

**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
JAMES ROBERT MUELLER	)	DETERMINATION
	)	
_____	)	Water Right Claim 137

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 137 (Claimant: JAMES ROBERT MUELLER) and its associated contests (3398, 3824, and 4165) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 116.
2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 137 on September 11, 2003.
3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) the United States of America and (2) the Klamath Tribes.
4. The exceptions to the Proposed Order along with any opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 137. The exceptions are found to be persuasive, and therefore, modifications are made to the Proposed Order as described in Sections A.6, A.7, A.8.b, and, A.9 below.
5. 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 "Procedural Matters" is adopted in its entirety.
  - c. The "Evidentiary Rulings" is adopted in its entirety.
  - d. The "Issues" is adopted in its entirety.
  - e. The "Findings of Fact" is adopted with modifications, as set forth in Section A.6, below.

- f. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.7, below.
- g. The “Opinion” is adopted with modifications, as set forth in Section A.8, below.
- h. 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 137. Except as identified in Section A.9, below, the outcome of the Order is without modification; it is presented in a format standardized by OWRD.

6. **Findings of Fact.**

- a. The last sentence in the Proposed Order Finding of Fact #2 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

Actual use totals ~~0.71~~ 0.08 cfs (0.07 for irrigation and 0.01 for domestic use).

(OWRD Exhibit 1, pgs. 27-33.)

**Reason for Modification:** To correct an addition error.

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

~~(5) The standard for the season of use has been determined by the Adjudicator as a result of an analysis of historical descriptions of irrigation use and previous adjudications within the Klamath Basin. Irrigation seasons within the Klamath Basin typically end October 31 of each year. (OWRD Exhibit 1, pgs. 82-83.)~~

**Reason for Deletion of Finding of Fact:** The season of use is established by the record; the claimed season of use is April 1 to November 1.

- 7. **Conclusions of Law.** Within the section titled “Conclusions of Law” of the Proposed Order, Conclusion #2 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

The acreage, ~~rate,~~ duty, actual use, points of diversion, and seasonal limitations of Claim 137 are as ~~set out in the Preliminary Evaluation~~ claimed. The rate for irrigation is limited to the actual use of 35 gallons per minute (0.07 cfs), and 0.01 cfs for domestic use.

**Reason for Modifications:** To base the conclusion using the evidence on the record rather than referencing the Preliminary Evaluation, an issue raised in exceptions.

8. **Opinion.**

- a. Within the section titled “Opinion” of the Proposed Order, the following sentence (shown in “underline” text) is added to the first paragraph:

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).

**Reason for Modification:** To clarify beneficial use of water by the method of natural overflow for a Pre-1909 water right

- b. Within the section titled “Opinion” of the Proposed Order, the following two paragraphs are modified to read as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

Amount of Water Beneficially Used. Mr. Mueller's ~~claim~~ claimed usage of 0.7 cfs for irrigation and 0.01 cfs for domestic use. As stated in the Adjudicator's Preliminary Evaluation, ~~found~~ the record shows that he was entitled to a lesser amount, ~~0.071~~ 0.08 cfs, being .07 for irrigation and .01 for domestic use, measured at the point of diversion. The field inspection performed in April 1987 showed actual use for irrigation totaling ~~0.71 (0.07 for irrigation and 0.01 for domestic use)~~ up to 35 gallons per minute (the equivalent of 0.07 cfs). (OWRD Exhibit 1, pgs 27-33.) Mr. Mueller did not contest that finding and provided no other evidence regarding his use.

Considering the commercial nature of their homestead gardens and livestock, as well as gardens and livestock for their own use, it is not unreasonable to believe that the Hagelsteins utilized the spring waters in much the same manner and in the same amount as is currently used. The greater weight of the evidence established that Mr. Mueller applies water to beneficial use in the amount of ~~0.071~~ 0.08 cfs and that that is an historical rate going back to the original settlement.

**Reason for Modifications:** To correct scrivener’s and addition errors. To apply the appropriate basis for establishing the rate, an issue raised in exceptions.

9. **Order.** Within the section titled “Order” of the Proposed Order, the following paragraph is modified to read as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

The record establishes the elements of a pre-1909 right ~~are established~~ for Claim 137. ~~and~~ Except for the seasons of use, the claim is approved for beneficial use as set forth in the October 4, 1999, Summary Preliminary Evaluation of Claim, a copy of which is attached hereto and incorporated as if fully set out in this order. The seasons of use for domestic use and irrigation are April 1 through November 1.

**Reason for Modifications:** To provide consistency with Sections A.6, A.7 and A.8.

## 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 “Procedural Matters” is adopted in its entirety.
  - c. The “Evidentiary Rulings” is adopted in its entirety.
  - d. The “Issues” is adopted in its entirety.
  - e. The “Findings of Fact” is adopted with modifications, as set forth in Section A.6, above.
  - f. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.7, above.
  - g. The “Opinion” is adopted with modifications, as set forth in Section A.8, above.
  - h. 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 137. Except as identified in Section A.9, above, the outcome of the Order is without modification; it is presented in a format standardized by OWRD.
2. The elements of a pre-1909 claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING PRE-1909 CLAIMS is incorporated as if set forth fully herein.
3. Based on the file and record herein, IT IS ORDERED that Claim 137 is approved as set forth in the following Water Right Claim Description.

**CLAIM NO.** 137

**CLAIM MAP REFERENCE:** OWRD INVESTIGATION MAP – T 37 S, R 9 E

**CLAIMANT:** JAMES ROBERT MUELLER  
16087 ALGOMA RD.  
KLAMATH FALLS, OR 97601

**SOURCE OF WATER:** An UNNAMED SPRING, tributary to UPPER KLAMATH LAKE

**PURPOSE OR USE:**  
DOMESTIC FOR ONE HOUSEHOLD; AND  
IRRIGATION OF 27.6 ACRES.

**RATE OF USE:**  
0.08 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINT OF DIVERSION AS  
FOLLOWS:  
0.01 CFS FOR DOMESTIC USE; AND  
0.07 CFS FOR IRRIGATION 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:**  
3.5 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH  
YEAR.

**PERIOD OF ALLOWED USE:**

Use	Period
Domestic	April 1 – November 1
Irrigation	April 1 – November 1

**DATE OF PRIORITY:** JUNE 21, 1894

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

Twp	Rng	Mer	Sec	Q-Q
37 S	9 E	WM	7	NW NE

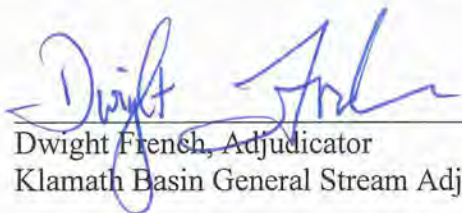
**THE PLACE OF USE IS LOCATED AS FOLLOWS:**

DOMESTIC				
Twp	Rng	Mer	Sec	Q-Q
37 S	9 E	WM	7	NW NE

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
37 S	9 E	WM	7	NW NE	2.5
37 S	9 E	WM	7	SW NE	25.1

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

  
Dwight French, Adjudicator  
Klamath Basin General Stream Adjudication