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
RICHARD W. BERG)	DETERMINATION
)	
)	Water Right Claim 201

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 AMENDED PROPOSED ORDER

- 1. Claim 201 (Claimant: RICHARD W. BERG) and its associated contests (36, 3187, 3412, 1843, and 4185) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 134.
- 2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER for Claim 201 on January 9, 2004. No exceptions were filed to the Proposed Order within the exceptions filing deadline.
- 3. On July 28, 2009, the Adjudicator issued an AMENDED PROPOSED ORDER (Amended Proposed Order) to address 7.9 acres, a portion of the 30.9 acres approved in the January 9, 2004 Proposed Order. These 7.9 acres are subject to irrigation by the method of natural overflow rather than by irrigation from a point of diversion as recommended in the January 9, 2004 Proposed Order. The Amended Proposed Order replaces the 2004 Proposed Order in its entirety.
- 4. Exceptions were filed to the Amended Proposed Order within the exception filing deadline by the United States of America.
- 5. The exceptions filed to the Amended Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 201. Except for the items addressed in Sections A.7 and A.8, below, the exceptions filed to the Amended Proposed Order for Claim 201 are found to be unpersuasive.

CLAIM 201 Page 1 of 5

- 6. The Amended Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
 - a. The introductory (first) paragraph of the Amended Proposed Order is adopted with modifications, as set forth in Section A.7, below.
 - b. The "History of the Case" is adopted in its entirety.
 - c. The "Procedural Matters" is adopted in its entirety.
 - d. The "Evidentiary Rulings" is adopted in its entirety.
 - e. The "Issues" is adopted in its entirety.
 - f. The "Findings of Fact" is adopted in its entirety.
 - g. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.8, below.
 - h. The "Opinion" is adopted with modifications, as set forth in Section A.9, below.
 - i. The "Order" is adopted as in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 201. The outcome of the Order is without modification.
- 7. **Introductory Paragraph.** The first sentence within the first paragraph is modified as follows (deletions are shown in "strikethrough" text):

After fully considering the entire record and exceptions filed, the Adjudicator issues this AMENDED PROPOSED ORDER pursuant to OAR 137-003-0655(3). This AMENDED PROPOSED ORDER modifies the PROPOSED ORDER issued on January 9, 2004, by Administrative Law Judge William D. Young, and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130.

Reason for Modifications: To make a correction raised in exceptions to the Amended Proposed Order; exceptions were not filed to the January 9, 2004 Proposed Order.

- 8. **Conclusions of Law.** Within the section titled "Conclusions of Law" of the Amended Proposed Order, Conclusion #6 is modified as follows (additions are shown in "underline" text, deletions are shown in "strikethrough" text):
 - (6) An irrigation claim based on natural overflow is entitled as a matter of law to a Pre-1909 water right. Beneficial use of water for irrigation by the method of natural overflow is a valid basis for a *Pre-1909* water right.

Reason for Modifications: To correct and clarify the wording in Conclusions of Law #6, an issue raised in exceptions.

9. **Opinion.** The following paragraph (shown in "<u>underline</u>" text) is added at the end of the "Acreage entitled to the pre-1909 water right" subsection of the "Opinion" section:

Lot 9 totals 34.18 acres (OWRD Ex. 1 at 44), of which 3 acres are not irrigable (OWRD Ex. 1, page 8, 10) and 23 acres are irrigated from a point of

diversion (OWRD Ex. 1, pages 51, 58). The remaining 7.92 acres within Lot 9 are irrigated by the method of natural overflow (TR. Pg 14-15, 30-33).

Reason for Modification: To add clarification using evidence on the record.

B. DETERMINATION

- 1. The Amended Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
 - a. The introductory (first) paragraph of the Amended Proposed Order is adopted with modifications, as set forth in Section A.7, above.
 - b. The "History of the Case" is adopted in its entirety.
 - c. The "Procedural Matters" is adopted in its entirety.
 - d. The "Evidentiary Rulings" is adopted in its entirety.
 - e. The "Issues" is adopted in its entirety.
 - f. The "Findings of Fact" is adopted in its entirety.
 - g. The "Conclusions of Law" is adopted with modifications, as set forth in Section A.8, above.
 - h. The "Opinion" is adopted with modifications, as set forth in Section A.9, above.
 - i. The "Order" is adopted as in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 201. The outcome of the Order is without modification.
- 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. Beneficial use of water by the method of natural overflow is shown to be established for a portion of this claim.
- 4. Based on the file and record herein, IT IS ORDERED that Claim 201 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 201

CLAIM MAP REFERENCE: CLAIM # 201, PAGES 10 and 51

CLAIMANT: RICHARD W. BERG

PO BOX 54

KENO, OR 97627

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

PURPOSE OR USE:

IRRIGATION OF 23.00 ACRES FROM POD 1; AND IRRIGATION OF 7.92 ACRES BY NATURAL OVERFLOW; LIVESTOCK WATERING OF 12 HORSES INCIDENTAL TO IRRIGATION

RATE OF USE OF WATER APPLIED FROM POD 1:

0.64 CFS FROM POD 1 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 OF WATER APPLIED FROM POD 1:

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

PERIOD OF ALLOWED USE OF WATER APPLIED FROM POD 1: APRIL 1 - OCTOBER 31

DATE OF PRIORITY: MARCH 30, 1905

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances
POD 1	40 S	8 E	WM	6	NW SE	9	2510 FEET NORTH AND 1990 FEET EAST FROM SE CORNER, SECTION 6
Natural Overflow	40 S	8 E	WM				No specific point of diversion; Natural Overflow

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGAT	TION WITI		OENTA OM P	AL LIVEST OD 1	OCK W	ATERING
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
40 S	8 E	WM	6	NE SW	9	2.00
40 S	8 E	WM	6	NW SE	9	21.00
40 S	8 E	WM	6	NW SE	9	7.92

110				L OVERF		111
Twp	Rng	Rng Mer Sec	Sec	Q-Q	GLot	Acres
40 S	8 E	WM	6	NW SE	9	7.92

FURTHER LIMITATIONS TO THE RIGHT TO USE OF WATER BY NATURAL OVERFLOW:

BENEFICIAL USE OF WATER MADE FROM THE METHOD OF NATURAL OVERFLOW IS A PRIVILEGE ONLY. AS LONG AS BENEFICIAL USE OF WATER BY NATURAL OVERFLOW CONTINUES, THE HOLDER OF THIS VESTED WATER RIGHT CANNOT MAKE A CALL ON WATER APPROPRIATED UNDER ANY OTHER WATER RIGHTS.

ANY CONVERSION FROM BENEFICIAL USE OF WATER BY NATURAL OVERFLOW TO BENEFICIAL USE OF THE SAME WATER FROM A SYSTEM RELYING ON A POINT(S) OF DIVERSION WILL BE CONSIDERED A CHANGE IN POINT OF DIVERSION SUBJECT TO APPROVAL OF A TRANSFER OF WATER RIGHT IN COMPLIANCE WITH THE PROVISIONS OF ORS 540.505 TO 540-587. NOTWITHSTANDING APPROVAL OF A CHANGE IN POINT OF DIVERSION, THE FOLLOWING CONDITIONS WILL APPLY TO ANY APPROVED POINT OF DIVERSION TRANSFER: 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. THE DUTY FOR IRRIGATION MAY NOT EXCEED 3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

Dwight French, Adjudicator

Klamath Basin General Stream Adjudication

PARTIAL ORDER OF DETERMINATION

CLAIM 201 Page 5 of 5