

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;~~ **PROPOSED ORDER**
Contestant Consolidated Case No. 119
Claim: 143

vs. Contest(s): ~~3137~~¹, ~~3827~~², and ~~4168~~³

Marta C. Carpenter;
Claimant

Under the authority of ORS 183.415 and 539.040 *et seq.* and OAR 690-030-0045 *et seq.*, the following information is provided regarding the hearing requested in the above-entitled matters:

HISTORY OF CONSOLIDATED CASES 118, 119, AND 120

Consolidated Case 003. By order dated May 12, 2003, as amended May 14, 2003, these cases were consolidated with cases 003, 129, 137, 148, 149, and 150, for the purpose of resolving the following question:

Whether the Bureau of Reclamation may claim a water right by virtue of
the construction and operation of the Klamath Project.

Following a hearing that started on April 6, 2004, a Proposed Order was issued November 14, 2006, in Lead Case 003, which includes Cases 118, 119, and 120. The Proposed Order followed an Interim Order issued on January 12, 2006, as amended May 24, 2006, which resolved the above question in the affirmative and is the law of these cases. The Proposed Order held that the United States' Bureau of Reclamation is the proper owner of a water right in the

¹ Langell Valley Irrigation District and Horsefly Irrigation District voluntarily withdrew, without prejudice, from Contest 3137. See VOLUNTARY WITHDRAWAL OF CONTEST BY LANGELL VALLEY IRRIGATION DISTRICT AND HORSEFLY IRRIGATION DISTRICT dated August 21, 2002. Medford Irrigation District and Rogue River Valley Irrigation District resolved Contest 3137 by Stipulation. See STIPULATION TO RESOLVE CONTEST 3137 AGAINST CLAIM NO. 143 dated April 25, 2006.

² On July 19, 2007, the United States signed a STIPULATION TO RESOLVE CONTEST to resolve Contest 3827.

³ The Klamath Tribes voluntarily withdrew, without prejudice, Contest 4168. See Klamath Tribes' VOLUNTARY WITHDRAWAL OF CONTESTS dated August 14, 2006.

Klamath River and its unadjudicated tributaries, having a priority date of May 19, 1905, that includes all water flowing in the Klamath River or its tributaries not subject to a presently existing right in the same waters having a priority before that date, limited to a specific amount being put to use by the Klamath Project. Proposed Order at 19-25 (November 14, 2006). This is the law of the case with respect to this issue. Thereafter, Cases 118, 119, and 120 were severed from consolidated case 003 to proceed to hearing.

On March 14, 2006, Claimant/Contestant Jeld-Wen, Inc. filed with the Office of Administrative Hearings (OAH) a Motion for Ruling on Legal Issues (now called a Motion for Summary Determination, *cf.* OAR 137-003-0580) seeking: (1) a determination that the interpretation of any alleged contract between the United States of America (United States) and Claimant's predecessor is beyond the scope of this general stream adjudication; and (2) an order severing the contract-related issues raised in Contestants' contests from this adjudication. On March 28, 2006, the United States and the Klamath Tribes filed responses to Claimant's motion. The Oregon Water Resources Department (OWRD) filed its response to Claimant's motion on April 11, 2006. On May 10, 2006, Administrative Law Judge Maurice L. Russell, II, denied Claimant's motion.

HISTORY OF CASE 119

Claim 143 was filed January 30, 1991, by the Estate of Agnes McCornack Oliver, based upon use of water commenced prior to February 24, 1909. Thereafter, the land changed ownership into the hands of Daryl J. and Marta C. Kollman. The Kollmans subsequently divorced, and Marta C. Kollman's name was changed to Marta C. Carpenter (Claimant). As a result of the divorce, Claimant became the sole owner of the property and was the sole claimant in Case 119 until the property was purchased by Jeld-Wen.

Claim 143 was for a total of 12.6 cubic feet per second (cfs) of water for irrigation of 497.9 acres and 500 head of livestock use, from one point of diversion located on Upper Klamath Lake, tributary to the Klamath River. The claimed period of use is year round for both uses, with a claimed priority date of 1866.

On October 4, 1999, OWRD preliminarily approved claim 143 for irrigation and livestock use, with a year-round season of use and a priority date of December 31, 1866. OWRD preliminarily found that all of the elements of a pre-1909 water right were established for claim 143.

On May 8, 2000, the United States of America filed contest 3827, the Klamath Tribes filed contest 4168, and the "Districts" (Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Irrigation District and Medford Irrigation District, as trustees for their affected water right patrons) filed contest 3137.

On August 21, 2002, Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from contest 3137. On April 25, 2006, Rogue River Irrigation District and Medford Irrigation District entered into a Stipulation to Resolve Contest 3137 Against Claim No. 143 with Claimant to resolve contest 3137. On August 14, 2006, the Klamath Tribes

voluntarily withdrew, without prejudice, Contest 4168. On July 19, 2007, the United States signed a Stipulation to Resolve Contest to resolve Contest 3827.

Numerous pre-hearing telephone conferences were held in this case and companion Cases 118 and 120. Attorney David Fillipi represented Claimant and successor-in-interest, Jeld-Win. Attorney Steve Palmer represented the United States. Attorney Andrew Hitchings represented Rogue River Irrigation District and Medford Irrigation District. Assistant Attorney General (AAG) Jesse Ratcliffe represented OWRD. The parties have reached a settlement in regards to Cases 118 and 120, and OWRD withdrew the referrals to OAH regarding these cases. The OAH issued no Proposed Order in those cases.

The remaining parties in Case 119, Claimant and the United States, and OWRD have resolved all issues except the appropriate diversion rate for irrigation. *See* Stipulation to Resolve Contest (Stipulation), last signed on August 8, 2007, which is adopted and incorporated into this Proposed Order. In regards to the issue of the diversion rate, Paragraph B.1.d of the Stipulation states, “[t]he Claimant and OWRD agree that Claim 143 should be approved by the Adjudicator with a diversion rate of no less than 8.47 cfs and no more than 12.5 cfs for irrigation and 6,000 gpd [gallons per day] for livestock, with the narrow issue of the exact diversion rate for irrigation to be subject of further proceedings.”

AAG Ratcliffe filed a Claimant’s and OWRD’s Joint Unopposed Motion to Supplement Record and Stipulate to Record as Supplemental, with Exhibit A. ALJ Smith granted this Motion in an Order signed on August 30, 2007.

EVIDENTIARY RULINGS

The following evidence was admitted into the record per stipulation of OWRD and Claimant:

Exhibit A to the Unopposed Motion (14 pages of communications between the counsel for Claimant and OWRD)

OWRD Ex. 1

Responses to discovery requests by Claimant, other contestants, and OWRD

Direct and rebuttal testimony from Claimant, the various contestants, and OWRD

Direct Testimony of Kevin Hatfield and accompanying exhibits

Stipulation to Resolve Contest (Stipulation), signed by Claimant, the United States, and OWRD

ISSUE

The contestants raised various issues, which have all been settled in the Stipulation and a prior Stipulation to settle contest 3137. Claimant and OWRD agree that the only remaining issue in Case 119 is:

What is the appropriate diversion rate for irrigation for Claim 143 (Claim 119)? Claimant and OWRD agree that the diversion should be no less than 8.47 cfs or more than 12.5 cfs.

FINDINGS OF FACT

(1) Claim 143 was filed January 31, 1991, by the Estate of Agnes McCornack Oliver, based upon use of water commenced prior to February 24, 1909. The claimed place of use for Claim 143 is property located in portions of Sections 14, 15, 22, and 23, Township 38 South, Range 8 East of the Willamette Meridian ("W.M."). (Stipulation, see the specific description below.) Thereafter, the land changed ownership into the hands of Daryl J. and Marta C. Kollman. The Kollmans subsequently divorced, and Marta C. Kollman's name was changed to Marta C. Carpenter (Claimant). As a result of the divorce, Claimant became the sole owner of the property and was the sole claimant in Case 119 until the property was recently purchased by Jeld-Wen.

(2) Claim 143 was initially for a total of 12.6 cubic feet per second (cfs) of water for irrigation of 497.9 acres and 0.1 cfs for 500 head of livestock use, from one point of diversion located on Upper Klamath Lake, tributary to the Klamath River. The claimed period of use is year-round for both uses, with a claimed priority date of 1866. (Stipulation.)

(3) On October 4, 1999, OWRD preliminarily approved Claim 143 for irrigation and livestock use, with a year-round season of use and a priority date of December 31, 1866. OWRD preliminarily found that all of the elements of a pre-1909 water right were established in the claim. (*Id.*)

(4) On May 8, 2000, the United States of America filed Contest 3827, the Klamath Tribes filed Contest 4168, and the "Districts" (Horsefly Irrigation District, Langell Valley Irrigation District, Rogue River Irrigation District and Medford Irrigation District, as trustees for their affected water right patrons) filed Contest 3137. (*Id.*)

(5) On August 21, 2002, Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from Contest 3137. On April 25, 2006, Rogue River Irrigation District and Medford Irrigation District entered into a Stipulation to Resolve Contest 3137 Against Claim No. 143 with Claimant to resolve Contest 3137 by stipulation. (*Id.*)

(6) Claimant, the United States, and OWRD agree that Contest 3827 can be resolved without the need for further proceedings, pursuant to the terms in Stipulation, except Claimant and OWRD agree that further proceedings are appropriate to determine the exact rate of diversion. (Stipulation.)

(7) In 1916, E. P. McCornack filed a Notice of Claim of Water Right in regards to the Little Wocus Reclamation & Irrigation Project. His claim (Old Filing No. 418) was 497.92 acres, which includes the property in Claim 143 except for an additional 58.9 acres of uplands. (OWRD Ex. 1 at 10-11.) Old Filing No. 418 was based on dikes constructed prior to 1889 to divert water, which were improved until October 1905, an irrigation canal built in 1908, a pump installed in May 1909. (*Id.* at 11.) McCornack reported in his Notice:

The amount of water which is deemed necessary for beneficial use and the amount to be so used is Seven (7) cubic feet per second.

The water to be used is from that usually and normally upon the land, but is the waters of Upper Klamath Lake, in Klamath County, Oregon.

The estimated cost of this reclamation and irrigation is \$20,000.00.

The construction work was begun prior to 1889.

The construction work was completed in 1905 and the water completely applied to the use for which it was intended on the first day of June, 1909.

(*Id.*)

(8) In an affidavit signed on June 2, 1920, Cornack reported in regards to the nearby Caledonia Marsh and Wocus Marsh:

A Power line has been built by the present owners, namely, the Geary Investment Company and Dr. R. H. Ellis and Dr. J.C. Elliott King, and pumps are shortly to be installed to pump out the rest of the water and to improve the productivity of the Marsh by the proper application of water.

(*Id.* at 14.)

(9) In 1939 and 1940, Claimant's predecessors installed four pumping plants to improve drainage on the property. (Direct Testimony of Kevin Hatfield, Ex. 2 at 50-51 and Ex. 45.)

CONCLUSION OF LAW

The appropriate rate of diversion for irrigation for Case 119 (Claim 143) is 8.47 cfs.

OPINION

Terms and Conditions (except for diversion rate)

Claimant, the United States, and OWRD agree that Claim 143 should be approved by the Adjudicator as described below, when viewed in light of the Stipulation to Resolve Contest 3137 Against Claim No. 143 (described above):

SOURCE: Upper Klamath Lake, tributary to Klamath River

LOCATION (Point of Diversion): A headgate located in Lot 2, SW¼ NW¼, Section 14, Township 38 South, Range 8 East, W.M. The approximate location of the headgate is shown on the map included in OWRD Exhibit 1 at page 7, a true and correct copy of which is attached hereto as Exhibit A (Claim Map).

USE: Irrigation of 497.9 acres and livestock watering of 500 head of cattle.

DIVERSION RATE: Claimant and the United States agree that Claim 143 should be approved by the Adjudicator with a diversion rate of 12.5 cubic feet per second (cfs) for irrigation and 6,000 gallons per day (gpd) for livestock. Claimant and OWRD agree that Claim 143 should be approved by the Adjudicator with a diversion rate of no less than 8.47 cfs and no more than 12.5 cfs for irrigation and 6,000 gpd for livestock, with the narrow issue of the exact diversion rate for irrigation to be the subject of further proceedings. Claimant, the United States, and OWRD agree that to facilitate livestock watering, water may be diverted as reasonably necessary to transport the water and to prevent the ditches and channels from being completely frozen, but at no time shall more water be diverted than has been historically diverted for beneficial use and is reasonably necessary to transport the water and to prevent the ditches and channels from being completely frozen.

DUTY FOR IRRIGATION USE: 3.0 acre-feet per acre.

PERIOD OF USE: January 1 through December 31 for irrigation and livestock watering.

PRIORITY DATE: December 31, 1889, except for irrigation and livestock watering on 58.9 acres of the 497.9 acres making up the total place of use (including Township 38 South, Range 8 East, W.M., Section 14, Lot 1 NWNW (1.4 acres); and Lot 2, SWNW (13.5 acres) and Section 15, NENE (4.0 acres); SWNE (5.7 acres); Lot 1, SENE (31.9 acres); and Lot 2, NWSE (2.4 acres), for which the prior date is December 31, 1907.

PLACE OF USE: Use of water under Claim 143 on the following place of use, when combined with use of water under any other right adjudicated in the Klamath Basin Adjudication for any portion or all of the same place of use, may not exceed the rate and duty necessary for beneficial use as determined the Klamath Basin Adjudication.

Township 38 South, Range 8 East, W.M.

Section 14: SENW (1.7 acres); NESW (7.6 acres); NWSW (40.0 acres); SWSW (40.0 acres); SWSE (1.5 acres); SESW (2.1 acres); Lot 1, NWNW (1.4 acres); Lot 2, SWNW (13.5 acres); Lot 3, SWNW (22.6 acres); Lot 4, SENW (3.9 acres); Lot 5, NESW (20.0 acres); Lot 6, SESW (36.8 acres).

Section 15: NENE (4.0 acres); SWNE (5.7 acres); NESE (40.0 acres); Lot 1, SENE (31.9 acres); Lot 2, NWSE (2.4 acres); Lot 5, SWSE (1.5 acres); Lot 6, SENE (7.0 acres); Lot 7, NWSE (16.2 acres); Lot 8, SESE (31.1 acres); Lot 8, SWSE (0.4 acres)

Section 22: Lot 9, NENE (1.3 acres)

Section 23: NENW (40.0 acres); Lot 1, SWNW (2.4 acres); Lot 2, NESW (1.2 acres);, Lot 7, SWNE (9.6 acres); Lot 8, NWNW (13.1 acres); Lot 9, NWNW (34.4 acres); Lot 9, SWNW (24.9 acres); Lot 10 SENW (39.7 acres)

497.9 acres total (shown in better detail on the attached Claim Map (Exhibit A))

The Stipulation to Resolve Contest signed by Claimant, the United States, and OWRD, as incorporated in this Proposed Order, is supported by a preponderance of the evidence in the record and settles all issues except the diversion rate.

Diversion Rate

Claimants of water rights have the burden of establishing their contested claims, by a preponderance of the evidence. ORS 539.110. The burden of presenting evidence to support a particular fact or position in a contested case rests on the proponent of the fact or position. ORS 183.450.

Claimants seeking to establish a pre-1909 water right have the burden of proving by a preponderance of the evidence that the following elements existed prior to February 24, 1909:

As a general rule, to constitute a valid appropriation of water, three elements must exist: (1) an intent to apply it to a beneficial use, existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, canal or other structure; and (3) an application of it within a reasonable time to some useful industry: *Low v. Rizor*, 25 Or. 557 (37 P. 82). It is said in Black's Pomeroy on Water Rights, § 48, in regard to the intent, that —

"The fundamental doctrine is well settled that the appropriation must be made with a *bona fide* present design or intention of applying the water to some immediate useful or beneficial purpose, or in present *bona fide* contemplation of a future application of it to such a purpose, by the parties thus appropriating or claiming."

In Re Rights to Waters of Silvies River, 115 Or 27, 64-65 (1925).

In regards to application for beneficial purpose, the court concluded:

The test, both in the construction of the necessary works and in the application of the water to a beneficial purpose, is reasonable diligence.

There must be by such assiduity of work of construction as will manifest to the world a *bona fide* intention to complete it within a reasonable time. The question is one of fact and must be determined from the surrounding circumstances in each particular case: [citations omitted].

Id. at 61.

A pre-1909 appropriation, such as the right claimed by Claimant, will include additional quantities of water with the same priority date if the development of the additional waters occurs with “reasonable diligence.” *In re Hood River*, 114 Or 112, 130-46 (1924), in which the court held in relevant parts:

In Long on Irrigation, Section 41, we read:

"The appropriator must exercise that degree of diligence which will indicate the constancy and steadiness of purpose and labor usual with men engaged in like enterprises, who desire a speedy accomplishment of their designs, and will manifest to the world a *bona fide* intention to complete the work without unnecessary delay."

* * * * *

* * * Reasonable diligence is the test, both in the construction of the necessary system of works and in the application of the water to a beneficial purpose. * * * In the prosecution of the construction of a system of works necessary for the diversion and application of water, in an attempted appropriation of the same, the diligence required by the law does not involve unusual or extraordinary efforts. That which is usual and ordinary with men engaged in like enterprises who desire to speedily effect their designs is required. There must be such assiduity of work of construction of the system as will manifest to the world a *bona fide* intention to complete it within a reasonable time.

(*Id.* at 130-31.)

Reasonable diligence is exercised in the diversion of the water, if such diversion keeps pace with the additional area of land brought under cultivation, and the latter in turn be done with reasonable diligence: *Seaward v. Pacific L.S. Co.*, [*supra*]; Wiel, *Water Rights* (3 ed.), §§ 382-385, 483-485; Kinney on Irrigation (2 ed.), Chap. 39, §§ 734, 736, 738, 740, 741.

(*Id.* at 136.)

OAR 690-028-0045 defines “reasonable diligence” as:

(1) The complete beneficial use of all the water for a proposed purpose does not have to be made in its entirety prior to February 24, 1909, to claim a vested water right. All persons, including persons who acquire formerly reserved land shall be allowed to develop their claim with reasonable diligence.

(2) Reasonable diligence in the construction of the system of works necessary to fully accomplish appropriation of the water does not require unusual or extraordinary effort. Reasonable diligence is that which is usual and ordinary with persons performing similar projects. The water user must demonstrate a genuine intent to complete the appropriation in a timely manner. The question is one of fact, to be determined from the circumstances on case-by-case basis.

Claimant has the burden of providing persuasive and preponderate evidence to establish the diversion rate. Claimant must show that her predecessors exercised “reasonable diligence” that is usual and ordinary with what persons would do with similar projects. OAR 690-028-0045(2). Claimant must establish “a genuine intent to complete the appropriation in a timely manner.” (*Id.*) Per the excerpts above in the pertinent cases, Claimant must “exercise that degree of diligence which will indicate the constancy and steadiness of purpose and labor usual with men engaged in like enterprises, who desire a speedy accomplishment of their designs, and will manifest to the world a *bona fide* intention to complete the work without unnecessary delay.” Long on *Irrigation*, quoted with approval in *In re Hood River*, 114 Or at 130. “That which is usual and ordinary with men engaged in like enterprises who desire to speedily effect their designs is required. There must be such assiduity of work of construction of the system as will manifest to the world a *bona fide* intention to complete it within a reasonable time.” *Id.* at 131.

In 1916, Claimant’s predecessor to much of the property in Claim 143 reported the diversion rate of 7.0 cfs. was the “completely applied” rate. The property in that report did not include 58.9 upland acres included in Claimant’s claim. OWRD concedes Claimant’s first argument that the additional land not considered in 1916 is a basis to increase the diversion rate for irrigation. OWRD agreed that the diversion rate should be increased by 1.47 cfs for a total of 8.47 cfs for irrigation purposes of all the acreage in Claim 143. OWRD does not contest the Stipulation’s proposed quantity of use for livestock. Claimant did not object to the proposed increase for inclusion of the additional 58.9 upland acres, but claimed two other reasons for a greater diversion rate, which are considered below.

The most persuasive evidence of the appropriate diversion rate is the 7.0 cfs designated by Claimant’s predecessor in 1916, increased to 8.47 cfs to include the 58.9 upland acres. Claimant has not met the burden of proving “reasonable diligence” to support a diversion rate above 8.47 cfs for irrigation of the lands in Claim 143. The only evidence of further diversion was the construction of pumping plants in 1939 and 1940, more than 50 years after first appropriation of the water and 30 years after the water right was completely applied by Claimant’s predecessor, as he reported in 1916. (OWRD Ex. 1 at 11.) These improvements were not reasonably diligent in regards to the appropriation for claim 143 and in effect constitute a separate appropriation of water.

Claimant further argues that the Link River Dam could possibly alter water elevations, so that Claimant’s predecessors *may* have had to address greater irrigation needs, but the possibility of such an increase is not a probability because the evidence reveals that the level went up and down. This *possibility* cannot support a finding or a conclusion, which must be based on a preponderance of the evidence.

Claimant's final argument is that "the basin-standard rate of 12.6 cfs is appropriate under the circumstances of this case, because the record as a whole supports beneficial use of that amount." The "record as a whole" contains evidence of much later improvements to increase the appropriation. These later improvements cannot be considered reasonably diligent development of the pre-1909 appropriation. Claimant has not met her burden of showing reasonable diligence of further appropriation beyond that noted in the 1916 Notice, except for the additional amount for the 58.9 upland acres.

ORDER

I propose 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 water right are established for Claim 143 as follows:

SOURCE: Upper Klamath Lake, tributary to Klamath River

LOCATION (Point of Diversion): A headgate located in Lot 2 (SW $\frac{1}{4}$ NW $\frac{1}{4}$ /), Section 14, Township 38 South, Range 8 East, W.M. The approximate location of the headgate is shown on the map included in OWRD Exhibit 1 at page 7, a true and correct copy of which is attached hereto as Exhibit A (Claim Map).

USE: Irrigation of 497.9 acres and livestock watering of 500 head of cattle.

DIVERSION RATE: 8.47 cfs for irrigation and 6,000 gpd for livestock. To facilitate livestock watering, water may be diverted as reasonably necessary to transport the water and to prevent the ditches and channels from being completely frozen, but at no time shall more water be diverted than has been historically diverted for beneficial use and is reasonably necessary to transport the water and to prevent the ditches and channels from being completely frozen.

DUTY FOR IRRIGATION USE: 3.0 acre-feet per acre.

PERIOD OF USE: January 1 through December 31 for irrigation and livestock watering.

PRIORITY DATE: December 31, 1889, except for irrigation and livestock watering on 58.9 acres of the 497.9 acres making up the total place of use (including Township 38 South, Range 8 East, W.M., Section 14, Lot 1 NWNW (1.4 acres); and Lot 2, SWNW (13.5 acres) and Section 15, NENE (4.0 acres); SWNE (5.7 acres); Lot 1, SENE (31.9 acres); and Lot 2, NWSE (2.4 acres), for which the prior date is December 31, 1907.

PLACE OF USE: Use of water under Claim 143 on the following place of use, when combined with use of water under any other right adjudicated in the

Klamath Basin Adjudication for any portion or all of the same place of use, may not exceed the rate and duty necessary for beneficial use as determined the Klamath Basin Adjudication.

Township 38 South, Range 8 East, W.M.

Section 14: SENW (1.7 acres); NESW (7.6 acres); NWSW (40.0 acres); SWSW (40.0 acres); SWSE (1.5 acres); SESW (2.1 acres); Lot 1, NWNW (1.4 acres); Lot 2, SWNW (13.5 acres); Lot 3, SWNW (22.6 acres); Lot 4, SENW (3.9 acres); Lot 5, NESW (20.0 acres); Lot 6, SESW (36.8 acres).

Section 15: NENE (4.0 acres); SWNE (5.7 acres); NESE (40.0 acres); Lot 1, SENE (31.9 acres); Lot 2, NWSE (2.4 acres); Lot 5, SWSE (1.5 acres); Lot 6, SENE (7.0 acres); Lot 7, NWSE (16.2 acres); Lot 8, SESE (31.1 acres); Lot 8, SWSE (0.4 acres)

Section 22: Lot 9, NENE (1.3 acres)

Section 23: NENW (40.0 acres); Lot 1, SWNW (2.4 acres); Lot 2, NESW (1.2 acres); Lot 7, SWNE (9.6 acres); Lot 8, NWNE (13.1 acres); Lot 9, NWNW (34.4 acres); Lot 9, SWNW (24.9 acres); Lot 10 SENW (39.7 acres)

497.9 acres total (shown in better detail on the attached Claim Map (Exhibit A))



Lawrence S. Smith, Administrative Law Judge
Office of Administrative Hearings

Date: November 20, 2007

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:

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

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2007, I mailed a true copy, certified return receipt requested 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:

Dwight W. French / Teri Hranac
Oregon Water Resources Dept.
725 Summer Street N.E., Suite "A"
Salem, OR 97301
Phone: 503-986-0826
Fax: 503-986-0901
dwight.w.french@wrд.state.or.us
teri.k.hranac@wrд.state.or.us

Carl V. Ullman
Water Adjudication Project
The Klamath Tribes
PO Box 957
Chiloquin, OR 97624
Phone: 541-783-3081
Fax: 541-783-2609
bullman3@earthlink.com

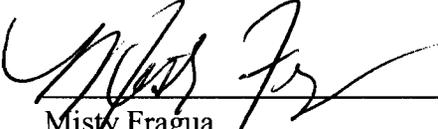
Stephen R. Palmer, Attorney
US Department of the Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825
Phone: 916-978-5683
Fax: 916-978-5694

Steven L. Shropshire / Justin Gericke
Jordan Schrader PC
PO Box 230669
Portland, OR 97281
Phone: 503-598-7070
Fax: 503-598-7373
steve.shropshire@jordanschrader.com
justin.gericke@jordanschrader.com

Jesse D. Ratcliffe
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310
Phone: 503-947-4500
Fax: 503-947-3802
jesse.d.ratcliffe@doj.state.or.us

Marta C. Carpenter
PO Box 1810
Klamath Falls, OR 97601

Greg D. Corbin/Jennie L. Bricker
Stoel Rives LLP
900 SW Fifth Ave., Suite 2600
Portland, OR 97204
Phone: 503-294-9631
Fax: 503-220-2480
gdcorbin@stoel.com
jlbricker@stoel.com



Misty Fragua
Administrative Assistant