres in the northeast corner (within Government Lot 3) of this quarter-quarter are part of the Kite Ranch, and were claimed by Kite Ranches in Claim 207. (Case 139, OWRD Exhibit 1 at 3, 24, 43, 75, 112.) The remaining 13.0 acres are appurtenant to Claim 203. (Case 136, OWRD Exhibit 1 at 1-2, 39.). However, within this quarter-quarter Claim 203 shows that 13.0 acres are irrigated from POD 1 and 0.7 acres from POD 2, which exceeds 13.0 remaining mapped acres. (Case 136, OWRD Exhibit 1 at 1-2, 6, 39, 57, 58.) On their Statement and Proof of Claim, claimants stated that "the map and Field Report prepared by WRD are accurate and are incorporated herein by this reference." (Case 136, OWRD Exhibit 1 at 6, Item 7.) Therefore, OWRD finds that within the SE¼ NE¼, Section 17, only 12.3 acres irrigated from POD 1, being 10.8 acres within Government Lot 2, and 1.5 acres within Government Lot 3; and 0.7 acres irrigated from POD 2 within Government Lot 2, can be found claimed under Claim 203.

Reason for Modification: To correct the number of acres claimed under Claim 203 within the above described location; the ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

10. In Claim 203, the quarter-quarter location of 1.0 acre is incorrectly described in the Preliminary Evaluation as being the SE¼ NE¼, Section 17, Township 40 S, Range 8 East, W.M.. The correct quarter-quarter location of this 1.0 acre is the SE¼ NW¼.. (Case 136 Exhibit 1, page 2, 29.)

11. In Claim 207, the Government Lot location for the first point of diversion (POD 1) is incorrectly described in the Preliminary Evaluation as being Lot 6, NE¼ SE¼, Section 6, Township 40 S, Range 8 East, W.M.. The correct location of this point of diversion is Government Lot 10. (Case 139 Exhibit 1, pages 61, 73.)

12. In Claim 207, the quarter-quarter location for the last point of diversion (POD 7) is incorrectly described in the Preliminary Evaluation as being Lot 13, SW¼ NE¼, Section 16, Township 40 S, Range 8 East, W.M.. The correct quarter-quarter location for this point of diversion is SE¼ NW¼. (Case 139 Exhibit 1, pages 61, 73.)

13. In Claim 207, the quarter-quarter location of 14.4 acres is incorrectly described in the Preliminary Evaluation as being Lot 11, SE¼ SE¼, Section 6, Township 40 S, Range 8 East, W.M.. The correct quarter-quarter location of these 14.4 acres is the SE¼ NE¼. (Case 139 Exhibit 1, page 61, 76.)

14. In Claim 207, the 11.0 acres within Lot 6, NW¼ NE¼, and 33.8 acres within Lot 6, NE¼ NE¼, are incorrectly described in the Preliminary Evaluation as being in Section 6 of Township 40 S, Range 8 East, W.M. The correct section location is Section 7. (Case 139 Exhibit 1, page 61, 76.)

Reasons for Modifications: To correct scrivener's errors in the Preliminary Evaluation for Claim 203 and 207.

MODIFICATIONS TO THE "OPINION"

Within the section titled "Opinion" of the Proposed Order, the following modifications are made (additions are shown in "underline" text, deletions are shown in "~~striketrough~~" text).

1. The following sentence is added to the end of the first paragraph:

The one exception to these elements is that, 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).

2. Subsection B.1 is modified as follows:

The United States first asserted a failure of proof, arguing that there is insufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right. The evidence on this issue is clear. The

property was developed and subject to irrigation before 1897, with the exception of the acres irrigated above the meander line of the Klamath River from points of diversion No. 1 and 2 in Claim 203, which were developed and placed into irrigation in 1908. The elements of a pre-1909 water right have been met.

3. The following paragraph is added to the end of subsection D.1 of the Opinion section:

In addition, there is no evidence that the lands claimed by the Calmes were in private ownership or exclusive possession in 1858. It is not always necessary for the owner of the land and the appropriator of the water to be the same in order to perfect a water right. *In re Water Rights of Hood River*, 114 Or 112, 137 (1924); *Nevada Ditch Co. v. Bennett*, 30 Or 59, 93-98 (1896). However, there is no support for the position that an appropriation of water by a private individual on state-owned land could have occurred prior to, at a minimum, possession of that land by some private individual or entity. See *Nevada Ditch Co. v. Bennett*, 30 Or 59, 93 (appropriation of water permitted for benefit of land owned by the United States where private individual had possessory rights to lands, even though title had not yet been acquired from the United States).

4. The first paragraph of subsection D.2 is modified as follows:

The second contest of the Adjudicator's Preliminary Evaluation by the Calmes is that all of the Calmes' land is entitled to the same priority date. The Preliminary Evaluation found a priority date of October 28, 1897 as to 4.2 acres irrigated from diversion point No. 1. That is the date of the deed from J.S. Rogers to Frank T. Nelson, *et ux.*, whereby the Nelsons took title to most of the land included in these consolidated cases. (Direct Test. of Calmes, Ex. B-9.) ~~However,~~ With respect to the remaining 25.9 acres from diversion point No. 1, and 72.5 acres from diversion point No. 2, the Preliminary Evaluation assigned a priority date of December 31, 1908. ~~The lands irrigated from diversion point No. 2 are irrigated by a pump, and~~ Prior to the use of diversion points No. 1 and 2, those lands which are above the meander line of the Klamath River were irrigated from "an old suction pump" located in the NE¼ NE¼, Section 17, Township 40 S, Range 8 E, W.M.. (Case 136, OWRD Exhibit 1 at 46.) The

Affidavit of Roy T. Nelson states in part: “In 1908, we put a pump in the canal closest to Teeter’s Landing and started irrigating the upland.” (Case 136; OWRD Exhibit 1, page 60). Calmes testified at hearing that the pump identified in the Affidavit of Roy T. Nelson was located at a sharp bend in the canal within Lot 3, NE¼ NE¼, Section 17 and that the canal originates at the POD labeled #7 [same as POD 1 for Claim 203] on Exhibit A. (Compare Hearing Transcript at 42 – 44; Case 136 OWRD Exhibit 1, pages 60-61; and Direct Testimony Barney Calmes, Exhibit A.) Although the lands irrigated from diversion No. 2 were not irrigated until about 1908, the evidence is clear that Frank Nelson intended to develop his lands for agricultural purposes and to irrigate his land. With due diligence, over a reasonable period of time, Frank Nelson made significant improvements to the irrigation system, including building a levee along the Klamath River to control the flow of water onto the land and installing a pump in 1908 to irrigate uplands. The Affidavit of Roy T. Nelson also states that three canals constructed on the property (which includes the canal in which the pump was placed) were completed by 1897. (Hearing Transcript at 42 – 44; Case 136 OWRD Exhibit 1, pages 60-61; and Direct Testimony Barney Calmes, Exhibit A.) There is no evidence of further development of irrigation works on the claimed lands until 1908, when the pump was placed in Lot 3, NE¼ NE¼, Section 17, and irrigation of the uplands began. Given these facts, the placement of the pump and irrigation of the uplands constitutes the initiation of a new appropriation, with a priority date of December 31, 1908, and not the reasonably diligent completion of the 1897 appropriation. The lands below the meander line of the Klamath River, subject to the earlier priority date, include 4.2 acres irrigated from POD 1 and 14.1 acres irrigated from POD 2.

5. The third paragraph of subsection D.2 is deleted and replaced as follows:

~~The actions of Frank T. Nelson during the first 10 or 11 years that he owned the subject property demonstrated an intent to substantially improve the irrigation system on the property by both excluding the natural flooding or overflow of the river and by installing canals, drains, and pumps to irrigate his land in an efficient manner. This is sufficient to establish the “due diligence required to place the priority date for the entire parcel at October 28, 1897.”~~

The only evidence of further improvements between 1897 and 1908 comes from a statement in the Calmes affidavit. (Direct Test. of Calmes.) This statement is based on the Nelson affidavit, which does not reference work between 1897 and 1908, and the Early Recollections, by Laura Nelson Burton (Exhibit D to the Calmes affidavit). (Id.) The pages of the Early Recollections that are in the record do not reference diking of the property between 1897 and 1908. Even if this diking had occurred, it does not appear related to the upland parcel, which from the Affidavit of Roy T. Nelson was not subject to flooding from the Klamath River. Given the absence of evidence of any effort to expand irrigation to the upland parcel for the 11-year period between 1897 and 1908, the 1908 expansion constitutes a new appropriation rather than the reasonably diligent completion of the 1897 appropriation.

6. The third paragraph of subsection F.1 is deleted and replaced as follows:

~~With respect to Kite Ranches, Inc.'s contest, there is no evidence that the Kites ever intended to abandon the right to irrigate said 52.2 acres. To the contrary, claimant has made significant efforts to restore the land after it was damaged. Kite Ranches, Inc. is entitled to maintain its right to irrigate that land until such time as it gives up its effort to revitalize the land and return it to production.~~

Intent to abandon may be inferred through a sufficiently long enough period of non-use. See, e.g., *In the Matter of the Clark Fork River*, 902 P2d 1353 (Mont 1996). The placement of dredge spoils on the 52.2 acres in question began in the years following the 1964 flood. (Direct Testimony of John N. Kite at 3.) After placement of the dredge spoils, Claimant attempted to grow crops on and irrigate the land, but was unable to produce a commercially viable agricultural crop. This effort continued over a period of several years. *Id.* At the time of John N. Kite's testimony, in 2003, Claimant had engaged a contractor to remove the dredge spoils, with the intent of eventually resuming agricultural production on the land. *Id.* Even assuming Claimant's unsuccessful efforts to grow crops on the property after placement of the dredge spoils lasted into the mid-1970s, the evidence shows a period of nearly thirty years where the land lay fallow and no use of water was made. Under the facts in this case, this is a sufficiently long period of

time for an intent to abandon the water right on this property to be inferred. The portion of Claim 207 for these 52.2 acres is denied.

Reasons for Modifications: To clarify beneficial use of water by the method of natural overflow for a Pre-1909 water right; to correct findings that were not supported by preponderance of evidence in the record; to apply principles of pre-1909 water law to the facts in this case.

7. Sections G and H are added as follows (additions are shown in “underline” text):

G. Duty for Claims 203 and 207

The duty allowed in the Preliminary Evaluation exceeds the claimed duty in the claims. As per ORS 539.210 and OAR 690-030-0085 (see Subsection B.2 in Proposed Order) the claims may not be allowed for a duty exceeding the duty specified in the claim itself. Therefore, the duty for Claims 203 and 207 is limited to 3.0 acre-feet per acre irrigated.

Reasons for Modifications: To limit the duty to that which was claimed.

H. Livestock Watering for Claims 203, 206 and 207

For Claims 203 and 207, livestock watering is limited to incidental livestock watering during the irrigation season, and is limited to the number of head claimed, being 300 head for Claim 203, and 600 pair for Claim 207.

Livestock watering in Claim 206 is year around, and is limited to 12 gallons per head per day, for up to 150 head, the number claimed.

Reasons for Modifications: To clarify that livestock watering is incidental to irrigation during the irrigation season, and to limit the number of livestock for incidental watering to that which was claimed.

MODIFICATIONS TO THE SECTION TITLED “PROPOSED ORDER”

The “Proposed Order” section of the Order is deleted and replaced with the following:

1. A water right for Claim 203 should be confirmed as set forth in the following Water Right Claim Description:

CLAIM NO. 203

CLAIM MAP REFERENCE:

OWRD INVESTIGATION MAP – T 40 S, R 8 E (Case 136 OWRD Ex. 1 at 38)

CLAIMANT: BARNEY CALMES
 DAISY CALMES
 PO BOX 42
 KENO OR 97627-0042

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

PURPOSE OR USE:

IRRIGATION OF 101.9 ACRES WITH INCIDENTAL LIVESTOCK WATERING OF UP TO 300 HEAD FOR ENTIRE CLAIM, AS FOLLOWS:

30.1 ACRES FROM POD 1, AND

71.8 ACRES FROM POD 2.

RATE OF USE:

2.38 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINTS OF DIVERSION, BEING 0.75 CFS FROM POD 1 AND 1.63 CFS FROM POD 2.

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: APRIL 1 - NOVEMBER 15

THE POINTS OF DIVERSION ARE LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	GLot	Survey Coordinates
POD 1 ^a	40 S	8 E	WM	16	SE NW	13	3760 FEET SOUTH AND 5830 FEET EAST FROM NW CORNER, SESW, SECTION 8
POD 2	40 S	8 E	WM	16	NE SW	14	NONE GIVEN

^aThis is the same as POD 7 in Claim 207

DATES OF PRIORITY AND THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING								
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized POD	PRIORITY DATE
40 S	8 E	WM	16	SW NW	12	1.7	POD 1	October 28, 1897
40 S	8 E	WM	16	SW NW	1	11.2	POD 2	December 31, 1908
40 S	8 E	WM	16	SW NW	12	7.5	POD 2	October 28, 1897
40 S	8 E	WM	16	SE NW	13	3.6	POD 2	October 28, 1897
40 S	8 E	WM	16	NE SW	14	3.0	POD 2	October 28, 1897
40 S	8 E	WM	16	NE SW	2	14.9	POD 2	December 31, 1908
40 S	8 E	WM	16	NW SW		14.3	POD 2	December 31, 1908
40 S	8 E	WM	16	SW SW		3.2	POD 2	December 31, 1908
40 S	8 E	WM	16	SE SW	3	14.1	POD 2	December 31, 1908

IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING								
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized POD	PRIORITY DATE
40 S	8 E	WM	17	NE NE	3	1.0	POD 1	October 28, 1897
40 S	8 E	WM	17	NE NE	1	1.9	POD 1	December 31, 1908
40 S	8 E	WM	17	NW NE		0.1	POD 1	December 31, 1908
40 S	8 E	WM	17	SW NE		0.8	POD 1	December 31, 1908
40 S	8 E	WM	17	SW NE		8.4	POD 1	December 31, 1908
40 S	8 E	WM	17	SE NE	2	10.8	POD 1	December 31, 1908
40 S	8 E	WM	17	SE NE	3	1.5	POD 1	October 28, 1897
40 S	8 E	WM	17	SE NE	2	0.7	POD 2	December 31, 1908
40 S	8 E	WM	17	NE NW		2.2	POD 1	December 31, 1908
40 S	8 E	WM	17	SE NW		1.0	POD 1	December 31, 1908

2. A water right for Claim 206 should be confirmed as set forth in the following Water Right Claim Description.

CLAIM NO. 206

CLAIM MAP REFERENCE:

OWRD INVESTIGATION MAP – T 40 S, R 8 E (Case 137 OWRD Ex. 1 at 22);
CLAIM # 206, PAGE 23 (Case 137 OWRD Ex. 1 at 23)

CLAIMANT: LARRY E. PEACORE AND CAROLYN F. PEACORE,
TRUSTEES FOR THE PEACORE FAMILY TRUST
PO BOX 1079
KENO, OR 97627

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

PURPOSE OR USE:

IRRIGATION OF 154.0 ACRES AND LIVESTOCK WATERING OF 150 HEAD.

RATE OF USE:

3.8528 CUBIC FEET PER SECOND (CFS) AS FOLLOWS:

3.85 CFS FOR IRRIGATION MEASURED AT THE POINT OF DIVERSION, AND

0.0028 CFS FOR LIVESTOCK WATERING MEASURED AT THE PLACE OF USE,
NOT TO EXCEED 1800 GALLONS PER DAY.

DIVERSION OF STOCK WATER TO THE PLACE OF USE IS LIMITED TO THAT WHICH HAS BEEN HISTORICALLY DIVERTED FOR BENEFICIAL USE AND IS REASONABLY NECESSARY TO TRANSPORT THE WATER, AND TO PREVENT THE WATERCOURSE FROM BEING COMPLETELY FROZEN WHEN TRANSPORTING WATER OUTSIDE OF THE IRRIGATION SEASON.

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:

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

PERIOD OF ALLOWED USE:

Use	Period
Irrigation	May 1 - October 31
Livestock	January 1 - December 31

DATE OF PRIORITY: AUGUST 26, 1905

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q	GLot	Survey Coordinates
40 S	8 E	WM	8	NE NW	9	1770 FEET EAST FROM NW CORNER, SECTION 8

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION and LIVESTOCK WATERING						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
40 S	8 E	WM	5	SW SW		40.0
40 S	8 E	WM	5	SE SW	13	13.2
40 S	8 E	WM	7	SE NE	5	21.6
40 S	8 E	WM	8	NW NW		39.7
40 S	8 E	WM	8	SW NW		39.5

- A water right for Claim 207 should be confirmed as set forth in the following Water Right Claim Description.

CLAIM NO. 207

CLAIM MAP REFERENCE:

OWRD INVESTIGATION MAP – T 40 S, R 8 E (Case 139 OWRD Ex. 1 at 61)
CLAIM # 207, PAGE 23 (Case 137 OWRD Ex. 1 at 73)

CLAIMANT: KITE RANCHES INC.
PO BOX 175
KENO, OR 97627

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

PURPOSE OR USE:

IRRIGATION OF 648.0 ACRES WITH INCIDENTAL LIVESTOCK WATERING OF UP TO 600 PAIR FOR ENTIRE CLAIM, AS FOLLOWS:

206.8 ACRES FROM PODS 1, 2, AND 4, AND

441.2 ACRES FROM PODS 5, 6, AND 7.

RATE OF USE:

16.2 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINTS OF DIVERSION, BEING 5.17 CFS OF WATER COMBINED FROM PODS 1, 2, AND 4, AND 11.03 CFS OF WATER COMBINED FROM PODS 5, 6, AND 7.

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: APRIL 15 - NOVEMBER 15

DATE OF PRIORITY: OCTOBER 28, 1897

THE POINTS OF DIVERSION ARE LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	GLot	Survey Coordinates
POD 1	40 S	8 E	WM	6	NE SE	10	2510 FEET NORTH AND 1280 FEET WEST FROM SW CORNER, SECTION 5
POD 2	40 S	8 E	WM	6	SE NE	11	2770 FEET NORTH AND 990 FEET WEST FROM SW CORNER, SECTION 5
POD 4	40 S	8 E	WM	5	NE SW	12	1320 FEET NORTH AND 2000 FEET EAST FROM SW CORNER, SECTION 5
POD 5	40 S	8 E	WM	8	SE NE	6	1580 FEET NORTH AND 3480 FEET EAST FROM NW CORNER, SESW, SECTION 8
POD 6	40 S	8 E	WM	9	SE SW	7	870 FEET SOUTH AND 5480 FEET EAST FROM NW CORNER, SESW, SECTION 8
POD 7	40 S	8 E	WM	16	SE NW	13	3760 FEET SOUTH AND 5830 FEET EAST FROM NW CORNER, SESW, SECTION 8

THE PLACE OF USE IS LOCATED AS FOLLOWS:


IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING							
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized PODS
40 S	8 E	WM	5	SW NW	10	16.8	PODS 1, 2, 4
40 S	8 E	WM	5	NE SW	12	3.5	PODS 1, 2, 4
40 S	8 E	WM	5	NW SW		31.9	PODS 1, 2, 4
40 S	8 E	WM	6	SE NE	11	14.4	PODS 1, 2, 4
40 S	8 E	WM	6	SE NE		3.1	PODS 1, 2, 4
40 S	8 E	WM	6	NE SE	10	36.0	PODS 1, 2, 4
40 S	8 E	WM	6	SW SE	8	16.3	PODS 1, 2, 4
40 S	8 E	WM	6	SE SE		40.0	PODS 1, 2, 4
40 S	8 E	WM	7	NE NE	6	33.8	PODS 1, 2, 4
40 S	8 E	WM	7	NW NE	6	11.0	PODS 1, 2, 4

IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING							
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized PODS
40 S	8 E	WM	8	NE NE		1.3	PODS 5, 6, 7
40 S	8 E	WM	8	NE NE	7	6.0	PODS 5, 6, 7
40 S	8 E	WM	8	NW NE	8	18.0	PODS 5, 6, 7
40 S	8 E	WM	8	NW NE		1.8	PODS 5, 6, 7
40 S	8 E	WM	8	SW NE		40.0	PODS 5, 6, 7
40 S	8 E	WM	8	SE NE	6	22.5	PODS 5, 6, 7
40 S	8 E	WM	8	SE SW	11	14.5	PODS 5, 6, 7
40 S	8 E	WM	8	SE SW	2	25.5	PODS 5, 6, 7
40 S	8 E	WM	8	NE SE	5	39.0	PODS 5, 6, 7
40 S	8 E	WM	8	NE SE		0.20	PODS 5, 6, 7
40 S	8 E	WM	8	NW SE		39.4	PODS 5, 6, 7
40 S	8 E	WM	8	SW SE	3	8.1	PODS 5, 6, 7
40 S	8 E	WM	8	SW SE	12	31.9	PODS 5, 6, 7
40 S	8 E	WM	8	SE SE	4	37.9	PODS 5, 6, 7
40 S	8 E	WM	9	NE SW	6	0.2	PODS 5, 6, 7
40 S	8 E	WM	9	NW SW	6	19.5	PODS 5, 6, 7
40 S	8 E	WM	9	NW SW		0.4	PODS 5, 6, 7
40 S	8 E	WM	9	SW SW		32.3	PODS 5, 6, 7
40 S	8 E	WM	9	SE SW	7	5.0	PODS 5, 6, 7
40 S	8 E	WM	16	NW NW	11	20.8	PODS 5, 6, 7
40 S	8 E	WM	16	SW NW	12	6.7	PODS 5, 6, 7
40 S	8 E	WM	17	NE NE	3	24.6	PODS 5, 6, 7
40 S	8 E	WM	17	NE NE	1	0.3	PODS 5, 6, 7
40 S	8 E	WM	17	NW NE		20.1	PODS 5, 6, 7
40 S	8 E	WM	17	SW NE		1.9	PODS 5, 6, 7
40 S	8 E	WM	17	SE NE	2	1.5	PODS 5, 6, 7
40 S	8 E	WM	17	SE NE	3	0.1	PODS 5, 6, 7
40 S	8 E	WM	17	NE NW		21.7	PODS 5, 6, 7

Reason for Modifications: To make the “Proposed Order” section consistent with the Findings of Fact and Opinion, as revised herein, and to present the claim descriptions in a format standardized by OWRD.

IT IS SO ORDERED.

Dated at Salem, Oregon on April 4, 2012.



 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 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 April 4, 2012, I mailed a true copy of the following: **AMENDED PROPOSED ORDER** (Claims 203, 206 and 207), by depositing the same in the U.S. Post Office, Salem, Oregon 97301, with first class postage prepaid thereon, and addressed to:

Stephen R. Palmer
U.S. Department of Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825

William Ganong
Attorney at Law
514 Walnut Street
Klamath Falls, OR 97601

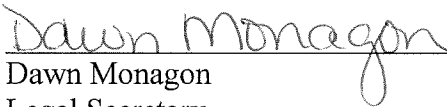
Steven Shropshire
Jordan Schrader PC
PO Box 230669
Portland, OR 97281

Jesse D. Ratcliffe
Oregon Department of Justice
1162 Court St NE
Salem, OR 97301

Paul Simmons
Andrew Hitchings
Somach Simmons & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814

Carl Ullman
The Klamath Tribes
PO Box 957
Chiloquin, OR 97624

Kite Ranches, Inc.
PO Box 154
Keno, OR 97627-0154


Dawn Monagon
Legal Secretary
Oregon Water Resources Department