

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River, a
Tributary of the Pacific Ocean.

United States of America; The Klamath
Tribes; Horsefly Irrigation District; Langell
Valley Irrigation District; Medford Irrigation
District; Rogue River Valley Irrigation
District,
Contestants

AMENDED PROPOSED ORDER

Case No. 130

Claim No. 193

Contest No. 3183, 3838, 4180.

vs.

Collins Products, LLC; Allan Moates;
Harold & Maria Moates, Trustees, Pentail
Company,
Claimants

After fully considering the entire record, the Adjudicator issues this AMENDED PROPOSED ORDER pursuant to OAR 137-003-0655(3). This AMENDED PROPOSED ORDER modifies the PROPOSED ORDER ("Order") issued on January 15, 2004 by Administrative Law Judge Maurice L. Russell, II, and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130. Modifications to the ORDER are shown as follows: additions are shown in underlined text; deletions are shown in ~~strike through~~ text. Per OAR 137-003-0655, OWRD provides an explanation for any "substantial" modifications to the Order.

HISTORY OF THE CASE

THIS PROCEEDING under the provisions of ORS Ch. 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin. This proceeding for Claim 193 in the Klamath Basin Water Adjudication was commenced by a claim filed on February 1, 1991 by Richard S. Baldwin, based upon use of water beginning prior to February 24, 1909.

On October 4, 1999, OWRD issued its Preliminary Evaluations of the claim, concluding that the elements of pre-1909 claims had been established, and preliminarily approving the claim. The claim as approved was for a lesser amount of water than that claimed. (130E00002002 at 1, 131.)

Claimants did not file contests against the Preliminary Evaluation.

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Contests were timely filed by Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District, Medford Irrigation District, The United States of America and the Klamath Tribes asserting an interest in water potentially subject to the claim, and seeking to bar the claim to the extent it would affect the water rights of these contestants. (130E00002002 at 107 ff.; 130E00002002 at 114; 130E00002002 at 118.)

This matter was then referred to the Office of Administrative Hearings for a contested case hearing. Contestants Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District, Medford Irrigation District, and the Klamath Tribes withdrew their contests prior to the hearing in this matter. These participants made no further appearance in these cases. A prehearing conference was conducted by Maurice L. Russell, II, Administrative Law Judge of the Office of Administrative Hearings, on December 12, 2002, after which a Pre-Hearing Order was issued, January 2, 2003, listing the issues presented in these cases, and setting a schedule for proceedings. This schedule was amended by an order issued April 17, 2003 setting the matter for hearing on August 26, 2003. Pursuant to the order of April 17, 2003, a Notice of Hearing was duly served on all participants on July 21, 2003, for a hearing commencing August 26, 2003. The participants timely submitted written testimony and exhibits.

The hearing for cross-examination of witnesses was convened on August 26, 2003, at 9:00 a.m. in the Conference Room at the offices of the Office of Administrative Hearings at 3420 Cherry Ave. NE, Suite 140, Salem, Oregon.

Cliff Bentz appeared as attorney for claimants. Kimberly Grigsby appeared as Agency Representatives for Oregon Water Resources Department (OWRD). Stephen Palmer and Barbara Scott-Brier appeared for Contestant, United States. Allan Moates appeared and submitted to cross-examination on behalf of claimant. Maurice L. Russell, II, Administrative Law Judge for the Office of Administrative Hearings, presided. Claimant Collins Products LLC did not appear and presented no evidence.

Pursuant to an order setting Post Hearing Schedule, the participants filed additional matter, closing, responsive and reply briefs. The evidentiary record closed September 8, 2003. The briefing record closed December 1, 2003.

EVIDENTIARY RULINGS

Exhibit 130#00002001 and 130E00002002, offered by OWRD, 130E00003001 through 130E00003020, offered by Claimants and 130E00004001 through 130E00004013 offered by the United States were received into the record without objection. Exhibits 130E00006000 through 130E00006056, which had previously been offered by Contestants Horsefly Irrigation District and Langell Valley Irrigation District were not received, as those contestants withdrew their contests.

Because this case involves a determination of the application of water prior to February 24, 1909, it is inevitable and necessary that a greater reliance be placed on inference and hearsay

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than in other administrative cases. It would be a very unusual case where testimony could be taken at hearing from a percipient witness to conditions that obtained 94 years before. Nonetheless, although hearsay is generally admissible in administrative proceedings, (*Pierce v. MVD*, 125 OR App 79,85 (1993)) where hearsay is offered as substantial evidence of a fact at issue, it is necessary to apply the five-part test first stated in *Reguero v. Teacher Standards and Practices*, 312 Or 402 (1991).

In *Reguero*, the Supreme Court has enunciated 5 factors to be considered in determining whether hearsay is "substantial evidence" such as will support agency action. These factors are as follows:

[1] the alternative to relying on the hearsay evidence; [2] the importance of the facts sought to be proved by the hearsay statements to the outcome of the proceeding and considerations of economy; [3] the state of the supporting or opposing evidence, if any; [4] the degree of lack of efficacy of cross-examination with respect to the particular hearsay statements; and [5] the consequences of the decision either way."

Reguero, 312 Or at 418.

The Court of Appeals has applied the analysis established in *Reguero* in several cases, including *Cole v. DMV*, 172 Or App 573 (rev. allowed, 2001) and *Dinsmore v. DMV*, 175 Or App 509 (rev. allowed, 2001). As the court noted in *Dinsmore*, accepting hearsay as substantial evidence prevents Protestants from exercising an important right of cross-examination, and should not be done lightly.

In this case virtually all the evidence regarding circumstances prior to 1995, when the property passed to the current claimant, is hearsay. Even after that time, evidence in the file includes considerable hearsay, although much of it is corroborated by the testimony presented at hearing.

For the earlier period, however, all the hearsay offered is subject to common factors, for *Reguero* purposes, as follows:

First, the declarant is unavailable. It is likely that the declarant is deceased. Thus, there is virtually no alternative to consideration of hearsay in some form for the early period.

Second, the hearsay evidence is important. Without hearsay evidence from the earlier period, there could be no evidence at all on matters dispositive of this case.

Third, whether there is corroboration to the facts for which the hearsay is offered depends on the specific item.

Fourth, the efficacy of cross-examination of the witnesses, were they available, is also questionable on the point at issue. For example, the Largent's statement, Ex. 130E00002002 at 21, is based upon his recollection of circumstances spanning 45 years, and ending in 1966 when the statement was submitted. If the Largents were still alive, it might be possible to test the

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quality of that recollection through cross-examination, but it seems unlikely that additional details could be brought to light through cross-examination that would impeach the main point of the statement, that as early as 1921 the Largents saw the property being irrigated from the Klamath River.

Finally, the consequences of the decision in this case is of the utmost significance, at least as great as that in *Reguero*, and perhaps more so. The determination of this case will establish or dispense with the existence of a right appurtenant in the land in perpetuity.

Under the circumstances, I conclude that the hearsay evidence presented in this case for the period before 1995 meets four of the five standards applicable under *Reguero*, as substantial evidence of the facts that evidence presents. The evidentiary effect of that hearsay will depend on the state of corroborating and contrary evidence in the record, as discussed in greater detail, below.

ISSUES¹

1. Whether flooding/sub-irrigation/natural overflow creates a valid water right.
2. Whether the record contains sufficient information to establish a vested pre-1909 claim.
3. Whether the evidence supports the total irrigated acreage included in the Place of Use.
4. Whether the diversion rate exceeds the amount of water that can be beneficially used at the Place of Use.
5. Whether there is sufficient evidence to support a period of use for irrigation outside of March 1 to October 31.

FINDINGS OF FACT

1. The land (the property) subject to the claimed water right includes 6 parcels totaling 40.6 acres (Transcript at 35) as follows:

In the Southeast quarter of the Southeast quarter of Section 18, T. 39 S, R. 9 E.W.M., that portion of Government Lot 11 west of Highway 97, 4.5 acres, within Tax Lot 1600. (Ex. 130E00003001 at 2 of 4; Ex. 130E00003003; Transcript at 28-31; Ex. 130E00002001 at 95; Ex. 130E00003005.)

In the Northwest quarter of the Northeast quarter of Section 19, T. 39 S., R. 9 E.W.M., ~~either part of Lot 7 west of the quarter-quarter line or~~ Government Lot 8,

¹ Additional issues were raised by Contestants Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District, and Medford Irrigation District. Those contests were withdrawn prior to the hearing. Consequently, the additional issues asserted by those contestants will not be addressed further.

2.2 acres,² within a small portion of Tax Lot 300 (north of Joe Wright Co. Road) and a portion of Tax Lot 600 (south of Joe Wright Co. Road). (Ex. 130E00003001 at 4 of 4; Ex. 130E00003003; Transcript at 37; Ex. 130E00002001 at 95; Ex. 130E00003005.)

In the Northeast quarter of the Northeast quarter of Section 19, T.39 S., R. 9 E.W.M., Government Lot 7, 10.6 acres, within Tax Lot 300 (north of Joe Wright Co. Road) and a portion of Tax Lot 600 (south of Joe Wright Co. Road). (Ex. 130E00003001 at 4 of 4; Ex. 130E00003003; Transcript at 37; Ex. 130E00002001 at 95; Ex. 130E00003005.)

In the Southeast quarter of the Northeast quarter of Section 19, T. 39 S., R. 9 E.W.M., Government Lot 6, 13.1 acres, within a portion of Tax Lot 600. (Ex. 130E00003001 at 4 of 4; Ex. 130E00003003; Transcript at 37; Ex. 130E00002001 at 95; Ex. 130E00003005.)

In the Southeast quarter of the Northeast quarter and the Northeast quarter of the Southeast quarter of Section 19, T. 39 S., R. 9 E.W. M., Lot 2, 10.2 acres³ Government Lot 1, 5.7 acres, within a portion of Tax Lot 600. (Ex. 130E00003001 at 4 of 4; Ex. 130E00003003; Ex. 130E00002002~~1~~ at 95, Transcript at 31-32; Ex. 130E00003005.)

In the Northeast quarter of the Southeast quarter of Section 19, T. 39 S., R. 9 E.W. M., Government Lot 2, 4.5 acres, and within a portion of Tax Lot 600. (Ex. 130E00003001 at 4 of 4; Ex. 130E00003003; Ex. 130E00002001 at 95; Ex. 130E00003005.)³

² The mapping is unclear, but There is a 2.2 acre parcel immediately west of the division line between the Northeast Quarter of the Northeast Quarter of Section 19, and the Northwest Quarter of the Northeast Quarter of Section 19 (Ex. 130E00002001 at 95) that is either part of lot 7 west of the quarter-quarter line or comprises the entirety of Lot 8. The participants agreed that for the purposes of this order, such an alternative description would be acceptable. (Ex. 130E00002002 at 95, (Transcript at 32, 44.) The 1872 "Special Plat" survey map (Ex. 130E00003005) shows that Lot 8 is coextensive with the Northwest Quarter of the Northeast Quarter of Section 19 except where lies the Klamath River, and therefore this 2.2 acre parcel is within Lot 8. Reason for modification of footnote: To correct the footnote such that it agrees with the modified fact, and to show the citation for the maps on the record used to determine that the 2.2 acre parcel is only in Lot 8.

³ The original claim filed by Richard S. Baldwin was for 75 irrigated acres. Subsequently, the property was transferred to several parties. Lot 10, A 2.1 acre parcel within SE¼ SE¼, Section 18, a 0.7 acre parcel within NE¼ NE¼, Section 19, and a 0.6 acre parcel within the NW¼ NE¼, Section 19 were erroneously treated as subject to this claim, is and are held by Collins Products, LLC, which did not appear in these proceedings but relied upon the evidence in OWRD's file, now Ex. 130E00002002 and Ex. 130E00002001. The property now owned by Allan Moates, was stated at hearing to total 40.6 acres irrigated. (Transcript, at 30 35.) Reasons for modification of footnote: To move footnote to the end of section; to correct and provide additional citations to the record. In addition, the ALJ's finding with respect location of the Collins Products parcels being in Lot 10 is not supported by a preponderance of evidence on the record. Since maps on the record (Ex. 130E00003001 at 2 of 4; Ex. 130E00003003; Ex. 130E00002001 at 95, Ex. 130E00003005), provide definitive information about location of the property held by Collins Products, OWRD views this change as the correction of a clerical error. (See complete explanation and description of lands owned by Collins Products in Fn 6)

Claimant Allen Moates holds the ~~entire~~ parcels, listed above, comprising 40.6 acres³ within Tax Lots 300, 600 and 1600. (Direct Test. of Allen Moates, at 5; Ex. 130E00002002¹ at 75 52-54, 73-74.)

¶ The original claimant made a claim for natural flooding and irrigation on 75 acres of property he owned, with a rate of 3.0 cfs per season. The season of use is generally described as “[d]epending on weather, Autumn, Winter and Spring floodings, October to March; and for irrigation and drainage, April to October”; it is further noted that the beginning and of ending of the irrigation season is subject to “annual and cyclical variables.” The claimed priority date is October 6, 1875. (Ex. 130E00002001 at 1-5.)

Collins Products, LLC holds “a strip of land 100 feet in width parallel to and adjacent to the said low water mark on the left bank of the Klamath River” (Ex. 130E00002001 at 81), being in pertinent part Tax Lots 1500 and 400. Tax Lot 1500 is a portion of Government Lot 11, comprising 2.1 acres⁵, located in the East Half Southeast quarter of the Southeast quarter of Section 18. Tax Lot 400 is 0.7 acres within a portion of Government Lot 7, located in ~~the~~ Northeast quarter of the Northeast quarter, and 0.6 acres within a portion of Government Lot 8, located in the Northwest quarter of the Northeast quarter, Section 19, T. 39 S., R. 9 E.W.M. (Ex. 130E00002001 at 52-54, 67, 76-82.) This strip of land is referred to as Parcel 10 in the legal description for this property. (Ex. 130E00002001 at 81). Although Collins Products, LLC has been treated throughout these proceedings as a proper claimant, the property held by Collins Products, LLC and listed as subject to the claim was not acquired from Richard S. Baldwin, but was transferred from Weyerhaeuser Company in 1996. (Ex. 130E00002002¹ at 75-81.) The property held by Collins Products was acquired by Weyerhaeuser Company from Ed Sutton and Mary J. Sutton in 1923, and was expressly excluded from the property conveyed to Richard S. and Florence Baldwin in 1960. (Ex. 130E00002002¹ at 38.) Richard S. Baldwin was the original claimant, but is not in the chain of title for the property now held by Collins Products, LLC.⁶

⁴ Ex. 130E00002002 is a one page AFFIDAVIT AND TESTIMONY OF TERI HRANAC; Ex. 130E00002001 is OREGON WATER RESOURCES DEPARTMENT’S EXHIBIT 1, pages 1 – 135. Reason for addition of footnote: To explain the corrections made to OWRD exhibits in this modified Proposed Order.

⁵ Throughout the record, this 2.1 acres within the SE¹/₄ SE¹/₄, Section 18 was incorrectly said to be within Lot 10. Although described in the deed as being a part of Parcel 10, (Ex. 130E00002001 at 81), this 2.1 acres is within Government Lot 11. Government Lot 10 is within the NE¹/₄ SE¹/₄, Section 18, which is north of Lot 11. (Ex. 130E00003001 at 2 of 4; Ex. 130E00003003; Ex. 130E00002001 at 95; Ex. 130E00003005.) Reason for addition of footnote: To correct and clarify the description of the location of the 2.1 acres using evidence on the record. The description provided in the Proposed Order is not supported by a preponderance of the evidence. (See also Fn 3.)

⁶ When sorting out Claim 193 in 1999 just prior to open inspection, OWRD found that the Baldwin’s had sold their property in 1995. (Ex. 130E00002001 at 51.) OWRD mistakenly concluded that Collins Products, LLC was a purchaser of one of Baldwin’s parcels, and acted on that mistaken conclusion when initiating correspondence with Collins Products, LLC regarding the company’s intention to continue pursuing Claim 193 Amended Proposed Order; Case 130, Claim 193

Reasons for Modifications: To provide correct and clarify the location descriptions of the 40.6 acres claimed, using evidence on the record. Certain of the descriptions provided in the Proposed Order were not supported by a preponderance of evidence in the record. The ALJ's proposed finding of fact failed to fully set forth the evidence on the record. To correct and provide additional citations to the record. In addition, the ALJ's finding with respect location of the 2.2 acres within the NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, being unclear as to whether it is in both Lots 7 or 8 or only in Lot 8 is not supported by a preponderance of evidence on the record. Since the comparative use maps on the record show that the 2.2 acres are only within Lot 8, OWRD views this change as the correction of a clerical error. (See also citation to maps in Fn 2). The ALJ's finding with respect the 10.2 acres within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 19, all being located in Lot 2 is not supported by a preponderance of evidence on the record. Since the comparative use maps on the record shows that 5.7 acres within the SE $\frac{1}{4}$ NE $\frac{1}{4}$ are in Lot 1 and 4.5 acres within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ are in Lot 2, OWRD views this change as the correction of a clerical error.

2. The area in which the property was located was settled by 1858. At that time, the property was subject to annual flooding, and at least portions of it were considered to be within the meander of the Klamath River. (Ex. 130E00003004, 130E00003001 at 4.) The area was resurveyed in 1872, at which point almost all the property was considered to be outside the meander line. (Ex. 130E00003001 at 2, 4.) The lowest portions of the property may still have been wet enough to support tule and swamp grass throughout the year, and in 1872 was noted as "particularly valuable to the settler's for the growth of grass large quantities of which being made into hay each season." (Ex. 130E00003005.)

Reason for Modification: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record.

3. On October 6, 1875, Lots 10, 11 and 7 of the property were listed in a federal patent

(Ex. 130E00002001 at 58). Collins Products, LLC responded with an intention to proceed in matters of Claim 193 (Ex. 130E00002001 at 68). This confusion may have originated because (1) the point of diversion is located on Collins Products' property, for which there is an easement (Transcript at 41-42), and (2) Baldwin did not submit a listing of his claimed place of use but in the Statement and Proof of Claim (Item 7), simply stated "I accept the OWRD maps." (Ex. 130E00002001 at 3). In OWRD's Work In Progress (WIP) file, the 2.1 acres within SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 18, the 0.7 acres within NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, and the 0.6 acres within the NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19 (a total of 3.4 acres belonging to Collins Products) were erroneously included as part of Baldwin's claim. (Ex. 130E00002001 at 106.) In the Preliminary Evaluation, OWRD stated incorrectly that the claim was "for irrigation of 49.5 acres." (46.1 + 3.4 = 49.5) (Ex. 130E00002001 at 131.) Based on OWRD's map, and ownership of property by Baldwin, his original claim was for 46.1 acres. According to testimony, the 46.1 acres was reduced to 40.6; the 10.0 acres shown on the OWRD map within the SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 18 was corrected to 4.5 acres. (46.1 - 10 + 4.5 = 40.6) (Transcript at 28-31.) The 1987 OWRD Field Inspection Report for Claim 193 noted the place of use as being in three tax lots appurtenant to property owned by Baldwin; it did not include property appurtenant to Tax Lots 400 and 1500. (Ex. 130E00002001 at 52 and 104.) **Reason for addition of the footnote:** To provide citations to the record while explaining the context and history of the Collins Products' property having been erroneously included in Claim 193; to show the reconciliation of the 40.6 acres subject to Claim 193.

as having been conveyed to James Tobin. (Ex. 130E000030014.)

4. In 1882 the same lots were listed in the Minutes of the Board of Commissioners of the State Land Board as having been reclaimed by John F. Miller. (Ex. 130E000030011.)

Reason for Modification: To provide an additional citation to the record.

5. In 1890, or shortly thereafter, a levy was built running generally southwest to northeast across the northern part of the property, to prevent the Klamath River from overflowing directly down Lost River Slough to Tule Lake during periods of high water. (Ex. 130E00003013 at 8.) That levy, presently referred to as the “Adams Levy,” still exists, and has the effect of diverting river overflow onto the property. (Direct Test. of Moates, at 7, 8.) Until 1917, water flowed around the south end of the Adams Levy during periods of high water, flowing over the entire property before draining into Lost River Slough. (Direct Test. of Moates, at 8, Ex. 130E00003007.) Subsequently, (between 1917 and 1936, compare Ex. 130E00003008, 130E00003009) a “control levy” was built, tending generally east-west across Lot 7, with an extension of Joe Wright Road running on top of it. A headgate has been placed through this levy to allow water to come into the southerly portion of the property. (Ex. 130E00003001 at 4, 130E00003003, Direct Test. of Moates at 3.) The entire parcel has been under cultivation for grass and pasture, and been irrigated from the Klamath River. (Ex. 130E00002002~~1~~ at 21.)

Reason for Modification: To correct citations to the record.

6. Water is diverted from the Klamath River through a ditch running across Lot ~~10~~ 11⁷ (pursuant to an easement with the present owners) in the SE¹/₄ SE¹/₄, Section 18, T 39 S, R 9 E. W. M. (Transcript at ~~35~~ 41-42; Ex. 130E00002001 at 95; Direct Test. of Moates at 2.) It then runs south across Lot 11 through ditches, and along the western face of the Adams Levy to the intersection of the Adams Levy and the Joe Wright Road control levy. The lands north of the Control Levy and on both sides of the Adams Levy, are “subirrigated”⁸ due to water resting in front of the Adams Levy. Part of the distribution system is the use of the levees. (Direct Test. of Moates at 2-5; Transcript at 42, 99-100.) Lands south of the Control Levy are irrigated by water that ~~it~~ passes through the headgate in the Control Levy, and is conducted by ditches throughout the southern part of the property. As it passes through these ditches, water “subirrigates”⁹ (that is, soaks into the soil) into the adjacent area, providing moisture for growing pasture grass. (Direct Test. of Moates at 3-5; Transcript at 100-101.)

⁷ See fn 5, above. **Reason for addition of footnote:** To explain the correction from Lot 10 to Lot 11.

⁸ Here subirrigation is created by artificial works; water is diverted from a point of diversion then subirrigates both sides of the levy as a result of as a result of water being channeled along the face of the Adam’s Levy. **Reason for addition of footnote:** To clarify that “subirrigation” as used here is not referring to “natural subirrigation.”

⁹ Here subirrigation is also created by artificial works; water enters the system through a point of diversion, moves along the face of the Adam’s Levy, then passes through a headgate in the Contol Levy into canals and Amended Proposed Order; Case 130, Claim 193

During periods of high water, between October and March each year, the property north of the control levy and west of the Adams levy is subject to flooding. During this time, water soaks (or “subirrigates”) through the soil under the Adams Levy and wets the part of the property to the east of that levy. The subirrigation that occurs during times of high water in the winter and spring is natural subirrigation. (Direct Test. of Moates at 5, Paragraph 16.)

¶ Between March 1 and October 31 (Direct Test. of Moates at 5, Paragraph 16), water flows from the Klamath River through the diversion point, filling ditches and ponds north of the Control Levy and West of the Adams Levy to the headgate through the Control Levy. Claimant Moates opens this headgate periodically beginning in March to allow water to flow to the remainder of the property. Water subirrigates from ditches and ponds throughout the property, providing moisture for grass and pasture. (Direct Test. of Moates at 5; Transcript at 69, 99-101.) The Claimant Moates uses the water he diverts between March 1 and October 31 for irrigation purposes, growing grass for pasture and using it for cattle and horses. (Direct Test. of Moates at 5, Paragraph 17.)

Reasons for Modifications: To correct a lot number; to correct and provide additional citations to the record; the ALJ’s proposed finding of fact failed to fully set forth the evidence on the record.

7. Water from the Klamath River was beneficially used for irrigation of grass for pasture on Lots 1, 2, 6, 7, 8,⁴⁰ and 11 from October 6, 1875 through the present.

Reason for Modification: To make the lot numbers consistent with those identified in Modified Proposed Order Finding of Fact #1.

8. The appropriate rate, duty and season for all parcels subject to this claim are as follows:

RATE: 1/40 cfs/acre

DUTY: 3.5 af/acre

SEASON: January 1 to Dec. 1, being the acceptance of natural subirrigation from November 1 through February 29, and diverted from the point of diversion March 1 through October 31, which is located on the Klamath River within the SE¼ SE¼, Section 18.

Reasons for Modification: To clarify the season of use in order to make it consistent with the Proposed Order’s Finding of Fact #6.

ditches from which the subirrigation occurs. **Reason for addition of footnote:** To clarify that “subirrigation” as used here is not referring natural subirrigation.

⁴⁰ Or additional acreage in Lot 7, cf. fn 1, above. **Reason for deleting the footnote:** As explained in Fn 2, this acreage is only in Lot 8.

CONCLUSIONS OF LAW

1. Flooding/sub-irrigation/natural overflow creates Beneficial use of natural overflow may form the basis for a valid pre-1909 water right, where diversion of water by artificial works is unnecessary. Naturally occurring subirrigation may not form the basis for a valid pre-1909 water right. Use of naturally occurring subirrigation is a privilege only.
Reason for modification: To clarify the legal status of natural overflow and naturally occurring subirrigation.
2. The record contains sufficient information to establish a vested pre-1909 claim respecting the property, with the exception of that portion of lot 10 presently the 3.4 acres held by Collins Products, LLC, being 2.1 acres within Lot 11, SE $\frac{1}{4}$ SE $\frac{1}{4}$, Section 18, 0.7 acres within Lot 7, NE $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19, and 0.6 acres within Lot 8, NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 19. The Collins Products, LLC property is not subject to this claim, and Collins Products, LLC is not a proper claimant in these proceedings.
Reason for Modification: The evidence on the record, as described in the modified findings of fact supports these corrected and clarified legal descriptions of lands not subject to this claim.
3. The evidence supports 40.6 acres to be included in the Place of Use.
4. The diversion rate allowed in the Preliminary Examination does not exceed the amount of water that can be beneficially used at the Place of Use.
5. There is sufficient evidence to support a period of use for irrigation the acceptance of natural subirrigation during periods of high water outside of the irrigation season when water is diverted from March 1 to October 31 from a point of diversion.
Reason for Modification: 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 a conclusion other than Conclusion #5 as stated in the 2004 Proposed Order.

OPINION

The burden of proof to establish a claim by a preponderance of the evidence is on the claimant. ORS 539.110; OAR 690-028-0040. In order to meet that burden, Claimant must show (1) an intent to apply the water to some beneficial use existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, channel or other structure; and (3) the application of the water within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930).

It is also the burden of the Claimant to prove the terms of the right, such as the priority date, amount claimed, season of use and number and location of irrigated acres.

1. Flooding/sub-irrigation/natural overflow creates a valid water right.

In *Warner Valley Stock Company v. Lynch*, 215 Or 523 (1959), the court stated:

It should be emphasized that the objectors whose lands are irrigated by the waters from Hart Lake have acquired a vested right in waters of Warner Valley. By their original application of water to a beneficial use, subsequently recognized by the adjudication of 1929, the objectors acquired a right to irrigate 6,532.15 acres. These rights they still have. The fact that they no longer have the privilege of a natural overflow method of diversion does not mean that their right to the waters in Warner Valley exists only if the water in fact overflows Hart Lake.

Warner Valley Stock Company at 538.

The court in that case expressly stated that, notwithstanding the characterization of the natural overflow method as a *privilege*, the parties held *a vested right to the water*. That is precisely the issue presented here. While Claimant may no longer have the privilege to irrigate by natural overflow, as being a wasteful use of a scarce and fully appropriated resource, this does not mean that Claimant does not have a vested right to the water. † It is concluded that Natural Overflow irrigation can be the basis for a pre-1909 water right.

2. The record contains sufficient information to establish a vested pre-1909 claim respecting the property, with the exception of of ~~that portion of lot 10~~ the 3.4 acres presently held by Collins Products, LLC. The Collins Products, LLC property is not subject to this claim, and Collins Products, LLC is not a proper claimant in these proceedings.

The evidence establishes that the properties in question were seasonally inundated by the natural rise of the Klamath River. Between 1858 and 1875, the properties began to be cultivated, making use of this natural flooding to irrigate the land. By 1882, a significant portion of the property had been reclaimed.

In 1890, after a season of severe flooding, the Adams Levy was built to cut the flow of water from Klamath River down the Lost River Slough to Tule Lake. This diverted the water onto most of the property during seasonal high water. After 1909, a second “control” levy was also placed across the property, with a headgate to control the flow of water around the southern end of the Adams Levy. Given the statement of Mildred and Herbert Largent that the property was irrigated in 1921¹¹ it is appropriate to infer that it was irrigated, either by inundation or subirrigation up to that date, at least.

¹¹ In 1966 the Largents stated that they had observed irrigation on the property “for a period of forty-five, 45, years.”

A peculiarity of this case is the situation of the 3.4 acres, being 2.1 acres within Lot 10 11, Section 18, 0.7 acres within Lot 7, Section 19, and 0.6 acres within Lot 8, Section 19. Collins Products, LLC, owner of ~~Lot 10~~ these lands, declined to appear in these proceedings, relying on the evidence in OWRD's file, included on the record as Ex. 130E00002001 and 130E00002002, to prove up that portion of the claim. However, closer consideration of that file shows that the property held by Collins Products, LLC was not in the chain of title from the original claimant, Richard S. Baldwin. Indeed, it was expressly excluded in the deed to the Baldwins. Instead, that property was transferred to Weyerhaeuser Company in 1923 by a predecessor in title to the Baldwins. As a result, although Collins Products, LLC has been treated as a proper claimant in these proceedings and ~~Lot 10 has~~ these 3.4 acres have been treated as part of the claim, this was erroneous. The property owned by Collins Products, LLC is not subject to the claim filed by the Baldwins, and Collins Products, LLC is not a proper claimant in these proceedings¹².

3. The evidence supports 40.6 acres to be included in the Place of Use.

Although the original claim was for 75 acres, Claimant Allen Moates conceded that this should be reduced to 40.6 acres. The evidence supports irrigation of at least this much property.

4. The diversion rate allowed in the Preliminary Examination does not exceed the amount of water that can be beneficially used at the Place of Use.

The diversion rate allowed by the Preliminary Examination is 1/40th cfs/acre. This is the standard rate established for this area, according to Appendix A of the Preliminary Evaluation. Although the Preliminary Examination allowed 49.5 acres¹³ and 1.24 cfs, the acreage subject to this claim has been reduced to 40.6 acres, and the total amount actually used should be reduced accordingly, to 1.02 cfs.

5. There is sufficient evidence to support a period of use for irrigation a privilege to accept the benefits of natural subirrigation that occurs outside of the irrigation season during which water is diverted from a specific point of diversion, being March 1 to October 31.

~~According to Appendix A of the Preliminary Evaluation, the accuracy of which has not been challenged, the standard period of use for irrigation by water artificially diverted is March 1 through October 31. Claimant Moates testified that he opens the floodgate on the Control Levy in March, and irrigates the property artificially from the diversion point throughout the irrigation season, which ends October 31. However, the testimony also establishes that much of the property is flooded during periods of high water, and that this flooding naturally subirrigates the property outside of the irrigation season. According to Appendix A, noted in the Preliminary Evaluation, when property is subject to "natural irrigation" the season of use is considered to be "the period of use claimed" unless the evidence does not support that~~

¹² This conclusion does not mean that there is no claim for a water right by Collins Products, LLC. However, any such claim would need to be considered in a different case, perhaps one in which Weyerhaeuser was the original claimant. That claim, if any, is not before me in this case.

¹³ See fn 6, above. Reason for addition of footnote: For the purpose of clarification.

~~allowance. In this case, given the periodic flooding reported by the witnesses, The period claimed stated in the Preliminary Evaluation, January 1 to December 1, is exceeds the period of use claimed and supported in the evidence for irrigation; the Claimant claimed, for irrigation and drainage, April to October, but further noted that the beginning and of ending of the irrigation season is subject to “annual and cyclical variables.” This variation was refined in testimony as being an irrigation season of March 1 to October 31.~~

The acceptance of natural subirrigation outside of the claimed irrigation season is a privilege only and as such cannot be insisted upon if it interferes with the appropriation of the waters for beneficial use by others, and no priority date, rate or duty shall attach to such privilege. This privilege may not be transferred to any other property, and may not be altered by the use of any physical means to modify the manner in which natural subirrigation occurs, to contain or further distribute water or to increase in any other way the consumption which takes place from natural subirrigation. Any such alteration shall require the filing with OWRD of an application for a permit to appropriate water under ORS 537.150. Any such alteration shall require the filing with OWRD of an application for a permit to appropriate water under ORS.537.150.

Reason for Modifications: To correct and clarify the legal description of lands not subject to this claim, to provide clarity of evidence on the record and provide further support for the conclusions reached herein; to apply the appropriate legal bases to the Proposed Order’s modified findings of fact; to clarify the use of water outside of the March 1 to October 31 irrigation season as a privilege only.

SUMMARY

A preponderance of the evidence establishes that the elements of a pre-1909 appropriation have been met respecting Claim 193, as provided in the Preliminary Evaluation, except as to the property ~~designated as Lot 10~~, held by Collins Products, LLC, which is not properly part of this claim.

Reason for Modification: To correct and clarify the property description for which the elements of a pre-1909 appropriation have not been met.

ORDER

~~I propose that the Adjudicator issue the following order:~~

Claim 193:

The claim shall be allowed as stated in the Preliminary Evaluation except as follows:

Lot 10, The 2.1 acres within SE¹/₄ SE¹/₄ , Section 18, the 0.7 acres within the NE¹/₄ NE¹/₄, Section 19, and the 0.6 acres within the NW¹/₄ NE¹/₄ , Section 19, which are owned by Collins Products, LLC shall be deleted from the claim.

With respect to the property held by Allen Moates, described as being within Lots 1
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(5.7 acres within the SE¼ NE¼), 2 (4.5 acres within the NE¼ SE¼), 6 (13.1 acres within the SE¼ NE¼), 7 (10.6 acres within the NE¼ NE¼), and 8 (2.2 acres within the NW¼ NE¼), all in Section 19; and 11 (4.5 acres within the SE¼ SE¼) in Section 18;

Use: Irrigation of 40.6 acres.

Amount Actually Beneficially Used: 1.02 cfs, measured at the point of diversion.

Season of Use: March 1 – October 31 for irrigation from a point of diversion located in the Lot 11, SE ¼ SE ¼ , Section 18, Township 39 South, Range 9 East, W.M.

November 1 – February 29 for acceptance of natural subirrigation during periods of high water.

Reasons for Modifications: To correct and clarify the legal description of lands pertaining to this claim; to describe the season of use such the Order is consistent with the Proposed Order's Finding of Fact #6.

1. The use of water for a portion of Claim 193 as specified in Paragraphs 2.a.-k., below, is a privilege only.
 - a. This privilege is limited to the acceptance of natural subirrigation on 40.6 acres.
 - b. This privilege has a season of use November 1 through February 29.
 - c. This privilege cannot be insisted upon if it interferes with the appropriation of the waters for beneficial use by others, and no priority date, rate or duty shall attach to such privilege.
 - d. This privilege may not be transferred to any other property.
 - e. This privilege may not be altered by the use of any physical means to modify the manner in which natural subirrigation occurs, to contain or further distribute water or to increase in any other way the consumption which takes place from natural subirrigation. Any such alteration shall require the filing with OWRD of an application for a permit to appropriate water under ORS 537.150.
 - f. This privilege to use water as specified in Paragraphs 5.a.-k., below, does not constitute a water right; as such, OWRD will not issue a certificate for this portion of Claim 193.
2. The portion of Claim 193 that is a privilege only should be confirmed as set forth below:
 - a. **CLAIM NO.** 193
 - b. **CLAIM MAP REFERENCE:** OWRD INVESTIGATION MAP – T 39 S, R 9 E

c. CLAIMANTS:

ALLAN MOATES
7100 HWY 97 S
KLAMATH FALLS OR 97601

HAROLD AND MARIA MOATES, TRUSTEES
PENTAIL CO.
1644 EVERGREEN DR
CARSON CITY, NV 89703

d. SOURCE OF WATER:

The KLAMATH RIVER, tributary to the PACIFIC OCEAN

e. PURPOSE OR USE:

ACCEPTANCE OF NATURAL SUBIRRIGATION ON 40.6 ACRES

f. RATE OF USE:

UNSPECIFIED – MAY ACCEPT NATURAL SUBIRRIGATION ON 40.6 ACRES.

g. PERIOD OF ALLOWED USE: NOVEMBER 1 – FEBRUARY 29

h. DATE OF PRIORITY: NONE

i. NO SPECIFIC POINT OF DIVERSION:

NATURAL SUBIRRIGATION FROM THE KLAMATH RIVER LOCATED APPROXIMATELY WITHIN THE SE¼, SECTION 18 AND THE NE¼, SECTION 19, TOWNSHIP 39 SOUTH, RANGE 9 EAST, W.M.

j. THE PLACE OF USE IS LOCATED AS FOLLOWS:

| IRRIGATION | | | | | | |
|------------|-----|-----|-----|-------|------|-------|
| Twp | Rng | Mer | Sec | Q-Q | GLot | Acres |
| 39 S | 9 E | WM | 18 | SE SE | 11 | 4.5 |
| 39 S | 9 E | WM | 19 | NE NE | 7 | 10.6 |
| 39 S | 9 E | WM | 19 | NW NE | 8 | 2.2 |
| 39 S | 9 E | WM | 19 | SE NE | 1 | 5.7 |
| 39 S | 9 E | WM | 19 | SE NE | 6 | 13.1 |
| 39 S | 9 E | WM | 19 | NE SE | 2 | 4.5 |

k. FURTHER LIMITATIONS:

THE METHOD OF DIVERSION BY WAY OF NATURAL SUBIRRIGATION IS A PRIVILEGE ONLY AND CANNOT BE INSISTED UPON IF IT INTERFERES WITH THE APPROPRIATION OF THE WATERS FOR BENEFICIAL USE BY OTHERS, MAY NOT BE TRANSFERRED TO ANY OTHER PROPERTY, AND MAY NOT BE ALTERED BY THE USE OF ANY PHYSICAL MEANS.

3. A water right for Claim 193 should be confirmed as set forth in the following Water Right Claim Description.

CLAIM NO. 193

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

CLAIMANTS: ALLAN MOATES

7100 HWY 97 S
KLAMATH FALLS OR 97601

HAROLD AND MARIA MOATES, TRUSTEES
PENTAIL CO.
1644 EVERGREEN DR
CARSON CITY, NV 89703

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

PURPOSE OR USE: IRRIGATION OF 40.6 ACRES FROM A POINT OF DIVERSION

RATE OF USE:

1.02 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINT OF DIVERSION.

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

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

PERIOD OF ALLOWED USE: MARCH 1 - OCTOBER 31

DATE OF PRIORITY: OCTOBER 6, 1875

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

| Twp | Rng | Mer | Sec | Q-Q | GLot |
|------|-----|-----|-----|-------|------|
| 39 S | 9 E | WM | 18 | SE SE | 11 |

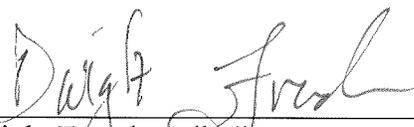
THE PLACE OF USE IS LOCATED AS FOLLOWS:

| IRRIGATION | | | | | | |
|------------|-----|-----|-----|-------|------|-------|
| Twp | Rng | Mer | Sec | Q-Q | GLot | Acres |
| 39 S | 9 E | WM | 18 | SE SE | 11 | 4.5 |
| 39 S | 9 E | WM | 19 | NE NE | 7 | 10.6 |
| 39 S | 9 E | WM | 19 | NW NE | 8 | 2.2 |
| 39 S | 9 E | WM | 19 | SE NE | 1 | 5.7 |
| 39 S | 9 E | WM | 19 | SE NE | 6 | 13.1 |
| 39 S | 9 E | WM | 19 | NE SE | 2 | 4.5 |

Reason for modifications to the Order section: To reflect the modifications made to the Findings of Fact, Conclusions of Law and Opinion sections.

IT IS SO ORDERED.

Dated at Salem, Oregon on July 21, 2011



Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Amended Proposed Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations contained within this Amended Proposed Order. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

Exceptions must be in writing and must clearly and concisely identify the portions of this Amended Proposed Order excepted to and cite to appropriate portions of the record to which modifications are sought. Parties opposing these exceptions may file written arguments in opposition to the exceptions within 45 days of service of the Amended Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

**Dwight French, Adjudicator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301**

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2011, I mailed a true copy of the following: AMENDED PROPOSED ORDER, by first class mail with first class postage prepaid thereon, and addressed to:

Stephen R. Palmer, Attorney
US Department of the Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825

Jesse D. Ratcliffe
Assistant Attorneys General
Oregon Department of Justice
1162 Court St. NE
Salem, OR 97301

Cliff Bentz
Yturri Rose LLP
PO Box "S"
Ontairo, OR 97914

Carl V. Ullman
Water Adjudication Project
The Klamath Tribes
PO Box 957
Chiloquin, OR 97624

Laura Schroeder
Schroeder Law Office
PO Box 12527
Portland, OR 97212-0527

Richard M. Glick / Nanci Klinger
Davis Wright Tremaine
1300 SW 5th Ave., Suite 2300
Portland, OR 97201



Adjudications Specialist
Oregon Water Resources Department