

**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)	CORRECTED PARTIAL ORDER OF
OREGON DEPARTMENT OF)	DETERMINATION
FISH AND WILDLIFE)	
_____)	
)	Water Right Claim 186

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 186 (Claimant: OREGON DEPARTMENT OF FISH AND WILDLIFE.) and its associated contests (47, 281, 516, 986, 1221, 1455, 1804, 2491, 2778, 2878, 2854, 3176, 3407, 3837, 4179, and 4951) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 129.
2. The Office of Administrative Hearings conducted contested case proceedings and issued a PROPOSED ORDER (Proposed Order) for Claim 186 on September 27, 2007 and an AMENDED PROPOSED ORDER (Amended Proposed Order) for Claim 186 on October 1, 2007.
3. Exceptions were filed to the Amended Proposed Order within the exception filing deadline by (1) the Klamath Project Water Users (KPWU); (2) the United States; and (3) Oregon Department of Fish and Wildlife (ODFW). Responses to exceptions were timely filed by (1) KPWU, (2) the United States, and (3) ODFW.
4. The exceptions filed to the Amended Proposed Order along with responses to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 186, and are found to be persuasive in part; therefore, modifications are made to the Amended Proposed Order as described in Sections A.6, A.7, and A.8, below.
5. The Amended 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 Presented” is adopted in its entirety.
- d. The “Findings of Fact” is adopted with modifications, as set forth in Section A.6, below.
- e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.7, below.
- f. The “Opinion” is adopted with modifications, as set forth in Section A.8, 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 186. Consistent with Sections A.6, A.7, A.8, and A.9, below, the outcome of the Order has been modified to limit the claim to the approval of 700.1 acres.

6. **Findings of Facts.** 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.

a. *Modified “Point of Diversion # 6” in Finding of Fact #1*

~~NW¼ SW¼ Section 24 T 39S R 8E.W.M.~~

NE ¼ SE ¼ Section 23 T 39s R 8E.W.M.

Reason for Modification: A careful reading of the map of record shows that Point of Diversion #6 is actually situated close to the section line in Section 23. This is also verified by the Diversion Point #6 location description given on the Field Inspection Report filed as part of the claim. (Ex C-33, Ex B; OWRD Ex. 1 at 7, 83.)

b. *Modified “Claim Places of Use Listing” in Finding of Fact #1*

The claimed places of use are located as follows:

Location	<u>Gov’t Lot</u>	Acreage	Diversion Point
<u>T39S R8E.W.M.</u>			
Section 23:			
NE¼ SE¼	<u>3</u>	0.1 acre	#6
SE¼ SE¼	<u>3</u>	17.2 acres	#6
Section 24:			
NE¼ NE¼	<u>4</u>	6.5 acres	#2
SW¼ NE¼	<u>5</u>	26.7 acres	#4
SE¼ NE¼		22.3 acres	#2
NW¼ SW¼	<u>7</u>	24.4 acres	#6
SW¼ SW¼		37.2 acres	#6
SE¼ SW¼		15.3 acres	#4 (2.7 acres), #5 (12.6 acres)
NE¼ SE¼		21.3 acres	#2 (8.0 acres), #3 (13.3 acres)

	NW¼ SE ¼		24.2 acres	#4 (22.7 acres), #5 (1.5 acres)
	SW¼ SE ¼		38.5 acres	#4 (3.4 acres), #5 (35.1 acres)
	SE¼ SE ¼		38.8 acres	#3
Section 25:				
	NE¼ NE¼		1.0 acres	#5
	NW¼ NE¼		7.1 acres	#5
	SW¼ NE¼		5.3 acres	#5
	NW¼ NW¼		38.0 acres	#7 (22.3 acres), #8 (15.7 acres)
	SW¼ NW ¼		38.3 acres	#7 (0.8 acres), #8 (37.5 acres)
	NW¼ SW ¼		5.7 acres	#8
	SW¼ SW¼		24.8 acres	#8
	NE¼ SE¼	<u>1</u>	3.5 <u>2.7</u> acres	#1 <u>#9</u>
	<u>NE¼ SE¼</u>	<u>2</u>	<u>0.8 acres</u>	<u>#1</u> <u>#9</u>
	SE¼ SE¼	<u>1</u>	5.3 <u>4.8</u> acres	#9
	<u>SE¼ SE¼</u>	<u>2</u>	<u>0.5 acre</u>	<u>#9</u>
Section 26:				
	NE¼ NE ¼	<u>4</u>	37.1 acres	#7
	NW¼ NE ¼	<u>5</u>	3.0 acres	#7
	SW¼ NE ¼	<u>6</u>	27.5 acres	#7 (8.2 acres), #8 (19.3)
	SE¼ NE ¼		37.5 acres	#7 (17.4 acres), #8 (20.1 acres)
	SW <u>SE¼ NW¼</u>	<u>7</u>	1.7 acres	#8
	<u>NE¼ SW¼</u>	<u>15</u>	<u>2.6 acres</u>	<u>#8</u>
	NE¼ SW¼	<u>8</u>	25.3 <u>22.7</u> acres	#8
	SW¼ SW¼	<u>10</u>	3.2 <u>2.0</u> acres	#8
	<u>SW¼ SW¼</u>	<u>15</u>	<u>1.2 acres</u>	<u>#8</u>
	SE¼ SW¼	<u>15</u>	37.1 <u>30.8</u> acres	#8
	<u>SE¼ SW¼</u>	<u>9</u>	<u>6.3 acres</u>	<u>#8</u>
	NE¼ SE¼		33.2 acres	#8
	<u>NW¼ SE¼</u>	<u>13</u>	<u>7.6 acres</u>	<u>#8</u>
	NW¼ SE¼	<u>11</u>	34.1 <u>26.5</u> acres	#8
	<u>SW¼ SE¼</u>	<u>14</u>	<u>10.8 acres</u>	<u>#8</u>
	SW¼ SE¼	<u>12</u>	29.0 <u>18.2</u> acres	#8
	SE¼ SE¼		37.5 acres	#8
Section 35:				
	NE¼ NE¼	<u>9</u>	40.8 acres	#8
Section 36:				
	NW¼ NE¼	<u>1</u>	1.9 acres	#9
	SW¼ NE¼	<u>2</u>	23.2 acres	#9
	SE¼ NE ¼		3.7 acres	#9
	NE¼ NW¼		0.5 acre	#8
	NW¼ NW ¼		27.9 acres	#8
	NE¼ SW¼	<u>6</u>	6.1 <u>5.2</u> acres	#8
	<u>NE¼ SW¼</u>	<u>10</u>	<u>0.9 acres</u>	<u>#8</u>
	SE¼ SW¼	<u>11</u>	9.6 <u>8.6</u> acres	#8
	<u>SE¼ SW¼</u>	<u>5</u>	<u>1.0 acres</u>	<u>#8</u>

T39S R9E.W.M.

Section 19:

NW¼ NE ¼	8	3.7 acres	#2
NW¼ NE ¼		7.3 <u>3.6</u> acres	#2
SW¼ NE ¼		0.7 acres	#2
<u>NE¼ NW ¼</u>	<u>9</u>	<u>2.2</u> acres	<u>#2</u>
NE¼ NW ¼		8.6 <u>6.4</u> acres	#2
<u>NW¼ NW¼</u>	<u>10</u>	<u>0.2</u> acres	<u>#2</u>
NW¼ NW¼		7.0 <u>6.8</u> acres	#2
SW¼ NW¼	<u>11</u>	30.1 acres	#2
SE¼ NW ¼		8.9 acres	#2
NE¼ SW¼		1.0 acres	#3
NW¼ SW ¼	<u>12</u>	18.4 acres	#2 (1.1 acre), #3 (17.3 acres)
SW¼ SW ¼	<u>13</u>	36.2 acres	#3
SE¼ SW ¼		1.5 acres	#3
NW¼ SE¼	<u>2</u>	5.6 acres	#1
SW¼ SE ¼	<u>3</u>	22.4 acres	#1

Section 30:

NW¼ NE¼	<u>1</u>	16.5 acres	#1
SW¼ NE ¼		0.9 acre	#1
NE¼ NW ¼	<u>1</u>	7.0 acres	#1
SW¼ NW¼	<u>2</u>	2.1 acres	#9
SE¼ NW ¼	<u>2</u>	26.4 acres	#1 (14.4 acres), #9 (12.0 acres)
<u>NE¼ NW SW¼</u>		8.8 acres	#9
NW¼ SW ¼	<u>3</u>	18.4 acres	#9
SW¼ SW¼		21.7 acres	#9
Grand total		1070.9	

(OWRD Ex. 1 at 57-65.)

Reason for Modification: To add Government Lots to the acreage listing because the Swamp Act Deeds include certain lands only listed by Government Lots. Government Lots were determined from a combination of the claimed place of use listing, and OWRD's Field Investigation Map (OWRD Ex. 1 at 9-12, 83), and Exhibit C-4. To correct scrivener's errors on two quarter-quarter descriptions. The acreage was incorrectly entered on the worksheet at OWRD Ex. 1 at 64 but the map correctly displays the location of the acreage. (OWRD Ex. 1 at 83.) To correct the claimed point of diversion from #1 to #9 in the NE¼ SE¼ Section 25 (OWRD Ex. 1 at 65.)

c. Modified Proposed Order Finding of Fact 3:

3) Beginning in the 1850s, European settlers began coming into the area. They grazed cattle in the area of the land in question, and, perhaps, harvested hay there. (Ex. C16 at 2 through 4.) The land in question in this case was immediately south of and adjoined the Klamath River, and much of this land was overflowed

seasonally by high water from the Klamath River. (*Id.*) There is no record, however, that this land was taken into exclusive ownership by any person until the 1870s.

Reason for Modification: The evidence in the record is clear that much of the claimed place of use was subject to seasonal flooding from the Klamath River. The record is contradictory as to whether the entirety of the place of use was subject to flooding. The ALJ's finding applied to the entirety of the place of use, and is not supported by a preponderance of the evidence.

d. Modified Proposed Order Finding of Fact 4

4) Beginning in the 1870s, the State of Oregon began designating swamp and overflow lands to be transferred to the State from the federal government and sold on terms specified by statute. (Ex. U8-U11.) Some purchasers designated dry land as swamp land, in an effort to defraud. (Ex. U8 at 5.) On February 14, 1882, the Board of Commissioners for the Sale of School and University Lands ("State Land Board") determined that John F. Miller had applied to purchase certain swamp lands on April 9, 1872, and had subsequently proven to the satisfaction of the Board that the claimed lands had been reclaimed. The portions of these lands that are subject to this claim were described as follows:

T39S R8E W.M.

Section 23:

NE $\frac{1}{4}$ SE $\frac{1}{4}$, <u>Lot 3</u>	0.1 acres
SE $\frac{1}{4}$ SE $\frac{1}{4}$, <u>Lot 3</u>	17.2 acres

Section 24:

SE$\frac{1}{4}$ NE$\frac{1}{4}$	22.3 acres
SW $\frac{1}{4}$ NE $\frac{1}{4}$, <u>Lot 5</u>	26.7 acres
NW $\frac{1}{4}$ SW $\frac{1}{4}$, <u>Lot 7</u>	24.4 acres

Section 26:

SE $\frac{1}{4}$ NE $\frac{1}{4}$	37.5 acres
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T39S R8E W.M.

Section 19

SW¼ SE¼, Lot 3, 22.4

(Corrected Ex. C36.) With the exception of the 22.4 acres claimed in the SW¼ SE¼, Lot 3, Section 19, this property was subsequently conveyed to John F. Miller on July 5, 1882, and August 16, 1882 by Swamp Act deeds. (Ex U19 at 10, 11; Ex. C-7.)

Reason for Modification: The 22.3 acres in the SE¼ NE¼, Section 24 are removed from Finding of Fact #4 because they were addressed at the Board's August 12, 1882 meeting, and not the Board's February 14, 1882 meeting. These acres were conveyed to John F. Miller on August 16, 1882.

e. Modified Proposed Order Finding of Fact 5

5) On February 10, 1882, the State Land Board issued a Swamp Act deed to John F. Miller for property including the following subject to this claim:

T39S R8E W.M.

Section 24:

NE¼ NE¼, Lot 4 6.5 acres

Section 26:

NE¼ NE¼, Lot 4 37.1 acres

NW¼ NE¼, Lot 5 3.0 acres

SW¼ NE¼, Lot 6 27.5 acres

~~SW¼~~ SE¼ NW¼, Lot 7 1.7 acres

T39S R9E W.M.

Section 19:

NW¼ NE¼, Lot 8 ~~7.3~~ 3.7 acres

NE¼ NW¼, Lot 9 ~~8.6~~ 2.2 acres

NW¼ NW¼, Lot 10 ~~7.0~~ 0.2 acres

SE¼ NW¼ 8.9 acres

(Ex. C5; Ex. U19 at 11.)

Reason for Modification: To add Government Lot numbers. To correct a scrivener's error in a quarter-quarter description. The acreage was incorrectly entered on the

worksheet at OWRD Ex. 1 at 64 but the map correctly displays the location of the acreage. (OWRD Ex. 1 at 83.) To correct the acreages in Section 19 to reflect the locations of the claimed acres which are included in the February 10, 1882 Swamp Act deed, being the SE¼ NW¼ and Lots 8, 9, and 10. Within the NW¼ NE¼, 3.6 acres are above the meander line, and are not included in Lot 8; within the NE¼ NW¼, 6.4 acres are above the meander line, and are not included in Lot 9; and within the NW¼ NW¼, 6.8 acres are above the meander line, and are not included in Lot 10, (Compare OWRD Ex. 1 at 83 and Exs. C3, C5.)

f. Modified Proposed Order Finding of Fact 6

6) On August 16, 1882, the State Land Board issued a Swamp Act deed to John F. Miller for property including the following that is subject to this claim:

T39S R8E W.M.

Section 24:

SE¼ NE¼	22.3 acres [†]
SW¼ SW¼	37.2 acres
SE¼ SW¼	15.3 acres
NE¼ SE¼	21.3 acres
NW¼ SE¼	24.2 acres
SW¼ SE¼	38.5 acres
SE¼ SE¼	38.8 acres

Section 25:

NE¼ NE¼	1.0 acres
NW¼ NE¼	7.1 acres
SW¼ NE¼	5.3 acres
NW¼ NW¼	38.0 acres
SW¼ NW¼	38.3 acres
NW¼ SW¼	5.7 acres
SW¼ SW¼	24.8 acres
NE¼ SE¼, Lot 2	3.5 0.8 acres
<u>SE¼ SE¼, Lot 2</u>	<u>0.5 acres</u>

[†] Although conveyed in 1882, this parcel was included in the property subject to Miller's 1872 application, as found by the State Land Board on February 14, 1882.

Section 26:

<u>SE¼ NE¼</u>	<u>37.5 acres²</u>
NE¼ SW¼, <u>Lot 8</u>	25.3 <u>22.7</u> acres
SW¼ SW¼, <u>Lot 10</u>	3.2 <u>2.0</u> acres
SE¼ SW¼, <u>Lot 9</u>	6.3 acres
NE¼ SE ¼	33.2 acres
NW¼ SE¼, <u>Lot 11</u>	26.5 acres
SW¼ SE¼, <u>Lot 12</u>	29.0 <u>18.2</u> acres
SE¼ SE¼	26.7 <u>37.5</u> acres

Section 35:

NE¼ NE¼, <u>Lot 9</u>	40.8 acres
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T39S R9E W.M.

Section 19:

SW¼ NE¼	0.7 acres
SW¼ NW¼, <u>Lot 11</u>	30.1 acres
NE¼ SW¼	1.0 acres
NW¼ SW¼, <u>Lot 12</u>	18.4 acres
SW¼ SW¼, <u>Lot 13</u>	36.2 acres
SE¼ SW¼	1.5 acres
NW¼ SE¼, <u>Lot 2</u>	5.6 acres

(Ex. C7.)

Reason for Modification: To add government lot numbers. To move a footnote from one quarter-quarter listing to another to make the reference correct. Modifications to Section 25: 2.7 acres within the NE¼ SE¼, and 4.8 acres within the SE¼ SE¼ are east of the meander line, and are located in Lot 1. Lot 1 was not included in the August 16, 1882 Swamp Act deed, resulting in reduced acreages. (Exs. C-4, C7; Ex. U 19 at 11; OWRD Ex. 1 at 83.) The addition of the 0.5 acres within Lot 2, SE¼ SE¼ is because a review of the maps in the record supports the conclusion that this acreage was conveyed to John Miller as part of the August 16, 1882 Swamp Act deed. (Exs. C4, C7; Ex. U 19 at 11; OWRD Ex. 1 at 83.) Modifications to Section 26: The addition of the 37.5 acres within the SE¼ NE¼ is because a review of the maps in the record supports the conclusion that

² Although conveyed in 1882, this parcel was included in the property subject to Miller's 1872 application, as found by the State Land Board on February 14, 1882.

this acreage was conveyed to John Miller as part of the August 16, 1882 Swamp Act deed. (Ex. C4, C7; Ex. U 19 at 11; OWRD Ex. 1 at 83.) 2.6 acres within the NE $\frac{1}{4}$ SW $\frac{1}{4}$ and 1.2 acres within the SW $\frac{1}{4}$ SW $\frac{1}{4}$ are located in Lot 15. Lot 15 was not included in the August 16, 1882 Swamp Act deed to John F. Miller but was actually part of the April 6, 1889 Swamp Act deed to E.C. Small. (Exs. C4, C7, C8; OWRD Ex. 1 at 83.) Within the SW $\frac{1}{4}$ SE $\frac{1}{4}$, 10.8 acres are located in Lot 14. Lot 14 was not included in the August 16, 1882 Swamp Act deed to John F. Miller but was actually part of the April 6, 1889 Swamp Act deed to E.C. Small. (Exs. C4, C7, C8; OWRD Ex. 1 at 83.) The modification to the listing for the SE $\frac{1}{4}$ SE $\frac{1}{4}$ is to correct a scrivener's error in the total acreage for this claimed place of use. (Ex. C7; Ex. U 19 at 11; OWRD Ex. 1 at 83.) Modifications to Section 19, T39S R9E W.M.: The 5.6 acres within located within Lot 2 of the NW $\frac{1}{4}$ SE $\frac{1}{4}$. These acres are omitted because neither Lot 2 nor the NW $\frac{1}{4}$ SE $\frac{1}{4}$ were included in the August 16, 1882 Swamp Act deed. (Exs. C4, C7; Ex. U 19 at 11; OWRD Ex. 1 at 83.)

g. Modified Proposed Order Finding of Fact 7

7) On April 6, 1889, the State Land Board issued a Swamp Act deed to E.C. Small for property including the following that is subject to this claim:

T39S R8E W.M.

Section 26:

<u>NE$\frac{1}{4}$ SW$\frac{1}{4}$$\frac{1}{4}$, Lot 15</u>	<u>2.6 acres</u>
<u>SW$\frac{1}{4}$ SW$\frac{1}{4}$ $\frac{1}{4}$, Lot 15</u>	<u>1.2 acres</u>
<u>SE$\frac{1}{4}$ SW$\frac{1}{4}$$\frac{1}{4}$, Lot 15</u>	30.8 acres
<u>NW$\frac{1}{4}$ SE$\frac{1}{4}$$\frac{1}{4}$, Lot 13</u>	7.6 acres
<u>SE SW$\frac{1}{4}$ SE$\frac{1}{4}$$\frac{1}{4}$, Lot 14</u>	10.8 acres

(Exs. C4, C-8; Ex. U19 at 25 26.)

Reason for Modification: To correct a scrivener's error in a quarter-quarter description. (Ex. C8.); to add two claimed quarter-quarters that were included in the April 6, 1889 Swamp Act deed to E.C. Small. This deed included Lots 13, 14, 15 within Section 26, T39S R8E W.M. (Exs. C4, C8; OWRD Ex. 1 at 83.)

h. Modified Proposed Order Finding of Fact 8

8) The evidence in the record establishes that the three Swamp Act properties ~~property~~ conveyed to Miller were under private ownership no later than 1882 and the Swamp Act property conveyed to Small was under private ownership no later than 1889. Natural grass was harvested from the two Miller properties described in the July 5, 1882 and August 16, 1882 Swamp Act deeds, ~~from the land,~~ either

through grazing or as hay, from at least the time that it was in private hands. (OWRD Ex. 1 at 18-42; Ex. C16 at 3, 4; Ex. C47 at 3; Ex. C11 at 5; Ex. C12 at 3; Ex. C36.)

Reason for Modification: The finding as written in the Amended Proposed Order is not supported by a preponderance of evidence in the record. To correct this, the modifications clarify the year the three Miller Swamp Act properties entered private ownership and clarify that the July 5, 1882 and August 16, 1882 Miller Swamp Act deeds are evidence of beneficial use of water, but the February 14, 1882 Miller Swamp Act deed and the E.C. Small Swamp Act deed are not.

i. Modified Proposed Order Finding of Fact 9

9) On June 1, 1895, William Miller conveyed to Sarah Miller, his wife, an undivided one-half interest in the following-described real property, among others:

T39S R8E W.M.

Section 36:

NW $\frac{1}{4}$ NE $\frac{1}{4}$, Lot 1	1.9 acres
SW $\frac{1}{4}$ NE $\frac{1}{4}$, Lot 2	23.2 acres
SE $\frac{1}{4}$ NE $\frac{1}{4}$	3.7 acres
NE $\frac{1}{4}$ NW $\frac{1}{4}$	0.5 acres
NW $\frac{1}{4}$ NW $\frac{1}{4}$	27.9 acres
NE $\frac{1}{4}$ SW $\frac{1}{4}$, Lots 6, 10	6.1 acres
SE $\frac{1}{4}$ SW $\frac{1}{4}$, Lots, 5, 11	9.6 acres

T39S R9E W.M.

Section 19:

<u>NW$\frac{1}{4}$ SE$\frac{1}{4}$, Lot 2</u>	<u>5.6 acres</u>
<u>SW$\frac{1}{4}$ SE$\frac{1}{4}$, Lot 3</u>	<u>22.4 acres</u>

Section 30:

<u>NW$\frac{1}{4}$ NE$\frac{1}{4}$, Lot 1</u>	<u>16.5 acres</u>
<u>NE$\frac{1}{4}$ NW$\frac{1}{4}$, Lot 1</u>	<u>7.0 acres</u>

(Ex. U19 at 2, 15-17)³

~~all in Section 36, T39S R8E W.M. The record does not include any evidence as to how or when William Miller acquired the property that he transferred to Sarah Miller, although included in the property transferred were parcels that had been conveyed to John Miller by the Swamp Act deeds listed above. None of the Swamp Act deeds in the record, however, describes any property in Section 36, T39S R8E W.M.~~

The conveyance from William Miller to Sarah Miller establishes that the lands listed above were in private ownership no later than 1895 (or 1886, in the case of the 22.4 acres in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19, based on the 1886 deed to William Miller from John Miller and Jarilda Miller). (Ex. U19 at 2, 12-14.)

Although not listed here, the property transferred from William Miller to Sarah Miller includes parcels that had been conveyed to John Miller by the Swamp Act deeds listed in Findings of Fact #5, #6, and #10. None of these Swamp Act deeds, however, describes any of the property listed in this Finding of Fact #9

Reason for Modification: The additional place of use descriptions are added because Ex. U19 at 15-17 identifies these parcels of claimed land as being conveyed from William Miller to Sarah Miller. None of these additional quarter-quarters were included within the three John F. Miller Swamp Act deeds.

j. Additional Proposed Order Finding of Fact #10

10) On July 5, 1882, the State Land Board issued a Swamp Act deed to John F. Miller for property including the following subject to this claim:

T39S R8E W.M.

Section 23:

NE $\frac{1}{4}$ SE $\frac{1}{4}$, Lot 3 0.1 acres

SE $\frac{1}{4}$ SE $\frac{1}{4}$, Lot 3 17.2 acres

³ While the deed conveying this land is hand written and difficult to read, on the bottom of page 16 of Ex. U19 the deed clearly includes the three parcels of land added to Finding of Fact #9.

Section 24:

<u>SW$\frac{1}{4}$ NE$\frac{1}{4}$, Lot 5</u>	<u>26.7 acres</u>
<u>NW$\frac{1}{4}$ SW$\frac{1}{4}$, Lot 7</u>	<u>24.4 acres</u>

(Ex. U19 at 10.)

Reason for Modification: To fully set forth the evidence on the record pertaining to claimed lands subject to the July 5, 1882 Swamp Act deed.

k. *Additional Proposed Order Finding of Fact # 11*

11) The following property subject to this claim was neither included on any of the Swamp Act deeds found in the record, nor included on the June 1, 1895 property transfer from William Miller to Sarah Miller:

T39S R8E W.M.

Section 25:

<u>NE$\frac{1}{4}$ SE$\frac{1}{4}$, Lot 1</u>	<u>2.7 acres</u>
<u>SE$\frac{1}{4}$ SE$\frac{1}{4}$, Lot 1</u>	<u>4.8 acres</u>

Section 36:

<u>NW$\frac{1}{4}$ NE$\frac{1}{4}$, Lot 1</u>	<u>1.9 acres</u>
<u>SW$\frac{1}{4}$ NE$\frac{1}{4}$, Lot 2</u>	<u>23.2 acres</u>
<u>SE$\frac{1}{4}$ NE$\frac{1}{4}$</u>	<u>3.7 acres</u>

T39S R9E W.M.

Section 19:

<u>NW$\frac{1}{4}$ NE$\frac{1}{4}$</u>	<u>3.6 acres</u>
<u>NE$\frac{1}{4}$ NW$\frac{1}{4}$</u>	<u>6.4 acres</u>
<u>NW$\frac{1}{4}$ NW$\frac{1}{4}$</u>	<u>6.8 acres</u>

Section 30:

<u>SW$\frac{1}{4}$ NE$\frac{1}{4}$</u>	<u>0.9 acres</u>
<u>SW$\frac{1}{4}$ NW$\frac{1}{4}$, Lot 2</u>	<u>2.1 acres</u>
<u>SE$\frac{1}{4}$ NW$\frac{1}{4}$, Lot 2</u>	<u>26.4 acres</u>
<u>NE$\frac{1}{4}$ SW$\frac{1}{4}$</u>	<u>8.8 acres</u>
<u>NW$\frac{1}{4}$ SW$\frac{1}{4}$, Lot 3</u>	<u>18.4 acres</u>
<u>SW$\frac{1}{4}$ SW$\frac{1}{4}$</u>	<u>21.7 acres</u>

Reason for Modification: To fully set forth the evidence on the record.

7. **Conclusions of Law.** Within the section titled “Conclusions of Law” of the Proposed Order, Conclusions #2, 3, 5, 6, 8, 12, 14, 16, 18, and 20 are modified as follows (additions are shown in “underline” text, deletions are shown in “~~strike through~~” text):

2. The vested water right on a portion of the claimed place of use is ~~prior to, and~~ not in part included in the claims filed by the United States for the Klamath Project.

3. Natural flood/~~sub-irrigation~~/natural overflow, with other factors, can form the basis of a valid pre-1909 water right.

5. The record establishes beneficial use of water on a part of the claimed place of use before February 24, 1909.

6. ~~Works were constructed within a reasonable time.~~ Under the facts in this case, beneficial use of natural overflow was sufficient to establish a vested right for irrigation without the construction of irrigation works.

8. The part of the claim that is recognized herein is recognized for an irrigation purpose of use. The use of the claimed water for irrigation of land for wildlife feed and habitat within the terms of use recognized herein is not wasteful.

12. The question of whether claimant’s use of water is detrimental to contestants’ water rights is not relevant in this case to a determination of Claimant’s rights. ~~Claimant’s use and application of the water is prior to, and not detrimental to contestants’ priority water rights.~~

14. “Over-appropriation” is not a relevant concept for determining the validity of claimed pre-1909 water rights. ~~The Klamath River and its tributaries were not over-appropriated at the time claimant began its use of the claimed water.~~

16. It is irrelevant in determining this claim whether the purposes of the Klamath Reclamation Project as authorized by Congress, will be realized in the event that

water used pursuant to the recognized portion of this claim interferes with the purpose of the Klamath Reclamation Project. ~~as the allowed portion of the right is senior to the priority of the Klamath Reclamation Project~~

18. The rights to use water for ~~claimed~~ the purposes recognized herein are not subordinate to senior to domestic and irrigation rights of contestants under the Klamath Compact.

20. The use of water on the recognized portion of the claim began prior to February 24th 1909.

Reason for Modifications: The evidence on the record, as described in the modified findings of fact, and the application of the appropriate legal bases to the evidence on the record, as described in the modified opinion section, below, supports conclusions other than those in the Amended Proposed Order.

8. **Opinion.** The “Opinion” section of the Amended Proposed Order is modified as shown below (additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text).

a. *The subsection entitled “THE PRE-1909 RIGHT” is modified as described in subsections 7.a.i through 7.a.iv, below.*

i. *“THE PRE-1909 RIGHT” Paragraphs 1-3 are modified as follows:*

The parties stipulated to limit the claim to 1051.6 acres, at a specified rate and duty. Under the stipulation ODFW limited its claim to acreage listed in OWRD Exhibit 1 at pages 57 to 65. However, as discussed more fully below, the claim can only be allowed to ~~868.5~~ 700.1 acres.

In its brief, ODFW also stated that all the property subject to this claim was described in the Swamp Act deeds to John Miller and E.C. Small that are contained in the record. ODFW then argued that the conveyance by Swamp Act deeds demonstrated that water was beneficially used on the property through natural overflow at the time the conveyances were made. ~~While,~~ As discussed below, OWRD concludes I conclude that water was applied to apportioned for beneficial use on the property conveyed by Swamp Act deeds to John F. Miller with the dates of July 5, 1882 and

August 16, 1882, as of dates three years' prior to the date each of the respective deeds was issued, the date the property was shown to be occupied. However, the Swamp Act deeds to John F. Miller from February 10, 1882 and to E.C. Small from April 6, 1889 do not demonstrate that water was apportioned for beneficial use on the property conveyed. Furthermore, not all the land subject to this claim was described in the Swamp Act deeds noted, as demonstrated here: (1) None of the Swamp Act deeds describe any of the claimed property in Section 30 T39S R8E. W.M. (2) Although the record contains a deed from William Miller to Sarah Miller dated June 1, 1895 describing all the claimed property in Section 36, T39S R8E. W.M., the record does not show that this property was originally acquired by a Swamp Act deed. (Exs C5; C-7; C-8; Ex. U 19 at 10, 11; OWRD Ex. 1 at 83.) (3) While John Miller acquired Lot 4 of Section 19 T39S R9E WM (west of the meander line in SW $\frac{1}{4}$ SE $\frac{1}{4}$), he did not acquire the 22.4 acres of Lot 3 (east of the meander line) within that section, which is part of that section listed in OWRD Exhibit 1, at page 57 as part of the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19 that was included in the claim.⁴ (Exs C4, C5; C-7; C-8; Ex. U 19 at 10, 11; OWRD Ex. 1 at 83.) (4) Similarly, John Miller did not acquire the 5.6 acres in Lot 2 of Section 19 listed in OWRD Exhibit 1, at page 57 as part of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19 that was included in the claim. Nor does the record show that any of the property in Lot 2, Section 19 was originally acquired by a Swamp Act deed. (Exs C4, C5; C-7; C-8; Ex. U 19 at 10, 11; OWRD Ex. 1 at 83.) (5) Likewise, also within Section 19, T39S R9E WM., 3.6 acres in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, 6.4 acres in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, and 6.8 acres in the NW $\frac{1}{4}$ NW $\frac{1}{4}$ - all above the meander line of Lots 8, 9 and 10, respectively - were not described in any of the Swamp Act deeds in the record. (Exs C5; C-7; C-8; Ex. U 19 at 10, 11; OWRD Ex. 1 at 83.) (6)

⁴ While Lot 4 within the NW $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 19 was conveyed to John Miller in the August 16, 1882 Swamp Act deed, the claimed portion (22.4 acres in Lot 3) of that area was not conveyed to John Miller as part of the deed. (Compare maps C3, C4, and C33 Ex. A.)

And finally, the ~~5.3~~ 4.8⁵ acres in the SE¼ SE¼ of Section 25, T39S R8W and 2.7⁶ acres in the NE¼ SE¼ of Section 25, T39S R8W were not described in any of the Swamp Act deeds in the record. (C3; C33 Ex. A) Taken all together, the properties that were not described in the July 5, 1882 and the August 16, 1882 Swamp Act deeds to John F. Miller add up to ~~202.4~~ 370.8 acres. ODFW's argument that acquisition by Swamp Act deed necessarily implies that the property was subject to natural irrigation and that a crop was harvested from it does not apply to that property. As discussed in more detail below, the February 14, 1882 Swamp Act deed to John F. Miller and the April 6, 1889 Swamp Act deed to E.C. Small do not necessarily imply that the property was subject to natural overflow and that the natural overflow was put to a beneficial use. Since the evidence ~~does not show~~ only shows beneficial use of water on property that was not conveyed under the July 5, 1882 and August 16, 1882 Swamp Act deeds to John F. Miller, ~~202.4~~ 370.8 acres must be subtracted from the 1070.9 acres tabulated by OWRD claimed, leaving ~~868.5~~ 700.1 acres allowable within the land subject to the claim.⁷

ODFW submitted testimony that the claimed Diversion Point #9 from the Ady Canal had not been used for a number of years, ~~and that a new diversion point between Diversion Points #2 and #3 had been developed to replace it.~~ Most of the places of use for water from Diversion Point #9 were within the parts not described in the Swamp Act deeds. Only ~~3.5~~ 0.5 and 0.8⁸ acres within the allowable portion of the claim were described as irrigated from Diversion Point #9. ODFW has elected, ~~however,~~ to designate Diversion Point #1 as the Diversion Point for the ~~3.5~~ 0.5 acres in

⁵ Only the 0.5 acres in Lot 2 of this 5.3 acres was included in the August 16, 1882 Swamp Act deed to John F. Miller. The 4.8 acres in Lot 1 are not covered by that Swamp Act deed. (Compare maps C3, C4, and C33 Ex. A.)

⁶ Only 0.8 acres in Lot 2 of the original 3.5 acres claimed is within the August 16, 1882 Swamp Act deed to John Miller. The 2.7 acres in Lot 1 are not covered by that Swamp Act deed (Compare maps C3, C4, and C33 Ex. A.)

⁷ This conclusion is bolstered by Ex. C33 which includes as an attachment Exhibit A, a map showing the property described in the Swamp Act deeds. That map shows no property in either Section 30 or 36, except the NW ¼ NW ¼ Section 30, which is not included in the tabulation at Pages 57 through 65 of OWRD Ex. 1.

⁸ These are the same parcels of land referred to in footnotes 5 and 6 respectively.

the SE¼ SE¼ Section 25, T39S R8E WM. ~~and not to include the new diversion point in the claim.~~

ii. *“THE PRE-1909 RIGHT” Paragraph 7 is modified as follows:*

ODFW is largely correct on both counts. The Swamp Act deeds can be ~~are~~ evidence that water was being beneficially used when the deeds were issued. As discussed in more detail below, whether or not Swamp Act deeds are evidence that water was being beneficially used depends on the details of the particular Swamp Act deed. Since the water is still being used to irrigate plants, there has been no change of use.

iii. *“THE PRE-1909 RIGHT” Paragraph 9 is replaced in its entirety as follows:*

While Swamp Act deeds can be evidence of reclamation and beneficial use, this depends on the circumstances in which the deeds were issued. The Swamp Land Act of 1870 (“1870 Act”) required proof of reclamation in order to obtain a swamp land deed. 1870 General Laws of Oregon §4, p. 56. The definition of “reclamation” provided in the 1870 Act is consistent with the application of water to beneficial use for irrigation. Specifically, the 1870 Act treated land as reclaimed which had been “successfully cultivated in either grass, the cereals or vegetables for three years.” *Id.* The 1870 Act placed no restrictions on the number of acres for which an applicant could obtain a deed. The 1870 Act permitted the sale of swamp lands for a minimum of \$1 per acre. *Id.* at §3, p. 55. The Swamp Land Act of 1878 (“1878 Act”) altered some of the provisions of the 1870 Act. An applicant under the 1870 Act could, under the terms of the 1878 Act, obtain a deed without proof of reclamation by payment of \$2.50 per acre. 1878 General Laws of Oregon, §10, p. 46. Otherwise, an applicant under the 1870 Act would still need to submit proof of reclamation. An applicant making an application under the terms of the 1878 Act (i.e., making an initial application after the effective date of the 1878 Act) could obtain a deed by payment of a minimum of \$1 per acre without proof of

reclamation. *Id.* at §4, p. 42). Applications under the terms of the 1878 Act were limited to 320 acres per applicant. *Id.*

The Swamp Land Act of 1887 (“1887 Act”) made further changes affecting applicants under the 1870 and 1878 Acts. The 1887 Act voided any applications made under the 1870 Act that had not been “reclaimed or paid” by the effective date of the 1887 Act, with the exception that such applicants who were also “actual settlers on lands of 320 acres or less” and who had paid a 20 percent down payment prior to the effective date of the 1887 Act could obtain a deed without proof of reclamation. General Laws of 1887 §2, p. 10. In addition, applicants under the 1870 Act who had paid their 20 percent down payment prior to January 17, 1879, could obtain a deed without proof of reclamation. *Id.* at §5, p. 9-10. Deeds issued under this provision were limited to 640 acres. *Id.* Any additional sales of swamp lands after the effective date of the 1887 Act were to be made in the same manner as provided in the 1878 Act (i.e., without requiring proof of reclamation). *Id.* The 1887 Act went into effect on February 16, 1887. *Id.*

Although the history of the Swamp Land Acts is somewhat convoluted, their effects on Swamp Land Deeds as evidence of beneficial use of water is straightforward. Any deed issued before the effective date of the 1878 Act was issued based on proof of reclamation. While swamp act deeds and State Land Board minutes do not contain direct testimony concerning the application of water to beneficial use, the findings required of the State Land Board in order to complete the conveyance of the land to the applicants constitute substantial evidence of beneficial use of water.⁹

Conversely, any deed issued after the effective date of the 1887 Act does *not* constitute proof of beneficial use for irrigation by a

⁹ The United States has submitted evidence suggesting that the process of conveyance of land under the Swamp Land Acts was subject to fraud. There is no evidence of fraud with respect to these particular lands, however, and OWRD does not conclude that the regular proceedings of a State entity are subject to a presumption of fraud.

preponderance of the evidence. Applicants under the 1870 Act were thereafter excused from proof of reclamation, and applicants under the 1878 and 1887 Acts had never been required to provide such proof.

This leaves deeds issued between the effective dates of the 1878 and 1887 Acts. Their use as evidence of beneficial use for irrigation is dependent on the terms of the deed. Because applicants under the 1878 Act were restricted to 320 acres, any deed exceeding that amount is proof of beneficial use for irrigation by a preponderance of the evidence, if the price of the deed is less than \$2.50 per acre. Conversely, a deed issued in this time period for up to 320 acres is insufficient proof of beneficial use for irrigation, unless there is some other evidence that the application was made under the 1870 Act, and not the 1878 Act (including a statement by the land board that proof of reclamation had been provided). Further, any deed issued in this time period for \$2.50 per acre is insufficient proof of beneficial use for irrigation.

As applied to the swamp land deeds submitted in this case, these principles mean that the two Swamp Act deeds issued to John F. Miller (July 5, 1882 and August 16, 1882) are sufficient evidence of reclamation and beneficial use. (Exs. C6; C7; C36 at 2; C44 at 17.) Swamp Act deeds issued to John F. Miller (February 10, 1882) and E.C. Small (April 6, 1889) are not sufficient evidence of reclamation and beneficial use. (Exs. C-5, C8.)

The July 5, 1882 Swamp Act deed is sufficient evidence of reclamation and beneficial use because, even though the total number of acres conveyed was less than 320, the minutes from the June 19, 1882 Board of State Land Commissioners note that the claim was made under the 1870 Act. (Ex. C44 at 17.)

The August 16, 1882 Swamp Act deed is sufficient evidence of reclamation and beneficial use because the total number of acres conveyed

was 2,149.61, well over 320 acres. (Ex. C7.) Furthermore, the land was conveyed for \$1 per acre and the minutes from the August 12, 1882 Board of State Land Commissioners note that, "John F. Miller submitted proof of the reclamation of the hereinafter described swamp lands." (Ex. C17 at 29.)

The claimed lands covered by these two deeds would be eligible for priority dates as early as 1879, well before the 1900 priority date claimed by ODFW. As a result, the priority date for these lands is January 1, 1900.

The Swamp Act deed issued to John F. Miller on February 10, 1882 is not sufficient evidence of reclamation and beneficial use because the total number of acres conveyed was less than 320. (Ex. C5.) The claimed acres included on the February 10, 1882 Swamp Act deed are *not* discussed in the Board of State Land Commissioner's June 19, 1882, or August 12, 1882 minutes.

The Swamp Act deed issued to E.C. Small on April 6, 1889 is not sufficient evidence of reclamation because the date of the Swamp Act deed is after the effective date of the 1887 Act. (Ex. C8.) Further, as described below, the other evidence in the record fails to demonstrate a beneficial use of water for irrigation prior to 1909 by a preponderance of the evidence on the land conveyed to E.C. Small.

- iv. *"THE PRE-1909 RIGHT" Paragraphs 14-20 are replaced in their entirety as follows:*

In this case the hearsay evidence is sufficient to provide some corroboration of the evidence of beneficial use provided by the two John F. Miller Swamp Act deeds. However, as described in detail below, the hearsay evidence is not sufficient to prove beneficial use for irrigation prior to 1909 on the two other categories of lands claimed (the claimed lands included within the February 14, 1882 John F. Miller Swamp Act

deed and the E.C. Small Swamp Act deed and the claimed lands not part of a Swamp Act Deed that were included in the conveyance from William Miller to Sarah Miller).

There is very limited evidence concerning the land included in the February 10, 1882 John F. Miller deed, the E.C. Small Swamp Act deed, and the land conveyed from William Miller to Sarah Miller. There are a number of statements concerning both natural overflow and beneficial use on Miller Island in general terms. Mr. Furber testified that “much” of Miller Island was subject to natural overflow. (Ex. C16 ¶ 7.) The History of Klamath County states that “[d]uring the spring, water would flood much of the island.” (Ex. C38 at 2.) Barney Hooper’s affidavit states that “[a]ll of Miller Island flooded.” (Ex. C12 at 3). There is sufficient evidence to support the proposition that “much” of Miller Island was seasonally flooded prior to 1909.

With respect to beneficial use, Mr. Furber testified that “[b]efore the turn of the century, the entire island was used for haying and grazing. Most of the island was part of the land holding of John F. Miller and part of Miller’s ranching operation.” (Ex. C 16 ¶ 9.) Mr. Hooper’s affidavit describes a conversation he had with someone named Jess Johnson, who said that that “in the late 1800s they [John Miller and his sons] put up meadow hay and ran cows on all the ground on Miller Island” (Ex. C12 at 3). There is no evidence, however, that the E.C. Small and Sarah Miller parcels were part of John F. Miller’s ranching operation. Without more specific information concerning operations on land not owned by John F. Miller, the inference that John F. Miller only intended to make beneficial use of the lands that he owned is at least as persuasive as the inference that he intended to make beneficial use of water on the entirety of Miller Island, regardless of property ownership. The only statement that refers specifically to the E.C. Small or Sarah Miller parcels is Mr. Furber’s testimony that “[it] is notable than land was reclaimed and farmed by Mr.

Miller, Mr. Logan and Mr. Small prior to the acquiring deeds from the state of Oregon in 1882 and 1889.” (Ex. C17 at ¶ 7.) There is no indication in the record as to the basis for this statement, and without additional detail it is not treated as substantial evidence. Mr. Furber may well have been relying on an erroneous belief that reclamation would have required for E.C. Small to obtain his Swamp Land Deed.

The evidence is sufficient to support a possibility that the E.C. Small and Sarah Miller parcels were subject to natural overflow and beneficially used prior to 1909. The hearsay statements are not, however, sufficiently specific to prove the required elements by a preponderance of the evidence. It is just as possible that the E.C. Small and Sarah Miller parcels were not among the Miller Island lands subject to natural overflow, or not beneficially used prior to 1909. Because the claimants bear of the burden of proof with respect to pre-1909 development, the lack of specificity in the evidence means that the portions of the claimed place of use within the boundaries of the E.C. Small and Sarah Miller parcels must be denied.

Finally, it has been suggested that Claimant’s predecessors unreasonably delayed the construction of works to more efficiently use the water. Under *In re Silvies River* construction of works was not necessary to appropriate a water right prior to 1909 where, as on at least part of the claimed lands, it was possible to make beneficial use of natural overflow. Finally, the claimed lands are now served by artificial diversion works rather than natural overflow, so any argument that the means of beneficial use by natural overflow should no longer be permissible on these lands is moot.

The preponderance of the evidence in the record in this case establishes that water was applied to beneficial use for irrigation on or before January 1, 1900 on 700.1 acres within the claimed property.

- b. *The subsection entitled "THE KLAMATH PROJECT" is replaced in its entirety as follows:*

The determination of this claim does not require or depend in any way upon a determination of whether use of water under the claim interferes with the purposes of the Klamath Project. The relative rights of the Claimant and the Klamath Project will be regulated according to the doctrine of prior appropriation.

- c. *The subsection entitled "SEASON OF USE" is replaced in its entirety as follows:*

The claim asserts a year-round season of use, describing flood-irrigation of the fields at various times, including mid-winter. There is insufficient evidence supporting the claim that a year-round season of use was developed prior to 1909. Consequently, the season of use is restricted to April 1 through October 31. The evidence pertaining to pre-1909 flooding patterns and beneficial uses of water is as follows. Lewis Furber made three statements relevant to this issue. First, he stated that "the land was overflowed by the Klamath River during the spring and other high water periods." (C17 ¶ 8.) Second, he stated that "the Klamath River would rise in the spring and naturally flood irrigate the Furber Property. * * *. The natural flooding would begin in early spring depending upon the snowpack and weather conditions. Usually by April, May, June, or July the water would begin to recede and they would begin grazing and haying the native grasses." (C14 ¶ 7.) Third, he referred to "periods of year round flooding" on Miller Island. (C47 ¶ 5.) In addition, Lanny Fujishin noted that, "the lower lands around Miller Island were naturally over flowed and flooded during the winter and spring." (C32 Ex. A at 3.) Although these statements are to a certain extent inconsistent, it is more likely than not that flooding of the property regularly occurred during the spring, and likely occurred from time to time during the winter or other periods. However, there is insufficient evidence that water was put to use prior to 1909 outside of the April 1 through October 31 period for the

purpose of irrigation (i.e., ‘to promote growth or nourish crops or plants’). See OAR 690-300-0010(26). Finally, as described above, there is insufficient evidence of intent to develop a wildlife purpose of use on the claimed property prior to 1909. Consequently, a season of use of April 1 through October 31 is appropriate for both the recognized irrigation and wildlife uses.

d. *The subsection entitled “CHANGE OF USE” is modified as described in subsections 7.d.i and 7.d.ii, below.*

i. *“CHANGE OF USE” Paragraph 3 is modified as follows:*

While the portion of these definitions requiring artificial diversion of water is inapplicable to pre-1909 claims as a result of ~~belied by~~ the Supreme Court’s opinion in *In re Silvies River*, the dictionary common definition of irrigation has in common with the OWRD definition that it is not limited to domestic crops or specific plants, but is based upon application of water to any plant to provide moisture for plant growth. The definition in the Klamath Compact, which is more limited than either of the other definition, is not controlling. It took effect in 1957, and there is no indication that it was intended to retroactively limit the scope of water rights developed prior to its enactment. Its persuasive authority is limited in this context, given that the OWRD definition applies statewide, and there is no compelling reason for a more limited definition as applied to pre-1909 rights in the Klamath Basin. , as it took effect in 1957, so cannot be held to limit a water right with a priority of 1900. Thus, from a definitional point of view, so long as water is intentionally applied to land in order to nurture plants that are desirable to the landowner, this would count as irrigation.

ii. *The following paragraphs are added to the end of the “CHANGE OF USE” subsection:*

ODFW claimed irrigation and wildlife habitat purposes of use, and specified rates associated with each use. The testimony demonstrates that

there is no meaningful difference in actual diversion and use practices as between the two claimed purposes.¹⁰ Lanny Fujishin testified that “the claimed water rights are managed differently from year to year. As a result, the line between the two categories [irrigated or wildlife habitat] is really not that clear and we did not intend to imply that they constitute legally distinct uses. For example, we may soon plant barley in one wetlands area to set back bulrush and other emergent vegetation in that area.” (C32 at ¶ 8.) Additionally, Ron Anglin explained in his affidavit that, while the ratio of land identified as irrigated for agriculture and land identified as irrigated for wildlife habitat changes from year to year, both categories still rely on irrigation for traditional agricultural and wildlife benefits. (C34 at ¶ 8.) He added that ODFW employs a moist soil management program which is dependent on seasonal drying and then reirrigating (or flooding) certain areas. (C34 at ¶ 10.) The crops in ODFW’s wetland areas are native vegetation which are valuable feed for waterfowl. (Id.) Thus, it is evident that the water ODFW is using on any wetland or marsh areas within the claim area is consistent with irrigation use.

In its Closing Brief, ODFW characterized use on the claimed property as irrigation. As a result, OWRD treats the claim as an irrigation claim, and the recognized purpose of use for the claim is irrigation.¹¹

- e. *The following subsection entitled “CHANGED PLACE OF USE” is added to the “OPINION” section:*

CHANGED PLACE OF USE

KPWU contends that ODFW changed the place of use descriptions after submitting its January 29, 1991 Statement and Proof of Claim. (KPWU’s

¹⁰ ODFW has removed areas of open water from its claim.

¹¹ Under the circumstances in this case, this does not constitute an impermissible claim amendment. As described above, the “wildlife use” claimed and actually occurring on the claimed property overlaps with OWRD’s definition of irrigation use. In addition, OWRD paid claim fees covering irrigation use on the entirety of the claimed property. (OWRD Ex. 1 at 5).

Exceptions to the Amended Proposed Order at 5.) ODFW admits that there has been some confusion about this issue (ODFW Post-Hearing Reply Brief at 22.) However, notwithstanding this confusion, there is sufficient evidence in the record to have put all contestants, including KPWU, on notice of all the areas subject to ODFW's claim. While the Statement and Proof of Claim that ODFW filed on January 29, 1991 did contain some errors and included the wrong map, there was sufficient evidence that existed at that point, prepared by OWRD, to put all contestants on notice of the entire claim area.

On ODFW's Statement and Proof of Claim, question 11 asks whether ODFW "accepts the maps which were prepared by the Water Resources Department as they relate to [ODFW's] claim?" (OWRD Ex. 1 at 4.) ODFW answered "yes" to this question. (Id.) The map and the accompanying place of use descriptions prepared by OWRD clearly identify all the areas included in ODFW's claim area that were incorporated into the ALJ's Amended Proposed Order. (OWRD Ex. 1 at 57-66).

OWRD's place of use descriptions, broken up by point of diversion, and OWRD's map existed before the deadline for filing claims. In Don Knauer's affidavit, he says that pages 57-65 of OWRD Exhibit 1 and page 66 of OWRD Exhibit 1, the map, "were prepared under my supervision * * * well before the taking of the claims." (C43 at ¶ 4.) He went on to say, "OWRD had already prepared the more detailed tabulations and mapping before the claim was filed." (C43 at ¶ 7.) Therefore, notwithstanding the confusion that ODFW created with the errors in its January 29, 1991 Statement and Proof of Claim, since it accepted OWRD's maps, which properly described the place of use descriptions and were prepared before the deadline, all claimants were on notice of the entire claim area and there was no impermissible claim amendment after the deadline.

Reasons for modifications: Based on the provisions of the applicable Swamp Land Acts, the February 10, 1882 and April 6, 1889 Swamp Act deeds cannot be accepted as beneficial use of water without additional evidence. While there is some evidence in the record about haying, grazing, and ranching throughout Miller Island and comments in affidavits about natural overflow covering all of Miller Island, this evidence is

generalized and does not refer with any level of detail to the E.C. Small parcel or the lands not covered by a Swamp Act deed that are part of the William Miller to Sarah Miller conveyance.

B. DETERMINATION

1. The Amended 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 Presented” is adopted in its entirety.
 - d. The “Findings of Fact” is adopted with modifications, as set forth in Section A.6, above.
 - e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A.7, above.
 - f. The “Opinion” is adopted with modifications, as set forth in Section A.8, 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 186. Consistent with Sections A.6, A.7, and A.8, above, the outcome of the Order has been modified to limit the claim to the approval of 700.1 acres.
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 186 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 186

CLAIM MAP REFERENCE: OWRD INVESTIGATION MAPS – T 39 S, R 9 E & T 39 S, R 8 E

CLAIMANT: OREGON DEPARTMENT OF FISH AND WILDLIFE
1850 MILLER ISLAND RD W
KLAMATH FALLS, OR 97603

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

PURPOSE OR USE:
IRRIGATION OF 700.1 ACRES

RATE OF USE:
17.5 CUBIC FEET PER SECOND (CFS), MEASURED AT THE POINT OF DIVERSION AS FOLLOWS:

0.03 CFS ON 1.3 ACRES FROM MILLER ISLAND REFUGE POD #1
1.56 CFS ON 62.2 ACRES FROM MILLER ISLAND REFUGE POD #2
2.70 CFS ON 108.1 ACRES FROM MILLER ISLAND REFUGE POD #3

- 1.38 CFS ON 55.5 ACRES FROM MILLER ISLAND REFUGE POD #4
- 1.57 CFS ON 62.6 ACRES FROM MILLER ISLAND REFUGE POD #5
- 1.97 CFS ON 78.9 ACRES FROM MILLER ISLAND REFUGE POD #6
- 1.01 CFS ON 40.5 ACRES FROM MILLER ISLAND REFUGE POD #7
- 7.28 CFS ON 291.0ACRES FROM MILLER ISLAND REFUGE POD #8

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 – OCTOBER 31

DATES OF PRIORITY: JANUARY 1, 1900

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

Pod Name	Twp	Rng	Mer	Sec	Q-Q
Miller Island Refuge POD 1	39 S	9 E	WM	19	NW NE
Miller Island Refuge POD 2	39 S	9 E	WM	19	NE NW
Miller Island Refuge POD 3	39 S	8 E	WM	24	NE NE
Miller Island Refuge POD 4	39 S	8 E	WM	24	SW NE
Miller Island Refuge POD 5	39 S	8 E	WM	24	SE NW
Miller Island Refuge POD 6	39 S	8 E	WM	23	NE SE
Miller Island Refuge POD 7	39 S	8 E	WM	26	NE NE
Miller Island Refuge POD 8	39 S	9 E	WM	26	SW NE

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized POD
39 S	8 E	WM	23	NE SE	3	0.1	POD 6
39 S	8 E	WM	23	SE SE	3	17.2	POD 6
39 S	8 E	WM	24	SW NE	5	26.7	POD 4
39 S	8 E	WM	24	NW SW	7	24.4	POD 6
39 S	8 E	WM	24	SE NE		22.3	POD 2
39 S	8 E	WM	24	SW SW		37.2	POD 6
39 S	8 E	WM	24	SE SW		2.7	POD 4
39 S	8 E	WM	24	SE SW		12.6	POD 5
39 S	8 E	WM	24	NE SE		8.0	POD 2
39 S	8 E	WM	24	NE SE		13.3	POD 3
39 S	8 E	WM	24	NW SE		22.7	POD 4
39 S	8 E	WM	24	NW SE		1.5	POD 5
39 S	8 E	WM	24	SW SE		3.4	POD 4
39 S	8 E	WM	24	SW SE		35.1	POD 5
39 S	8 E	WM	24	SE SE		38.8	POD 3
39 S	8 E	WM	25	NE NE		1.0	POD 5
39 S	8 E	WM	25	NW NE		7.1	POD 5
39 S	8 E	WM	25	SW NE		5.3	POD 5
39 S	8 E	WM	25	NW NW		22.3	POD 7


IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized POD
39 S	8 E	WM	25	NW NW		15.7	POD 8
39 S	8 E	WM	25	SW NW		0.8	POD 7
39 S	8 E	WM	25	SW NW		37.5	POD 8
39 S	8 E	WM	25	NW SW		5.7	POD 8
39 S	8 E	WM	25	SW SW		24.8	POD 8
39 S	8 E	WM	25	NE SE	2	0.8	POD 1
39 S	8 E	WM	25	SE SE	2	0.5	POD 1
39 S	8 E	WM	26	SE NE		17.4	POD 7
39 S	8 E	WM	26	SE NE		20.1	POD 8
39 S	8 E	WM	26	NE SW	8	22.7	POD 8
39 S	8 E	WM	26	SW SW	10	2.0	POD 8
39 S	8 E	WM	26	SE SW	9	6.3	POD 8
39 S	8 E	WM	26	NE SE		33.2	POD 8
39 S	8 E	WM	26	NW SE	11	26.5	POD 8
39 S	8 E	WM	26	SW SE	12	18.2	POD 8
39 S	8 E	WM	26	SE SE		37.5	POD 8
39 S	8 E	WM	35	NE NE	9	40.8	POD 8
39 S	9 E	WM	19	SW NE		0.7	POD 2
39 S	9 E	WM	19	SW NW	11	30.1	POD 2
39 S	9 E	WM	19	NE SW		1.0	POD 3
39 S	9 E	WM	19	NW SW	12	1.1	POD 2
39 S	9 E	WM	19	NW SW	12	17.3	POD 3
39 S	9 E	WM	19	SW SW	13	36.2	POD 3
39 S	9 E	WM	19	SE SW		1.5	POD 3

FURTHER LIMITATIONS:

USE OF WATER ON THE PLACE OF USE DESCRIBED IN THIS CLAIM, WHEN COMBINED WITH USE OF WATER UNDER ANY OTHER RIGHT ADJUDICATED IN THE KLAMATH BASIN ADJUDICATION FOR ANY PORTION OR ALL OF THE SAME PLACE OF USE, MAY NOT EXCEED THE RATE AND DUTY NECESSARY FOR BENEFICIAL USE AS DETERMINED IN THE KLAMATH BASIN ADJUDICATION.

[End of Water Right Claim Description]

Dated at Salem, Oregon on February 28, 2014



 Dwight French, Adjudicator
 Klamath Basin General Stream Adjudication