

**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
NANCY CHARLEY FAMILY, LLC	)	DETERMINATION
_____	)	
	)	Water Right Claim 141

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 141 (Claimants: NANCY CHARLEY FAMILY, LLC<sup>1</sup>) and its associated contests (2, 2850, 3399, 3825, and 4166) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 117.
2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 141 on July 9, 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 141. Except for the scrivener's error addressed in Section A.6, below, the exceptions filed to the Proposed Order for Claim 141 are found to be unpersuasive.
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 with modifications, as set forth in Section A.7, below.
  - b. The "Evidentiary Rulings" is adopted with modifications, as set forth in Section A.8, below.

---

<sup>1</sup> Ownership was updated to Nancy Charley Family, LLC from Nancy Charley/Nancy Charley, Trustee of the Nancy Charley Family Trust dated March 26, 1997. See CHANGE OF OWNERSHIP FORM and Certificate of Service (May 16, 2002)

- 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 141. Except as identified in Section A.11, below, the outcome of the Order is without modification; it is presented in a format standardized by OWRD.

6. **Caption.** In the case caption on page 1, the contestant’s name, United States Bureau of Reclamation, is corrected to the United States of America.

**Reason for Modification:** To correct a scrivener’s error raised in exceptions.

7. **History of the Case.** Within the section titled “History of the Case,” of the Proposed Order, the first sentence in Paragraph 7, page 2, is modified as follows (additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text):

On May 8, 2000, the Klamath Tribes filed ~~Claim~~ Contest Number 4166 . . . .

**Reason for Modification:** To correct a scrivener’s error.

8. **Evidentiary Rulings.** Within the section titled “Evidentiary Rulings” of the Proposed Order, the first paragraph is modified as follows:

The AFFIDAVIT OF VINCE BODNER, JR. dated April 9, 2004, is added to the list of items that were admitted into the record.

**Reason for Modification:** To correct an omission from the list of Evidentiary Rulings.

9. **Findings of Fact.**

a. Proposed Order Finding of Fact #2 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text):

2. Buck Lake was transferred by the United States to the State of Oregon pursuant to the Swamp Act of ~~1960~~ 1860. The State of Oregon transferred title to 1531.97 acres of lands describing the location of Buck Lake that are appurtenant to Claim 141 to ~~various~~ four individuals ~~between 1880 and 1889~~ on August 17, 22, 23, 1888, and July 29, 1889, for one dollar per each acre by State of Oregon deeds designating the land as “swamp”. (Ex. 117E00006017, pages 1-4; Ex. 117E00006018.)

**Reasons for Modification:** To correct a scrivener’s error in the date of the Swamp Act - by the act of March 12, 1860, the swamp-land act of 1850 was extended over Oregon (Ex. 117E00006010 at 5); the ALJ’s proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record.

- b. The citation for Proposed Order Finding of Fact # 3, page 6 is corrected to (E117E00002002 at 6.)

**Reason for Modification:** To provide a corrected citation to the record.

- c. Proposed Order Finding of Fact #13 is added as follows (additions are shown in “underline” text):

13. Claim 141 was submitted for a total of 36.3 cubic feet per second (cfs) of water, being 9.0 cfs from an unnamed stream, 18.0 cfs from unnamed springs, 9.0 cfs from Tunnel Creek, and 0.3 cfs from an unnamed spring, all tributaries of Spencer Creek, for irrigation of 1448.9 acres with a season of use June 1 to October 1. The claimed priority date is November 14, 1901. (E117E00002002 at 1-9.)

**Reasons for Additional Finding of Fact:** 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.

- d. Proposed Order Findings of Facts #14 through #16 are added as follows (additions are shown in “underline” text):

14. On April 6, 1888, the governor for the State of Oregon “request[ed] a patent to be issued to the said state as required in the aforesaid Acts [Swamp Land Acts of 1850 and 1860]” for 1316.13 acres of land appurtenant to Buck Lake. (Ex. 117E00006015, pages 1-4.)

15. On April 10, 1888, a letter of certification from the Department of Interior, General Land Office was sent to the Swamp Land Division of the General Land Office, stating “[t]his certifies that the tracts of land described in the foregoing list [appurtenant to Buck Lake], containing thirteen hundred and sixteen acres and thirteen hundredths of an acre, have been selected as swamp and overflowed land . . . that the character of the same as swamp and overflowed land is established by the joint report of Charles Shackelford,

special agent of this office, and Alex Smeek, agent of the State of Oregon, made under oath November 17, 1887. . . .” (Ex. Ex. 117E00006014, pages 4-7; 10.)

16. On June 1, 1888, the lands describing the location of Buck Lake were made patent by the United States “in consideration of the premises, and in conformity with the Acts of Congress [swamp land Acts of 1850 and 1860] aforesaid,” and granted to the State of Oregon: “Have Given and Granted, and by these presents do Give and Grant unto the said state of Oregon . . . the tracts of land above described [Buck Lake].” (Ex. E117E00006015, pages 1-4.)

**Reasons for Additional Findings of Facts:** The ALJ’s proposed finding of fact failed to fully set forth the evidence on the record in regards to the designation of lands appurtenant to Buck Lake as swamp lands subject to the Swamp Act which were granted to the State of Oregon; to add clarification using evidence on the record.

10. **Opinion.** Within the section titled “Opinion” of the Proposed Order, the fourth paragraph is deleted and replaced as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

a. The following sentence (shown in “underline” text) is added to the first paragraph of the “Opinion” section:

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 Silvie’s River*, 115 Or 27, 66 (1925).

b. The fourth paragraph is deleted and replaced as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

~~The evidence concerning the application of the Swamp Act of 1850 to this property is not conclusive. Claimant asserts that the transfer of the property compels the conclusion that the property was reclaimed. The United States has presented evidence that this was not always the case. While the evidence on this point may show that the property had been reclaimed, it is not evidence that, as early as the 1880s, the property was being irrigated.~~

It is unnecessary to consider the effect of the swamp act deeds in this case. The claimed priority date is 1901, based on an act of appropriation occurring in 1901. A preponderance of the evidence supports the conclusion that the 1901 appropriation was successfully completed with reasonable diligence. Under these circumstances, the consideration of efforts to develop the land or appropriate water prior to 1901 is unnecessary.

**Reasons for Modifications:** To clarify beneficial use of water by the method of natural overflow for a Pre-1909 water right; to clarify the necessity of considering the effect of swamp land deeds entered into evidence in this proceeding.

11. **Order.** Within the section titled “Order” of the Proposed Order, Item #1 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strike through~~” text):

Point of Diversion: Commingled Water from various sources, located in Section ~~H~~ 14, Township 38 S, Range 5 E., W.M. (OWRD Ex. 1 at 15-16.)

**Reason for Modifications:** To correct a scrivener’s error; to provide an additional citation to the record.

## 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 with modifications, as set forth in Section A.7, above.
  - b. The “Evidentiary Rulings” is adopted with modifications, as set forth in Section A.8, above.
  - 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, 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 141. Except as identified in Section A.11, 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 141 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

**CLAIM NO. 141**

**CLAIM MAP REFERENCE:**

CLAIM # 141, PAGE 16 and OWRD INVESTIGATION MAP – T 38 S, R 5 E

**CLAIMANT:** NANCY CHARLEY FAMILY, LLC

493 STRAIT WAY  
CENTRAL POINT, OR 97502

**SOURCE OF WATER:**

UNNAMED STREAM, tributary to SPENCER CREEK,  
UNNAMED SPRING, tributary to SPENCER CREEK,  
TUNNEL CREEK, tributary to SPENCER CREEK, and  
UNNAMED SPRINGS, tributary to TUNNEL CREEK

**PURPOSE OR USE:**

IRRIGATION OF 1448.9 ACRES

**RATE OF USE:**

UP TO 36.3 CFS OF COMMINGLED WATER FROM ALL SOURCES FROM A SINGLE POD, NOT TO EXCEED 9.0 CFS FROM THE UNNAMED STREAM, 0.3 CFS FROM THE UNNAMED SPRING, 9.0 CFS FROM TUNNEL CREEK, AND 18.0 CFS FROM THE UNNAMED SPRINGS.

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:** JUNE 1 - OCTOBER 1

**DATE OF PRIORITY:** NOVEMBER 14, 1901

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

Twp	Rng	Mer	Sec	Q-Q	GLot	Remarks
38 S	5 E	WM	14	SE NW	7	Single POD for commingled waters from all sources


THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
38 S	5 E	WM	11	NE SW	6	3.2
38 S	5 E	WM	11	SE SW	5	13.6
38 S	5 E	WM	11	NE SE	8	16.8
38 S	5 E	WM	11	NW SE	7	19.2
38 S	5 E	WM	11	SW SE		40.0
38 S	5 E	WM	11	SE SE		40.0
38 S	5 E	WM	12	NE SW	3	1.8
38 S	5 E	WM	12	NW SW	5	8.8
38 S	5 E	WM	12	SW SW		40.0
38 S	5 E	WM	12	SE SW	6	39.5
38 S	5 E	WM	12	SW SE	7	23.1
38 S	5 E	WM	12	SW SE	2	2.6
38 S	5 E	WM	12	SE SE	1	0.5
38 S	5 E	WM	13	NE NE	6	16.0
38 S	5 E	WM	13	NW NE		40.0
38 S	5 E	WM	13	SW NE		40.0
38 S	5 E	WM	13	SE NE	5	35.2
38 S	5 E	WM	13	SE NE	2	1.6
38 S	5 E	WM	13	NE NW		40.0
38 S	5 E	WM	13	NW NW		40.0
38 S	5 E	WM	13	SW NW		40.0
38 S	5 E	WM	13	SE NW		40.0
38 S	5 E	WM	13	NE SW		40.0
38 S	5 E	WM	13	NW SW		40.0
38 S	5 E	WM	13	SW SW		40.0
38 S	5 E	WM	13	SE SW		40.0
38 S	5 E	WM	13	NE SE		40.0
38 S	5 E	WM	13	NW SE		40.0
38 S	5 E	WM	13	SW SE	7	35.2
38 S	5 E	WM	13	SE SE	4	10.6
38 S	5 E	WM	13	SE SE	3	3.3
38 S	5 E	WM	14	NE NE		40.0
38 S	5 E	WM	14	NW NE		39.9
38 S	5 E	WM	14	SW NE		40.0
38 S	5 E	WM	14	SE NE		40.0
38 S	5 E	WM	14	NE NW	8	6.4
38 S	5 E	WM	14	SE NW	7	10.4
38 S	5 E	WM	14	NE SW	6	20.0
38 S	5 E	WM	14	SW SW	4	2.5
38 S	5 E	WM	14	SW SW	5	4.2
38 S	5 E	WM	14	SE SW		32.0
38 S	5 E	WM	14	NE SE		40.0
38 S	5 E	WM	14	NW SE		40.0
38 S	5 E	WM	14	SW SE		40.0
38 S	5 E	WM	14	SE SE		40.0
38 S	5 E	WM	23	NE NE	6	36.8
38 S	5 E	WM	23	NW NE	7	16.5
38 S	5 E	WM	23	SE NE	5	5.6
38 S	5 E	WM	23	NE NW	8	24.0

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
38 S	5 E	WM	23	NW NW	9	4.8
38 S	5 E	WM	24	NW NE	4	16.8
38 S	5 E	WM	24	NE NW	5	40.0
38 S	5 E	WM	24	NW NW		40.0
38 S	5 E	WM	24	SW NW	6	24.0
38 S	5 E	WM	24	SE NW	5	14.0

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

  
 Dwight French, Adjudicator  
 Klamath Basin General Stream Adjudication