

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

~~WaterWatch of Oregon, Inc.~~; United States of  
America; ~~The Klamath Tribes~~; 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

**CORRECTED<sup>1</sup> PROPOSED ORDER**

Case No. 202

Claim: 74

Contests: ~~2838~~<sup>2</sup>, 3466<sup>3</sup>, 3742, and 4123<sup>4</sup>

vs.

Wayne Ranch, LLC;  
Claimant.

**HISTORY OF THE CASE**

Claimant Walter Seput filed this claim (claim 74) on January 30, 1991, making a claim for water as a non-Indian successor to a Klamath Indian Allottee. This *Walton*

<sup>1</sup> This Corrected Proposed Order is issued to correct an error in the Priority Date as stated in the Paragraphs 3 through 6 of the Findings of Fact. No other change has been made.

<sup>2</sup> WaterWatch of Oregon, Inc.'s Contest 2838 was dismissed. See ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

<sup>3</sup> Don Vincent voluntarily withdrew from Contest 3466 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3466 on June 24, 2002. Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3466 on January 15, 2004.

<sup>4</sup> The Klamath Tribes voluntarily withdrew Contest 4123. See KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST dated March 4, 2005.

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claim<sup>5</sup> is for 20,660 gallons per minute of water for irrigation of approximately 710 acres of land, and for livestock use, with a claimed period of use from April through October 31 for irrigation, and year round for livestock. On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin Adjudication, issued a Preliminary Evaluation for this claim preliminarily allowing the claim as modified. Various contests were filed, including Contest 2838 filed by WaterWatch,<sup>6</sup> Contest 3466 filed by Klamath Project Water Users (KPWU),<sup>7</sup> Contest 3742 filed by the United States, and Contest 4123 filed by the Klamath Tribes.<sup>8</sup>

On September 30, 2004, the OAH issued a Notice of Hearing, setting the case for hearing for the purpose of taking cross-examination testimony on November 3 through 5, 2004, and specifying the issues to be considered at hearing.

Because no participant requested the opportunity to cross-examine any witnesses, the hearing was convened by telephone on November 3, 2004, before Daina Upite, Administrative Law Judge (ALJ) for the purpose of receiving into evidence the documents, written testimony and exhibits submitted by the parties, and considering any objections made to evidence. This proceeding was to determine the rights to the use of the water enumerated in the claim and contests listed above, and as to the relative rights of Claimant and contestants to the use of water as provided under ORS Chapter 539, including more particularly ORS 539.021 and OAR Chapter 690, Division 30. Attorney Ron Yockim appeared representing Claimant. David Harder appeared as attorney for Contestant the United States. Lorna Babby appeared on behalf of Contestant Klamath Tribes. Justin Wirth, Assistant Attorney General, appeared in person for the Oregon Water Resources Department (OWRD), and Dan Kelly appeared for Contestants Klamath Project Water Users. The record remained open for written argument.

On December 14, 2004, a Scheduling Order was issued, providing due-dates for submission of written argument. On February 11, 2005, Claimant filed its Closing Argument. On March 30, 2005, the United States filed a motion seeking an extension of time to file its brief in response. This motion was denied, but, upon renewal of the motion, a short extension, until April 6, 2005, was allowed. On April 6, 2005 the United States filed its Posthearing Brief. Also on April 6, 2005, KPWU filed its Response to

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<sup>5</sup> Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "Walton" rights, a term derived from the *Colville Confederated Tribes v. Walton* line of cases. *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9<sup>th</sup> Cir 1981), *cert den*, 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9<sup>th</sup> Cir 1985), *cert den*, 475 US 1010 (1986) (*Walton III*).

<sup>6</sup> Withdrawn on February 20, 2003.

<sup>7</sup> KPWU is a group of separate water users and districts within the Klamath Basin who have filed joint contests in Adjudication proceedings. The group is composed of the following parties: 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.

<sup>8</sup> Withdrawn on August 12, 2004.

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Claimant's closing brief. On April 29, 2005, OWRD filed its Reply Brief. Also on April 29, 2005, Claimant filed its Reply Brief. The record closed on April 29, 2005.

Thereafter, this case was assigned to me. I have reviewed the entire record in this case in preparation for writing this Proposed Order.

### EVIDENTIARY RULINGS

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

OWRD Exhibit 1 including the Affidavit and Testimony  
of Teri Hranac.  
Stipulation between the United States and Oregon Water Resources Department,  
Amended Stipulation and documents referred to therein.  
Direct Testimony of Loring Gurney with Exhibits 1 through 15.  
Rebuttal Testimony of Loring Gurney with Exhibits 16 and 17.  
Affidavit of David Harder dated 11/1/04, including Exhibits 1 through 8.  
Direct Testimony of Walter Seput  
Direct Testimony of Leroy Gienger  
Rebuttal Testimony of Walter Seput  
Rebuttal Testimony of Maureen Linn, as amended by stipulation between the  
United States and Claimant.  
Affidavit of R.S. Yockim  
Affidavit of Ronald S. Yockim (4/3/04)  
Exhibits submitted by Claimant, marked A-1 through A-4, B-1 and B-2, C-1  
through C-19, D-2(a), (b) and (c), E-1 through E-3, F-1 and F-2, G-2 and  
G-3, H-1 and H-2, I through M, AA-1 through AA-3, AB-1 through AB-9,  
AC, AD-1 through AD-4, ML-1 through ML-6, RS-1 through RS-11.

The record was held open until November 21, 2004 for the submission of additional evidence. The following documents were received and admitted prior to November 21, 2004.

Ex. RS-11 through RS-14 submitted by Claimant on November 10, 2004.  
Affidavit of Walter Seput dated 11/8/04.  
Affidavit of David W. Harder concerning Claimant's Exhibit RS-11, with  
Exhibits 100-110, submitted November 16, 2004.

The evidentiary record closed on November 21, 2004.

On August 1, 2005, the United States moved for an order to strike all reference in Claimant's closing brief to documents not previously admitted into the record in this case. This motion was granted by order dated August 31, 2005. On November 10, 2005, the United States moved for an order to strike all reference in Claimant's Reply Brief to documents not admitted into the record in this case. That motion is granted on the same

basis as the previous Order of August 31, 2005 was made. The ALJ is prohibited from considering evidence not contained in the record of this case. ORS 183.415(11); 183.450; OAR 137-003-0645.

## ISSUES

1. Whether the record supports the required elements for the claim, including rate, duty, actual use, priority of diversion and re-diversion, place of use, seasons of use, and/or acreage claimed.
2. Whether there is sufficient chain of title information to establish a *Walton* right for the claimed Place of Use, or for a part of the claimed Place of Use.
3. Whether there is sufficient information on the development or continuous use of the water on the claimed lands to establish a *Walton* right.
4. Whether the total acreage in the Place of Use exceeds the irrigated acreage supported by the evidence.
5. Whether the diversion rate exceeds the capacity of the irrigation system used to serve the Place of Use.
6. Whether the diversion rate is too large for the valid number of irrigated acres within the Place of Use.
7. Whether the claimed water duty exceeds three acre-feet per acre, which should be the maximum allowable water duty.
8. Whether the period of use for irrigation approved in the Preliminary Evaluation exceeds the period of use claimed.
9. Whether the claimed Place of Use was under irrigation by the Indian owner before the land was transferred to the first non-Indian owner.
10. Whether irrigation of part of the claimed Place of Use was developed with reasonable diligence by the first non-Indian purchaser from an Indian owner, or by subsequent non-Indian owners after the first non-Indian purchaser from an Indian owner.
11. Whether water provided to the claimed Place of Use by natural means (flooding in the spring or through sub-irrigation) and not through a diversion system created by humans, can be the basis for a *Walton* right or can constitute irrigation under a *Walton* right.

12. Whether the diversion rate for any lands awarded a water right may exceed one cfs (cubic foot per second) per forty acres.

The Klamath Tribes joined the United States in raising issues 2, 3, 4, 5, and 8, and raised additional issues that are not addressed in this Proposed Order because of the Tribe's withdrawal.

### FINDINGS OF FACT

1. Claim 74 involves property that was originally part of the Klamath Indian Reservation, and has subsequently been transferred to non-Indian ownership. It was originally 13 parcels, all of which were allotted to Klamath Indians after 1910 as part of the termination of the Reservation. (OWRD Ex. 1 at 37 to 129.) The total claim is for 710.3 acres. (*Id.* at 7-9.)
2. The allotments are located on the Sprague River. (*Id.* at 27.) Prior to development, most of the land was subject to periodic flooding, while other portions were subject to subirrigation from the Sprague River or its tributaries. (Direct Test. of Walter Seput, at 2.)
3. Klamath Indian Allotments 713 (131.9 acres) and 714 (66.9 acres), totaling 198.8 acres at SE 1/4 of Section 36, Township 34 S, Range 8 E.W.M and NE 1/4 of Section 1, Township 35 S, Range 8 E.W.M., respectively, were allotted to Clarence Cowen and Ransom Cowen, both members of the Klamath Tribe. (Ex. 3 at 2, OWRD Ex. 1 at 14, 18.) The property was sold to Henry G. Wolff, a non-Indian, in 1955 (Allotment 713) and 1957 (Allotment 714). (OWRD Ex. 1 at 78, 104.) Wolff filed for a water right permit to develop irrigation on this property on April 9, 1957. (*Id.* at 187.) Development was complete by January 24, 1962, when Certificate 29626 was issued. (*Id.*) Proved application of water on this property is 1/40<sup>th</sup> cfs per acre, three acre feet per acre, from April 1 through October 31, priority date October 14, 1864. The Diversion Point is located in the NE 1/4 SE 1/4 Section 36, Township 34 S, Range 8 E.W.M. (*Id.* at 18, 19.).
4. Klamath Indian Allotments 127 (0.9 acres), 548 (0.6 acres) and 989 (8.6 acres), totaling 10.1 acres in NW 1/4, NW 1/4 of Section 31, Township 34 S, Range 9 E.W.M., (127) the NW 1/4, NW 1/4 of Section 32, Township 34 S, Range 9 E.W.M., (548) and the NW 1/4, SW 1/4 of Section 32, Township 34 S, Range 9 E.W.M., (989) (Ex. 3 at 2, OWRD Ex. 1 at 14, 18.), were first purchased by non-Indians Earl Harris, F.F. McCready and Nellie McCready in the 1950s. (Ex. 5 at 1, 8, OWRD Ex. 1 at 125.) The properties were already under an application for a water right permit (No. 26915) on March 3, 1952, when the property passed out of Indian ownership. (OWRD Ex. 1 at 17.) A Final Proof Survey shows the system was completed in 1958. (*Id.* at 18.) Proved application of water on this property is 1/40<sup>th</sup> cfs per acre, three acre feet per acre, from April 1 through October 31, priority date October 14, 1864. The Diversion Point was located in the NW 1/4 SE 1/4 Section 31 Township 34 S, Range 8 E.W.M. (127); SW 1/4 SW 1/4 Section 32, Township 34 S Range 9 E.W.M. (548, 989) (*Id.* at 17, 18).

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5. Klamath Indian Allotment 1284 (9.4 acres), located in the SW ¼, SW ¼ of Section 32, Township 34 S, Range 9 E.W.M., (Ex. 3 at 2, OWRD Ex. 1 at 14, 18.) was first sold to non-Indians J.W. Wolff, Gerald C. Wolff, and Henry C. Wolff on May 11, 1948. (Ex. 5 at 3.) The Wolff family filed for a water right permit to develop irrigation on this property on March 3, 1952. (OWRD Ex. 1 at 17, 18.) Development was complete by 1958. (*Id.* at 18.) Proved application of water on this property is 1/40<sup>th</sup> cfs per acre, three acre feet per acre, from April 1 through October 31, priority date October 14, 1864. The Diversion Point: SW ¼ SW ¼ Section 32, Township 34 S Range 9 E.W.M. (*Id.* at 17, 18.).

6. Klamath Indian Allotments 205 (154.3 acres in the SW 1/4, Section 31, Township 34 S, Range 9 E.W.M.), 206 (116 acres in the NW 1/4, Section 6, Township 35 S, Range 9 E.W.M.) and a portion of Allotment 1156 (51.9 acres in the NW ¼, Section 31, Township 34 S Range 9 E.W.M.), was first sold to non-Indian Marvin Williams, Sr. in 1920. It was transferred to Klamath Indian Marvin Williams, Jr. in 1923, from Marvin Williams, Jr. to C.R. Bowman, a non-Indian, and from C.R. Bowman to L.V. Corbell later the same year. (*Id.* at 49.) Although Corbell applied for a water right permit in 1924, that permit was subsequently cancelled for lack of diligent development. Water was not applied to this property prior to the transfer of the property by C.R. Bowman to L.V. Corbell. (Testimony of Loring Gurney, at 3, 4, Ex. 7.)

7. The remaining portion of Allotment 1156<sup>9</sup> (approximately 5 acres in Section 32, Township 34 S, Range 9 E.W.M.) was first sold to D.E. Colwell and R.D. Colwell, non-Indians, in 1943. (OWRD Ex. 1 at 52.) Water was not applied to this property prior to the transfer of the property by the Colwells to the Wolff family in 1945. (*Id.* at 54.)

8. Klamath Indian Allotment 207 (92.6 acres in Section 31, Township 34 S, Range 9 E.W.M.) was first sold to non-Indian owners A.C. and Dora Gienger in 1918. (*Id.* at 45.) The property was then sold to L.H. and Daisy Lauritsen on May 17, 1920. (*Id.* at 46.) Water was not applied to this property prior to the transfer to the Lauritsens. (Ex. 9, 10, 11, 12; Testimony of Loring Gurney at 7.)

9. Klamath Indian Allotment 547 (53.8 acres in Sections 31 and 32, Township 34 S, Range 9 E.W.M.) was first transferred to non-Indian F. F. McCready in 1948 or 1949.<sup>10</sup> The property then passed to Henry G. and Josephine M. Wolff, also non-Indians, in 1952 (*Id.* at 113.) Water was not applied to this property prior to the transfer to the Wolffs.<sup>11</sup>

10. Klamath Indian Allotment 1154 (23.4 acres in Section 31, Township 35 S, Range 9 E.W.M.) was first transferred to Della Barber, on July 2, 1947. (*Id.* at 62, 63.). While an Indian, Barber was not a member of the Klamath Tribe. (Ex. 14 at 7.) Barber sold the

<sup>9</sup> Allotment 1156 was divided into two separate, non-contiguous parcels in different Sections.

<sup>10</sup> The property was owned by Klamath Indian Fanny Alta Jackson in 1948. (Ex. J.) It was transferred by F.F. McCready to his wife in 1949. (OWRD Ex.1 at 107.) The record does not contain a transfer from Fanny Alta Jackson. She probably conveyed to F.F. McCready, but the record is silent.

<sup>11</sup> As Claimant notes, a water right application was filed while the McCreadys were still in title. (OWRD Ex. 1 at 17. This application, however, was filed by the Wolffs. It is not likely that water was diverted to the property by the Wolffs in the 24 days before their deed, as second non-Indian owner, was recorded.

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property to the Wolff family on August 2, 1947. (OWRD Ex. 1 at 64.) Barber did not apply water to the property prior to her sale to the Wolffs. (*Id.* at 17-18, 191.)

11. Klamath Indian Allotment 126 (0.7 acres in Section 30 Township 34 S, Range 9 E.W.M.) was first transferred to non-Indian F.F. McCreedy in 1915. (Ex. 5 at 1.) There is no evidence that this property was irrigated.

### CONCLUSIONS OF LAW

1. As to some, but not all the lands subject to this claim, the record supports the required elements for the claim, including rate, duty, actual use, priority of diversion and re-diversion, place of use, seasons of use, and/or acreage claimed.

2. There is sufficient chain of title information to establish a *Walton* right for a part of the claimed Place of Use.

3. There is sufficient information on the development or continuous use of the water on some of the claimed lands to establish a *Walton* right.

4. The total acreage in the Place of Use exceeds the irrigated acreage supported by the evidence.

5. The diversion rate does not exceed the capacity of the irrigation system as developed.

6. The diversion rate is not too large for the valid number of irrigated acres within the Place of Use.

7. The claimed water duty is three acre-feet per acre. This is the maximum allowable water duty.

8. The period of use for irrigation approved in the Preliminary Evaluation exceeds the period of use claimed.

9. A portion of the claimed Place of Use was under irrigation by Indian owners before the land was transferred to the first non-Indian owner.

10. Irrigation of part of the claimed Place of Use was developed with reasonable diligence by the first non-Indian purchaser from an Indian owner.

11. Water provided to the claimed Place of Use by natural means (flooding in the spring or through subirrigation) and not through a diversion system created by humans, cannot be the basis for a *Walton* right or constitute irrigation under a *Walton* right.

12. The diversion rate for any lands awarded a water right may not exceed one cfs per forty acres.

### 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); *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.

Claimant has raised several arguments which must be addressed before a consideration of the allowable scope of the appropriation can be determined. These have to do with the elements of a *Walton* claim, and whether, or under what conditions, a claimant in the Klamath Adjudication may raise alternative legal theories in support of a claim.

First, claimant asserts that the federal courts were incorrect in the *Walton* line of cases in limiting the appropriation of water to the first non-Indian appropriator. *Walton* rights are a creature of federal law. While the decision by the Ninth Circuit Court of Appeals limiting such rights may be open to question, and could someday be reversed, the decision is very clear,<sup>12</sup> is binding precedent at this point, and may not be revisited in these proceedings.

Second, claimant argues that a *Walton* right may be established through natural overflow of water, without any artificial diversion works. Claimant argues that the *Walton* line of cases has been misconstrued, and does not actually prevent appropriation of water from natural overflow.

I am persuaded by the opinion of Administrative Law Judge Ken Betterton in Klamath Adjudication Case 157, which was noted in the arguments of the United States, that subirrigation and natural overflow are not contemplated as a basis for a *Walton* right under federal law. As Judge Betterton noted:

It is clear to me after reading the District Court's Memorandum Decision in *Colville Confederated Tribes v. Walton*, No. 3421 (D E Wash, filed December 31, 1983, which *Walton III* [*Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985)]

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<sup>12</sup> See the concurring opinion of Judge Sneed, reported in *Colville Confederated Tribes v. Walton*, 757 F2d 1324 (9th Cir. 1985), wherein Judge Sneed noted the possibility that limiting the appropriation to the first non-Indian owner could reduce the ability of Indians to maximize the economic value of their allotments, but concluded: "However, the law of this court is adequately clear, and the existence of a contrary congressional intent sufficiently uncertain, to require that I concur in the court's opinion." *Colville Confederated Tribes*, 758 F2d at 1324.

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reversed and remanded with a mandate in 1985, and the District Court's Order, *Colville Confederated Tribes v. Walton*, No. C-3421-RJM (D E Wash, filed June 25, 1987), based on the Ninth Circuit's mandate in *Walton III*, that sub-irrigation does not constitute a valid *Walton* water right. (Note omitted.)

Klamath Adjudication Case 157, *Amended Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues*, December 10, 2004, at 3, 4.

In *Walton III*, the Ninth Circuit concluded that 40 acres of land that had been subject to subirrigation, could not be included as land subject to a federally reserved water right. The court noted:

Walton argues that each preceding owner has farmed the water-saturated or subirrigated portion of his allotments, near the granitic lip. This, he urges, demonstrates reasonable diligence for purposes of perfecting a reserved right to water for irrigating other areas of his land.

We find his argument unpersuasive. The record indicates that this same acreage is subirrigated today. *See, e.g.*, Reporter's Transcript, May 7, 1982, p. 612 (testimony of Walton, Sr.). Thus, assuming arguendo that the subirrigated acreage may give rise to an entitlement, it is being satisfied by the present subirrigation. To award additional water on this basis would result in a double allocation.

*Colville Confederated Tribes v. Walton*, 752 F2d at 403.

Claimant urges that *Walton III* was based not on federal law, but on the fact that the land, being already saturated throughout the year, could not be benefited by additional irrigation. However, that argument is not supported by the decision. The court concluded "[A]ssuming arguendo that the subirrigated acreage may give rise to an entitlement, it is being satisfied by the present subirrigation." *Id.* This shows that the court was aware of the possibility that subirrigation could be used as the basis for a water appropriation under state law, but did not consider it appropriate as the basis for a reserved right under federal law. If Walton wanted to use the subirrigation as the basis for a water right, he needed to do so through the procedures provided under state law, and not by claiming a federally reserved right.

Reserved rights are 'federal water rights' and 'are not dependent upon state law or state procedures.' *Cappaert v. United States*, 426 U S 128, 145 \*\*\*(1976); (citations omitted). It is appropriate to look to state law for guidance\*\*\* although the "volume and scope of particular reserved rights... [remain] federal questions." *Colorado River Water Conservation Dist. v. United States*, 424 U S 800, 813 (1976).

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*Walton III*, 752 F2d at 400.

Based on the foregoing, I agree with Judge Betterton that natural overflow and subirrigation cannot form the basis for a *Walton* claim. The water must have been artificially diverted in order for it to be appropriated.

I turn now to the analysis of the specific claim. In his Ruling on United States' Motion for Ruling on Legal Issues in Klamath Case 272, Administrative Law Judge William Young stated the elements of such a claim as follows:

1. The claim is for water use on land formerly part of the Klamath Indian Reservation, and the land was allotted to a member of an Indian tribe;
2. The allotted land was transferred from the original allottee, or a direct Indian successor to the original allottee, to a non-Indian successor;
3. The amount of water claimed for irrigation is based on the number of acres under irrigation at the time of transfer from Indian ownership; except that:
4. The claim may include water use based on the Indian allottee's undeveloped irrigable land, to the extent that the additional water use was developed with reasonable diligence by the first purchaser of land from an Indian owner.
5. After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors.

Ruling on United States' Motion for Ruling on Legal Issues (August 4, 2003), at 9.

I adopt that formulation as the correct interpretation of the *Walton* line of cases.

As discussed below, the various allotments have very different histories. Those different histories control the outcome as to each parcel.

The United States concedes that Claimant has met its burden as to Allotments 713, 714, 127, 548, 989 and 1284. The United States argues that the rate and duty as allowed in the Preliminary Evaluation exceed the amount claimed. This is correct. Claimant enclosed with his claim water right permits previously issued as evidence of use of water. Those permits expressly limited the rate and duty to 1/40<sup>th</sup> cfs per acre and three acre-feet per acre. That states the limit on rate and duty in this case.

In the remaining allotments, Claimant did not meet the burden of showing that water had been artificially applied to the parcel before the land was conveyed to the

second non-Indian owner. Claimant asserted that the “historical accounts” showed that in 1918, A.C. Gienger was irrigating the property that he owned for two years. That “historical account” is actually the hearsay recital of Leroy Gienger as to what he had been told at third-hand about the activities of his grandfather. While recourse to such evidence has sometimes been necessary in the Klamath Adjudication, it must be viewed with some caution. In this case, there were maps and reports prepared contemporaneously with the Giengers’ occupation of Allotment 207 which purported to record the property that was irrigated within the Klamath Reservation, including private developments. Those maps and reports make no mention of irrigation works developed in the area included within Gienger’s property.

In *Cole v. DMV*, 336 Or 565 (2004) the Supreme Court discussed the factors to be considered in deciding whether hearsay may be treated as substantial evidence in any particular case. There, the Supreme Court concluded that where hearsay evidence is based upon multiple hearsay, and is contradicted by evidence presented by the opposing party, it is not sufficiently reliable to allow it to be treated as substantial evidence in an administrative case. Here, that is the case. The testimony of Leroy Gienger is multiple hearsay, and is contradicted by contemporaneously prepared documents in the record. It is not, therefore, sufficiently reliable to allow it to be treated as substantial evidence to support a finding of fact in this case.

Likewise, Claimant’s arguments for the existence of the Lewis Dam in 1918, and the development of irrigation by Corbell are based entirely on inference unsupported by evidence sufficient to allow the inference to be made. In the case of Corbell’s project, Claimant presents an application for a permit filed by Corbell in 1924 as evidence for development of irrigation in the area. Claimant discounts the cancellation of the permit in 1933 for lack of diligent development, suggesting that this record is not necessarily accurate, since “the State of Oregon had no authority over Indian water rights at that time.” Claimant also points out that “an Indian’s rights were not lost to abandonment or forfeiture.” (Claimant’s Reply Brief at 42.) Both statements are inapposite to the issue as framed by the evidence.

The application, together with a 1956 map showing a ditch and “old pump” are relied upon to show that Corbell developed an irrigation system at some time after 1924. Having relied upon the records of the Department to support the claim, Claimant can hardly be heard to deny the accuracy of those records when they cancel the permit for lack of development. The fact that state law could not regulate Indian water rights at the time has nothing to do with the facts purported to be shown by the records, that Corbell applied for a permit to develop an irrigation system but did not construct the system. In any event, there were two intervening non-Indian owners, Marvin Williams, Jr. and C.R. Bowman, before Corbell acquired the property. By the time he did so, the right had been extinguished by lack of development by the first non-Indian owner.

In view of the foregoing, the portion of Claim 74 related to Allotments 713, 714, 127, 548, 989 and 1284 should be allowed at least in part. The remainder of the Claim should not be allowed.

## ORDER

I propose that the Adjudicator issue the following order:

Claim 74 is allowed in part as follows:

Season of Use (all parcels): April 1 to October 31.

Purpose of Use (all parcels): Irrigation

Source: Sprague River, a tributary of the Klamath River

### Allotment 713

Point of Diversion: NE 1/4 SE 1/4 Section 36, Township 34 S, Range 8  
E.W.M.

Priority: October 14, 1864.

Place of Use: SE 1/4 of Section 36, Township 34 S, Range 8 E.W.M.,

Acres: 131.9

Rate: 3.3 cfs

Duty: 395.7 acre-feet

### Allotment 714

Point of Diversion: NE 1/4 SE 1/4 Section 36, Township 34 S, Range 8  
E.W.M.

Priority: October 14, 1864.

Place of Use: NE 1/4 of Section 1, Township 35 S, Range 8 E.W.M.

Acres: 66.9

Rate: 1.67 cfs

Duty: 200.7 acre-feet

### Allotment 127

Point of Diversion: NW 1/4, SE 1/4 Section 31, Township 34 S, Range 9  
E.W.M.

Priority: October 14, 1864.

Place of Use: NW 1/4, NW 1/4 of Section 31, Township 34 S, Range 9  
E.W.M.,

Acres: 0.9

Rate: 0.02 cfs

Duty: 2.7 acre-feet

### Allotment 548

Point of Diversion: SW 1/4, SW 1/4 Section 32, Township 34 S, Range 9  
E.W.M.

Priority: October 14, 1864.

Place of Use: NW 1/4, NW 1/4 of Section 32, Township 34 S, Range 9  
E.W.M.,

Acres: 0.6  
Rate: 0.015 cfs  
Duty: 1.8 acre-feet

Allotment 989  
Point of Diversion: SW ¼, SW ¼ Section 32, Township 34 S, Range 9  
E.W.M.  
Priority: October 14, 1864.  
Place of Use: NW ¼, SW ¼ of Section 32, Township 34 S, Range 9  
E.W.M.,  
Acres: 8.6 acres,  
Rate: 0.215 cfs  
Duty: 25.8 acre-feet

Allotment 1284  
Point of Diversion: SW ¼, SW ¼ Section 32, Township 34 S, Range 9  
E.W.M.  
Priority: October 14, 1864.  
Place of Use: SW ¼, SW ¼ of Section 32, Township 34 S, Range 9  
E.W.M.  
Acres: 9.4  
Rate: 0.24 cfs  
Duty: 28.2 acre-feet

The remaining portions of the claim should be denied.



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

Dated: December 8, 2006

**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

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2006, I sent a true copy of the following:  
**CORRECTED PROPOSED ORDER**, by depositing the same in the U.S. Post Office,  
Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

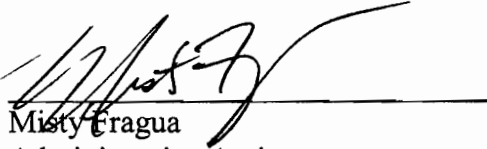
Dwight W. French / Teri Hranac  
Oregon Water Resources Department  
725 Summer Street N.E., Suite "A"  
Salem, OR 97301  
[Dwight.W.French@wrđ.state.or.us](mailto:Dwight.W.French@wrđ.state.or.us)  
[Teri.Hranac@wrđ.state.or.us](mailto:Teri.Hranac@wrđ.state.or.us)

David W. Harder  
United States Department of Justice  
Indian Resources Section  
1961 Stout Street – 8<sup>th</sup> Floor  
Denver, CO 80294  
Phone: 303-844-1368  
Fax: 303-844-1350  
[David.Harder@us.doj.gov](mailto:David.Harder@us.doj.gov)

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Misty Fragua  
Administrative Assistant