

**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
ROBERT FLOWERS; FLOWERS BROS.)	DETERMINATION
INC.; MARTIN SCULL; SANDRAL)	
TUCKER; AND KAREN TUCKER)	
_____)	Water Right Claim 205

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 205 (Claimants: ROBERT FLOWERS, FLOWERS BROS. INC, MARTIN SCULL, SANDRAL TUCKER, AND KAREN TUCKER) and its associated contests (2856, 3191, 3864 and 4188) were referred to the Office of Administrative Hearings for a contested case hearing which were designated as Case 137, and subsequently consolidated with Case 3. The consolidation with Case 3 was reversed by INTERIM ORDER (Jan 12, 2006) at 31.¹
2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 205 on April 13, 2007.
3. Exceptions were filed to the Proposed Order within the exception filing deadline by (1) claimants Robert Flowers, Martin Scull, Flowers Bros. Inc., Sandral Tucker and Karen Tucker, and (2) the United States of America.
4. The exceptions filed to the Proposed Order along with responses to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 205. The exceptions are found to be persuasive in part, and therefore, modifications are made to the Proposed Order as described in Sections A.6, A.7 and A.8, below.

¹ This Interim Order was amended by an AMENDED INTERIM ORDER (May 24, 2006) issued *sua sponte* by the Administrative Law Judge to provide clarification of certain matters raised in correspondence and to correct typographical errors noted since the original order was issued.

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 “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 “Summary” is deleted in its entirety.
 - 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 205. Consistent with sections A.6, A.7., and A.8, below, the outcome of the order has been modified to recognize a right for irrigation on acreage reduced by 109.7 acres.

6. **Findings of Fact.**

- a. Within Proposed Order Finding of Fact #1, three place of use descriptions are modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

i. Lot 6, ~~SE¼ SE¼~~ SW¼ SE¼ Section 15 T40SR8E. W.M. 5.1 acres irrigation

Reason for Modification: To correct a scrivener’s error; the 5.1 acres (1.7 + 3.4) within Lot 6 is within the SW¼ of the SE¼. (OWRD Ex. 1 at 100.)

ii. ~~Lot 3, SE¼ NE¼ Section 22 T40SR8E. W.M. 0.1 acres irrigation~~

iii. Lot 10, SE¼ NE¼ Section 22 T40SR8E. W.M. ~~15.1~~ 15.2 acres irrigation

Reason for Modification: To correct a scrivener’s error in the lot number for the 0.1 acres within the SE¼ NE¼. This parcel is located above the meander line whereas Lot 3 is below the meander line; the 0.1 acres is within Lot 10. This 0.1 acre parcel shows on the OWRD Investigation Map as being separated from the 15.1 acres by an ownership boundary; the map shows 0.1 acres under the ownership of R.G. Flowers and 15.1 acres under J.A. Flowers. Thus the 0.1 acres has been combined with the 15.1 acres, all within Lot 10, for a total of 15.2 acres within the SE¼ NE¼, Section 22. (Compare C-14 @ 2 to OWRD Ex. 1 at 100: note the small arrow extending left from the ‘0¹’ lettering on the OWRD Investigation Map – it points to the sliver within R.G. Flowers property boundary which is also within Lot 10.)

- b. The last Paragraph of Proposed Order Finding of Fact #1 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

An additional water right was claimed based upon application of water from the Ady District Improvement Co. and Warren Act contracts with the

United States for use of water from the Klamath Project, having a priority date of 1905. This portion of the claim was conditional on the United States failing to establish that it was the proper holder of the water right appropriated for the Klamath Project. The area in question in these additional properties was not defined with particularity in the original claim document. (OWRD Ex. 1 at 4.) ~~The holding in the Amended Interim Order in Klamath Adjudication Case 003 that the United States is the proper holder of the water right for the 1905 appropriation for the Klamath Project is the law of the case for this proceeding. Klamath Adjudication Case 003, May 23, 2006, at page 35.~~ This portion of the claim was properly consolidated with Case 003, since it concerns appropriations made for the Klamath Reclamation Project or appropriations that were incorporated into the Klamath Reclamation Project. The Partial Order of Determination pertaining to the Klamath Reclamation Project claims addresses this portion of the Claimants' claim.

- c. Proposed Order Findings of Facts #8, #9 and #10 are renumbered as follows, and changes are made to the Finding of Fact renumbered as #11 (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

~~8)~~ 10) On October 30, 1889, the State of Oregon conveyed to W.L. Garretson a parcel of swamp land, including the following property subject to this claim: NW¼ NE¼ and Lots 5, 6 and 7, Section 22, T40S R8E.W.M. Consideration for this sale was one dollar per acre. (Ex. C-17.)

~~9)~~ 11) The evidence in the record establishes that most of the property subject to this claim (that portion within the meander line of the Klamath River) was under private ownership no later than the 1880s. ~~Natural grass was harvested from the land, either through grazing or as hay, from at least the time that it was in private hands.~~ (OWRD Ex. 1 at 16-29; Rebuttal Testimony of Robert Flowers at 2.)

~~10)~~ 12) Beginning in the early 1900s, various facilities were built on the Klamath River to control the flow of the river. Link River Dam controlled flooding, so that the upper areas previously subject to seasonal inundation

were no longer covered with water. From 1930 on, the California-Oregon Power Company raised the level of the river in the area subject to this claim, by building a dam downstream at Keno. This maintained the level of water in the river and Klamath Straits at a point where the land within the meander line of the river would be continually flooded without control structures. As dikes and levies were built along the Klamath River, and the Klamath Straits was blocked, Claimants built head-gates through the structures to allow water to flood the subject property for irrigation. (OWRD Ex. 1 at 11, 12, 15.)

Reason for Modification: The record does not support, by a preponderance of the evidence, the finding that the entire claimed place of use within the meander line was either harvested or grazed by the time the land was taken into private ownership.

d. Proposed Order Findings of Fact #13 is added to the Proposed Order as follows (additions are shown in "underline" text):

13) An experimental farm began operation on a portion of the claimed place of use sometime in 1907, and operated through at least 1912. Pipe was installed to irrigate the farm. The farm was located south of Wildhorse Butte and west of the railroad. It included lands in Sections 22, 23 and 26. Based on a comparison of the written description of the location of the experimental farm with maps in the record, the experimental farm included the following claimed lands:

Lot 10 SE¼ NE¼ Section 22 T40S R8E W.M. 15.2 acres irrigation

Lot 10 NE¼ SE¼ Section 22 T40S R8E W.M. 12.7 acres irrigation

Lot 11 SE¼ SE¼ Section 22 T40S R8E W.M. 1.3 acres irrigation

SE¼ SW¼ Section 23 T40S R8E W.M. 0.3 acres irrigation

Lot 4 NE¼ NW¼ Section 23 T40S R8E W.M. 15.2 acres irrigation

Lot 4 NW¼ NW¼ Section 23 T40S R8E W.M. 0.6 acres irrigation

Lot 5 SE¼ NW¼ Section 23 T40S R8E W.M. 11.1 acres irrigation

Lot 6 NE¼ SW¼ Section 23 T40S R8E W.M. 8.7 acres irrigation

Lot 7 NW¼ SW¼ Section 23 T40S R8E W.M. 38.0 acres irrigation

Lot 8 SW¼ NW¼ Section 23 T40S R8E W.M. 3.3 acres irrigation

Lot 9 SW¼ SW¼ Section 23 T40S R8E W.M. 33.5 acres irrigation

Lot 3 NW¼ NW¼ Section 26 T40S R8E W.M. 7.2 acres irrigation

Direct Testimony of Robert Flowers at 5, Attachment A; Ex. C5; OWRD Ex 1 at 11, 78.

Reason for Modification: To make an additional finding of fact supported by a preponderance of evidence in the record.

7. **Conclusions of Law.** Within the section titled “Conclusions of Law” of the Proposed Order, Conclusions #2 and #3 are modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

a. *Conclusion of Law #2 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):*

2. There is sufficient information on the development of water on a portion of this place of use prior to February 24, 1909, to establish a vested pre-1909 water right. There is insufficient evidence to establish a vested pre-1909 water right on the remainder of the claimed place of use.

b. *Conclusion of Law #3 is deleted as follows (deletions are shown in “~~strikethrough~~” text):*

3. ~~The pre-1909 water right on the claimed place of use that is within the meander line of the Klamath River is prior to the claims of the United States for the Klamath Project. The United States is the proper holder of the water right for water obtained from the Klamath Project through contracts with the United States and the Ady District Improvement Company.~~

Reason for Modification: To make the Conclusions of Law consistent with the Findings of Fact and Opinion. In addition, the Partial Order of Determination concerning the Klamath Reclamation Project claims is the appropriate place to address claims for this place of use based on appropriations made for the Klamath Reclamation Project.

8. **Opinion.** Within the section titled “Opinion” of the Proposed Order, subsection #2 is modified as shown below in A.8.a., and A.8.b.

a. Paragraph 7 of subsection #2 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

In this case, the United States objected to admission of hearsay. However, the findings of fact that are supported by hearsay in this case, contained in Findings of Fact Paragraphs 1, 2, 3 and 10², provide general information as to the seasonal overflow of the property, and the development of dams and control structures on the Klamath River. None of these facts ~~is~~ are contradicted in the United States' presentation, or seriously open to question. In addition, the United States' evidence does not contradict the existence, dates of operation, or location of the experimental farm described in Finding of Fact #13.³ Consequently, under *Cole*, the hearsay evidence used to support those findings of fact is substantial evidence.

- b. The remainder of subsection #2 is deleted and replaced as follows (additions are shown in “underline” text):

Evidence of beneficial use prior to 1909 on a portion of the claimed lands comes from swamp land deeds and from evidence of an experimental farm on a portion of the claimed lands prior to 1909.

The Claimants have submitted swamp land deeds covering most of the claimed place of use. Swamp land deeds were issued in Oregon based on applications made under the terms of one of three successive Swamp Land Acts. The effect of a given swamp land deed as evidence of beneficial use of water depends both on the terms of the Swamp Land Act in effect at the time of the application, and on the effect of any subsequent Swamp Land Acts on the terms of the original application. Applications for deeds made under the authority of the initial Swamp Land Act of 1870 (“1870 Act”) required subsequent 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

² Renumbered as Finding of Fact #12 in Section A.6.c of this Partial Order of Determination for Claim 205.

³ Added in Section A.6.d of the Partial Order of Determination for Claim 205.

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 second Swamp Land Act of 1878 (“1878 Act”) altered certain provisions of the 1870 Act. It provided applicants who initially applied under the 1870 Act a second path for obtaining a deed. An applicant under the 1870 Act could still submit proof of reclamation to obtain a deed. Or, an applicant under the 1870 Act could instead pay a higher price (\$2.50 per acre) and obtain a deed without proof of reclamation. 1878 General Laws of Oregon, §10, p. 46. In addition, the 1878 Act provided that any applicant making a *new* 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). New applications made after the effective date 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.⁴

Conversely, any deed issued after the effective date of the 1887 Act does not constitute proof of beneficial use for irrigation by a 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 deed dated February 1, 1886, in the name of Quincy A. Brooks, is substantial evidence of beneficial use. Because the 1870 Act

⁴ 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.

required three years' cultivation before the state could issue a swamp land deed, the appropriate priority date for the claimed lands subject to this deed is February 1, 1883. The remaining swamp land deeds were all issued after February 16, 1887, and are not proof of beneficial use.

The following claimed lands are included in the deed dated February 1, 1886:

Lot 4 SW¼ SW¼ Section 15 T40S R8E.W.M. 14.2 acres irrigation

Lot 5 SE¼ SW¼ Section 15 T40S R8E.W.M. 4.4 acres irrigation

Lot 6 SW¼ SE¼ Section 15 T40S R8E.W.M. 5.1 acres irrigation

Lot 7 SE¼ SE¼ Section 15 T40S R8E.W.M. 1.0 acres irrigation

NE¼ NE¼ Section 21 T40S R8E.W.M. 40.0 acres irrigation

Lot 3 SE¼ NE¼ Section 21 T40S R8E.W.M. 8.0 acres irrigation

Lot 4 NW¼ NE¼ Section 21 T40S R8E.W.M. 17.6 acres irrigation

NE¼ NW¼ Section 22 T40S R8E.W.M. 38.5 acres irrigation

NW¼ NW¼ Section 22 T40S R8E.W.M. 40.0 acres irrigation

SE¼ NW¼ Section 22 T40S R8E.W.M. 40.0 acres irrigation

Lot 8 NE¼ SW¼ Section 22 T40S R8E.W.M. 12.5 acres irrigation

Lot 9 SW¼ NW¼ Section 22 T40S R8E.W.M. 30.0 acres irrigation

In addition to the swamp land deeds actually submitted in this case, a swamp land purchase covering the lands claimed in Section 16 of Township 40 South, Range 8 East, is referenced in *Corpe v. Brooks*, 8 Or 222 (1880).⁵ In that case, the court found that Quincy Brooks purchased property under the 1870 Act, and that the land board approved the sale on April 4, 1872. The

⁵ Additional support for beneficial use prior to 1909 on the claimed lands in Sections 15 and 16 comes from the Affidavit of J.W. and G.G. Kerns, in which they state that these lands were among lands that had "been used as naturally irrigated swamp land prior to 1905, and that after the flooding and receding of the water the land was used for hay and livestock pasture." OWRD Ex. 1 at 20.

following claimed lands are included in the deed referenced in *Corpe v. Brooks*:

	<u>SW$\frac{1}{4}$ SE$\frac{1}{4}$</u>	<u>Section 16 T40S R8E.W.M.</u>	<u>2.5 acres irrigation</u>
	<u>SE$\frac{1}{4}$ SE$\frac{1}{4}$</u>	<u>Section 16 T40S R8E.W.M.</u>	<u>0.7 acres irrigation</u>
Lot 5	<u>SW$\frac{1}{4}$ SE$\frac{1}{4}$</u>	<u>Section 16 T40S R8E.W.M.</u>	<u>15.3 acres irrigation</u>
Lot 6	<u>SE$\frac{1}{4}$ SE$\frac{1}{4}$</u>	<u>Section 16 T40S R8E.W.M.</u>	<u>9.8 acres irrigation</u>

Beneficial use prior to 1909 on the remainder of the claimed lands must be established by evidence other than swamp land deeds.

There is substantial evidence that a portion of the claimed lands was included within an “experimental farm” that operated between at least 1907 and 1912. The following lands are therefore entitled to a right with a priority date of December 31, 1907:

Lot 10	<u>SE$\frac{1}{4}$ NE$\frac{1}{4}$</u>	<u>Section 22 T40S R8E W.M.</u>	<u>15.2 acres irrigation</u>
Lot 10	<u>NE$\frac{1}{4}$ SE$\frac{1}{4}$</u>	<u>Section 22 T40S R8E W.M.</u>	<u>12.7 acres irrigation</u>
Lot 11	<u>SE$\frac{1}{4}$ SE$\frac{1}{4}$</u>	<u>Section 22 T40S R8E W.M.</u>	<u>1.3 acres irrigation</u>

	<u>SE$\frac{1}{4}$ SW$\frac{1}{4}$</u>	<u>Section 23 T40S R8E W.M.</u>	<u>0.3 acres irrigation</u>
Lot 4	<u>NE$\frac{1}{4}$ NW$\frac{1}{4}$</u>	<u>Section 23 T40S R8E W.M.</u>	<u>15.2 acres irrigation</u>
Lot 4	<u>NW$\frac{1}{4}$ NW$\frac{1}{4}$</u>	<u>Section 23 T40S R8E W.M.</u>	<u>0.6 acres irrigation</u>
Lot 5	<u>SE$\frac{1}{4}$ NW$\frac{1}{4}$</u>	<u>Section 23 T40S R8E W.M.</u>	<u>11.1 acres irrigation</u>
Lot 6	<u>NE$\frac{1}{4}$ SW$\frac{1}{4}$</u>	<u>Section 23 T40S R8E W.M.</u>	<u>8.7 acres irrigation</u>
Lot 7	<u>NW$\frac{1}{4}$ SW$\frac{1}{4}$</u>	<u>Section 23 T40S R8E W.M.</u>	<u>38.0 acres irrigation</u>
Lot 8	<u>SW$\frac{1}{4}$ NW$\frac{1}{4}$</u>	<u>Section 23 T40S R8E W.M.</u>	<u>3.3 acres irrigation</u>
Lot 9	<u>SW$\frac{1}{4}$ SW$\frac{1}{4}$</u>	<u>Section 23 T40S R8E W.M.</u>	<u>33.5 acres irrigation</u>
Lot 3	<u>NW$\frac{1}{4}$ NW$\frac{1}{4}$</u>	<u>Section 26 T40S R8E W.M.</u>	<u>7.2 acres irrigation</u>

There is insufficient evidence to establish pre-1909 beneficial use on the remainder of the claimed lands. The record contains a variety of

statements about pre-1909 use of land for cattle grazing in the general vicinity. There are two problems with this evidence. First, some of the evidence concerns use made before the claimed lands were in private ownership or under a claim of right to the land (such as a Homestead Act claim). Beneficial use could not form the basis for a water right until it coincided with evidence of a claim of right in the land. *Hough v. Porter* 51 Or 318, 421 (1909). Second, the evidence is not specific about the location of the beneficial use. While it is possible that the area described includes the claimed lands, these generalized statements are insufficient on their own, to establish beneficial use by a preponderance of the evidence.

Finally, certain of the claimed lands lie outside the meander line of the Klamath River, and there is no evidence that beneficial use of water was made, by natural overflow or otherwise, prior to 1909.

For example, there is some evidence in the record that at least a portion of the claimed place of use was purchased in 1903 by Ottolini and Belloni, and that they leased this land for grazing after purchase. However, the location of the lands purportedly acquired is inadequately supported. In addition, there is evidence in the record that tends to contradict the evidence of the 1903 purchase. A deed shows that Belloni acquired roughly 700 acres of land in a sheriffs' sale, approximately 180 of which are included in the claimed place of use, but not until 1915.

Nonetheless, the Proposed Order infers that beneficial use of water was occurring on the entire claimed place of use by the time the various parcels comprising the claimed place of use passed into private ownership. While this is a possible inference, it is at least as likely, if not more so, that at least a portion of the place of use was not being hayed or grazed at the time that portion passed into private ownership, or indeed at any time prior to 1909. Because the Claimants have the burden of proving their claims, this inference and the evidence on which it relies is insufficient to establish the claim.

The modifications to the Proposed Order therefore rely on other evidence: the evidence of the swamp land deeds and the evidence of the “experimental farm.” Both of these types of evidence are sufficiently related to specific lands within the claimed place of use, but they do not support the approval of all of the claimed lands.

Finally, this Partial Order of Determination recognizes the portion of the claim for 1.3 acres of irrigation for Lot 11 in Section 22. The Proposed Order denied this portion of the claim due to lack of title information. The evidence indicates that this acreage was part of the “experimental farm” that began operation in 1907. The evidence is sufficient to establish this portion of the claim with a December 31, 1907 priority date.

The Rate and Duty claimed (1/40th cfs per acre and 3 acre-feet per acre per year) are not challenged by the other parties, and therefore will be allowed. The claim asserts a year-round season of use, describing flood-irrigation of the fields three times per year, beginning during the winter. However, there is no evidence for this practice prior to 1909, and it was likely not possible until the dam was built at Keno to maintain a constant high level in the river. Prior to that point, the land was inundated during the spring floods, and the water gradually receded during the remainder of the spring and summer. Consequently, a Season of Use of April 1 through October 31 is appropriate.

Reasons for modifications: The Proposed Order relies on evidence in the record about pre-1909 use of land in the vicinity of the claimed place of use. However, this evidence is inadequately tied to specific lands within the claimed place of use. This Partial Order of Determination therefore relies on swamp land deeds and other evidence in the record pertaining to pre-1909 use.

- c. Subsection #3 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

3. ~~None of the pre-1909 water right on the claimed place of use is included in the claims of the United States for the Klamath Project. The United States is the proper holder of the water right for water obtained~~

~~from the Klamath Project through contracts with the United States and the Ady District Improvement Company. The claimed appropriations described in subsection 2, above, are not included in the claims of the United States for the Klamath Project. The portion of the Claimants' claim that is based on Klamath Project appropriations is addressed in the Partial Order of Determination pertaining to the Klamath Project.~~

In addition to the claim for irrigation within the meander line, the claim included the following:

We wish to Reserve the Right to extend this claim the rest of this property described in att deeds if Bureau of Rec. fails to establish claim and Attach Rights on all Real Property for ADY Dist. Imp. Co. and Warren Act. Lands.
[sic]

(OWRD Ex. 1 at 4.)

Robert Flowers, in his Direct Testimony, characterized this portion of the claim as 180 acres under the Warren Act contract and 435.1 acres under contract with the Ady District Improvement Company. Flowers also indicated that both the Warren Act contract and the Ady District Improvement Company contract are part of the Bureau of Reclamation's Klamath Project, with a priority date of 1905. As noted in the History of this case, above, this case was consolidated with Klamath Adjudication Case 003 for a determination of the ownership of the water right in the Klamath Project. ~~The decision in that case that the United States was the legal owner of that water right, is law of the case for this matter. Moreover, because the Bureau of Reclamation did *not* fail to establish its claim, the condition for application of this portion of the claim has not been met. Because this portion of the Claimants' claim is based solely on Klamath Project appropriations, this portion of the claim is addressed in the Partial Order of Determination pertaining to the Klamath Project.~~

Reason for Modification: For clarity, all claims based on the Klamath Project appropriations are addressed in the Partial Order of Determination pertaining to the Klamath Project.

9. **Summary.** The “Summary” section of the Proposed Order is deleted in its entirety.

Reason for Modification: The “Summary” in the Proposed Order is inconsistent with the outcome of the Partial Order of Determination, and it is unnecessary to replace it.

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 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 “Summary” is deleted in its entirety.
 - 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 205. Consistent with sections A.6, A.7., and A.8, above, the outcome of the order has been modified to recognize a right for irrigation on acreage reduced by 109.7 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 205 is approved as set forth in the following Water Right Claim Description.

CLAIM NO. 205

CLAIM MAP REFERENCE:

OWRD INVESTIGATION MAP – T 40 S, R 8 E; CLAIM # 205, PAGE 88

CLAIMANT:

ROBERT FLOWERS
FLOWERS BROS. INC.
MARTIN SCULL
18110 KENO-WARDEN RD.
KLAMATH FALLS, OR 97603

SANDRAL AND KAREN TUCKER
134 PFEIFFER RD
BULVERDE, TX 71863

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

PURPOSE OR USE:

IRRIGATION OF 426.7 ACRES, BEING 399.8 ACRES FROM PODS 1, 2, 3, 4, AND 5, AND 26.9 ACRES FROM POD 6.

RATE OF USE:

10.67 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINTS OF DIVERSION, BEING 10.00 CFS OF WATER COMBINED FROM PODS 1, 2, 3, 4, AND 5, AND 0.67 CFS FROM POD 6.

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

THE POINTS OF DIVERSION IS LOCATED AS FOLLOWS:

POD Name	Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances
POD 1	40 S	8 E	WM	15	SW SW	4	NONE GIVEN
POD 2	40 S	8 E	WM	16	SE SW		
POD 3	40 S	8 E	WM	16	SW SE		
POD 4	40 S	8 E	WM	16	SE SE		
POD 5	40 S	8 E	WM	22	NE NW		
POD 6	40 S	8 E	WM	23	NE NW	4	4805 FEET NORTH AND 1415 FEET EAST FROM SW CORNER, SECTION 23

DATES OF PRIORITY AND THE PLACES OF USE ARE LOCATED AS FOLLOWS:

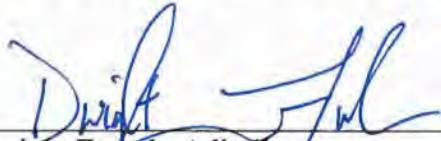
IRRIGATION								
DATE OF PRIORITY	Twp	Rng	Mer	Sec	Q-Q	GLot	Acres	Authorized PODS
April 4, 1872	40 S	8 E	WM	16	SW SE		2.5	PODS 1, 2, 3, 4, 5
	40 S	8 E	WM	16	SW SE	5	15.3	
	40 S	8 E	WM	16	SE SE		0.7	
	40 S	8 E	WM	16	SE SE	6	9.8	
February 1, 1883	40 S	8 E	WM	15	SW SW	4	14.2	PODS 1, 2, 3, 4, 5
	40 S	8 E	WM	15	SE SW	5	4.4	
	40 S	8 E	WM	15	SW SE	6	5.1	
	40 S	8 E	WM	15	SE SE	7	1.0	
	40 S	8 E	WM	21	NE NE		40.0	
	40 S	8 E	WM	21	NW NE	4	17.6	
	40 S	8 E	WM	21	SE NE	3	8.0	
	40 S	8 E	WM	22	NE NW		38.5	
	40 S	8 E	WM	22	NW NW		40.0	
	40 S	8 E	WM	22	SW NW	9	30.0	
	40 S	8 E	WM	22	SE NW		40.0	
	40 S	8 E	WM	22	NE SW	8	12.5	
December 31, 1907	40 S	8 E	WM	22	SE NE	10	15.2	PODS 1, 2, 3, 4, 5
	40 S	8 E	WM	22	NE SE	10	12.7	
	40 S	8 E	WM	22	SE SE	11	1.3	
	40 S	8 E	WM	23	SW NW	8	3.3	
	40 S	8 E	WM	23	NE SW	6	8.7	
	40 S	8 E	WM	23	NW SW	7	38.0	
	40 S	8 E	WM	23	SW SW	9	33.5	
	40 S	8 E	WM	23	SE SW		0.3	
	40 S	8 E	WM	26	NW NW	3	7.2	
December 31, 1907	40 S	8 E	WM	23	NE NW	4	15.2	POD 6
	40 S	8 E	WM	23	NW NW	4	0.6	
	40 S	8 E	WM	23	SE NW	5	11.1	

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