

**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
KLAMATH SPRIG ANDHONKER)	DETERMINATION
CLUB, INC.)	
)	Water Right Claim 286

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 286 (Claimant: KLAMATH SPRIG AND HONKER CLUB, INC.; PO BOX 900, GEYSERVILLE, CA 95441) and its associated contests (3209, 3425, 3859, and 4211) were referred to the Office of Administrative Hearings for a contested case hearing. The Office of Administrative Hearings designated these matters as Case 148.
2. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) on January 19, 2007, denying Claim 286.
3. The United States filed exceptions to the Proposed Order on February 20, 2007. The Claimant filed responses to the United States' exceptions on February 24, 2007.
4. The exceptions filed to the Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 286. The United States exceptions have been found be persuasive in part, and therefore, modifications are made to the Proposed Order as described in Sections A.6 through A.9, below.
5. The Proposed Order is adopted and incorporated with modifications, into this Partial Order of Determination, as follows:
 - a. The "History of the Case" is adopted with modifications, as set forth in Section A.6, below.
 - b. The "Evidentiary Rulings" is adopted without modification.
 - c. The "Issues of Law" is adopted without modification.
 - d. The "Findings of Fact" is adopted with modifications, as set forth in Section A.7, below.

- e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A. 8, below.
- f. The “Discussion” is adopted with modifications, as set forth in Section A.9, below.
- g. The “Order” is adopted without modification.

6. **History of the Case.** The second-to-last paragraph of the “History of the Case” section is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

Thereafter, on August 17, 2006, a post-hearing briefing schedule was issued by ALJ Gutman, requiring claimant’s written argument to be filed by September 22, 2006. Claimant ~~having~~ filed no argument by the date specified, ~~the other participants declined to file argument, and the record was closed.~~ The United States timely filed its Closing Brief on November 3, 2006.

Reason for Modification: To clarify that the United States timely and properly filed a closing argument in this proceeding.

7. **Findings of Fact.** The Proposed Order’s “Findings of Fact” section is modified as follows. Findings of Fact 1, 3 and 4 are adopted without modification. Finding of Fact 2 is modified as shown in the “Modified Proposed Order Findings of Fact” section, below. Finding of Fact 5 is added as shown in the “Additional Findings of Fact” section, below. Additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text.

Modified Proposed Order Findings of Fact

2) The property in question is near the former shores of Lower Klamath Lake. Prior to 1909, all or part of the property may have been flooded during seasonal rises in the water level of the lake. (Ex. U3.) At that time, the property was part of a larger parcel exceeding 2,300 acres. Cattle were grazed on some part of this larger property prior to 1909, but there is no evidence of cattle grazing specifically on the claimed place of use ~~that was farmed by grazing and production of hay.~~ (Ex. U3 Written Direct Testimony and Affidavit of H. Loring Gurney at 7-8).

Additional Finding of Fact #5

5) On April 15, 1912, the claimant’s predecessors in interest withdrew from the Klamath Project and did not seek water rights from the Project until at least 1942. Written Direct Testimony and Affidavit of H. Loring Gurney at 8.

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to provide additional citations to the record; to clarify that there is no evidence of cattle grazing specifically on the claimed lands.

8. **Conclusions of Law.** Within the Proposed Order's "Conclusions of Law" section, Conclusion of Law 9 is modified as follows (additions are shown in "underline" text, deletions are shown in "~~striketrough~~" text):

9) Any pre-1909 use of water on the claimed place of use was ~~may have been~~ abandoned.

Reason for Modification: To reflect the facts as supported by a preponderance of evidence on the record in this proceeding.

9. **Discussion.** Within the Proposed Order's "Discussion" section, the third paragraph is modified as follows (additions are shown in "underline" text, deletions are shown in "~~striketrough~~" text):

In order to establish such a water right, Claimant must show that (1) prior to February 24, 1909, the appropriator had an intent to apply the water to some beneficial use existing at the time or contemplated in the future; (2) water was subsequently diverted from the natural channel by means of a ditch, channel or other structure; and (3) water was applied within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930). It has also been held that harvesting of hay and other products nurtured by natural overflow of water ~~and subirrigation of land~~ can be sufficient water use to establish a pre-1909 appropriation. *In re Silvies River* 115 Or 27, 66 (1925). Here, the evidence is sufficient to show that, in all probability, part, if not all, the land in question was subject to seasonal flooding, prior to blockage of the connection between Lower Klamath Lake and the Klamath River. The evidence also shows that the larger parcel of which the land in question was once a part, was farmed through grazing and production of hay. The evidence in its present form is not sufficient to show that the particular place of use claimed was so used prior to 1909. In addition, the evidence shows that, to the extent any part of the particular place of use claimed was so used prior to 1909, that right was abandoned through non-use between 1912 and 1942. While abandonment requires a showing of an intent to abandon, that intent may be inferred through a sufficiently long enough

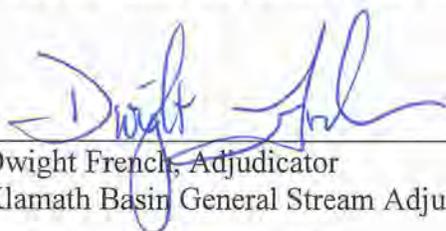
period of non-use. See, e.g., In the Matter of the Clark Fork River, 902 P2d 1353 (Mont 1996). Under the facts in this case, 30 years of non-use is sufficient to establish an intent to abandon. In any event, claimant no longer asserts a pre-1909 right, having instead argued that the right is based on riparian water rights recognized under California law. To the extent that claimant may have originally made a claim based on the United States Notice of Appropriation of May 19, 1905, as part of the development of the Klamath Reclamation Project, this portion of the claim is addressed in the Partial Order of Determination pertaining to the Klamath Project.

Reason for Modification: To reflect the facts as supported by a preponderance of evidence on the record in this proceeding.

B. DETERMINATION

1. The Proposed Order is adopted and incorporated with modifications, into this Partial Order of Determination, as follows:
 - a. The “History of the Case” is adopted with modifications, as set forth in Section A.6, above.
 - b. The “Evidentiary Rulings” is adopted without modification.
 - c. The “Issues of Law” is adopted without modification.
 - d. The “Findings of Fact” is adopted with modifications, as set forth in Section A.7, above.
 - e. The “Conclusions of Law” is adopted with modifications, as set forth in Section A. 8, above.
 - f. The “Discussion” is adopted with modifications, as set forth in Section A.9, above.
 - g. The “Order” is adopted without modification.
2. The elements of a pre-1909 claim are not 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 286 is denied and is of no force or effect.

Dated at Salem, Oregon on March 7, 2013



Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

PARTIAL ORDER OF DETERMINATION

CLAIM 286
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