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WATER RESOURCES DEPT.
SALEM, OREGON

**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;
Klamath Irrigation District; Klamath Drainage
District; Tulalake Irrigation District; Klamath Basin
Improvement District; Ady District Improvement
Company; Enterprise Irrigation District; Klamath
Hills District Improvement Co.; Malin Irrigation
District; Midland District Improvement Company;
Pine Grove Irrigation District; Pioneer District
Improvement Company; Poe Valley Improvement
District; Shasta View Irrigation District; Sunnyside
Irrigation District; Don Johnston & Son; Bradley S
Luscombe; Berlva Prichard; Don Vincent; Randy
Walthall; Inter-County Title Co.; Winema Hunting
Lodge, Inc.; Reames Golf and Country Club; Van
Brimmer Ditch Co.; Plevna District Improvement
Company; and Collins Products, LLC;
Contestants

PROPOSED ORDER

Case No. 116

Claim: 137

Contests: 3398,¹ 3824, and 4165

vs.

James Robert Mueller, Claimant.

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.

¹ On November 28, 2000, Contestant Don Vincent informed the Adjudicator that he had sold his interest in the property giving rise to his claims and this contest and was no longer a participant in this contested case. On June 24, 2002 Contestant Berlva Pritchard informed the Office of Administrative Hearings that she had sold her interest in the property giving rise to her claims and contests and was no longer a participant in this contested case.

On November 20, 1990, James Robert Mueller filed claim 137 for a total of 0.7 cubic feet per second (cfs) for irrigation of 27.6 acres, and 0.01 cfs for domestic use from an unnamed spring, with a claimed period of use from April 1 to November 1 of each year, and a claimed priority date of "Spring 1894." On October 4, 1999, the Adjudicator of the Klamath Basin General Stream Adjudication, issued a Preliminary Evaluation allowing the claim as filed, but for less water than claimed (0.070 cfs for irrigation), with a period of use from March 1 to October 31 of each year, and with a June 21, 1894 priority date.

On May 8, 2000, the entities and individuals identified herein as the Klamath Project Water Users² (KPWU) filed contest 3398 against the claim and against the Adjudicator's Preliminary Evaluation. On that same date the United States of America (United States) filed contest 3824 and the Klamath Tribes filed contest 4165, both contesting the water right claimed, and the Adjudicator's Preliminary Evaluation.

PROCEDURAL MATTERS

The Water Resources Department (OWRD) referred this matter to the Office of Administrative Hearings for a contested case hearing. A prehearing conference was held on April 25, 2002, at which the participants agreed upon a schedule to assure the resolution of legal matters before the hearing and for the orderly exchange of exhibits, including pre-filed written direct testimony.

Pursuant to a Notice of Hearing mailed to all participants by certified mail on March 25, 2003, a hearing was held on May 6, 2003, for the purpose of admitting evidence into the record and cross-examining witnesses whose direct testimony had previously been filed. William D. Young, Administrative Law Judge, presided. Mr. Mueller appeared for the hearing with his attorney, Christopher L. Cauble. The United States appeared by its attorney, Stephen R. Palmer. The Klamath Tribes appeared by their attorney, Lorna Babby. The KPWU appeared by their attorney, Andrew M. Hitchings. OWRD appeared through its authorized agency representative, Kimberly Grigsby.

Mr. Mueller and Robert Buchanan, a witness for Mr. Mueller, provided written direct testimony and were cross-examined at the hearing. L. Ralph Saunders provided written direct testimony.

I held the hearing record open to allow the participants opportunities to file written closing arguments. Mr. Mueller filed his Post Hearing Memorandum on

² Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Klamath Hills District Improvement Co.; Malin Irrigation District; Midland District Improvement Company; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S Luscombe; Berlva Prichard; Don Vincent; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Reames Golf and Country Club; Van Brimmer Ditch Co.; Plevna District Improvement Company; and Collins Products, LLC.

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June 16, 2003. The United States filed its Post-Hearing Memorandum on July 23, 2003. The Klamath Tribes elected not to file a written closing argument in this proceeding. Instead, the Tribes adopted by reference the post-hearing argument of the United States. KPWU and OWRD filed their responses on July 23, 2003. The record closed on August 7, 2003, after receipt of Mr. Mueller's Reply Memorandum.

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EVIDENTIARY RULINGS

All evidence previously submitted was admitted into the record. OWRD's Exhibit 1 (Ref. No. 116E00020001) and the Affidavit and Testimony of Teri Hranac (Ref. No. 116E00020002) were admitted without objection. Evidence submitted by the United States (Ref. No. 137F00040004, referring to 137E00040001 through 137E00040006), including the signed affidavit found in 137E00040005, were admitted without objection. Evidence submitted by the Klamath Tribes identified as items 1-8 in the cover letter dated March 7, 2003, were admitted without objection.

Mr. Mueller had submitted his evidence before the hearing but had failed to identify them or to paginate the documentary evidence. At the hearing, he agreed to resubmit his exhibits and to paginate his documents. I admitted Mr. Mueller's exhibits, overruling objections raised by all other participants regarding the relevance of Mr. Mueller's Exhibits 2 and 3, and overruling objections to his Exhibit 3 as inappropriate rebuttal evidence.

ISSUES

- (1) Have the required pre-1909 elements been established for claim 137 and, if so, what is the appropriate priority date?
- (2) What are the acreage, rate, duty, actual use, points of diversion, and seasonal limitations of claim 137, if the claim is established?
- (3) Does the record establish continuous diversion and beneficial use of water on the property appurtenant to claim 137 since the claimed date of appropriation?
- (4) Does the diversion rate exceed the capacity of the ditch system used to serve the place of use?

FINDINGS OF FACT

(1) On November 20, 1990, Claimant Mueller filed claim 137 for a total of 0.7 cfs for irrigation of 27.6 acres, and 0.01 cfs for domestic use from an unnamed, with a claimed period of use from April 1 to November 1 of each year, and a claimed priority date of "Spring 1894." (OWRD Exhibit 1, pgs. 1-3.)

(2) The spring is the source of water for domestic purposes for one household through 700' of 2" pipe that also supplies three 500 gallon stock tanks. All water not used

domestically overflows and flood irrigates pasture at a rate of 30-35 gallons per minute. Spring water does not leave the property in any well-defined channel. Actual use totals 0.71 cfs (0.07 for irrigation and 0.01 for domestic use). (OWRD Exhibit 1, pgs. 27-33.)

(3) In the fall of 1893 Mr. Mueller's predecessor-in-interest, John Hagelstein, came to the United States from Germany. He and his family spent the winter of 1893 with his sister-in-law and, in the spring of 1894 homesteaded property that includes the property appurtenant to Claim 137. They built a home and extensive gardens, irrigating their crops and pasturage by natural irrigation from the seasonal rise and fall of Upper Klamath Lake, and by a natural spring that lay on the property. The Hagelsteins raised garden vegetables and livestock for their own use, for travelers who used the home as a stage coach stop, and for sale to the Klamath Indian Agency. As time passed, the Hagelstein family acquired extensive holdings in the area surrounding the original homestead. (*Buchanan Direct Testimony* pgs. 1-2.)

(4) The United States granted John Hagelstein a patent dated August 17, 1903 for one hundred sixty acres of real property in the "North West quarter of the North East of Section Seven in Township Thirty Seven South of Range Nine East of Willamette Meridian in Oregon." Property appurtenant to Claim 137 falls within this patent and was the site of the Hagelstein homestead. The property appurtenant to Claim 137 also includes a portion of the S $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 7, Township 37 South, Range 9 East, Willamette Meridian. (*Buchanan Direct Testimony* pgs. 1-2; OWRD exhibit 1, pgs. 7-8.)

(5) The standard for the season of use has been determined by the Adjudicator as a result of an analysis of historical descriptions of irrigation use and previous adjudications within the Klamath Basin. Irrigation seasons within the Klamath Basin typically end October 31 or each year. (OWRD exhibit 1, pgs. 82-83).

CONCLUSIONS OF LAW

(1) Mr. Mueller met his burden of proving the required pre-1909 elements for claim 137. The priority date of the claim is June 21, 1894. Construction of pipes, ditching and other works for the application of water occurred within a reasonable time after commencement of use of water.

(2) The acreage, rate, duty, actual use, points of diversion, and seasonal limitations of claim 137 are as set out in the Preliminary Evaluation.

(3) Water has been continuously diverted for beneficial use on the property appurtenant to claim 137 since the claimed date of appropriation.

(4) The diversion rate does not exceed the capacity of the ditch system used to serve the place of use.

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OPINION

To establish a claim for a pre-1909 water right in the Klamath Basin General Stream Adjudication, a claimant 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) a diversion from the natural channel; and (3) application of 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).

Claimant has the burden of establishing the claim by a preponderance of the evidence. See ORS 539.110; ORS 183.450(2); *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). Claimant met his burden.

Pre-1909 Elements and Place of Use. The property appurtenant to Claim 137 borders Upper Klamath Lake. Portions of the property are somewhat elevated and, in the 1890s, the lower part was irrigated by natural irrigation from the lake. The higher elevations were irrigated by the spring, which is the subject of the Claim. (*Mueller Testimony* pgs. 36-37.) The greater weight of the evidence established that Mr. Mueller's predecessors-in-interest started using water from the spring for irrigation in the spring of 1894 and that they expanded their use of the spring's water in the years following by increasing the flow and by ditching. He is entitled to a priority date not later than July 21, 1894, the first day of summer of that year.

The United States concedes that Mr. Buchanan's great-grandparents, Mr. Mueller's predecessors-in-interest, moved to the Algoma area next to Upper Klamath Lake and homesteaded land in 1894 that is now part of Claim 137. The United States contends, however, that the anecdotal history indicate only that garden vegetables were grown on the property, and do not indicate the extent of the acreage, suggesting that only a small garden operation may have existed prior to 1909. The United States notes that much of Mr. Buchanan's testimony and supporting documentation relate to properties associated with his great-grandparents and other ancestors, and did not directly concern the property appurtenant to Claim 137. The United States also argues that Mr. Mueller did not prove that the use of the spring waters for irrigation was contemplated at the time the initial appropriation was made.

KPWU contend that Mr. Mueller failed to establish that irrigation was used in 1894 or that water was put to beneficial uses at that time; that ditches or other works were constructed on that date; or that water was applied to a beneficial use within a reasonable time after that date.

The greater weight of the evidence convinces me that the Hagelsteins started farming as soon as they arrived on their homestead in the spring of 1894 and that they established significant gardens and orchards as soon as possible after they claimed the land. Although the lower portion of their property was inundated by yearly flooding of Klamath Lake, the home was provided water and the gardens and orchards were irrigated by the spring, which is the subject of this claim. Expansion of the spring and ditching to carry the water for irrigation when the lake waters receded was no doubt contemplated early into their residence, and accomplished within a short time after the property was homesteaded.

Mr. Buchanan's testimony, although largely based upon his family's oral history, was highly persuasive regarding the date by which water use began on the subject property. He credibly testified that his great-grandparents, John and Mary Hagelstein, homesteaded the property appurtenant to Claim 137 in the spring of 1894, when they started living on what is now Mr. Mueller's property. He testified that his great-grandparents raised garden vegetables and livestock for their own use, for travelers who used their home as a stage coach stop, and for sale to the Klamath Indian Agency. That testimony was corroborated by various documents attached to the Testimony, including a page from a Klamath County History apparently published in 1941, which also stated that John Hagelstein had arrived in the Antelope Valley in 1893 and that he moved to the Algoma area the following year to homestead, where he began raising vegetable which he hauled to the "Government Agency." (*Buchanan Direct Testimony* pgs. 1-2.)

The original settlers used the land for commercial purposes as well as to provide for their own family. This shows that although the property included in Mr. Buchanan's claim is relatively small, use of the homestead property was intensive. It seems likely that the homestead property was fully utilized before Mr. Hagelstein acquired additional properties, which are the subject of much of the documentation in the case record. The greater weight of the evidence established that the spring was utilized for domestic purposes and for irrigation of the entire property, which is the subject of Claim 37.

Mr. Buchanan described the family's use of natural irrigation due to the rise and fall of Klamath Lake, and to their use of waters from the spring, the source of Mr. Mueller's claim, "When more water was needed on the higher ground or later in the season." He confirmed continuous beneficial use of water by irrigation for crops and livestock on Mr. Mueller's property, and testified that the spring waters reach Klamath Lake through ditches that constitute the irrigation system. (*Buchanan Direct Testimony* pgs. 1-2.) Mr. Mueller also testified that as far as he had been informed by the previous owners, the ditching and other aspects of the irrigation were virtually unchanged, with minor improvements and constant maintenance, since Mr. Buchanan's great-grandparents homesteaded the property. (*Mueller Testimony*, Tr. pg. 44.)

The evidence available so long after the events the witnesses are attempting to recreate for the record is not of the quality that could reasonably be expected for more recent events. I believe, however, that Mr. Mueller has met his burden of proving that his

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entire property meets the criteria for a pre-1909 water right with a priority date of June 21, 1894.

The United States presented expert evidence that the property appurtenant to Claim 137 was under water for an extended some time, thereby casting doubt as to the continuous use of the property. (*Saunders testimony*). Although unrebutted by Mr. Mueller, the testimony regarding photographic analysis by Mr. Saunders is not persuasive. His examination of a 1940 black and white high resolution photograph led him to believe that "the claim area was covered with water with the exception of a couple of acres of shoreline," with the claim area appearing to serve as a storage area for logs at that time. This opinion is generally consistent with Mr. Buchanan's testimony in a related hearing that a mill was on a nearby property (*Buchanan Rebuttal Testimony* pgs. 132-133.) but is contrary to Mr. Buchanan's testimony of continuous use of the property appurtenant to Claim 137 as a homestead and for farming and ranching. (*Buchanan Direct Testimony* pg. 2.).

Although not argued, the United States was apparently suggesting that claimant's predecessors in interest had abandoned their pre-1909 water right under criteria stated in ORS 539.010(1).³ As stated in the United States' argument, Mr. Saunders' testimony "cast[s] doubt" on the continuous nature of the irrigation use. The evidence is in equipoise on this issue, upon which the contestants would have had the burden if abandonment had been raised in their contests. *See*, ORS 183.450(2). It was not, and if the issue had been properly raised, they have not met their burden.

Amount of Water Beneficially Used. Mr. Mueller's claim claimed usage of 0.7 cfs for irrigation and 0.01 cfs for domestic use. The Adjudicator's Preliminary Evaluation found that he was entitled to a lesser amount, 0.071 cfs, measured at the point of diversion. The field inspection performed in April 1987 showed actual use totaling 0.71 cfs (0.07 for irrigation and 0.01 for domestic use). (OWRD Exhibit 1, pgs 27-33.) Mr. Mueller did not contest that finding and provided no other evidence regarding his use.

Considering the commercial nature of their homestead gardens and livestock, as well as gardens and livestock for their own use, it is not unreasonable to believe that the Hagelsteins utilized the spring waters in much the same manner and in the same amount as is currently used. The greater weight of the evidence established that Mr. Mueller applies water to beneficial use in the amount of 0.071 cfs and that that is an historical rate going back to the original settlement.

Season of Use. When Mr. Mueller filed his claim he indicated that irrigation was April 1 to November 1. Although the question is asked, "if water is used for other purposes, during what months is it use?" Mr. Mueller did not indicate a different time frame for domestic use. The Adjudicator's Preliminary Evaluation stated a period of use for

³ "Actual application of water to beneficial use prior to February 24, 1909, by or under authority of any riparian proprietor or the predecessors in interest of the riparian proprietor, shall be deemed to create in the riparian proprietor a vested right to the extent of the actual application to beneficial use; provided, such use has not been abandoned for a continuous period of two years."

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irrigation greater than claimed, March 1 - October 31. The Preliminary Evaluation also awarded a period of use for domestic use of January 1 - December 31.

At the hearing Mr. Mueller testified that he begins a period of "pre-irrigation" about March 1. He also testified that he spoke with some OWRD employees at some unknown time and had a conversation in which his March "pre-irrigation" was discussed. From that discussion, whenever it may have occurred, he believes that he should be considered to have amended his claim for irrigation to the March 1 date.

OWRD characterized the finding of a March 1 - October 31 irrigation season as a typographical error and argues that he may not amend a claim through testimony to claim a longer season of use than is claimed in the claim document. The Department correctly points out that ORS 539.210 and OAR 690-030-0085 prohibit claim amendments that would expand a claim. By attempting to amend his claim for a longer period of use, Mr. Mueller is basically making a new claim – outside the claim period – and therefore contrary to the time limits or in the manner required by law. ORS 539.210 states, in part:

Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law.

OWRD's position is buttressed by its rule, which clearly prevents amendment of the claim at this late date. OAR 690-030-0085 states:

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.

The period for public inspection has long since passed. The permissible season of use for irrigation begins no earlier than was claimed by Mr. Mueller when he filed his claim, April 1 of each year. And, although by only one day, the season of use must be ended one day earlier than claimed.

Mr. Mueller claimed a season through November 1. OAR 690-028-0040 allows OWRD to propose rates and duties of water to be allowed per acre of irrigated lands. Appendix A, The Department's "Standards for Rates, Duties and Seasons of Use Within Previously Unadjudicated Areas of the Klamath Basin" is the result of the studies conducted and hearings held regarding the appropriateness of those limitations. (OWRD Exhibit 1 pgs. 82-83.) As such, it is persuasive evidence of the appropriate season of use for all claims in the Klamath Basin Adjudication. Appendix A establishes standard

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seasons of use for irrigation ending October 31 of each year.⁴ Mr. Mueller provided evidence regarding his end of use of water for irrigation and has not met his burden of proving that the November 1 date is more appropriate than the October 31 date.

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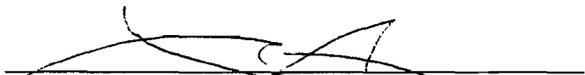
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ORDER

I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as specifically set out below:

The elements of a pre-1909 right are established for Claim 137 and the claim is approved for beneficial use as set forth in the October 4, 1999, Summary Preliminary Evaluation of Claim, a copy of which is attached hereto and incorporated as if fully set out in this order.



William D. Young, Administrative Law Judge
Office of Administrative Hearings

Date: September 11, 2003

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 Hearing Officer. 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:

Dick Bailey
Klamath Basin Adjudication
Oregon Water Resources Dept
158 12th Street NE
Salem OR 97301

⁴ This standard season, which begins March 1 of each year, is apparently the genesis of the "typographical error" discussed above.

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**Summary - Preliminary Evaluation of Claims
Klamath Basin General Stream Adjudication**

Claim No. **137**
Pre-1909 claim

Current Claimant(s) of Record:

James Robert Mueller
16087 Algoma Rd.
Klamath Falls OR 97601

Original Claimant(s):

James Robert Mueller

The general location of the claimed use is Township 37 South, Range 9 East, W.M.

This preliminary evaluation takes into consideration all information available as of September 7, 1999.

ELEMENTS OF A PRE-1909 CLAIM

1. Elements of a Pre-1909 right are:
 - a. Use of water, or construction of works for the application of water prior to February 24, 1909.
 - b. Completion of works within a reasonable time after commencement of construction or use of water.

CLAIM INFORMATION

2. The claim was filed on November 20, 1990.
3. The claim is for a total of 0.71 cubic feet per second from one point of diversion located on unnamed Spring for irrigation of 27.6 acres and domestic use.
4. The claimed period of use is April 1 to November 1.
5. The claimed priority date is Spring 1894.

FINDINGS OF FACT

6. The Department performed a field inspection which found the irrigation and domestic use as claimed.
7. The field inspection described that water not used domestically overflows and flood

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irrigates pasture. The overflow was measured at 35 gallons per minute.

8. For reasons stated in Appendix A of this Report, the appropriate rate, duty, and season of use for the claimed use(s) in this basin are as follows:

Irrigation:

RATE: 1/40th cfs/acre DUTY: 3.5 af/acre SEASON: March 1 - October 31

For domestic: RATE: 0.01 cfs/home SEASON: January 1 - December 31

9. The Department finds the following actual use, subject to rate, duty, and season limitations described above:

POINT OF DIVERSION LOCATION: NW ¼ NE ¼, Section 7, Township 37 South, Range 9 East, W.M.

SOURCE: unnamed Spring, tributary to Upper Klamath Lake

USE: irrigation of 27.6 acres

AMOUNT ACTUALLY BENEFICIALLY USED: 0.07 cubic feet per second, measured at the point of diversion. This is less than the quantity claimed.

PERIOD OF USE: March 1 - October 31

PRIORITY DATE: June 21, 1894

PLACE OF USE:

NW ¼ NE ¼ 2.5 ACRES IRRIGATION
SW ¼ NE ¼ 25.1 ACRES IRRIGATION
SECTION 7
TOWNSHIP 37 SOUTH, RANGE 9 EAST, W.M.

USE: domestic

AMOUNT ACTUALLY BENEFICIALLY USED: 0.01 cubic feet per second, measured at the point of diversion.

PERIOD OF USE: January 1 - December 31

PRIORITY DATE: June 21, 1894

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PLACE OF USE:

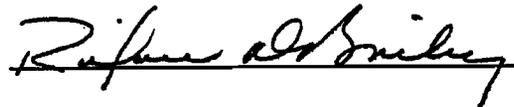
NW ¼ NE ¼ DOMESTIC
SECTION 7
TOWNSHIP 37 SOUTH, RANGE 9 EAST, W.M.

10. For the required Pre-1909 elements the Department finds:
 - a. Use of water, or construction of works for the application of water occurred in 1894.
 - b. Works were completed within a reasonable time after commencement of construction or use of water.

CONCLUSION

11. The elements for a Pre-1909 right are established for this claim. Therefore, the claim is approved to the extent of beneficial use as described in item 9 above.

Dated the 4th day of October, 1999.



Richard D. Bailey, Adjudicator
Klamath Basin General Stream Adjudication

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2003, 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
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Fax: 916-978-5694

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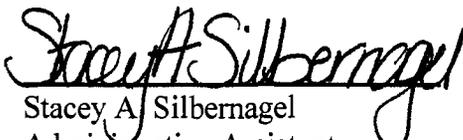
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