

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

~~Water Watch of Oregon, Inc.~~; Horsefly Irrigation District; Langell Valley Irrigation District; ~~Medford Irrigation District; Rogue River Valley Irrigation District~~; United States of America; ~~Klamath Tribes~~; Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; ~~Klamath Hills District Improvement Company~~; 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 Pritchard; 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; William J. and Ethel J. Rust; Margaret Jacobs; Carolyn Obenchain; Rodney Z. James; Francis Loving Trust, Hilda Francis, Trustee; Leonard Baio; Thomas W. Mallams; Gary Strong; Robert Bartell;  
Contestants

**AMENDED PROPOSED ORDER**

Case No. 129

Claim(s): 186

Contest(s): 47, 281, 516, 986, 1221, 1455, 1804, 2491, 2778, 2854, 3176<sup>1</sup>, 3407<sup>2</sup>, 3837, 4179<sup>3</sup>, and 4951

vs.

Oregon Department of Fish and Wildlife;  
Claimant/Contestant

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<sup>1</sup> Medford Irrigation District and Rogue River Valley Irrigation Districts voluntarily withdrew, without prejudice, from their Contest 3176 on December 5, 2002.

<sup>2</sup> Don Vincent voluntarily withdrew from Contest 3407 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3407 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3407 on January 16, 2004.

<sup>3</sup> The Klamath Tribes voluntarily withdrew, without prejudice, Contest 4179. See KLAMATH TRIBES' WITHDRAWAL OF CONTEST dated September 28, 2006.

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## HISTORY OF THE CASE

The Oregon Department of Fish & Wildlife (ODFW, or Claimant) filed Claim 186 on January 30, 1991, claiming an appropriation of water in the Klamath Basin prior to February 24, 1909. The claim is for 26 cubic feet per second (cfs) for irrigation of approximately 1051.6 acres of land. The claimed uses of the water are irrigation and stock watering (6 cfs) and wildlife habitat (20 cfs). The claimed period of use is April 1 through October 31 for irrigation and January 1 through December 31 for wildlife habitat.

On October 4, 1999, the Oregon Water Resources Department (OWRD) issued its Preliminary Evaluation, concluding that there was insufficient evidence to prove a pre-1909 water right.

On May 5, 2000, the Francis Loving Trust filed Contest 2491. On May 8, 2000, the following contests were filed: Thomas William Mallams filed Contest 4951; The Klamath Tribes (Tribes) filed Contest 4179; The United States (USA) filed Contest 3837; Klamath Project Water Users (KPWU)<sup>4</sup> filed Contest 3407; the Horsefly Irrigation Group<sup>5</sup> (HID et al) filed Contest 3176; WaterWatch of Oregon filed Contest 2854; Claimant filed Contest 2778; Rodney Z. James filed Contest 1804; Carolyn Obenchain filed Contest 1455; Margaret Jacobs filed Contest 1221; Robert Bartell filed Contest 986; Gary Strong filed Contest 516; Leonard Baio filed Contest 281<sup>6</sup>; and William and Ethel Rust filed Contest 47. The WaterWatch contest was dismissed by order dated May 20, 2003; all other dismissals or withdrawals are noted in the footnotes to the caption.

On May 14, 2003, Claims 142, 143, 144, 186, 205 and 286 were consolidated in Lead Case 003 for a determination as to whether the United States is the proper holder of the right to the water in the Klamath Project. After Administrative Law Judge (ALJ) Maurice L. Russell, II, determined that the United States is the proper holder of all water rights appropriated in 1905 for the Klamath Project,<sup>7</sup> he terminated the consolidated proceedings and the individual claims were activated for further proceedings. In his Amended Interim Order, ALJ Russell ordered that the determination that the United States is the proper holder of all water rights under the appropriation for the Klamath Project be the law of the case for the individual claims.

On June 22, 2006, ALJ Gutman issued an Order Granting Joint Motion Clarifying Scope of Proceedings. The Order clarified that this Adjudication and this Case do not include a determination of the relative rights to use the waters of the Lost River basin, as opposed to the waters of the Klamath basin, and provided that the Proposed Order in this case would contain

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<sup>4</sup> KPWU is an association of several individual parties otherwise identified in these proceedings and in the caption of this Notice. The names will not be repeated here.

<sup>5</sup> The Horsefly Group consists of Horsefly Irrigation District, Langell Valley Irrigation District, Rogue Valley Irrigation District and Medford Irrigation District.

<sup>6</sup> Francis Loving Trust, Thomas William Mallams, Rodney Z. James, Carolyn Obenchain, Margaret Jacobs, Robert Bartell, Gary Strong, Leonard Baio, and the Rusts all filed identical contests, but did not file any evidence or otherwise participate in the case. They are hereinafter referred to as "Baio et al."

<sup>7</sup> Klamath Adjudication Case No. 003, Amended Interim Order at 40, May 23, 2006.

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language effectuating that conclusion. On July 12, 2006, ODFW filed a Motion for Ruling on Legal Issues. After briefing, on October 10, 2006, ALJ Dove Gutman issued a Ruling granting ODFW's motion in part and denying it in part.<sup>8</sup>

A Notice of Hearing was duly served on all participants on September 25, 2006, for a hearing commencing October 26, 2006. On October 26, 2006, ALJ Gutman convened the scheduled hearing. Lynne Perry and Stephen Sanders appeared for ODFW. Stephen Palmer appeared for the United States. Daniel Kelly appeared for KPWU. Jesse Ratcliffe appeared for OWRD. All parties advised the ALJ that no cross-examination was necessary. ALJ Gutman then admitted stipulations between Claimant and the United States, and Claimant and KPWU, ruled on evidentiary issues and established a schedule for further proceedings. Among other provisions, the stipulation between Claimant and the United States limited the claim to 1051.6 acres within the 1070.9 acres tabulated by OWRD at pages 57 through 65 of OWRD Exhibit 1, based upon a map prepared by OWRD and accepted by Claimant in the original claim document.

Pursuant to an order setting the post-hearing briefing schedule, the participants timely filed closing, responsive and reply briefs. The record closed on March 1, 2007. On June 11, 2007, I issued an Interim Order, reopening the record to receive clarification as to one diversion point. That clarification was received and commented upon. The record closed on July 18, 2007.

Prior to closure of the record, the case was assigned to me to prepare this Proposed Order. I have reviewed the entire record, including all argument, prior to preparation of this order.

### EVIDENTIARY RULINGS

The record is composed of the following evidence.

OWRD Exhibit 1 together with the affidavit of Teri Hranac was admitted without objection.

Exhibits U1, U2, and U4 through U21, offered by the United States, were admitted without objection. Exhibit U3 was withdrawn by stipulation.

The United States offered corrections to Exhibit U16, and to Exhibit A attached to Exhibit U1. These corrections were admitted without objection.

Contestant KPWU was granted leave to file an objection to Exhibit U22, a decision upon which objection, if any, was reserved for this order. No such objection having been received, Exhibit U22 is admitted into the record.

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<sup>8</sup> ALJ Gutman concluded that as a matter of law natural overflow could form the basis for a pre-1909 water right. However, the ALJ denied the motion as to whether such a pre-1909 water right by natural overflow had been shown in this case, and whether its priority date was earlier than that of the Klamath Project. Order on Motion for Ruling on Legal Issues (Case 129) at 3, 4.

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Claimant's Exhibits C1 through C31, C33, C35 through C43, C44 pages 16 through 20, and C45 through C47 were admitted without objection. KPWU objected to Exhibits C32 and C34 on relevance grounds. That objection was overruled at hearing and Exhibits C32 and C34 were admitted into evidence. Claimant withdrew Exhibit C40 and pages 1 through 15 of Exhibit C44. On November 27, 2006, Claimant moved to reopen the record to substitute the minutes of the State Land Board meeting of February 14, 1882 as Exhibit C36. Based on the representation that none of the active participants in the case objected to this substitution, I issued an order granting the motion on January 3, 2007. The document previously marked as Exhibit C36 was retained in the record as "withdrawn Exhibit C36" and the new Exhibit C36 was admitted into evidence.

On the date of the hearing, Contestant KPWU offered Exhibit A, which was a copy of discovery responses that had been filed as part of the prior proceedings on the Motion for Ruling on Legal Issues. Claimant objected to admission of this exhibit as untimely filed. The admission of this exhibit was reserved for determination in this order.

On July 26, 2006, ALJ Gutman issued an order setting dates for further proceedings leading up to the hearing in this case. That order, issued on an unopposed motion for extension by the United States, required all direct and rebuttal testimony, together with all documentary exhibits, to be filed in this case no later than October 16, 2006. OAR 137-003-0575 authorizes the Administrative Law Judge to, among other things, "schedule the date, time and location of the hearing or for any other matters connected with the hearing, including dates for prefiled testimony and exhibits." OAR 137-003-0575(4)(i). The ALJ is also vested with authority to conduct and control the hearing itself, under OAR 137-003-0600. Particularly in a case such as this, where the dates for submitting prefiled testimony and exhibits were set upon motion, without opposition by any other party, the offering at hearing of an additional exhibit is objectionable. KPWU argued that it was unnecessary to allow Claimant the opportunity to file additional evidence in rebuttal, because the exhibit was a response filed by the Claimant to a discovery request. However, Claimant rightly noted that whatever evidence is offered in a case, the opposing party has the right to respond to it. Thus, Claimant would be entitled to reopen the record to submit additional rebuttal evidence if this exhibit were allowed, causing unnecessary delay and disruption in proceedings. It is also noteworthy that Contestant KPWU did not cite to this exhibit for any purpose in briefing. I therefore conclude that Exhibit A, offered by Contestant KPWU at hearing, is not necessary to a full and fair hearing on the merits.

In view of the foregoing, Claimant's objection to Exhibit A offered on October 26, 2006<sup>9</sup> is sustained. The document will be retained in the record, however, as an offer of proof for the purpose of review.

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<sup>9</sup> Paradoxically, KPWU withdrew at hearing the attendant Exhibit B, an Order on Motion for Ruling on Legal Issues in Klamath Adjudication Case 141, but then attached it as "Exhibit A" to its Response Brief, resulting in some potential confusion in the record. I suggest that in the future counsel for all participants avoid duplicative designations that could cause confusion. This "Exhibit A" will not be stricken, however, as it appears not to have been submitted for its evidentiary effect, but as a supplement to argument. In any event, the Order on Motion for Ruling on Legal Issues in Klamath Adjudication Case 141 was recently vacated at the request of OWRD, and the matter set down for hearing on the merits.

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## ISSUES PRESENTED

1. Whether the record contains sufficient information to establish a vested pre-1909 claim. (USA, KPWU)
2. Whether any vested water right on all or a portion of the claimed place of use is included in the claims filed by the United States for the Klamath Project. (USA, KPWU)
3. Whether natural flood/sub-irrigation/natural overflow is a valid water right. (USA)
4. Whether the required elements are established for this claim. (KPWU, Baio, *et al*)
5. Whether the record establishes use of water or construction of works for the application of water before February 24, 1909. (KPWU)
6. Whether the works were constructed within a reasonable time after beginning construction or use of water. (KPWU, Baio, *et al*)
7. Whether the record supports the rate, duty, actual use, points of diversion, season of use or acreage claimed. (KPWU)
8. Whether the use of the claimed water for fish and wildlife habitat is wasteful. (KPWU)
9. Whether the record establishes year round use of water as claimed. (KPWU)
10. Whether the use of the claimed water has changed from irrigation to fish and wildlife management without compliance with Oregon statutory procedures for securing a change of use. (KPWU)
11. Whether water is being used for the claimed use. (KPWU)
12. Whether the claimant's changed use and application of the water is detrimental to contestants' priority water rights. (KPWU)
13. Whether the claimed water rights were abandoned when the land was purchased by claimant. (KPWU)
14. Whether the Klamath River and its tributaries were over-appropriated at the time claimant began its use of the claimed water. (KPWU)
15. Whether the current use was developed within a reasonable time after the claimed date of appropriation. (KPWU)

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16. Whether the purposes of the Klamath Reclamation Project as authorized by Congress, may not be realized in the event that water used pursuant to this claim interferes with the purpose of the Klamath Reclamation Project. (KPWU)
17. Whether, to the extent that a right is asserted for fish and wildlife use which interferes with the direct diversion and storage of waters for domestic and irrigation uses, it is in violation of Article III.C. of the Klamath River Basin Compact (Klamath Compact), ORS 542.620. (KPWU)
18. Whether any rights to use or store water for claimed purposes are subordinate to domestic and irrigation rights of contestants as provided in the Klamath Compact. (KPWU)
19. Whether the claims describe water rights claiming water that is not "water available" under the Klamath Adjudication. (HID *et al*)
20. Whether the use of water began prior to February 24<sup>th</sup> 1909. (Baio, *et al*)
21. Whether the construction of storage did not begin prior to February 24<sup>th</sup> 1909. (Baio, *et al*)
22. Whether the irrigation began within a reasonable period of time. (Baio, *et al*)
23. Whether development of "Walton Rights" over 70+ years constitutes a "reasonable period of time" and/or a "double standard". (Baio, *et al*)<sup>10</sup>
24. Whether the right claimed is a "claim to have a use of surface water from a spring, creek, river, or lake that began before February 24, 1909 and the use has been continuous since then," and/or whether OWRD has developed a 2<sup>nd</sup> standard "and whether there needs to be a 2<sup>nd</sup> opportunity to file." (Baio, *et al*)

#### FINDINGS OF FACT

1) This claim was originally for 26 cubic feet per second (cfs) of water (6 for irrigation and 20 for wildlife) from nine points of diversion located on the Klamath River, tributary to the Pacific Ocean, for irrigation of 1051.6 acres. The claimed priority date is 1900. By stipulation, the claim is limited to a rate of 1/40<sup>th</sup> cubic feet of water per second (cfs) per allowed acre, and a duty of three acre-feet of water per allowed acre. This rate and duty is appropriate. (Ex. C41; Stipulation of Claimant Oregon Department of Fish and Wildlife and Contestant United States of America Concerning Contests of Claim 186.) The Diversion Points are located as follows:

# 1 NW ¼ NE ¼ Section 19 T39S R9E.W.M.

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<sup>10</sup> Although this issue is listed because it was raised by a party or parties, no claim of a *Walton* right has been made in this case.

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- # 2 NE ¼ NW ¼ Section 19 T39S R9E.W.M.
- # 3 NE ¼ NE ¼ Section 24 T39S R8E.W.M.
- # 4 SW ¼ NE ¼ Section 24 T39S R8E.W.M.
- # 5 SE ¼ NW ¼ Section 24 T39S R8E.W.M.
- # 6 NW ¼ SW ¼ Section 24 T39S R8E.W.M.
- # 7 NE ¼ NE ¼ Section 26 T39S R8E.W.M.
- # 8 SW ¼ NE ¼ Section 26 T39S R8E.W.M.
- # 9 SW ¼ SW ¼ Section 30 T39S R8E.W.M.<sup>11</sup>

One additional Point of Diversion has been developed between Points #2 and #3, but its precise location is unclear.

The claimed places of use are located as follows:<sup>12</sup>

Location <u>T39S R8E.W.M.</u>	Acreage	Diversion Point
Section 23:		
NE ¼ SE ¼	0.1 acre	#6
SE ¼ SE ¼	17.2 acres	#6
Section 24:		
NE ¼ NE ¼	6.5 acres	#2
SW ¼ NE ¼	26.7 acres	#4
SE ¼ NE ¼	22.3 acres	#2
NW ¼ SW ¼	24.4 acres	#6
SW ¼ SW ¼	37.2 acres	#6
SE ¼ SW ¼	15.3 acres	#4 (2.7 acres), #5 (12.6 acres)
NE ¼ SE ¼	21.3 acres	#2 (8.0 acres), #3 (13.3 acres)
NW ¼ SE ¼	24.2 acres	#4 (22.7 acres), #5 (1.5 acres)
SW ¼ SE ¼	38.5 acres	#4 (3.4 acres), #5 (35.1 acres)
SE ¼ SE ¼	38.8 acres	#3
Section 25:		
NE ¼ NE ¼	1.0 acres	#5
NW ¼ NE ¼	7.1 acres	#5
SW ¼ NE ¼	5.3 acres	#5
NW ¼ NW ¼	38.0 acres	#7 (22.3 acres), #8 (15.7 acres)
SW ¼ NW ¼	38.3 acres	#7 (0.8 acres), #8 (37.5 acres)
NW ¼ SW ¼	5.7 acres	#8
SW ¼ SW ¼	24.8 acres	#8

<sup>11</sup> This diversion point has not been used for several years. Although, as recited in the Stipulation, Claimant has developed a new diversion point between Diversion Points #s 2 and 3, Claimant elected, by letter dated June 20, 2007, and corrected on June 21, 2007, not to include the new diversion point in this claim. The claim is therefore based on irrigation from Diversion Points #s 1 through 8.

<sup>12</sup> The Stipulation between Claimant and the United States limits the claim to 1,051.6 acres located within the 1,070.9 acres tabulated by OWRD in OWRD Exhibit 1 pages 57-65, which is the source of this list. Although the record does not establish which 1,051.6 acres, among the 1,070.9 acres tabulated by OWRD, is the subject of the stipulation, the evidence does not support allowance of the full 1,051.6 acres in any event.

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	NE ¼ SE ¼	3.5 acres	#1
	SE ¼ SE ¼	5.3 acres	#9
Section 26:			
	NE ¼ NE ¼	37.1 acres	#7
	NW ¼ NE ¼	3.0 acres	#7
	SW ¼ NE ¼	27.5 acres	#7 (8.2 acres), #8 (19.3)
	SE ¼ NE ¼	37.5 acres	#7 (17.4 acres), #8 (20.1 acres)
	SW ¼ NW ¼	1.7 acres	#8
	NE ¼ SW ¼	25.3 acres	#8
	SW ¼ SW ¼	3.2 acres	#8
	SE ¼ SW ¼	37.1 acres	#8
	NE ¼ SE ¼	33.2 acres	#8
	NW ¼ SE ¼	34.1 acres	#8
	SW ¼ SE ¼	29.0 acres	#8
	SE ¼ SE ¼	37.5 acres	#8
Section 35:			
	NE ¼ NE ¼	40.8 acres	#8
Section 36:			
	NW ¼ NE ¼	1.9 acres	#9
	SW ¼ NE ¼	23.2 acres	#9
	SE ¼ NE ¼	3.7 acres	#9
	NE ¼ NW ¼	0.5 acres	#8
	NW ¼ NW ¼	27.9 acres	#8
	NE ¼ SW ¼	6.1 acres	#8
	SE ¼ SW ¼	9.6 acres	#8

T39S R9E.W.M.

Section 19:			
	NW ¼ NE ¼	7.3 acres	#2
	SW ¼ NE ¼	0.7 acres	#2
	NE ¼ NW ¼	8.6 acres	#2
	NW ¼ NW ¼	7.0 acres	#2
	SW ¼ NW ¼	30.1 acres	#2
	SE ¼ NW ¼	8.9 acres	#2
	NE ¼ SW ¼	1.0 acres	#3
	NW ¼ SW ¼	18.4 acres	#2 (1.1 acre), #3 (17.3 acres)
	SW ¼ SW ¼	36.2 acres	#3
	SE ¼ SW ¼	1.5 acres	#3
	NW ¼ SE ¼	5.6 acres	#1
	SW ¼ SE ¼	22.4 acres	#1
Section 30:			
	NW ¼ NE ¼	16.5 acres	#1
	SW ¼ NE ¼	0.9 acres	#1
	NE ¼ NW ¼	7.0 acres	#1
	SW ¼ NW ¼	2.1 acres	#9
	SE ¼ NW ¼	26.4 acres	#1 (14.4 acres), #9 (12.0 acres)

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NE ¼ NW ¼	8.8 acres	#9
NW ¼ SW ¼	18.4 acres	#9
SW ¼ SW ¼	21.7 acres	#9
Grand total	1070.9	

(OWRD Ex. 1 at 57-65.)

2) Prior to European settlement, the Klamath River was subject to seasonal flooding, during which a portion of the property subject to this claim was seasonally inundated. (Ex. C13 at 3; C14 at 5.) As snow melted in early spring, the level of the Klamath River would rise until it flooded the adjoining properties. (*Id.*) Starting in May or June of each year, floodwaters receded, the land was 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. (*Id.*) This process was generally complete by fall, each year. (*Id.*) Prior to 1909, a cut was made in the natural berm on the southerly side of the Klamath River, to allow water to flow onto the property owned by the family of Lewis Furber immediately to the south of the claimed place of use during times when the river was not in flood. (Ex. C16 at 4, C17 at 11.) Although it is possible that water from this cut would reach a portion of the claimed place of use, the record does not show which part of the claimed place of use would have been affected. (Ex. C16 at 4.) After 1910, the Hooper family acquired a large part of the property subject to this claim, and built a similar diversion cut in the berm to allow irrigation of their property when the river was not in flood. (Ex. C16 at 5.)

3) Beginning in the 1850s, European settlers began coming into the area. They grazed cattle in the area of the land in question, and, perhaps, harvested hay there. (Ex. C16 at 2 through 4.) The land in question in this case was immediately south of and adjoined the Klamath River, and was overflowed seasonally by high water from the Klamath River. (*Id.*) There is no record, however, that this land was taken into exclusive ownership by any person until the 1870s.

4) Beginning in the 1870s, the State of Oregon began designating swamp and overflow lands to be transferred to the State from the federal government and sold on terms specified by statute. (Exs. U8-U11.) Some purchasers designated dry land as swamp land, in an effort to defraud. (Ex. U8 at 5.) On February 14, 1882, the Board of Commissioners for the Sale of School and University Lands ("State Land Board") determined that John F. Miller had applied to purchase certain swamp lands on April 9, 1872, and had subsequently proven to the satisfaction of the Board that the claimed lands had been reclaimed. The portions of those lands that are subject to this claim were described as follows:

T39S R8E.W.M.

Section 23:

NE ¼ SE ¼	0.1 acres
SE ¼ SE ¼	17.2 acres

Section 24:

SE ¼ NE ¼	22.3 acres
SW ¼ NE ¼	26.7 acres
NW ¼ SW ¼	24.4 acres

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Section 26:

SE ¼ NE ¼ 37.5 acres

(Ex. C36.) This property was subsequently conveyed to John F. Miller on July 5, 1882 and August 6, 1882, by Swamp Act deed. (Ex. U19 at 10, 11.)

5) On February 10, 1882, the State Land Board issued a Swamp Act deed to John F. Miller for property including the following subject to this claim:

T39S R8E.W.M.

Section 24:

NE ¼ NE ¼ 6.5 acres

Section 26:

NE ¼ NE ¼ 37.1 acres

NW ¼ NE ¼ 3.0 acres

SW ¼ NE ¼ 27.5 acres

SW ¼ NW ¼ 1.7 acres

T39S R9E.W.M.

Section 19:

NW ¼ NE ¼ 7.3 acres

NE ¼ NW ¼ 8.6 acres

NW ¼ NW ¼ 7.0 acres

SE ¼ NW ¼ 8.9 acres

(Ex. C5.)

6) On August 16, 1882, the State Land Board issued a Swamp Act deed to John F. Miller for property including the following that is subject to this claim:

T39S R8E.W.M.

Section 24:

SE ¼ NE ¼ 22.3 acres<sup>13</sup>

SW ¼ SW ¼ 37.2 acres

SE ¼ SW ¼ 15.3 acres

NE ¼ SE ¼ 21.3 acres

NW ¼ SE ¼ 24.2 acres

SW ¼ SE ¼ 38.5 acres

SE ¼ SE ¼ 38.8 acres

Section 25:

NE ¼ NE ¼ 1.0 acres

NW ¼ NE ¼ 7.1 acres

SW ¼ NE ¼ 5.3 acres

NW ¼ NW ¼ 38.0 acres

SW ¼ NW ¼ 38.3 acres

<sup>13</sup> Although conveyed in 1882, this parcel was included in the property subject to Miller's 1872 application, as found by the State Land Board on February 14, 1882.

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NW ¼ SW ¼ 5.7 acres  
SW ¼ SW ¼ 24.8 acres  
NE ¼ SE ¼ 3.5 acres

Section 26:

NE ¼ SW ¼ 25.3 acres  
SW ¼ SW ¼ 3.2 acres  
SE ¼ SW ¼ 6.3 acres  
NE ¼ SE ¼ 33.2 acres  
NW ¼ SE ¼ 26.5 acres  
SW ¼ SE ¼ 29.0 acres  
SE ¼ SE ¼ 26.7 acres

Section 35:

NE ¼ NE ¼ 40.8 acres

T39S R9E.W.M.

Section 19:

SW ¼ NE ¼ 0.7 acres  
SW ¼ NW ¼ 30.1 acres  
NE ¼ SW ¼ 1.0 acres  
NW ¼ SW ¼ 18.4 acres  
SW ¼ SW ¼ 36.2 acres  
SE ¼ SW ¼ 1.5 acres  
NW ¼ SE ¼ 5.6 acres

(Ex. C7.)

7) On April 6, 1889, the State Land Board issued a Swamp Act deed to E.C. Small for property including the following that is subject to this claim:

T39S R8E.W.M.

Section 26:

SE ¼ SW ¼ 30.8 acres  
NW ¼ SE ¼ 7.6 acres  
SE ¼ SE ¼ 10.8 acres

(Ex. U19 at 25.)

8) The evidence in the record establishes that the property conveyed to Miller and Small was under private ownership no later than 1889. Natural grass was harvested from the land, either through grazing or as hay, from at least the time that it was in private hands. (OWRD Ex. 1 at 18-42; Ex. C16 at 3, 4; Ex. C47 at 3; Ex. C11 at 5; Ex. C12 at 3.)

9) On June 1, 1895, William Miller conveyed to Sarah Miller, his wife, an undivided one-half interest in the following-described real property, among others:

NW ¼ NE ¼ 1.9 acres  
SW ¼ NE ¼ 23.2 acres  
SE ¼ NE ¼ 3.7 acres  
NE ¼ NW ¼ 0.5 acres  
NW ¼ NW ¼ 27.9 acres

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NE ¼ SW ¼ 6.1 acres  
SE ¼ SW ¼ 9.6 acres

all in Section 36, T39S R8E.W.M. The record does not include any evidence as to how or when William Miller acquired the property that he transferred to Sarah Miller, although included in the property transferred were parcels that had been conveyed to John Miller by the Swamp Act deeds listed above. None of the Swamp Act deeds in the record, however, describes any property in Section 36, T39S R8E.W.M.

10) The only property located in Section 30, T39S R9E.W.M. that was described in a Swamp Act deed in the record was Lot 7. (Ex. U19 at 11.) Lot 7 was not included in the property subject to this claim. (OWRD Ex. 1 at 57, 65 and 66.)

11) Beginning in the early 1900s, various facilities were built on the Klamath River to control the flow of the river. Link River Dam controlled flooding, so that the upper areas previously subject to seasonal inundation were no longer covered with water. From 1930 on, the California-Oregon Power Company raised the level of the river in the area subject to this claim, by building a dam downstream at Keno. This maintained the level of water in the river and Klamath Straits at a point where the land would be continually flooded without control structures. As dikes and levies were built along the Klamath River, and the Klamath Straits was blocked, owners built head-gates through the structures to allow water to flood the subject property for irrigation. (Ex. C47 at 2, 3.)

#### CONCLUSIONS OF LAW

1. **The record contains sufficient information to establish a vested pre-1909 claim for a portion of the claimed places of use.**
2. **The vested water right on a portion of the claimed place of use is prior to, and not included in the claims filed by the United States for the Klamath Project.**
3. **Natural flood/sub-irrigation/natural overflow, with other factors, can form the basis of a valid pre-1909 water right.**
4. **The required elements are established for this claim, as to a portion of the claimed place of use.**
5. **The record establishes use of water before February 24, 1909.**
6. **Works were constructed within a reasonable time.**
7. **The record supports part of the rate, duty, actual use, points of diversion, seasonal use or acreage claimed.**

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8. The use of the claimed water for irrigation of land for wildlife feed and habitat is not wasteful.
9. The record does not establish year round use of water as claimed.
10. The use of the claimed water has not changed from irrigation to fish and wildlife management without compliance with Oregon statutory procedures for securing a change of use.
11. Water is being used for the claimed use.
12. Claimant's use and application of the water is prior to, and not detrimental to contestants' priority water rights.
13. The claimed water rights were not abandoned when the land was purchased by claimant.
14. The Klamath River and its tributaries were not over-appropriated at the time claimant began its use of the claimed water.
15. The current use was developed within a reasonable time after the claimed date of appropriation.
16. It is irrelevant whether the purposes of the Klamath Reclamation Project as authorized by Congress, will be realized in the event that water used pursuant to this claim interferes with the purpose of the Klamath Reclamation Project, as the allowed portion of the right is senior to the priority of the Klamath Reclamation Project.
17. Since this claim is for irrigation, it is irrelevant whether a right asserted for fish and wildlife use which interferes with the direct diversion and storage of waters for domestic and irrigation uses would be in violation of Article III.C. of the Klamath River Basin Compact (Klamath Compact), ORS 542.620.
18. The rights to use water for claimed purposes are senior to domestic and irrigation rights of contestants under the Klamath Compact.
19. The claims do not describe water rights claiming water that is not "water available" under the Klamath Adjudication.
20. The use of water began prior to February 24<sup>th</sup> 1909.
21. Since the claim is for irrigation, it is irrelevant whether the construction of storage did not begin prior to February 24<sup>th</sup> 1909.
22. The irrigation began within a reasonable period of time.

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23. There is no claim for *Walton* rights in this case.
24. The right claimed is a “claim to have a use of surface water from a spring, creek, river, or lake that began before February 24, 1909 and the use has been continuous since then.”

### OPINION

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. The standard of evidence applicable to these cases is by a preponderance. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division* 47 Or App 437 (1980); *Metcalf v. AFSD*, 65 Or App 761 (1983), *rev den* 296 Or 411 (1984); *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, *rev den* 308 Or 660 (1989). Thus, if, considering all the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

In order to establish the claim, Claimant must show (1) an intent to apply the water to some beneficial use existing at the time or contemplated in the future; (2) a diversion from the natural channel by means of a ditch, channel or other structure; and (3) the application of the water within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930). Where the claim is based on natural overflow, the appropriation may be established by evidence that the “proprietor of the land accepts the gift made by nature and garners the produce of the irrigation by harvesting or utilizing the crops grown on the land\*\*\*.” *In re Silvies River*, 115 Or 27, 66 (1925).

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

### THE PRE-1909 RIGHT:

The parties stipulated to limit the claim to 1051.6 acres, at a specified rate and duty. Under the stipulation ODFW limited its claim to acreage listed in OWRD Exhibit 1 at pages 57 to 65. However, as discussed more fully below, the claim can only be allowed for 868.5 acres.

In its brief, ODFW also stated that all the property subject to this claim was described in the Swamp Act deeds to John Miller and E.C. Small that are contained in the record. ODFW then argued that the conveyance by Swamp Act deeds demonstrated that water was beneficially used on the property through natural overflow at the time the conveyances were made. While, as discussed below, I conclude that water was appropriated for beneficial use on the property conveyed by Swamp Act deed as of the date the property was shown to be occupied, not all the land subject to this claim was described in the Swamp Act deeds noted. None of the Swamp Act deeds describe any of the claimed property in Section 30 T 39S R8E.W.M. Although the record contains a deed from William Miller to Sarah Miller dated June 1, 1895 describing all the claimed property in Section 36 T39S R8E.W.M., the record does not show that this property was originally acquired by a Swamp Act deed. While John Miller acquired Lot 4 of Section 19 T39S

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R9E.W.M., he did not acquire Lot 3 within that section, which is the part of that section listed in OWRD Exhibit 1, at page 57 as the part of the SW ¼ SE ¼ of Section 19 that was included in the claim. Likewise, 5.3 acres in the SE ¼ SE ¼ of Section 25, T 39S R8E.W. were not described in any of the Swamp Act deeds in the record. Taken all together, the properties that were not described in Swamp Act deeds add up to 202.4 acres. ODFW's argument that acquisition by Swamp Act deed necessarily implies that the property was subject to natural irrigation and that a crop was harvested from it does not apply to that property. Since the evidence does not show beneficial use of water on property that was not conveyed under the Swamp Act, 202.4 acres must be subtracted from the 1070.9 acres tabulated by OWRD claimed, leaving 868.5 acres allowable within the land subject to the claim.<sup>14</sup>

ODFW submitted testimony that the claimed Diversion Point #9 from the Ady Canal had not been used for a number of years, and that a new diversion point between Diversion Points #2 and #3 had been developed to replace it. Most of the places of use for water from Diversion Point #9 were within the parts not described in the Swamp Act deeds. Only 3.5 acres within the allowable portion of the claim were described as irrigated from Diversion Point #9. ODFW has elected, however, to designate Diversion Point #1 as the diversion point for the 3.5 acres in the SE ¼ SE ¼ Section 25, T39S R8E.W.M. and not to include the new diversion point in the claim.

The Rate and Duty claimed (1/40<sup>th</sup> cfs per acre and 3 acre-feet per acre per year) are not challenged by the other parties, and are supported by the evidence, and therefore will be allowed.

The contestants raise two main arguments against allowance of this claim. The United States argues that the Swamp Act deeds are not evidence of beneficial use of water, and that, apart from those deeds, the only evidence of beneficial use of water prior to 1909 is hearsay. KPWU argues that use of water for wildlife is a change in use from the irrigation by natural overflow on which the claim is based, and that the claim must therefore be disallowed because ODFW never took the steps necessary to allow such a change.<sup>15</sup>

ODFW argues, to the contrary, that the Swamp Act deeds are conclusive evidence that crops were harvested from the land, necessarily implying the beneficial use of water through natural irrigation. ODFW also argues that the use of the water has not changed, that the water is still being used for irrigation, and that the only change is the use of the plants that are being irrigated.

ODFW is correct on both counts. The Swamp Act deeds are evidence that water was being beneficially used when the deeds were issued. Since the water is still being used to irrigate plants, there has been no change of use.

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<sup>14</sup> This conclusion is bolstered by Ex. C33 which includes as an attachment Exhibit A, a map showing the property described in the Swamp Act deeds. That map shows no property in either Section 30 or 36, except the NW ¼ NW ¼ Section 30, which is not included in the tabulation at Pages 57 through 65 of OWRD Ex. 1.

<sup>15</sup> KPWU also challenged the places of use, since ODFW filed documents in 1998, after the time for increasing a claim had passed, which appeared to increase the amount of acreage in some of the parcels, while reducing it in others. The Stipulation appears to resolve this question, however, since it limited the claimed place of use to the tabulations in Exhibit 1 at pages 57 through 65, which were generated by OWRD based on a map that was accepted by ODFW in the initial claim.

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The United States has sought to show that the conveyances of property by the State of Oregon under Swamp Act deed did not necessarily mean that the land had been reclaimed or that water was being beneficially used by the time those deeds were given.

In the first place, reclamation itself is not the issue in this case. Claimant asserts that the property could be profitably used for grazing or hay without construction of any works until control facilities were constructed on the Klamath River in the 20<sup>th</sup> century. The evidence supports this assertion. Thus, no active efforts at reclamation were required. Indeed, the Act of 1870 supports this assertion, as it treated land as reclaimed which had been “successfully cultivated in either grass, the cereals or vegetables for three years.” 1870 General Laws of Oregon §4, p. 56. Since the properties in question were already planted in grass, it only remained to harvest the crop for three years for reclamation to be complete. The evidence is clear that the property was subject to overflow from the Klamath River, and that the grass that was harvested was nurtured by this overflow. Thus, conveyance by Swamp Act deed is evidence of the beneficial use of water.

The United States also argued that the evidence of pre-1909 use of the water was hearsay, and therefore not substantial evidence. Hearsay evidence may be substantial evidence for purposes of an administrative hearing if it is shown to be of sufficient reliability to meet the test provided by ORS 183.450: It must be “of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs \* \* \*.” The Oregon Supreme Court has discussed the standard for evaluating the reliability of such evidence in a number of cases, notably *Reguero v. Teacher Standards and Practices*, 321 Or 402 (1991) and *Cole v. Driver and Motor Vehicle Services Branch*, 336 Or 565 (2004). In those cases, the Court enunciated a series of factors that were to be considered in deciding whether a particular item of hearsay should be treated as substantial evidence, although in *Cole* the Court emphasized that these factors were not exclusive, and should not be “treated as a checklist.” *Id.* at 585 note 18. In this case, as discussed further below, I conclude that at least some of the hearsay information contained in the file qualifies as substantial evidence.

*Cole v. DMV* was a consolidated decision on two separate cases that had previously been considered by the Court of Appeals. Those cases involved two drivers whose licenses had been suspended under different statutory provisions, after administrative hearings at which hearsay evidence was a significant part of the case.

In one case, Cole’s driver license was suspended after he was arrested for Driving Under the Influence of Intoxicants, based in part on a police report that was admitted at hearing. The report had been prepared by a police officer in the regular performance of his duty and, although Cole objected to admission of the report at hearing, Cole did not put on any evidence that contradicted the report. In these circumstances, the Court held that the report was substantial evidence, especially where the driver had the right to subpoena the author of the report if cross-examination was desired. However, since the identity of the author of the report was unknown to Cole prior to the hearing, Cole was deprived of a reasonable opportunity to subpoena the officer, which, the Court concluded, was a violation of Due Process.

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In the second case, Dinsmore's driver license was alleged to be subject to suspension because her driving caused or contributed to a death due to recklessness or criminal negligence. Two police officers who prepared reports of the incident were subpoenaed by the agency, but did not appear. The Court concluded that the reports could not be treated as substantial evidence because they were the only evidence supporting the agency's action and Dinsmore had submitted evidence that contradicted them in important respects. Significantly, the Court noted that the expert opinion contained in one of the reports was open to question because Dinsmore had submitted evidence contrary to the facts that served as the foundation for that opinion.

In this case there are two critical facts that are shown by hearsay evidence. First, the affidavits of several people were submitted, in which they testified to conversations they had with people who either owned the property in question or owned property nearby that was subject to the same conditions. Those people described the property in question as being farmed prior to 1900, and as part of John Miller's large cattle operation. Additionally, the witnesses described the use of the property prior to 1900, noting that the property was subject to seasonal flooding and that as the water receded, the owners of the property either harvested the hay that was nurtured by the overflow, or grazed their cattle on the property. The United States argues that these statements should receive no weight, and that without them there is no evidence that the property was put to beneficial use prior to 1909. The evidence presented by the United States is not conclusive and, for the most part, suggests an inference from conditions after 1909 that the property was not used prior to that date. However, the evidence also shows that conditions on the land changed significantly after 1909, when control structures were built on the Klamath River that eliminated the cycle of flooding and recession upon which the farmers in this area had previously depended. Thus, this evidence does not demonstrate that water was not put to beneficial use prior to 1909.

The United States also submitted evidence that there was significant corruption in the way Swamp Act properties were acquired, and suggested that this brings into question whether the property was actually reclaimed. The evidence of corruption, however, does not relate to the specific lands subject to this claim, and does no more than raise the possibility of suspicion. Moreover, most of the frauds described in the evidence related to designation of property as swamp land when it was actually dry land. It has never been suggested that the land subject to this claim fell in that category.

The situation in this case is similar to that confronting the Oregon Supreme Court in 1931, when that court reviewed the decree in the Sprague River Adjudication in *Campbell v. Walker*, 137 Or 375 (1931). There, the court said the following:

Appreciating the difficulty of getting testimony of all the conditions that existed at the time the lands were first settled on, the trial court awarded the water rights as of the date shown by the evidence, upon which an honest effort was made to occupy or acquire title to the lands and to use both the lands and waters for beneficial purposes. In the very nature of things it was impossible for the early settlers to complete their irrigation plans immediately.

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*Campbell v. Walker*, 137 Or at 393.

The hearsay accounts opposed by the United States are corroborated by the Swamp Act deeds, among other evidence presented. Consequently, I treat the hearsay statements as substantial evidence of the facts they provide. With this in mind, the evidence in this case shows that the property that was conveyed in the Swamp Act deeds was subject to natural overflow, and that crops had been harvested from the property by owners of the property no later than 1889. The evidence also shows that this practice continued until the dams and dikes built in the 20<sup>th</sup> century ended the cycle of overflow and recession of water upon which the property owners had previously depended. Beneficial use of water is not established by mere ownership of the land, without the additional inference that a Swamp Act deed allows. Since, as noted above, some of the property subject to the claim was not described in the Swamp Act deeds that are in the record, and the evidence for harvesting crops from the non-Swamp Act lands prior to 1909 is considerably weaker, the evidence as to those lands does not establish beneficial use of water prior to 1909.

Taken together, the preponderance of the evidence in the record in this case establishes that hay was harvested or cattle grazed on 868.5 acres within the claimed property at least as early as the date individuals held the property under claim of right. Likewise, the fact that crops watered by natural overflow were being harvested from the properties is sufficient to establish the intent to accept the bounty of the natural overflow at least as of the date the property passed into private ownership. *In re Silvies River*, 115 Or at 66.

It has been suggested that Claimant's predecessors unreasonably delayed construction of works to more efficiently use the water. Under *In re Silvies River* construction of works was not necessary to appropriate a water right prior to 1909. Even if such construction were, at some point, required to perfect the water right, however, the record shows that works of some sort were constructed early in the 20<sup>th</sup> century, including ditches and dikes to control the flow of water across the property. There is no evidence from which it can be determined that an unreasonable time passed before works were constructed to more efficiently use the water.

The evidence shows directly that grass was harvested from the Swamp Act properties in the early 20<sup>th</sup> century, under conditions identical with those that had been present since before European settlement. Given the pattern of use in the record, and the evidence of similar practices from the mid-1800s in similar properties in the area, I conclude that water could have been put to beneficial use on the properties in question as early as 1868. Nonetheless, this use could not form the basis for a water right until it coincided with evidence of a claim of right in the land. *Hough v. Porter* 51 Or 318, 421 (1909). John Miller is known to have run a large cattle ranch in the area, and at one point owned most of the land in question. I therefore conclude that it is more likely than not that water was put to beneficial use immediately after the land went into private ownership, if not before.

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## THE KLAMATH PROJECT

Although the record contains contracts for delivery of Klamath Project water to the property in question, only Diversion Point #9 was described as drawing water from the Project. The remainder of the diversion points are on the Klamath River, itself. The priority of the Klamath Project is 1905.<sup>16</sup> Since this claim has a 1900 priority date<sup>17</sup>, it is senior to the Klamath Project, and not included in the claims for that project. When Congress passed the Reclamation Act of 1902, it specified that the water rights of reclamation projects would be subject to existing water rights. 43 USC §383. Thus, even if the allowance of this claim were to interfere with the purpose of the Klamath Project, it would not be precluded, as the claim has a senior priority.

## THE KLAMATH BASIN COMPACT

The Klamath Compact does not control rights that vested before the Compact was established in 1957. (ORS 542.620, Article III.) Since this claim vested prior to 1909, it cannot be defeated by inconsistency with the Klamath Compact.

## SEASON OF USE

The claim asserts a year-round season of use, describing flood-irrigation of the fields at various times, including mid-winter. There is insufficient evidence for this practice on the property in question prior to 1909 to allow the claim. Lewis Furber testified that the berm near the river was breached before 1909 to allow winter pre-irrigation on his family's land. He also stated that water from this breach would likely have reached the "lower parts" of the claimed property. However, this is not a sufficiently specific description of land watered from this breach to allow the portion of the claimed property that was irrigated in winter to be identified. Furber did not describe a second breach to provide water to the property subject to this claim prior to acquisition of a portion of the property by the Hoopers, which occurred some time after 1910. Prior to that time, the land was inundated during the spring floods, and the water gradually receded during the remainder of the spring and summer. Consequently, a Season of Use of April 1 through October 31 is appropriate.

## CHANGE OF USE

KPWU argued that the use of the water changed from irrigation to wildlife, and that such a change should not be permitted. ODFW argued, however, that the water use was not changed. ODFW is correct.

"Irrigation" is defined in *Webster's Third New International Dictionary* at page 1196 (Merriam-Webster, Inc. 2002): "The action or process of irrigating, as **a**: the artificial watering of land (as by canals, ditches, pipes, or flooding) to supply moisture for plant growth." KPWU

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<sup>16</sup> The Project was authorized by the legislature in Or Laws 1905 Chapt.288 §2.

<sup>17</sup> Had the claim originally asserted an earlier date, it might have been allowable with various priority dates depending on the property, some as early as 1872. However, the claim as filed sought a 1900 priority, and ODFW has admitted that it is limited by that filing.

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put forward the definition of "irrigation" contained in the Klamath Basin Compact as defeating the characterization of the present use as irrigation. Under that definition, irrigation is defined as "the use of water for production of agricultural crops, including grain grown for feeding wildfowl." ORS 542.620, Article II(J). OAR 690-300-0010(26) defines irrigation as follows:

"Irrigation" means the artificial application of water to crops or plants by controlled means to promote growth or nourish crops or plants. Examples of these uses include, but are not limited to, watering of an agricultural crop, commercial garden, tree farm, orchard, park, golf course, play field or vineyard and alkali abatement.

While the portion of these definitions requiring artificial diversion of water is belied by the Supreme Court's opinion in *In Re Silvies River*, the common definition of irrigation has in common with the OWRD definition that it is not limited to domestic crops or specific plants, but is based upon application of water to any plant to provide moisture for plant growth. The definition in the Klamath Compact, which is more limited than either of the other definitions, is not controlling, as it took effect in 1957, so cannot be held to limit a water right with a priority of 1900. Thus, from a definitional point of view, so long as water is intentionally applied to land in order to nurture plants that are desirable to the landowner, this would count as irrigation.

KPWU also argued from two other cases in the Klamath Adjudication that wildlife use should not be allowed. Neither of those cases apply in this instance, however. The Order on Motion for Ruling on Legal Issues in Case 141 was recently withdrawn at the request of OWRD. That case cannot, therefore, provide any guidance here. Contestant's argument from ALJ Betterton's order in Case 157 fares little better. That case involved a *Walton* claim, filed by the successor of an Indian owner of an allotment from the Klamath Indian Reservation. The claim included a claim for "wildlife use" in addition to an irrigation claim. ALJ Betterton concluded, properly, that the line of federal cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9<sup>th</sup> Circuit, 1985), from which the *Walton* cases are named, reserved wildlife claims to the tribes as a whole, rather than allotting it along with the irrigation claim to individual members of the tribe. Thus the existence of a wildlife claim was not at issue, only whether that claim had been transferred to the Allottee's successor along with the irrigation right. Moreover, it is unclear from the record in that case precisely what relationship the claimed water right for wildlife had to the irrigation claim. Thus, Judge Betterton's analysis is not sufficiently applicable to these proceedings to provide any guidance in deciding this case.

The original use of water was for irrigation of plants growing on the property in question. The evidence establishes that ODFW has continued to apply water to the property in order to nurture plants growing there. The difference is not in the use of the water, but in the use of the plants nurtured by the water. Those plants are grown to provide food and habitat for animals, just as the hay was grown to provide food for cattle prior to the development of ODFW's facility. There is no authority requiring that for water to be treated as used for irrigation the animals fed by the crop irrigated must be domestic breeds. This is particularly so since plants watered by irrigation might not be used for feed at all—cotton comes to mind as an example. I can find no

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legally cognizable difference between the irrigation upon which the claim is based, and the present use of the water.

### **STIPULATION REGARDING WATER AVAILABLE FROM LOST RIVER**

The parties stipulated that this order should contain the following provision:

Nothing in this order shall constitute or be construed as a finding or determination with respect to the rights of any claimant, contestant, party, person or agency (collectively the "Parties") to the right to use the waters of the Lost River, including but not limited to the Lost River, Clear Lake, Gerber Reservoir, and their tributaries, nor does this proposed order affect any of the Parties' rights to the use of waters of the Lost River or its tributaries.

Nothing in this order is intended to prevent any of the parties from filing exceptions, should the Adjudicator's findings of fact and order of determination deviate from any such proposed order in this regard.

This order does not preclude the introduction of evidence necessary to determine the beneficial use of Klamath River basin waters in any later proceedings.

This stipulation resolves the issue as to whether Lost River water is "water available" in the Klamath Adjudication.

### **OVERAPPROPRIATION OF THE KLAMATH BASIN**

As the proponent of the position that the Klamath River was over-appropriated, KPWU had the burden to put on evidence on the question. No evidence was presented as to this issue. It will therefore not be further addressed.

### **STORAGE AND WALTON RIGHTS**

Since the claim does not assert a storage right, or a water right as non-Indian successor to an Indian allottee (a so-called "Walton" right) there is no basis upon which to consider these arguments, which will not be further addressed.

### **ORDER**

I propose that the Adjudicator issue the following order:

Nothing in this order shall constitute or be construed as a finding or determination with respect to the rights of any claimant, contestant, party, person or agency (collectively the "Parties") to the right to use the waters of the Lost River, including but not limited to the Lost

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River, Clear Lake, Gerber Reservoir, and their tributaries, nor does this proposed order affect any of the Parties' rights to the use of waters of the Lost River or its tributaries.

Nothing in this order is intended to prevent any of the parties from filing exceptions, should the Adjudicator's findings of fact and order of determination deviate from any such proposed order in this regard.

This order does not preclude the introduction of evidence necessary to determine the beneficial use of Klamath River basin waters in any later proceedings.

Claim 186 should be allowed as follows:

Rate: 21.71 cfs of water  
 Duty: 2605.5 acre-feet of water per year  
 Season of Use: April 1 through October 31  
 Purpose of Use: Irrigation  
 Source: Klamath River, Tributary to Pacific Ocean.  
 Priority: 1900

The claim should be allowed as to the following places of use and diversion points:

- # 1 NW ¼ NE ¼ Section 19 T39S R9E.W.M.
- # 2 NE ¼ NW ¼ Section 19 T39S R9E.W.M.
- # 3 NE ¼ NE ¼ Section 24 T39S R8E.W.M.
- # 4 SW ¼ NE ¼ Section 24 T39S R8E.W.M.
- # 5 SE ¼ NW ¼ Section 24 T39S R8E.W.M.
- # 6 NW ¼ SW ¼ Section 24 T39S R8E.W.M.
- # 7 NE ¼ NE ¼ Section 26 T39S R8E.W.M.
- # 8 SW ¼ NE ¼ Section 26 T39S R8E.W.M.

Location	Acreage	Diversion Point
T39S R8E.W.M.		
Section 23:		
NE ¼ SE ¼	0.1 acres	#6
SE ¼ SE ¼	17.2 acres	#6
Section 24:		
NE ¼ NE ¼	6.5 acres	#2
SW ¼ NE ¼	26.7 acres	#4
SE ¼ NE ¼	22.3 acres	#2
NW ¼ SW ¼	24.4 acres	#6
SW ¼ SW ¼	37.2 acres	#6
SE ¼ SW ¼	15.3 acres	#4 (2.7 acres) #5 (12.6 acres)
NE ¼ SE ¼	21.3 acres	#2 (8.0 acres) #3 (13.3 acres)
NW ¼ SE ¼	24.2 acres	#4 (22.7 acres) #5 (1.5 acres)
SW ¼ SE ¼	38.5 acres	#4 (3.4 acres) #5 (35.1 acres)
SE ¼ SE ¼	38.8 acres	#3

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Section 25:

NE ¼ NE ¼	1.0 acres	#5
NW ¼ NE ¼	7.1 acres	#5
SW ¼ NE ¼	5.3 acres	#5
NW ¼ NW ¼	38.0 acres	#7 (22.3 acres) #8 (15.7 acres)
SW ¼ NW ¼	38.3 acres	#7 (0.8 acres) #8 (37.5 acres)
NW ¼ SW ¼	5.7 acres	#8
SW ¼ SW ¼	24.8 acres	#8
NE ¼ SE ¼	3.5 acres	#1

Section 26:

NE ¼ NE ¼	37.1 acres	#7
NW ¼ NE ¼	3.0 acres	#7
SW ¼ NE ¼	27.5 acres	#7 (8.2 acres) #8 (19.3)
SE ¼ NE ¼	37.5 acres	#7 (17.4 acres) #8 (20.1 acres)
SW ¼ NW ¼	1.7 acres	#8
NE ¼ SW ¼	25.3 acres	#8
SW ¼ SW ¼	3.2 acres	#8
SE ¼ SW ¼	37.1 acres	#8
NE ¼ SE ¼	33.2 acres	#8
NW ¼ SE ¼	34.1 acres	#8
SW ¼ SE ¼	29.0 acres	#8
SE ¼ SE ¼	37.5 acres	#8

Section 35:

NE ¼ NE ¼	40.8 acres	#8
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T39S R9E.W.M.

Section 19:

NW ¼ NE ¼	7.3 acres	#2
SW ¼ NE ¼	0.7 acres	#2
NE ¼ NW ¼	8.6 acres	#2
NW ¼ NW ¼	7.0 acres	#2
SW ¼ NW ¼	30.1 acres	#2
SE ¼ NW ¼	8.9 acres	#2
NE ¼ SW ¼	1.0 acres	#3
NW ¼ SW ¼	18.4 acres	#2 (1.1 acre) #3 (17.3 acres)
SW ¼ SW ¼	36.2 acres	#3
SE ¼ SW ¼	1.5 acres	#3
NW ¼ SE ¼	5.6 acres	#1

The remainder of the claim should be denied.



Maurice L. Russell, II, Administrative Law Judge  
Office of Administrative Hearings

Dated: October 1, 2007

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

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2007, I mailed a true copy of the following: **AMENDED 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

Lynne A. Perry, AAG  
Oregon Dept. of Justice  
1515 SW Fifth Ave., Ste 410  
Portland, OR 97201  
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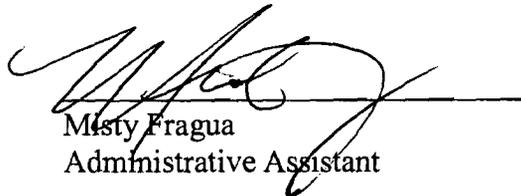
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