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

**AUG 31 2005
WATER RESOURCES DEPT
SALEM, OREGON**

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

Horsefly Irrigation District; Langell Valley Irrigation District; United States of America; The Klamath Tribes, Contestants vs.	PROPOSED ORDER Case No. 136 Claim: 203
Barney Calmes and Daisy Calmes; Claimants/Contestants. vs.	Contests: 35, 3189 ¹ , 3413 ² , 3845, and 4187 ³ Case No. 138
Larry E. Peacore and Carolyn F. Peacore, Trustees of the Peacore Family Trust; Claimants. vs.	Claim: 206 Contests: 3192, ⁴ 3847, and 4189 ⁵ Case No. 139
Kite Ranches, Inc., Claimant/Contestant.	Claims: 207 Contests: 34, 2857, ⁶ 3193 ⁷ , 3414, ⁸ 3848, and 4190

¹ On May 1, 2003, Medford Irrigation District and Rogue River Irrigation District withdrew from participation in Contest 3189.

² On March 25, 2003, Klamath Irrigation District *et al*, commonly referred to as the Klamath Project Water Users, withdrew their Contest 3413 to claim 203.

³ On March 25, 2003, the Klamath Tribes withdrew their contest 4187 to claim 203, without prejudice.

⁴ On June 9, 2003, Medford Irrigation District and Rogue River Irrigation District withdrew from participation in contest 3192.

⁵ On May 20, 2003, the Klamath Tribes withdrew Contest 4189, without prejudice.

⁶ On June 9, 2003 Contestants Medford Irrigation District and Rogue River Valley Irrigation Districts withdrew their contests to Claim 207.

⁷ On June 9, 2003, Contestants Medford Irrigation District and Rogue River Valley Irrigation Districts withdrew from participation in Contest 3193.

⁸ On March 21, 2003, Contestants Klamath Irrigation District, *et al.*, commonly referred to as Klamath Project Water Users, withdrew contest 3414.

Barney Calmes et al (136); *Larry E. Peacore et al* (138); *Kite Ranches* (139)

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HISTORY OF THE CASE

This matter came to hearing pursuant to notice served upon the participants by certified mail on December 8, 2003. A hearing was held on January 29, 2004, at 9:00 a.m. PST. Administrative Law Judge William Young presided.

The hearing was to determine the relative water rights regarding three claims within the Klamath Basin General Stream Adjudication, Claims 203, 206 and 207, identified by the Office of Administrative Hearings as Case numbers 136, 138, and 139, respectively.

Claimants Barney Calmes and Daisy Calmes in Claim 203; Claimants Larry E. Peacore and Carolyn F. Peacore, Trustees for the Peacore Family Trust in Claim 206; and Claimant Kite Ranches, Inc. in Claim 207, appeared and were represented by their attorney, William M. Ganong. Water Resources Department was represented by Renee Moulun, an authorized agency representative. The United States appeared and was represented by Stephen R. Palmer, Assistant Regional Solicitor of the United States Department of the Interior. Horsefly Irrigation District and Langell Valley Irrigation District appeared and were represented by their attorney, Laura A. Schroeder.

On June 6, 2003, the individual claimants in Claims 203, 206 and 207 moved for an Order consolidating the claims for hearing because all the land included in these claims was part of a ranch owned initially by one landowner so that the facts and law pertaining to the pre-1909 appropriation and development of irrigation and stock water from the Klamath River are the same for each Claimant.

No participant objected to Claimants' Motion to Consolidate. For the reasons of administrative efficiencies stated in the Motion, the motion was granted and the contested cases were consolidated in this proceeding.

Subsequent to that time, and prior to this proposed order being prepared, ALJ Young retired. Michael Andrew Francis from the Office of Administrative Hearings was assigned to prepare this order based on review of the record as a whole.

Preliminary Matters

Claim 203. On January 31, 1991 Barney Calmes and Daisy Calmes filed a Statement and Proof of Claim for Claim 203 based upon use of water commenced before February 24, 1909. The claim is for a total of 3.0 acre-feet per acre from two points of diversion located on the Klamath River for irrigation of 112.0 acres and for water for 300 head of livestock. The claimed period of use is April 1 through November 15 for irrigation and year-round for livestock. The claimed priority date is October 28, 1897.

On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin General Stream Adjudication, issued a Preliminary Evaluation recommending approval of a pre-1909 water right with portions of Claim 203 from one point of diversion having a priority date of October 28, 1897, and another portion of Claim 203 from another point of diversion having a

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priority date of December 31, 1908. For that portion with a recommended priority date of October 28, 1897, the Adjudicator recommended reducing the irrigation and stock acreage to 30.1 acres at a rate of 0.75 cfs, with a period of use from March 1 through October 31 for irrigation, and year-round for livestock use; and from the second point of diversion with a recommended priority date of December 31, 1908, the Adjudicator recommended reducing the irrigation and stock acreage to 72.5 acres at a rate of 1.64 cfs, with a period of use from March 1 through October 31 for irrigation, and year-round for livestock use.

On April 27, 2000, Claimants filed Contest 35 against the Preliminary Evaluation. Issues raised by Contest 35 include:

Whether beneficial use of water on claimants' land was initiated at the same time as the other land along the Klamath River above the Keno reef and so is entitled to the same priority date as the land described in claim nos. 177, 183, 185 and 205.

Whether claimants' predecessors-in-interest completed the works necessary to divert water and irrigate all of claimants' land within a reasonable time after commencement of construction or beneficial use of water and all of claimants' land is entitled to an 1858 priority date.

Whether claimants/contestants have "a right to divert water from the Klamath River to irrigate 102.6 acres of land with a duty of 3.5 af/acre, a rate of 1/40th cfs/acre, and a priority date of 1858."

On May 8, 2000, Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District, and Medford Irrigation District filed Contest 3189 against the claim. On May 1, 2003, Medford Irrigation District and Rogue River Irrigation District withdrew from participation in Contest 3189. On December 18, 2003, Horsefly Irrigation District and Langell Valley Irrigation District filed an Amended Statement of Contest. Issues raised by Amended Contest 3189 include:

Whether waters originating within the Lost River Basin are subject to appropriation in the Klamath Adjudication.

If the water sources appropriated by Contestants Districts are determined to be available for appropriation under the Klamath Adjudication, then whether the Claimant: (a) perfected use of these sources and (b) if perfected, whether these sources were abandoned or forfeited.

The amendment was to the Statement of Contest to all three claims, and will not be restated.

On May 8, 2000, a group of individuals and public and private entities commonly referred to in this proceeding as the Klamath Project Water Users filed Contest 3413. They withdrew that contest on March 25, 2003.

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On May 8, 2000, the United States of America filed Contest 3845 against the Claim and against the Preliminary Evaluation. Issues raised by Contest 3845 include:

Whether there is insufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right.

Whether the diversion rate exceeds the capacity of the ditch system used to serve the place of use.

Whether the period of use for irrigation may exceed the period of use claimed in the Statement and Proof of Claim.

On May 8, 2000, the Klamath Tribes filed Contest 4187 against the Claim and against the Preliminary Evaluation. They withdrew that contest, without prejudice, on March 25, 2003.

Claim 206. On November 9, 1990, Lloyd V. Howard, predecessor-in-interest to the present claimants, Larry E. Peacore and Carolyn F. Peacore, Trustees of the Peacore Family Trust, filed a Statement and Proof of Claim for Claim 206, based upon use of water commenced before February 24, 1909. The claim is for a total of 3.9 cfs from one point of diversion located on the Klamath River for irrigation of 154.0 acres and livestock use for 150 head. The claimed period of use is May 1 through October 31 for irrigation and year-round for livestock. The claimed priority date is August 26, 1905.

On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin General Stream Adjudication, issued a Preliminary Evaluation recommending approval of a pre-1909 water right for a lesser quantity than claimed; 3.85 cfs for irrigation and 1800 gallons per day for 150 head of livestock with a period of use from March 1 through October 31 for irrigation and January 1 through December 31 for livestock, and a priority date of August 26, 1905.

On May 8, 2000, Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District and Medford Irrigation District filed Contest 3192 against the claim. On June 9, 2003, Medford Irrigation District and Rogue River Irrigation District withdrew from participation in Contest 3192. On December 18, 2003, Horsefly Irrigation District and Langell Valley Irrigation District filed an Amended Statement of Contest, described above.

On May 8, 2000, the United States of America filed Contest 3847 against the Claim and against the Preliminary Evaluation. Issues raised by Contest 3847 include:

Whether there is insufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right.

Whether the period of use for irrigation may exceed the period of use claimed in the Statement and Proof of Claim.

On May 8, 2000, the Klamath Tribes filed Contest 4189 against the Claim and against the Preliminary Evaluation. They withdrew that contest, without prejudice, on May 20, 2003.

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Claim 207. On January 31, 1991, Kite Ranches, Inc. filed a Statement and Proof of Claim for Claim 207 based upon use of water commenced before February 24, 1909. The claim is for a total of 3 acre-feet per acre from six points of diversion located on the Klamath River for irrigation of 771.6 acres and livestock use for 600 cow-calf pairs. The claimed period of use is May 1 through October 31 for irrigation and year-round for livestock. The claimed priority date is October 28, 1897.

On October 4, 1999, Richard D. Bailey issued a Preliminary Evaluation for lesser acreage (648 acres) and quantity of water than had been claimed, and specifically finding that 71.2 acres in section 5 and 52.2 acres in sections 9 and 16, covered by dredging spoils, were not beneficially used.

On April 27, 2000, the Claimant, Kite Ranches, Inc., filed Contest 34 against the Preliminary Evaluation. Issues raised by Contest 34 include:

Whether the 123.4 acres of land not allowed by the Adjudicator were being put to beneficial use.

Whether claimants/contestants have "A right to divert water from the Klamath River to irrigate 771.6 acres of land with a duty of 3.5 af/acre, a rate of 1/40th cfs/acre, and a priority date of 1858."

Water Watch of Oregon, Inc. filed Contest 2857 on May 8, 2000. By an Order dated May 20, 2003, Water Watch was dismissed as a party contestant from all proceedings in the Klamath Basin Adjudication.

On May 8, 2000, Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Valley Irrigation District and Medford Irrigation District, filed Contest 3193 against the claim. On June 9, 2003, Medford Irrigation District and Rogue River Irrigation District withdrew from participation in Contest 3193. On December 18, 2003, Horsefly Irrigation District and Langell Valley Irrigation District filed an Amended Statement of Contest raising issues described above.

On May 8, 2000, Klamath Project Water Users filed Contest 3414. They withdrew that contest on March 21, 2003.

Also on May 8, 2000, the United States of America filed Contest 3848 against the Claim and against the Preliminary Evaluation. Issues raised by Contest 3848 include:

Whether there is insufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right.

Whether the period of use for irrigation may exceed the period of use claimed in the Statement and Proof of Claim.

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The Klamath Tribes filed Contest 4190 on May 8, 2000, also raising issues regarding the sufficiency of information regarding pre-1909 water use and the Adjudicator's recommendation that the period of use be for a longer period than claimed.

The issues for hearing stated in the notice of hearing were not intended to and did not effect any change in the issues for hearing stated in the Statements of Contest, which may be generally stated as:

- Whether the required elements of a pre-1909 water right are established by the record.
- Whether the record supports the rates, duty, actual use, points of diversion, seasonal limitations or acreage claimed, including issues related to the appropriate period of use for irrigation
- Whether waters originating within the Lost River Basin are subject to appropriation in the Klamath River Adjudication.

EVIDENTIARY RULING

Motion for Reconsideration of Evidentiary Ruling

During the hearing, the United States moved the court for an Order excluding Exhibit C to the Direct Testimony of Barney Calmes as being duplicative of OWRD Exhibit 1, pages 60 and 61, Case No. 136. (Transcript at 22-24.) Claimants agreed that pages 60 and 61 are a photocopy of the original Affidavit of Roy W. Nelson submitted as Exhibit C to Mr. Calmes' Direct Testimony. However, after having the opportunity to carefully review pages 60 and 61 of OWRD Exhibit 1, Case No. 136, claimants argued that those pages are not duplicative of the original Affidavit submitted with Mr. Calmes' Direct Testimony. Page 61 of OWRD Exhibit 1 is replete with markings and comments apparently made by OWRD employees. The original Affidavit of Mr. Nelson submitted with the Direct Testimony is the best evidence of Mr. Nelson's statements. It contains only Mr. Nelson's statements and is the original, notarized Affidavit. The record should contain the original Affidavit, as this record becomes the record submitted to the Circuit Court and eventually to Appellate courts. By including the original Affidavit, any concern that any judge or other party on review may have as to the authenticity of Mr. Nelson's Affidavit is removed. Further, anyone reviewing this record should have the benefit of Mr. Nelson's original Affidavit without comments or markings of third parties.

The motion was denied.

Documentary Evidence

WRD – in each of the claims WRD has prepared what is identified as Exhibit 1, consisting of the claim file of the claim.

United States – in each claim the United States filed the

Direct Testimony of Loring Gurney (136E00040001; 138E00040001 and 139E00040001), with attachments:

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136, 138, 139E00040002 = vitae of Loring H. Gurney
136, 138, 139E00040003 = Soil survey
139E00040004 = Proof of Appropriation of Water – permit 30087
136, 138E00040004 = A History of Oregon School Lands 1849-1900
136E0040005 = “Swamp Angels in Klamath” – Article from Oregon Journal
November 11, 1945
136E00040006=Rebuttal Testimony of Loring Gurney
136E00040007=color map of Township 40 S, R8E
136E00040008= Deed to John H. Miller from the State of Oregon dated February
25, 1885
136E00040009= Deed to W.J. Nichols from the State of Oregon dated November
14, 1884

Based on the record it was the United States’ intention that these items of
evidence be considered for all the claims.

Horsefly Irrigation District and Langell Valley Irrigation District-

Direct testimony of John W. Nichols, and concurring of testimony of Dave

McCarley with attachments

Direct Testimony of Bruce McCoy

Claimants –

Calmes (136) – Direct Testimony of Barney Calmes

Peacore (138) – Direct Testimony of Larry E. Peacore and Carolyn F. Peacore

Kite (139) – Direct Testimony of John N. Kite

All evidence listed above was admitted into the record.

Cross-examination Testimony

Barney Calmes; Larry E Peacore, Carolyn F. Peacore; and John N. Kite, submitted to
cross-examination.

FINDINGS OF FACT

1. Prior to European settlement, the Klamath River was subject to seasonal flooding, during
which the property subject to these claims was seasonally inundated. As floodwaters receded in
the spring, the land would be exposed, and, since it was still saturated with water for some time
after exposure, would produce an abundant crop of vegetation suitable for cattle feed. (Direct

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Test. of Calmes.) In addition, the young shoots emerging from the saturated ground provided a suitable environment for waterfowl, especially juvenile waterfowl.

2. Beginning in the 1850s, European settlers began coming into the area. They grazed cattle on the land in question, and, perhaps, harvested hay there. (Ex. 139E00020001.) There is no record, however, that the land was taken into exclusive ownership by any person at this time. (Ex. 139E00020001.)

3. On October 28, 1897 J. S. Rogers conveyed by deed to Frank T. Nelson, *et ux.*, most of the land included in these consolidated cases. (Testimony of Calmes, Ex. B-9.) At the time Frank T. Nelson purchased the property, the land below the Klamath River meander line was subject to seasonal flooding from the Klamath River. (Affidavit of Roy W. Nelson, Exh. C, pg.1.) The property had been improved with three canals. (Affidavit of Roy W. Nelson, Exh. C, pg.1.) Mr. Nelson thereafter built a levee between his land and the river, some three miles in length. (Ex. Affidavit of Roy W. Nelson, Exh. C, pg.1 .) He also constructed additional canals and drains on the land and then in 1908, installed a pump to lift water to a portion of his land lying above the meander line of the Klamath River. (Case 136 Exhibit 1, page 60.)

4. Between 1897 and 1908, the land below the meander line was irrigated by a combination of natural overflow irrigation and the three canals. (Ex. Affidavit of Roy W. Nelson, Exh. C, pg.1.) Between 1908 and 1964, all the land subject to these three claims was continuously irrigated. (Ex. Direct Test. of Kite and Calmes.)

5. In 1964, a parcel of 52.2 acres located on the land subject to Case 139 was covered with dredging spoils as a result of severe flooding. (Ex. Direct Test. of Kite, at 3-4.) Kite Ranches, Inc. made substantial efforts to restore the property to cultivation, but was unsuccessful because of the poor quality of the soil. (Direct Test. John E. Kite at 3.) Kite Ranches, Inc. has engaged a local contractor to remove the dredging spoils, so that the property can be returned to cultivation. (Direct Test. John E. Kite at 4.)

6. The record establishes a beneficial use of water for a season beginning in March and ending in November for each parcel of property. (Case 136 OWRD Ex. 1 at 7; Case 138 OWRD Ex. 1 at 15; Case 139 OWRD Ex. 1 at 4.)

7. The property acquired by Nelson was subsequently divided and the pieces eventually acquired by the present claimants. (Direct Test. of Calmes, Affidavit of Roy W. Nelson.)

OPINION

Elements of the Claim.

Pre-1909 Water Right. To establish claims for a pre-1909 water right in the Klamath Basin General Stream Adjudication, claimants must prove the following elements: (1) a *bona fide* intent prior to February 24, 1909, to apply the water to a currently existing or currently contemplated future beneficial use; (2) diversion from the natural channel; and (3) application of *Barney Calmes et al* (136); *Larry E. Peacore et al* (138); *Kite Ranches* (139)
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the water within a reasonable time to some useful purpose. ORS 539.010; *In Re Water Rights to Waters of Silvies River*, 115 Or. 27 (1925); *In Re Rights of Deschutes River and Tributaries*, 134 Or. 623 (1930).

Claimants have the burden of establishing their claims by a preponderance of the evidence. ORS 539.110; ORS 183.450(2); *see Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of evidence means that the fact-finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

A. The Klamath Tribes Contests.

1. The Klamath Tribes initially filed contests of the Calmes' claim in Case No. 136 and the claim of the Peacores in Case No. 138. The Tribes withdrew those contests.

2. The Klamath Tribes also contested the claim of Kite Ranches, Inc. in Case No. 139. The Klamath Tribes' contest of the Kites' claim is identical in wording to the contest of the United States. In addition, The Klamath Tribes' contest of the Adjudicator's Preliminary Evaluation is identical to the contest of the Adjudicator's evaluation by the United States.

B. The United States' Contests.

The United States has asserted the same issues as to all three claims:

1. The United States first asserted a failure of proof, arguing that there is insufficient information on the development of water on this place of use prior to February 24, 1909, to establish a vested pre-1909 water right. The evidence on this issue is clear. The property was developed and subject to irrigation before 1897. The elements of a pre-1909 water right have been met.

2. The second issue raised by the United States questioned the period of use allowed in the Preliminary Evaluation, because it differed from the period of use stated in the claims. As to this argument, the United States is correct. OAR 690-030-0085 provides as follows:

The Water Resources Director shall not permit any alteration or amendment of the original claim after the period for inspection has commenced; but any new matter which the claimant may wish to set forth shall be set forth in the form of an affidavit, regularly verified before a proper officer and filed with the Water Resources Director prior to the close of the period for public inspection.

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Since the period of inspection referred to in this rule is required to occur prior to the filing of contests (OAR 690-028-0075) it is clear that the time for amendment of claims is long past. The claims may not, therefore, be allowed for a period of use exceeding the time specified in the claim itself.

Those periods are as follows:

Calmes: April 1 to November 15.

Kite: April 15 to November 15.

Peacore: May 1 through October 31.

These are the seasons of use that will be allowed.

C. Horsefly Irrigation District and Langell Valley Irrigation District Contests.

1. Horsefly Irrigation District and Langell Valley Irrigation District filed contests against all three of the claims in these consolidated cases. The contests filed by Horsefly and Langell Valley against each of the three claims are identical.
2. The contests filed by Horsefly and Langell Valley are not specific as to the elements for the establishment of a water rights by claimants, but rather seek to preserve their ability to participate in this proceeding if a claim is made for waters of the Lost River. It is not clear whether or not the contestants believe a claim has been made to waters of the Lost River. As the contests do not specify any issues challenging the claims of the Calmes, Kite Ranches, Inc., and the Peacores to a pre-1909 water right from the Klamath River, necessary to decide the issues in this case.

D. Barney Calmes and Daisy Calmes Contests.

Claimants Barney Calmes and Daisy Calmes contested two elements of the Adjudicator's preliminary evaluation:

1. The Calmes first assert that they are entitled to the same priority date as other similarly situated lands described in Claim Nos. 177, 183, 185, and 205 in this Adjudication, based on evidence that the property was watered by natural overflow and used for grazing as early as 1858. However, as discussed above, the period for amending claims has long since past. OAR 690-030-0085. Since the claim specifies a priority date of October 28, 1897, the claimants are limited to that date, regardless of the evidence that water was beneficially used at an earlier time.
2. The second contest of the Adjudicator's Preliminary Evaluation by the Calmes is that all of the Calmes' land is entitled to the same priority date. The Preliminary Evaluation

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found a priority date of October 28, 1897 as to diversion point No. 1. That is the date of the deed from J. S. Rogers to Frank T. Nelson, et ux., whereby the Nelsons took title to most of the land included in these consolidated cases. (Direct Test. of Calmes, Ex. B-9.) However, with respect to diversion point No. 2, the Preliminary Evaluation assigned a priority date of December 31, 1908. The lands irrigated from diversion point No. 2 are irrigated by a pump, and those lands are above the meander line of the Klamath River. The Affidavit of Roy T. Nelson states in part: "In 1908, we put a pump in the canal closest to Teeter's Landing and started irrigating the upland." (Case 136; Exhibit 1, page 60.) Although the lands irrigated from diversion No. 2 were not irrigated until about 1908, the evidence is clear that Frank Nelson intended to develop his lands for agricultural purposes and to irrigate his land. With due diligence, over a reasonable period of time, Frank Nelson made significant improvements to the irrigation system, including building a levee along the Klamath River to control the flow of water onto the land and installing a pump in 1908 to irrigate uplands.

The court, in *In Re Water Rights in Silvies River*, 115 Or 27 (1925), summarized the law in Oregon as follows:

In regard to the question of awarding a full water right to the land, where only a partial application of water to a beneficial use has been made, we follow the general rule that, where an appropriation and diversion of water has been made, and the water partially applied, either to a part of the land intended to be irrigated at the time the appropriation is made, or where a partial application has been made to all of the land embraced, or intended to be embraced, in the appropriation, the appropriator is entitled to a reasonable time in which by due diligence he can make a complete application of the water to a beneficial use. It is not the custom, nor is it expected, that one making an appropriation of water for the irrigation of land will put all of the land in cultivation, or irrigate the land completely at one time. The law sanctions the application of water to a beneficial use within a reasonable time; the party being required to use due diligence, according to the circumstances and difficulties to be encountered.

115. Or. At 87, 88.

The actions of Frank T. Nelson during the first 10 or 11 years that he owned the subject property demonstrated an intent to substantially improve the irrigation system on the property by both excluding the natural flooding or overflow of the river and by installing canals, drains, and pumps to irrigate his land in an efficient manner. This is sufficient to establish the "due diligence" required to place the priority date for the entire parcel at October 28, 1897.

E. Peacore Family Trust:

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Although it is clear that the water right to all three properties were developed at the same time the claimed priority date for claim 206 is in 1905, rather than in 1897. This priority date cannot be changed because, as noted above, the date for amending claims has passed.

F. Kite Ranches, Inc.'s Contest.

Kite Ranches, Inc. contested two elements of the Preliminary Evaluation of its claim:

1. The first element relates to 52.2 acres of land on which a claim was not allowed by the Adjudicator, but which were irrigated for many years prior to being damaged as a result of severe flooding in 1964. The land excluded by the Adjudicator is land upon which dredge spoils were deposited. Following the deposit of the dredge spoils, the property owners attempted to bring the land back into cultivation, but were unsuccessful because of the poor soil. The claimants have taken steps to improve the soil, including arranging for a local contractor to remove the dredge spoils over a period of time.

In its Preliminary Evaluation of Claim 207, the Adjudicator deemed the right to use the water on said 52.2 acres abandoned. The elements of abandonment, as they apply to a pre-1909 water right were addressed by Judge Maurice Russell in his Proposed Order in Consolidated Cases No. 113, 114, and 115. Judge Russell states:

Since one of the issues presented by this case is whether the water has been continuously used for the requisite period, the question of abandonment is fairly raised by the facts of this case. "Abandonment" is a question of fact, requiring evidence of an intentional forsaking or desertion, as well as a failure to use the water. *In Re Willow Creek*, 74 Or 592 (1914); *Wimer v. Simmons*, 27 Or 1, 12 (1895). "An abandonment of a right is a forsaking or desertion of it, and operates as a relinquishment of it. There can be no abandonment without some action of the will, and an intent to abandon, but such intent may be inferred from the acts and declarations of the party against whom the relinquishment is claimed. Time is not, however, an essential element of abandonment. The moment the intention to abandon and the relinquishment of possession unite, the abandonment is complete." *Wimer v. Simmons*, 27 Or 13 at 14."

With respect to Kite Ranches, Inc.'s contest, there is no evidence that the Kites ever intended to abandon the right to irrigate said 52.2 acres. To the contrary, claimant has made significant efforts to restore the land after it was damaged. Kite Ranches, Inc. is entitled to maintain its right to irrigate that land until such time as it gives up its effort to revitalize the land and return it to production.

2. The second contest of the Preliminary Evaluation by Kite Ranches, Inc. is the same as the first contest by Calmes, and must meet the same response. The claimants are bound

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by the priority date specified in the claim, which may not at this point be amended, regardless of evidence of earlier beneficial use. I therefore recommend the following

PROPOSED ORDER

1. In the matter of Barney Calmes and Daisy Calmes, Claim No. 203, Case No. 136, the Preliminary Evaluation for Claim No. 203 made by the Adjudicator is adopted in its entirety, except that the priority date for all of the land described in the Preliminary Evaluation should be not later than October 28, 1897, and the period of use should be April 1 to November 15, as claimed.

2. In the matter of Kite Ranches, Inc., Claim No. 207, Case No. 139 the Preliminary Evaluation of Claim No. 207 is adopted in its entirety, except the Order should add to the land for which the claim is sustained 52.2 acres of land in Sections 9 and 16 shown on the map prepared by a Certified Water Rights Examiner located at OWRD Exhibit 1, page 34, Case No. 207 and described as:

SW¹/₄ SW¹/₄ 7.4 acres irrigation and livestock
SE¹/₄ SW¹/₄ 2.6 acres irrigation and livestock

Section 9, Township 40 South, Range 8 East W.M.

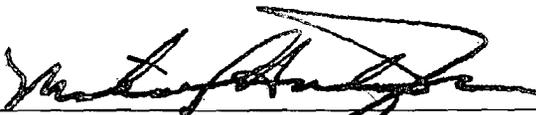
NW¹/₄ NW¹/₄ 19.2 acres irrigation and livestock
NE¹/₄ NW¹/₄ 4.9 acres irrigation and livestock
SW¹/₄ NW¹/₄ 8.2 acres irrigation and livestock
SE¹/₄ NW¹/₄ 9.9 acres irrigation and livestock

Section 16, Township 40 South, Range 8 East W.M.

and the rate of diversion should be increased by 1.3 cubic feet per second from 11.03 to 12.33 to accommodate said additional land. The period of use should be April 15 to November 15, as claimed.

3. In the matter of of Larry E. Peacore and Carolyn F. Peacore, Trustees of the Peacore Family Trust, Claim No. 206, Case No. 138, the Preliminary Evaluation of Claim No. 206 is adopted in its entirety without amendment, except that the period of use should be May 1 through October 31, as claimed.

IT IS SO ORDERED


Michael Andrew Francis, Administrative Law Judge
Office of Administrative Hearings

Dated: August 30, 2005

Barney Calmes et al (136); *Larry E. Peacore et al* (138); *Kite Ranches* (139)
Proposed Order – page 13 of 14

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SALEM OREGON

KBA_ACFOD_06429

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

EXCEPTIONS: Parties may file exceptions to this 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 of the Administrative Law Judge. 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 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 Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

Dwight W. French
Klamath Basin Adjudication
Oregon Water Resources Dept
725 Summer Street N.E., Suite "A"
Salem OR 97301

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SALEM, OREGON

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2005, I mailed a true copy of the following: **PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, 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
Phone: 916-978-5683
Fax: 916-978-5694

Carl V. Ullman
Water Adjudication Project
The Klamath Tribes
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Chiloquin, OR 97624
Phone: 541-783-3081
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Jesse D. Ratcliffe / Stephen E.A. Sanders
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
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Steve.sanders@doj.state.or.us

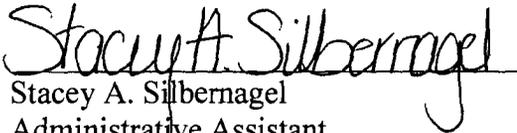
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Stacey A. Silbernagel
Administrative Assistant

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