

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

**KLAMATH BASIN GENERAL STREAM ADJUDICATION**

|                               |   |                      |
|-------------------------------|---|----------------------|
| In the Matter of the Claim of | ) | PARTIAL ORDER OF     |
| NBCC, LLC                     | ) | DETERMINATION        |
|                               | ) |                      |
| _____                         | ) | Water Right Claim 41 |

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

**A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS  
TO THE PROPOSED ORDER**

1. Claim 41 (Claimant: NBCC, LLC) and its associated contests (2825, 3267, 3448, 3786, and 4096) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 180.
2. On May 6, 2003, Claim 41 was consolidated with Case 900 “for the sole purpose of determining whether [this and other] claims for rights to water from the Wood River system . . . which have been previously adjudicated, bar the Claimants from participation in this adjudication.” *See* ORDER GRANTING MOTION TO CONSOLIDATE AND SCHEDULING PREHEARING CONFERENCE (May 6, 2003) at 3.
3. On April 20, 2004, an ORDER AMENDING RULINGS ON MOTIONS FOR RULING ON LEGAL ISSUES (April 20, 2004) was issued in Case 900, and is adopted and incorporated in its entirety as if set forth fully herein.
4. On May 27, 2004, the consolidation of claims and cases in Case 900 was reversed; the law of the case in each case is set out in the ORDER AMENDING RULINGS ON MOTIONS FOR RULING ON LEGAL ISSUES (referenced in Finding 3, above). *See* ORDER VACATING ORDER TO CONSOLIDATE (May 27, 2004).
5. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 41 on February 28, 2007.

6. Exceptions were filed to the Proposed Order within the exception filing deadline by NBCC, LLC.
7. The exceptions filed to the Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 41. Except for the items addressed in Sections A.9, A.10.b and A.11, below, the exceptions filed to the Proposed Order for Claim 41 are found to be unpersuasive.
8. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
  - a. The “History of the Case” is adopted in its entirety.
  - b. The “Evidentiary Rulings” is adopted in its entirety.
  - c. The “Issues” is adopted in its entirety.
  - d. The “Findings of Fact” is adopted with modifications, as set forth in Section A.9, below.
  - e. The “Conclusions of Law” is adopted in its entirety.
  - f. The “Opinion” is adopted with modifications, as set forth in Section A.10, below.
  - g. The “Order” is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 41, which also incorporates any modifications made in Section A.11, below. Consistent with Sections A.9, A.10.b, and A.11, below, the outcome of the Order has been modified as to a standard rate for irrigation and season of use.
9. **Findings of Fact.**
  - a. Proposed Order Finding of Fact #1 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strike through~~” text):
    1. This claim was originally for a total of 7.75 cubic feet per second (cfs) of water, being 5.75 cfs for approximately 114.8 acres of land for irrigation at a rate of 1/20 of one cfs per acre, 1.0 cfs for stock and 1.0 cfs for fish and wildlife. The claimed duty is 5.0 acre-feet/irrigated acre. The claimed period of use is April 1 through November 1 for irrigation. (OWRD Ex. 1 at 1, 4.) Of the original claim, 112 acres located in the SE ¼ Section 35, T33S R7½E.W.M. were the subject of a previous adjudication of the Wood River, and are therefore precluded from inclusion within this adjudication. (Order on Motions for Ruling on Legal Issues, Dec. 9, 2005.) The remaining 2.8 acres was held in trust by the United States at the time of the Wood River Adjudication, and was therefore not a part of that adjudication. (*Id.*)

**Reason for Modification:** Using evidence on the record, to provide more specific information with reference to what was claimed; the ALJ’s proposed finding of fact

failed to fully set forth the evidence on the record; to provide additional citations to the record.

- b. Proposed Order Finding of Fact #5 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

5. The description of the works in the Field Inspection Report establishes that the works are adequate to deliver the rate and duty of water ~~noted as agreed upon in the Stipulation between the Claimant and the United States.~~ noted as agreed upon in the Stipulation between the Claimant and the United States. (OWRD Ex. 1 at 106, 115, 116.) The adjoining property in common ownership that was subject to the Wood River Adjudication has an allowed season of use pursuant to the Decree in that adjudication of April 1 to October 1, an allowed rate of 1/50<sup>th</sup> cfs per acre from April 1 through July 20, and 1/80<sup>th</sup> cfs per acre from July 20 through October 1, and a duty of 5 acre-feet of water per acre during the entire season of use. (*Id.* at 111.) ~~No evidence has been presented for a different rate, duty and season of use, except as limited by the Stipulation.~~ However, the Claimant attested to the ability to beneficially use the claimed quantities of water. The Stipulation between the Claimant and the United States limits the rate and duty to 1/40 cfs per acre, and 4.3 acre-feet per acre, with a season of use of April 1 through November 1. The evidence supports the rate, duty, and season of use as agreed upon in the Stipulation. [STIPULATION BETWEEN CLAIMANT AND THE UNITED STATES TO RESOLVE THE UNITED STATES’ CONTEST 3786, July 3, 2006 (Stipulation).]

**Reason for Modification:** To base the standard rate, duty and season of use on the stipulation between the Claimant and United States, an issue raised in exceptions; to provide an additional citation to the record. The ALJ’s finding with respect to the appropriate rate, duty and season of use is not supported by a preponderance of evidence in the record.

10. **Opinion.**

- a. Within the section titled “Opinion” of the Proposed Order, OWRD removed the ALJ’s discussion regarding the elements of a *Walton* Claim. In its place, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

**Reason for Modifications:** To correct and clarify the elements of a Walton water right.

- b. Within the section titled “Opinion” of the Proposed Order, the last paragraph is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

~~This parcel adjoined, and was in common ownership from 1960 on with a parcel that was subject to the Wood River Adjudication. There is no evidentiary basis for allowing a different rate, duty and season of use for this property, than for the adjoining parcel, although the claim was for a longer season of use and a higher rate than was allowed in the prior adjudication. At the same time, the allowed duty in the Wood River Adjudication was 5 acre feet of water per acre, whereas the Stipulation limited the duty to 4.3 acre feet of water per acre. Except as limited by stipulation, I conclude that~~ The rate, and duty and season of use for this parcel should be the same as for the connected property that was previously adjudicated reduced from that which was originally claimed to that which was agreed upon in the Stipulation between the United States and the Claimant. The season of use should be April 1 through November 1 as claimed and agreed upon in the Stipulation.

**Reasons for Modifications:** To base the standard rate, duty and season of use on the stipulation between the Claimant and United States, an issue raised in exceptions.

11. **Order.** Within the section titled “Order” of the Proposed Order, the following modifications are made (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

~~Diversion Rate: 0.056 cfs (1/50 = 0.02; 2.8 X 0.02 = 0.056) from April 1 through July 20, 0.035 cfs (1/80 = 0.0125; 0.0125 X 2.8 = 0.035) for the remainder of the season of use~~ 0.07 cfs (1/40 = 0.025; 2.8 X 0.025 = 0.07), measured at the point of diversion.

~~Period of Use: April 1 to October~~ November 1

**Reasons for Modifications:** To provide consistency with Sections A.9 and A.10.b.

## B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
  - a. The “History of the Case” is adopted in its entirety.
  - b. The “Evidentiary Rulings” is adopted in its entirety.
  - c. The “Issues” is adopted in its entirety.
  - d. The “Findings of Fact” is adopted with modifications, as set forth in Section A.9, above.
  - e. The “Conclusions of Law” is adopted in its entirety.
  - f. The “Opinion” is adopted with modifications, as set forth in Section A.10, above.
  - g. The “Order” is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 41, which also incorporates any modifications made in Section A.11, above. Consistent with Sections A.9, A.10.b, and A.11, above, the outcome of the Order has been modified as to a standard rate for irrigation and season of use.
2. The elements of a Walton claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.
3. Based on the file and record herein, IT IS ORDERED that Claim 41 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

**CLAIM NO. 41**

**CLAIM MAP REFERENCE:** OWRD INVESTIGATION MAP – T 35 S, R 7.5 E

**CLAIMANT:** NBCC, LLC  
PO BOX 458  
FORT KLAMATH, OR 97626

**SOURCE OF WATER:** CROOKED CREEK, tributary to the WOOD RIVER

**PURPOSE OR USE:** IRRIGATION OF 2.8 ACRES

**RATE OF USE:**

0.07 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINT OF DIVERSION

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

**DUTY:**

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

**PERIOD OF ALLOWED USE:** APRIL 1 - NOVEMBER 1

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

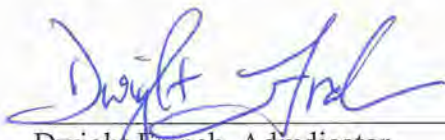
| Twp  | Rng   | Mer | Sec | Q-Q   | Measured Distances   |
|------|-------|-----|-----|-------|--|
| 33 S | 7.5 E | WM  | 26  | NW NE | 1200 FEET SOUTH AND 270 FEET EAST FROM N¼ CORNER, SECTION 26 |

THE PLACE OF USE IS LOCATED AS FOLLOWS:

| IRRIGATION |       |     |     |       |       |
|------------|-------|-----|-----|-------|-------|
| Twp        | Rng   | Mer | Sec | Q-Q   | Acres |
| 33 S       | 7.5 E | WM  | 35  | NE SW | 2.8   |

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

  
Dwight French, Adjudicator  
Klamath Basin General Stream Adjudication