

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; Roger Nicholson;  
WaterWatch of Oregon, Inc.; Klamath Irrigation  
District; Klamath Drainage District; Tulelake  
Irrigation District; Klamath Basin Improvement  
District; Ady District Improvement Company;  
Enterprise Irrigation District; Malin Irrigation  
District; Midland District Improvement Co.;  
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; Randy  
Walthall; Inter-County Title Company; Winema  
Hunting Lodge, Inc.; Van Brimmer Ditch  
Company; Plevna District Improvement  
Company; Collins Products, LLC;  
Contestants

**PROPOSED ORDER**

Case No. 198

Claim: 67

Contests: 2756<sup>1</sup>, 2837<sup>2</sup>, 3104, 3464<sup>3</sup>,  
3806, and 4119<sup>4</sup>

vs.

Thomas Family Limited Partnership;  
Claimants/Contestants.

**HISTORY OF THE CASE**

Claimants seek a water right as non-Indian successors to Klamath Indian Allottees, claiming an amount of water sufficient to irrigate the allotments' share of the Tribe's "practically

<sup>1</sup> William Nicholson, and Elmore Nicholson voluntarily withdrew from Contest 2756 on November 3, 2004. On November 3, 2004, Roger Nicholson substituted for Richard Nicholson in Contest 2756.

<sup>2</sup> WaterWatch of Oregon, Inc.'s Contest 2837 was dismissed. See ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

<sup>3</sup> Don Vincent voluntarily withdrew from Contest 3464 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3464 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3464 on January 15, 2004.

<sup>4</sup> The Klamath Tribes voluntarily withdrew, without prejudice, Contest 4119 on July 28, 2004. See KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST (July 28, 2004).

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irrigable acreage" ("PIA").<sup>5</sup> This *Walton* claim is for three acre-feet of water per acre for irrigation of approximately 1515.6 acres of land and for livestock use. The claimed period of use is April 1 through October 1. The claimed priority date is October 14, 1864.<sup>6</sup>

On January 31, 1991, Kurt C. Thomas and Melinda A. Thomas (Claimants) filed Claim 67. On October 4, 1999, OWRD issued its Preliminary Evaluation for this claim preliminarily denying the claim. Claimants filed Contest 3104 on May 8, 2000. Elmore Nicholson, Richard Nicholson, and William Nicholson (hereafter "Nicholsons") filed Contest 2756 on May 8, 2000. William and Elmore Nicholson withdrew from Contest No. 2756 on November 3, 2004. Also on November 3, 2004, Roger Nicholson substituted for Richard Nicholson in Contest No. 2756. WaterWatch of Oregon, Inc. (WaterWatch) filed contest 2837 to this claim on May 8, 2000.<sup>7</sup> The United States filed Contest 3806 on May 8, 2000.<sup>8</sup> Also on May 8, 2000, the Klamath Tribes filed Contest 4119.<sup>9</sup> Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland District Improvement Co.; 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; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC; (hereinafter collectively called "Klamath Project Water Users" or "KPWU") filed Contest 3464 on May 8, 2000.<sup>10</sup>

The matter was then referred to the Office of Administrative Hearings. On July 16, 2004, Administrative Law Judge (ALJ) Daina Upite issued a letter announcing a prehearing conference, to be held by telephone on October 11, 2004 (subsequently reset to October 18, 2004). That letter described the purpose of the conference as follows:

A prehearing conference has been scheduled to help clarify the issues, decide what kind of evidence will be necessary to reach an informed decision, set dates for completing the discovery process and taking testimony, and to encourage exploration of alternative dispute resolution. Please have your calendars available at the prehearing conference to aid in setting dates for exchange of documents and for scheduling a hearing date. Also be prepared to agree to matters that are not in dispute as a means of further facilitating this hearing process.

<sup>5</sup> Such claims are known as *Walton* claims, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9<sup>th</sup> Circuit, 1985).

<sup>6</sup> This is the priority date for all allowed *Walton* claims, as the date on which the Klamath Indian Reservation was created by treaty.

<sup>7</sup> WaterWatch Contest No. 2837 was dismissed on May 20, 2003.

<sup>8</sup> The United States withdrew Contest No. 3806 pursuant to stipulation with Claimants file on February 14, 2006.

<sup>9</sup> As noted above, Klamath Tribes withdrew Contest No. 4119 on July 28, 2004.

<sup>10</sup> KPWU withdrew Contest No. 3464 pursuant to stipulation with Claimants filed on February 14, 2006.

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On September 20, 2004, ALJ Upite granted a Motion for Ruling on Legal Issues filed by the United States, concluding as follows:

1. The established general rule is that where unallotted Indian tribal lands were returned to the public domain and transferred to a non-Indian under a homestead or land grant program, no portion of an Indian tribe's reserved water right was transferred with the land.
2. The unique facts and circumstances of the transfer of Klamath Tribal lands to non-Indian purchasers pursuant to the express language of the Klamath Termination Act provides an exception to the general rule that no portion of an Indian tribe's reserved water right was transferred with the land.
  - a. Based on the specific language of the Klamath Termination Act, Congress expressly intended that a share of the Klamath Tribes' consumptive water rights associated with the unallotted Klamath Tribal lands and transferred pursuant to the express language of the Klamath Termination Act may be sold with the lands, as limited below.
  - b. A water right of a non-Indian successor in interest to unallotted Klamath Tribal lands transferred pursuant to the express language of the Klamath Termination Act (a so-called "Klamath Termination Act water right") is limited to consumptive water uses because the Klamath Tribes retained their reserved water rights to protect their treaty hunting, fishing, trapping, and gathering rights; and the priority date for such a water right is the date of the treaty establishing the Klamath Reservation, October 14, 1864.
3. A Klamath Termination Act water right is limited to the amount of water established by the claimant under a legal standard similar to that recognized for *Walton* rights, with the exception that a claimant of a Klamath Termination Act water right is required to show that he is a successor in interest to ownership of former unallotted lands of the Klamath Tribes. Specifically, the legal standard to establish a Klamath Termination Act water right is:
  - a. The claim is for a consumptive water use on former unallotted Klamath Tribal lands that were formerly part of the Klamath Reservation;
  - b. The unallotted Klamath Tribal lands were transferred from the Klamath Tribes to a non-Indian purchaser pursuant to the express language of the Klamath Termination Act, and the claimant is a successor in interest to the first non-Indian purchaser;
  - c. The amount of water claimed for a consumptive use Klamath Termination Act water right is limited to the amount of water that was:

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- i. being used by the Klamath Tribes on the unallotted Klamath Tribal lands associated with the claim at the time title passed to the first non-Indian purchaser; or
  - ii. that was put to use on those lands with reasonable diligence by the first non-Indian purchaser;
- d. After its initial development, the water claimed was continuously used by the first non-Indian purchaser and by all subsequent successors to the unallotted Klamath Tribal lands associated with the claim.

Contestants Nicholsons' counsel, Carol Skerjanek, among others, appeared at the October 18, 2004 prehearing conference. On October 19, 2004, ALJ Upite issued a First Pre-Hearing Order, which stated, *inter alia*:

If the claim preclusion issue has been resolved, then a schedule for bringing this case to hearing on the merits will be established at the second prehearing conference. Such schedule will include discovery on the merits, briefing on legal issues (if necessary) *opportunity to amend contests*, submission of written testimony, and cross examination hearing. (*Emphasis added.*)

After a second, follow-up prehearing conference on November 18, 2004, which neither Roger Nicholson, nor his counsel attended, the ALJ issued a scheduling order, which included the following: "**September 30, 2005** – No participant may file an Amended Contest after this date."

On February 6, 2006, ALJ Dove Gutman conducted a prehearing conference preparatory to a hearing previously scheduled for February 13, 2006. In the course of that prehearing conference, ALJ Gutman granted the Motion of Claimants to deny leave to Contestant Nicholson to amend Contest No. 2756, and excluded portions of the Written Direct and Rebuttal Testimony of Roger Nicholson, with related exhibits, as outside the scope of his contest. The parties then concluded that no hearing would be necessary in this case, and submitted the case on the record, subject to filing of the Stipulation between Claimants, the United States and KPWU.

On February 14, 2006, Claimants filed a Motion to Admit Stipulation to Resolve Contests 3464 and 3806 into the Record. Also on February 14, 2006, Contestant Roger Nicholson filed his Motion to Preserve the Record for Review. Both motions recited that the other participants did not oppose the motion. The record closed after receipt of these motions on February 15, 2006.

After the record closed, the case was reassigned to me to prepare this Proposed Order. I have reviewed the entire record, including the record of the February 6, 2006 prehearing conference, prior to preparation of this order.

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## EVIDENTIARY RULINGS

The following exhibits, written testimony and affidavits were admitted into the record.

OWRD Exhibit 1 including the Affidavit and Testimony of Teri Hranac.

Written Direct Testimony of Kurt C. Thomas, with Exhibits A through H attached thereto.

Written Rebuttal Testimony of Kurt C. Thomas, with Exhibits A through I attached thereto.

Written Direct Testimony of Edwin Fernlund, with Exhibit A attached thereto.

Claimants objected to those portions of the Direct and Rebuttal Testimony of Roger Nicholson discussing lack of continuous use as irrelevant, being outside the scope of Contest 2756. ALJ Gutman sustained the objection. Consequently, Section 3 on Page 7 of the Written Testimony of Roger Nicholson, and the incorporation of that section in the Submittal of Rebuttal Testimony of Roger Nicholson, together with Exhibit 1, Water Use Forbearance Agreements between Klamath Basin Rangeland Trust and Kurt Thomas/Thomas Family Limited Partnership, dated 2002, 2003 and 2004 are excluded from the record. Based upon the Motion to Preserve the Record for Review and Offer of Proof submitted by Contestant Nicholson, however, the evidence excluded is accepted as an Offer of Proof, and included in the record as such. The remainder of Roger Nicholson's direct and rebuttal testimony were admitted.

## ISSUES<sup>11</sup>

1. **Whether the claim seeks an unspecified rate. The Water Resources Department has determined that for irrigation use the appropriate rate is 1 cfs per 50 acres.**
2. **Whether the claim does not quantify the amount of water per each point of diversion.**
3. **Whether the claim seeks *Walton* status for lands not formerly owned by an Indian allottee and within the former Indian Reservation.**
4. **Whether the claimed right is not subject to the prior adjudication because it is derived from a federal reserved right that could not have been determined in the prior adjudication.**
5. **Whether the Claimants' predecessor in interest was given appropriate notice of the prior adjudication and was not bound thereby.**

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<sup>11</sup> The issues raised in the contests by the United States, Klamath Tribes, KPWU and Claimants have not been listed. Contestants Nicholson raised the first three issues. Issues 4 and 5 were raised by Claimants.

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## FINDINGS OF FACT

1) For all allowed water rights in Claim 67, the Rate is 1/50th cfs/acre.<sup>12</sup> The Duty is 3 acre feet of water per acre per year. The Period of Use for irrigation is April 1 through October 1. The Priority date is October 14, 1864.

2) The land subject to this claim as limited under the Stipulation is composed of two parcels. One parcel, of 725.5 acres, is irrigated from Wood River. The second parcel, 775 acres, is irrigated from Crooked Creek, all within Township 34 South, Range 7 ½ East Willamette Meridian. (Written Rebuttal Testimony of Kurt C. Thomas at 3.) The property is described in the attached Claim 67 Schedule of Places of Use and Points of Diversion. (Written Rebuttal Testimony of Kurt C. Thomas, Ex. B.)

3) On March 3, 1959, the United States of America, acting through the Bureau of Indian Affairs, transferred the property in question to the United States National Bank of Portland, Trustee, in trust for the enrolled members of the Klamath Tribe, pursuant to the Klamath Termination Act, 68 Stat. 718. (Written Direct Testimony of Kurt C. Thomas at 2, 3, Ex. C.) On June 6, 1977, the United States National Bank of Oregon, Trustee, conveyed the property to A.T. Spence, Jr. and John R. Norton, both non-Indians. (Written Direct Testimony of Kurt C. Thomas at 3, Ex. D.) Spence and Norton transferred the property to Montgomery Drilling Co. in 1981. (Written Direct Testimony of Kurt C. Thomas at 3, Ex. F.) Montgomery Drilling Co. transferred the property to Kurt C. Thomas and Melinda Thomas in 1985. (Written Direct Testimony of Kurt C. Thomas at 3, Ex. G.) The Thomases transferred the property to the Thomas Family Trust, the current claimant, in 1998. (Written Direct Testimony of Kurt C. Thomas at 3, Ex. H.)

4) Between 1961 and 1970, prior to transfer out of Indian ownership, OWRD issued water right certificates 27011, 27012 and 30381 for irrigation of 1,869 acres, including 1,414.7 acres within the claimed place of use. (Written Rebuttal Testimony of Kurt C. Thomas, at 4, Ex. A.) Irrigation works involving three points of diversion on Wood River, Fort Creek and Crooked Creek were installed, and irrigation commenced on the entire claimed place of use. (Written Rebuttal Testimony of Kurt C. Thomas at 4; Written Direct Testimony of Edwin Fernlund at 2, 3.) Certificate 30381 authorized a rate of 19.1 cfs from Crooked Creek. (Written Rebuttal Testimony of Kurt C. Thomas at Exhibit A page 8.) After October 1981, the property's owner stopped diverting water from Fort Creek. (Written Direct Testimony of Edwin Fernlund, at 4.) Since prior to the transfer from Indian ownership, an average of 3,400 head of cattle have been pastured on the property. (Written Direct Testimony of Kurt C. Thomas at 4.)

5) On average, between 60 and 70 cfs of water flow in Crooked Creek at the diversion point from Crooked Creek. Of this total, less than 18 to 33 cfs come from the Fort Creek Canal

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<sup>12</sup> The rate allowed is based on certificates of water right obtained by U.S. Bank as Trustee for the Klamath Tribes in 1960-63, prior to transfer out of Indian ownership. (OWRD Ex. 1 at 146-149.) This is also the rate agreed upon in the Stipulation between Claimants and the United States and KPWU. Contestant Nicholson also sought that the rate be limited to this amount in his contest. The duty is based on the duty agreed upon in the Stipulation and asserted in Roger Nicholson's contest. Season of use is as claimed. Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation.

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Bypass. (Written Rebuttal Testimony of Kurt C. Thomas at 8, Ex. H.) The Crooked Creek diversion point, located at NW ¼ SE ¼ Section 13, T34S, R7½E.W.M. is a pump which lifts up to 15.5 cfs out of Crooked Creek for application on the place of use.<sup>13</sup> (*Id.*)

6) The two diversion points claimed on Wood River are located at the same place: Lot 5 (NW¼NW¼) Section 14, T34S, R7½E.W.M. One, the headgate diversion, is used when the water level in Wood River is high enough to permit water to gravity-flow into the place of use. The pump diversion, pumps water out of Wood River when the water level in the river is too low to allow use of the headgate diversion. (Written Direct Testimony of Kurt C. Thomas at 4.)

### CONCLUSIONS OF LAW

1. **The appropriate rate is 1 cfs per 50 acres.**
2. **The claim quantifies the amount of water per each point of diversion.**
3. **The claim may be allowed status similar to a *Walton* claim, because, although not formerly owned by an Indian allottee, it is within the former Indian Reservation, and was transferred directly by the Klamath Tribe, itself.**
4. **The claimed right is not subject to any prior adjudication because it was subject to the sovereign immunity of the United States at the time of the prior adjudication.**
5. **It is irrelevant whether the Claimant's predecessor in interest was given appropriate notice of the prior adjudication, as it was not bound thereby.**

### OPINION

The burden of proof to establish a claim is on the claimant. ORS 539.110; OAR 690-028-0040. All facts must be shown to be true by a preponderance of the evidence. *Gallant v. Board of Medical Examiners*, 159 Or App 175 (1999); *Cook v. Employment Division*, 47 Or App 437 (1980); *Metcalfe 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.

Issue 1, above, was conceded by Claimant. The rate for this Claim should be 1/50 cfs per acre.

Issue 2, raised by Contestant Nicholson, is still at issue, and will be addressed, here.

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<sup>13</sup> In his Written Rebuttal Testimony, Kurt C. Thomas states that this pump lifts 14.71 cfs. However, this is based on a calculation from the number of acres, 775, multiplied by the claimed rate, 1/50<sup>th</sup> cfs/acre. That calculation is incorrect. 775 acres multiplied by 1/50<sup>th</sup> cfs/acre equals 15.5 cfs.

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Issue 3, also raised by Contestant Nicholson, was resolved by ALJ Upite's Order on Motion for Ruling on Legal Issues, recited above, and is the law of the case.

Issue 4, raised by Claimant, is no longer an issue, as the United States and KPWU have withdrawn their contests, and Contestant Nicholson did not argue it.

Issue 5, also raised by Claimant, and not addressed by any party, became moot when the United States and KPWU withdrew their contests.

Thus, there are two remaining issues in this case, one of which was presented in Contestant Nicholson's Statement of Contest, and one of which was not:

1. Does the Claim quantify the amount of water for each diversion, and
2. Was Contestant Nicholson entitled to amend his contest, and, if so, would the statement of Contest so amended have had merit.

**The Claim quantifies the amount of water per each diversion point:**

Contestant Roger Nicholson, in his written testimony, asserted that the water applied while in tribal ownership was drawn from Fort Creek Canal, rather than Crooked Creek. Nicholson argued that the diversion at Crooked Creek was based on a Certificate for a Supplemental Water Right, and that this should preclude a claim on Crooked Creek at a rate larger than the supplemental rate allowed in the Certificate. Nicholson also stated that he understood that the Tribes had intended this supplemental water right to have been satisfied by water from the upper portion of Crooked Creek, but that the upper portion of Crooked Creek had been completely diverted prior to the issuance of the Certificate, indicating that the water must actually have been drawn from another source.

A *Walton* right is ultimately derived from a water right reserved under Federal law, and is not subject to any certificate of water right issued by the state. For the adjudication, the only significance of a water right certificate, whether supplemental or not, would be as evidence of beneficial application of water on described property from a described source at a particular time. Although the land passed out of Tribal ownership in 1977, Edwin Fernlund testified that prior to 1977 substantial water was being drawn from Crooked Creek. Indeed, the Certificate for supplemental water rights noted by Contestant Nicholson allowed diversion at the rate of 14.40 cfs from Crooked Creek, up to 5 acre-feet per acre for 720.1 acres. This is nearly the same rate as has been claimed in these proceedings, and a substantially higher duty than is claimed. The flow records provided by Claimant show that water sufficient to satisfy the claimed rate and duty are available in Crooked Creek without any reliance on water that might flow into Crooked Creek from Fort Creek.

Thus, a preponderance of evidence supports the conclusion that the amount claimed from Crooked Creek is, in fact, Crooked Creek water, and not water from Fort Creek.

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**Contestant Nicholson's attempt to amend his contest was properly denied, and, even had it been allowed, would have been without merit.**

In this case, ALJ Gutman denied Contestant leave to amend his contest. Contestant sought to submit evidence and argument about an issue that was not stated in the original Contest 2756:

Whether claimant has made continuous beneficial use of the water since development.

ALJ Gutman also excluded those portions of Contestant Nicholson's written testimony and related exhibits that only addressed this issue. The first question presented, then, is whether her decision was lawful.

Although OAR 690-030-0035 authorizes amendment of a contest 10 days prior to the hearing on the contest, this rule is not necessarily controlling. OAR 690-030-0035 was promulgated in 1977, and has not since been amended.

In 1999, the legislature enacted ORS 183.630, as part of the statutes creating the Office of Administrative Hearings (called at that time the Hearing Officer Panel). That statute provides in pertinent part as follows:

Except as provided in subsection (2) of this section, all contested case hearings conducted by administrative law judges assigned from the Office of Administrative Hearings must be conducted pursuant to the model rules of procedure prepared by the Attorney General under ORS 183.341 if the hearing is subject to the procedural requirements for contested case proceedings.

ORS 183.630(1).

To implement this statute, OAR 137-003-0501(2) of the Attorney General's Uniform and Model Rules of Procedure under the Administrative Procedures Act provides as follows:

Any procedural rules adopted by the agency related to the conduct of hearings shall not apply to contested case hearings conducted for the agency by an administrative law judge assigned from the Office of Administrative Hearings unless required by state or federal law or specifically authorized by these rules or by order of the Attorney General. An agency may have rules specifying the time for requesting a contested case hearing, the content of a hearing request, any requirement for and content of a response to the contested case notice, the permissible scope of the hearing and timelines for issuance of a proposed or final order. The agency's substantive rules, including those allocating the burden of proof, shall apply to all of its hearings.

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There is no indication that the Attorney General has specifically ordered that the Model Rules of Procedure do not apply to these proceedings or any part of them. Thus, the Model Rules supercede OWRD's prior rules of procedure, unless, in a particular case, the rule is authorized by statute. ORS 539.100, the statute governing the filing of contests, does not expressly authorize the amendment of a contest, but requires the filing of a contest and service within 15 days, or at most 35 days, after the conclusion of the Public Inspection period. This statute was amended in 1989, and again in 1991.

OAR 137-003-0575 provides in pertinent part as follows:

(1) Prior to hearing, the administrative law judge may conduct one or more prehearing conferences to facilitate the conduct and resolution of the case. The administrative law judge may convene the conference on the initiative of the administrative law judge or at the agency's or a party's request.

(2) Prior to the conference, the administrative law judge shall notify the party(ies) and the agency, if participating, of the purposes of the conference and the matters to be considered. The agency may add additional matters to be considered at the conference by providing notice in writing to the administrative law judge and the parties.

\* \* \* \* \*

(4) The purposes of a prehearing conference may include, but are not limited to the following:

\* \* \* \* \*

(g) To decide the order of proof and other procedural matters pertaining to the conduct of the hearing;

\* \* \* \* \*

(i) To schedule the date, time and location of the hearing or for any other matters connected with the hearing, including dates for pre-filed testimony and exhibits; and

(j) To consider any other matters that may expedite the orderly conduct of the proceeding.

\* \* \* \* \*

(6) The failure of a party or the agency to appear at a prehearing conference convened by the administrative law judge shall not preclude the administrative law judge from making rulings on any matters identified by the administrative law judge in the notice issued under section (2) of this rule, and discussion of any of these matters at the conference in the absence of the agency or a party notified of the conference does not constitute an ex parte communication with the administrative law judge.

Here, Contestant Nicholson's counsel appeared at the first prehearing conference on October 18, 2004, and the parties, including this Contestant through counsel, received notice that the opportunity to amend the contests would be the subject of scheduling at the prehearing conference on November 18, 2004. Contestant Nicholson did not attend this conference, at which it was agreed by the parties that September 30, 2005 was the deadline for filing amended contests. Under OAR 137-003-0575(6) the ALJ was authorized to rule on matters before her even if parties failed to appear. Thus, the deadline of September 30, 2005 for amending contests was binding. Any attempt to amend the contests after that date was properly denied.

Even had they been encompassed within the contests as stated, or Contestant had been allowed to amend the contest to include his new issues, the new issues would have had no merit. Claimant did not fail to continuously use the water in question.

Although claimant's testimony on this question was accepted as an offer of proof, rather than as a part of the evidentiary record, there is sufficient evidence admitted in the record to address this question. The Written Rebuttal Testimony of Kurt C. Thomas discloses that in the years 2002 through 2005 no water was applied to the property because of forbearance agreements that Claimant had entered into with the Klamath Basin Rangeland Trust. Thus, for four years, no water was applied to the property. This is the fact that Contestant Nicholson attempted to show in the portion of his testimony that was excluded. Thus, Contestant Nicholson would not be prejudiced by ALJ Gutman's order excluding the portion of his testimony related to this issue, even if it was erroneous. Nonetheless, four years' non-use is not sufficient to defeat a *Walton* or Klamath Termination Act claim.

Both *Walton* claims and the similar Klamath Termination Act claims require that water be continuously put to beneficial use. (*Colville Confederated Tribes v. Walton*, 752 F2d 397 (9<sup>th</sup> Circuit, 1985); Order on Motion for Ruling on Legal Issues, ALJ Daina Upite, Sept. 20, 2004.) The question presented here, then, is what does "continuous" mean in this context? In answering that question I am guided by the provisions of OAR 690-028-0075(3). That rule lists possible grounds for contesting a claim in an adjudication. The list includes:

(d) Claiming a use started after February 24, 1909, except on federal reserved rights or spring registration;

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(e) Claiming a use that had been forfeited by five or more consecutive years of non-use less than fifteen years previously; and

(f) Claiming a use that has been intentionally abandoned.

The mention of federal reserved rights in this list would suggest that Klamath Termination Act claims, as based upon a tribal right reserved by the federal government, could be subject to the grounds stated on the list (except, of course, that restricted to pre-1909 claims). Since the non-use in this case is based upon an agreement that only applied for the four years in question, and that will not prevent water use in 2006, it is apparent that claimant did not intend to abandon the water right. The five year period for presumption of forfeiture, however, is in line with a similar provision under OAR 690-017-0400, under which a water right may be considered forfeited for non-use after five consecutive years of non-use in the past 15 years. Under that rule, five years is the minimum period of non-use that can be used to raise the presumption of forfeiture for non-use, and even non-use for five years only sets up a presumption that can be rebutted by a proper showing. OAR 690-017-0800. Thus, five years is the shortest period of time that could create a presumption of forfeiture under OAR 690-028-0075. I conclude that this provision applies to Klamath Termination Act cases, once the property in question has left Indian ownership, and that failure to make beneficial use of water for fewer than five years does not defeat the "continuous use" element of such a claim. Since the non-use in this case was for only four years, the claim is not defeated.

Based on the evidence presented, I recommend that the Adjudicator allow the claim on the terms specified in the stipulation between Claimant and the United States.

### ORDER

I propose that the Adjudicator issue the following order:

Claim 67 is allowed in part as follows:

Stock Water for 3,400 head of cattle, between March 1 and October 31.

Irrigation use as follows:

Season of Use : April 1 through October 1.

Purpose of Use : Irrigation

Priority Date: October 14, 1864

Diversion Points #1 (headgate) and #2 (pump):

Rate: 14.51 cfs

Duty: 2,176.5 acre-feet

Acres: 725.5

Source: Wood River, tributary to Agency Lake.

Place of Use and Point of Diversion: See Claim 67 Schedule of Places of Use and Points of Diversion

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Diversion Point #3:

Rate: 15.5 cfs

Duty: 2,324 acre-feet

Acres: 775

Source: Crooked Creek, tributary to Agency Lake.

Place of Use and Point of Diversion: See Claim 67 Schedule of Places of Use and Points of Diversion

The remaining portions of the claim should be denied.



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

Dated: March 14, 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 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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**CLAIM 67 SCHEDULE OF  
PLACES OF USE  
AND  
POINTS OF DIVERSION**

**POINT OF DIVERSION #1**

Lot 5 (NW $\frac{1}{4}$ NW $\frac{1}{4}$ ) Section 14, T34S, R7 $\frac{1}{2}$ E.W.M. (Headgate)

**POINT OF DIVERSION #2**

Lot 5 (NW $\frac{1}{4}$ NW $\frac{1}{4}$ ) Section 14, T34S, R7 $\frac{1}{2}$ E.W.M. (Pump)

**Place of Use for Diversion Points #1 and #2**

SE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 11, T34S, R7 $\frac{1}{2}$ E.W.M.	22.5 acres
SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 11, T34S, R7 $\frac{1}{2}$ E.W.M.	27.1 acres
Lot 5, (NW $\frac{1}{4}$ NW $\frac{1}{4}$ ) Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	22.9 acres
NE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	40.0 acres
Lot 6 SW $\frac{1}{4}$ NW $\frac{1}{4}$ ) Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	16.6 acres
SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	40.0 acres
NW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	37.6 acres
NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	1.6 acres
SW $\frac{1}{4}$ NE $\frac{1}{4}$ Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	37.6 acres
SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	16.5 acres
Lot 7 Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	43.1 acres
Lot 8 (SE $\frac{1}{4}$ SW $\frac{1}{4}$ ) Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	10.9 acres
NW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	40.0 acres
NE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	33.4 acres
Lot 9 (SW $\frac{1}{4}$ SE $\frac{1}{4}$ ) Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	33.9 acres
SE $\frac{1}{4}$ SE $\frac{1}{4}$ Section 14, T34S, R7 $\frac{1}{2}$ E.W.M.	40.0 acres
Lot 1 (NW $\frac{1}{4}$ NE $\frac{1}{4}$ ) Section 23, T34S, R7 $\frac{1}{2}$ E.W.M.	9.8 acres
NE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 23, T34S, R7 $\frac{1}{2}$ E.W.M.	40.0 acres
Lot 2 Section 23, T34S, R7 $\frac{1}{2}$ E.W.M.	28.5 acres
Lot 3 (NE $\frac{1}{4}$ SE $\frac{1}{4}$ ) Section 23, T34S, R7 $\frac{1}{2}$ E.W.M.	5.7 acres
SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 13, T34S, R7 $\frac{1}{2}$ E.W.M.	10.3 acres
NW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 24, T34S, R7 $\frac{1}{2}$ E.W.M.	30.0 acres
SW $\frac{1}{4}$ NW $\frac{1}{4}$ Section 24, T34S, R7 $\frac{1}{2}$ E.W.M.	41.0 acres
SE $\frac{1}{4}$ NW $\frac{1}{4}$ Section 24, T34S, R7 $\frac{1}{2}$ E.W.M.	13.3 acres
Lot 6 (NW $\frac{1}{4}$ SW $\frac{1}{4}$ ) Section 24, T34S, R7 $\frac{1}{2}$ E.W.M.	37.7 acres
NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 24, T34S, R7 $\frac{1}{2}$ E.W.M.	33.0 acres
Lot 7 Section 24, T34S, R7 $\frac{1}{2}$ E.W.M.	12.5 acres
Total:	725.5 acres

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POINT OF DIVERSION # 3  
 NW ¼ SE ¼ Section 13, T34S, R7½E.W.M.

Place of Use for Diversion Point #3:

SW¼SE¼ Section 11, T34S, R7½E.W.M.	12.9 acres
SE¼SE¼ Section 11, T34S, R7½E.W.M.	39.6 acres
NW¼NE¼ Section 14, T34S, R7½E.W.M.	2.4 acres
NE¼NE¼ Section 14, T34S, R7½E.W.M.	38.4 acres
SE¼NE¼ Section 14, T34S, R7½E.W.M.	24.5 acres
NE¼SE¼ Section 14, T34S, R7½E.W.M.	6.6 acres
SW¼SW¼ Section 12, T34S, R7½E.W.M.	39.2 acres
SE ¼SW¼ Section 12, T34S, R7½E.W.M.	30.4 acres
NW¼NW¼ Section 13, T34S, R7½E.W.M.	40.0 acres
NE¼NW¼ Section 13, T34S, R7½E.W.M.	35.6 acres
SW¼NW¼ Section 13, T34S, R7½E.W.M.	40.0 acres
SE¼NW¼ Section 13, T34S, R7½E.W.M.	40.0 acres
Lot 4 (NW¼NE¼) Section 13, T34S, R7½E.W.M.	2.2 acres
Lot 6 (SW¼NE¼) Section 13, T34S, R7½E.W.M.	12.3 acres
Lot 7 Section 13, T34S, R7½E.W.M.	6.2 acres
NW¼SW¼ Section 13, T34S, R7½E.W.M.	40.0 acres
NE¼SW¼ Section 13, T34S, R7½E.W.M.	35.1 acres
SW¼SW¼ Section 13, T34S, R7½E.W.M.	29.7 acres
SE¼SW¼ Section 13, T34S, R7½E.W.M.	39.8 acres
Lot 10 Section 13, T34S, R7½E.W.M.	9.6 acres
Lot 11 (NW¼SE¼) Section 13, T34S, R7½E.W.M.	14.0 acres
Lot 12 (NW¼SE¼) Section 13, T34S, R7½E.W.M.	3.7 acres
Lot 9 (NE¼SE¼) Section 13, T34S, R7½E.W.M.	0.5 acres
Lot 13 (SW¼SE¼) Section 13, T34S, R7½E.W.M.	3.9 acres
Lot 14 (SW¼SE¼) Section 13, T34S, R7½E.W.M.	7.9 acres
NW¼NW¼ Section 24, T34S, R7½E.W.M.	10.5 acres
NE¼NW¼ Section 24, T34S, R7½E.W.M.	41.9 acres
SE¼NW¼ Section 24, T34S, R7½E.W.M.	25.9 acres
NW¼NE¼ Section 24, T34S, R7½E.W.M.	37.4 acres
NE¼NE¼ Section 24, T34S, R7½E.W.M.	4.8 acres
SW¼NE¼ Section 24, T34S, R7½E.W.M.	37.5 acres
SE¼NE¼ Section 24, T34S, R7½E.W.M.	0.9 acres
NE¼SW¼ Section 24, T34S, R7½E.W.M.	6.0 acres
NW¼SE¼ Section 24, T34S, R7½E.W.M.	22.1 acres
NE¼SE¼ Section 24, T34S, R7½E.W.M.	0.3 acres
SW¼SE¼ Section 24, T34S, R7½E.W.M.	29.1 acres
SE¼SE¼ Section 24, T34S, R7½E.W.M.	1.9 acres
NE¼NW¼ Section 25, T34S, R7½E.W.M.	2.2 acres
Total:	775.0 acres

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2007 I mailed a true copy of the following return receipt requested: **PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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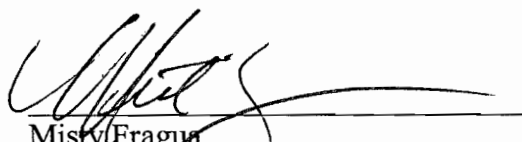
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Misty Fragua  
Administrative Assistant

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