

**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; Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Klamath Hills District Improvement Co.; Malin Irrigation District; Midland District Improvement 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. 211**

**Claim No. 95**

**Contests 2764, 3477,<sup>1</sup> 3746,<sup>2</sup> and 4131**

**v.**

**Clifford C. Rabe; Mary A. Rabe,  
Claimants/Contestants.**

**HISTORY OF THE CASE**

Clifford C. Rabe and Mary A. Rabe (Claimants) filed Claim 95 on December 7, 1990, making a claim for water as non-Indian successors to a Klamath Indian Allottee. This *Walton*

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

<sup>2</sup> On January 21, 2004, the Klamath Tribes withdrew their contest to Claim 95, without prejudice.

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claim<sup>3</sup> is for seven cubic feet per second (cfs) of water from the Sprague River, a tributary to Williamson River, for irrigation of 374.8 acres of land, and for 225 livestock use, with a claimed period of use of April 15 through October 15 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 approving the claim for irrigation of 353.6 acres from March 1 to October 31 and year round for livestock.

On August 27, 2004, the Office of Administrative Hearings (OAH) issued a Hearing Notice setting the hearing for the purpose of taking cross-examination testimony for September 30, 2004, and specifying the issues to be considered at hearing.

On September 30, 2004, Administrative Law Judge (ALJ) Maurice L. Russell, II,<sup>4</sup> conducted a hearing in Salem, Oregon, for the purpose of cross-examination of a witness who had submitted written direct and rebuttal testimony prior to the hearing. The hearing 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 Claimants 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.

Claimants Clifford and Mary Rabe appeared in person and were represented by Ron Yockim. David Harder and Barbara Scott Brier, appeared in person and represented the United States. Justin Wirth appeared in person for Oregon Water Resources Department (OWRD). Andy Hitchings and Jackie McDonald appeared by telephone and represented Klamath Project Water Users (KPWU). United States' expert Dale Book was the only witness to be cross-examined.

On October 1, 2004, ALJ Russell issued a Post-Hearing Scheduling Order, establishing due dates for submission of additional documents and written argument. On May 19, 2005, Claimants filed their Closing Argument. On June 23, 2005, the United States moved to strike all references to extra-record documents and non-record exhibits relied upon or appended to Claimants' Closing Argument. On June 30, 2005, Claimants filed a Response to the United States' Motion to Strike. On July 11, 2005, the United States and OWRD filed their Replies to Claimants' Response to United States' Motion to Strike.

On August 17, 2005, ALJ Russell issued an Order Granting United States' Motion to Strike. The Order struck "all references to extra-record documents and non-record exhibits relied upon or appended to the 'Claimants' Closing Argument' submitted May 19, 2005."

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<sup>3</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>4</sup> The case was originally assigned to ALJ Lawrence Smith, but he was unable to conduct the hearing on that date. ALJ Russell conducted the hearing for ALJ Smith.

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Contestants' Response briefs were filed on August 18, 2005. Reply briefs were filed on September 15, 2005. The United States filed a sur-reply to OWRD's brief on September 26, 2005. The record closed on that date.

The case was reassigned to ALJ Richard Barber and then to me, ALJ Charlotte Rutherford, on September 11, 2006. I have reviewed the entire record, including exhibits and testimony, and make the following findings based on the preponderance of the evidence in the record.

### EVIDENTIARY RULINGS

Claimants' Exhibits 1 through 62, A through N, Q through W, AD-1 through AD-3, the Direct and Rebuttal Testimony of Clifford Rabe and the Affidavit of Ron Yockim were admitted into the record.

United States' Direct Testimony of Dale Book including his Exhibits 1 through 22 and 24 were admitted into the record.<sup>5</sup> Exhibit 23 was rejected as cumulative. The Affidavit of David Harder and Exhibits 100 through 110 were admitted into the record.<sup>6</sup>

OWRD Exhibit 1 was admitted into the record. However, statements at pages 13 and 16 were admitted as evidence of the contents of the Application, but not for the truth of the matter asserted.

Judicial Notice is taken of ALJ William Young's *Ruling on United States' Motion for Ruling on Legal Issues*, Klamath Adjudication Case 272, August 4, 2003, and ALJ Ken L. Betterton's *Amended Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues*, Klamath Adjudication Case 157, December 10, 2004.

On September 1, 2005, Claimants filed a Motion to Strike, arguing that the ALJ should strike "all citations to non-record documents and strike Attachments 1-6 appended to the United States' Closing Argument that are not part of the record in this case." (Claimants' Motion to Strike at 2.) Claimants' Motion to Strike is denied by this Order for the reasons stated below.

Claimants moved to strike the following documents that are attached to the United States' Closing Argument: Unpublished rulings from courts in another state; an order from another Klamath Adjudication case; and Findings of Fact and Order of Determination in the Lost River Adjudication. Claimants argue that the unpublished opinions only provide "a snapshot of a complex and lengthy series of court rulings;" and the findings from another jurisdiction must be excluded on the same basis ALJ Russell excluded the "reports on the Sprague." Claimants contend if the attachments are not stricken, they must be afforded an opportunity to examine the records and submit additional evidence relative to the attachments. (Claimants' Motion to Strike at 4.)

<sup>5</sup> The exhibits are referred to as "Book Ex. \_\_\_."

<sup>6</sup> The exhibits are referred to as "Harder Ex. \_\_\_."

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Claimants confuse legal argument and evidence. The attachments to the United States' Closing Argument are not exhibits offered to prove certain facts in the instant case, but are offered to support the legal arguments being made by the United States. Access to those legal documents, particularly those that are not published, is ensured by attaching a copy of the document to the Argument. In determining whether the claims at issue have been established by a preponderance of the evidence, the ALJ may consider legal rulings in other cases, but may not consider evidence not directly submitted into the record of the contested case proceeding immediately before her. ORS 183.415(11); 183.450; OAR 137-003-0645. The attachments to the United States' Closing Argument are not evidence and are allowable to support legal arguments.<sup>7</sup> Claimants' Motion to Strike is denied.

### ISSUES<sup>8</sup>

1. Whether the period of use should be March 1 to October 31.
2. Whether the record supports the rate, duty, actual use, points of diversion and re-diversion, place of use, seasons of use and/or acreage claimed.
3. Whether there is sufficient title information to establish a *Walton* right on a portion of the Place of Use.
4. Whether there is sufficient information on the development of continuous use of water on the Place of Use to establish a *Walton* right.
5. Whether the diversion rate is too large for the valid number of irrigated acres within the Place of Use.
6. Whether the diversion rate for livestock watering exceeds what can be beneficially used.
7. Whether the period of use for irrigation in the preliminary evaluation exceeds the period of use claimed.
8. Whether the claimed place of use was under irrigation by the Indian owner before the land was transferred to the first non-Indian owner.
9. Whether irrigation of the claimed place of use was developed with reasonable diligence by the first non-Indian purchaser from an Indian owner.

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<sup>7</sup> To the extent Attachment 5 contains factual matter, those facts are stricken. Use of the attachment for legal precedent is allowed.

<sup>8</sup> The United States filed an amendment to the contest issues. Claimants objected to the amendment. OAR 690-030-0035 provides the statement of contest may be amended up to 10 days before the date of the hearing. There is no evidence the United States' amendment was late filed. Therefore, Claimant's objection is overruled by this Order.

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10. Whether irrigation of the claimed place of use was developed with reasonable diligence by the non-Indian owner(s) 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) – not through a diversion system created by humans – constitutes irrigation under a *Walton* right.

12. If any part of the claimed place of use was ever irrigated by the Indian owner before the land was transferred to the first non-Indian owner or developed with reasonable diligence by the first non-Indian purchaser from an Indian owner, whether the water claimed for that part of the claimed place of use has been continuously used by the first non-Indian successor and by all subsequent successors.

13. Whether the irrigation season of use should be no more than the season of use claimed.

14. If any part of the claimed place of use is awarded a water right, whether the water duty for that part of the claimed place of use should be no more than three acre-feet per acre.

15. If any part of the claimed place of use is awarded a water right, whether the diversion rate for that part of the claimed place of use should be no more than the ratio of the actual pumping capacity of the claimed diversion to the total number of acres claimed (5.8 cfs to 353.6 acres (0.0164 cfs per acre), or the claimed diversion rate of 7 cfs to 374.8 acres (0.0187 cfs per acre).

16. Whether the Preliminary Evaluation for Claim No. 95 (including Appendix A to the Preliminary Evaluation entitled “Standards for Rates, Duties, and Seasons of Use Within Previously Adjudicated Areas of the Klamath Basin”) should be accorded any weight in this contested case.

## FINDINGS OF FACT

1. Claim 95 involves property that was originally part of the Klamath Indian Reservation, and has subsequently been transferred to non-Indian ownership. The claim is comprised of six allotments in the Klamath Reservation (Allotment numbers 400, 409, 637, 638, 1091 and 1252), that have been consolidated into the ownership of Clifford and Mary Rabe (Claimants). The total acreage is 353.6 acres.<sup>9</sup> Claimants acquired the property in 1976. (Rabe Direct testimony at 2.)

2. The claimed acreage for Claim 95 extends into each of the six allotments. The Sprague River flows through the property and the acreage in the claim is located on the west and south sides of the Sprague River. Near the property, Trout Creek joins the Sprague River, approximately one-half mile west of the property. (Book Affidavit at 13 and Book Ex. 3.)

<sup>9</sup> Claimants claimed the total acreage was 374.8 acres, but OWRD determined the correct acreage was 353.6 acres. (OWRD Ex. 1 at 24, 29, 113, 118 69.) There is no evidence to dispute OWRD’s determination.

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Claimants identified two diversions serving the property from Trout Creek and the Sprague River. (OWRD Ex. 1 at 13.)

3. Vincent Bodner Jr,<sup>10</sup> a Klamath Indian, acquired allotment 637 in the late 1940s. He acquired allotments 638 and 1091 in the mid 1950s. He inherited allotments 400, 409 and 1252 in 1962. (Bodner Affidavit.) Mr. Bodner did not irrigate any of the allotments. (*Id.* at 5-6.)

4. In 1967 the California Land Co. acquired all of the allotments from Vincent Bodner Jr., Shirley Bodner, Alfaretta Skeen Bodner and Vincent Bodner, Sr, all Klamath Indians. The California Land Co. was a group of non-Indians. (OWRD Ex. 1 at 11 and Bodner Affidavit.) The property was then conveyed to David Griffith in 1967 and subsequently acquired by a partnership in 1971 that included Cecil Elliott. The land was conveyed from Elliott to the Claimants in 1976. (OWRD Ex. 1 at 11.) There is no evidence that any of the persons in the chain of title after the California Land Co. are Klamath Indians. (Book Affidavit at 12.)

5. There is no evidence that water was diverted for livestock use.

#### **Allotment 400**

6. This property is located in the N ½ NE ¼, Section 36, Township 35 S, Range 9 E, W. M. The property was allotted to Rosa Dick, a Klamath Indian, by trust patent in 1900. (Book Ex. 14 at 4.) In 1918, the allotment was conveyed to John A. Smith, as heir to Rosa Dick, by fee patent from the United States. (Claimants Ex. 25.) John Smith was not a member of the Klamath Tribe or any other tribe.<sup>11</sup> (Book Ex. 14 at 2.) John Smith was the first non-Indian owner of Allotment 400. The property was conveyed to Nettie Smith, a Klamath Indian, in 1924. (Claimants Ex. 33.) The property remained in Indian ownership until sold by Alfaretta and Vincent Bodner to the California Land Co. in 1967. (Claimants Ex. 50.)

7. Part of Allotment 400 was irrigated from a diversion on Trout Creek prior to 1923. (Book Ex. 10 at 27.) This irrigation was discontinued by at least the 1930's and was not resumed through 1967. (Bodner Affidavit at 3-4.) There was no state water right for Allotment 400 prior to 1976. (Book Affidavit at 16.) There was no irrigation on the property from 1967 to 1976 when Claimants purchased the property. (Bodner Affidavit at 3.) Claimants started the irrigation system on Allotment 400 in 1976. (Rabe Direct testimony at 2.)

#### **Allotment 1252**

8. This property is located in the S ½ NE ¼, Section 36, Township 35 S, Range 9 E, W. M. The allotment was confirmed to David Skeen, a Klamath Indian, by trust patent granted in

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<sup>10</sup> The Affidavit filed in this case shows the name spelled Bodnar. However, most of the other documents in the record spell the name Bodner. I have adopted the spelling used by the majority of documents, Bodner. I note that there is no contention that the two spellings refer to two different people.

<sup>11</sup> John Smith self-reported to being one quarter Pitt River Indian and three quarters white. He was not enrolled in any Indian Tribe. He was the widow of Rosa Dick and inherited the property from her on her death. I am not persuaded by Claimants' argument that Smith should be treated as an Indian for *Walton* right purposes because he married a Klamath Tribal member. See Claimant's Closing Argument at 9-10.

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1915 (Claimants Ex. 24), and by fee patent in March 1918. (Claimants Ex. 26.) The property was conveyed from David Skeen to B. S. Grigsby and then back to David Skeen in 1918.<sup>12</sup> (Claimants Ex. 27.) B. S. Grigsby was a white man. (Stipulation.) The property was conveyed by Sheriff's deed to Klamath County in 1930, (Claimants Ex. 37), and then back to David Skeen in 1933. (Claimants Ex. 38.) The property was subsequently conveyed to the United States in trust for David Skeen in 1950 and conveyed to David Skeen again in 1959. (OWRD Ex. 1 at 8-9.) The property was inherited by Vincent Bodner Jr. and Alfaretta Skeen Bodner in 1962. (Bodner Affidavit at 3.) The property was subsequently conveyed to the California Land Co. in 1967. (Claimant Ex. 50.)

9. A portion of Allotment 1252 was irrigated by a ditch from Trout Creek prior to 1923. (Bodner Affidavit at 3 and Book Ex. 10.) However, irrigation was discontinued some time prior to 1950. (Bodner Affidavit at 3.) The ditch from Trout Creek was not used from at least 1950 through 1976. (*Id.* and Book Affidavit at 18.) Mr. Bodner did not recall Trout Creek Ditch ever being used to irrigate Allotment 1252. (*Id.*) There was no irrigation of the property from 1967 until Claimants purchased the property in 1976. (Bodner Affidavit at 2-4.) Claimants started the irrigation system on Allotment 1252 in 1976. (Rabe Direct Testimony at 8-9.)

#### **Allotment 409**

10. The property is located in the SE ¼, Section 36, Township 35 S, Range 9 E, W. M. The allotment to Bessie Faithful, a Klamath Indian, was confirmed by trust patent dated 1910. (Claimants Ex. 23.) David Skeen received a fee patent as heir to Faithful in 1919. (Claimants Ex. 28.) The property was conveyed by Sheriff's deed to Klamath County in 1930, (Claimants Ex. 37), and back to David Skeen by deed in 1933. (Claimants Ex. 38.) The property was conveyed from David Skeen to Hans Anderson in January 1945. (Claimant Ex. 43.) Hans Anderson was not an Indian. (Book Ex. 15 at 2.) The property was conveyed to David Skeen again in July 1945. The property was subsequently conveyed to the United States in trust for David Skeen in 1950. (OWRD Ex. 1 at 8.) The property was inherited by Vincent Bodner Jr. and Alfaretta Skeen Bodner in the early 1960s (Bodner Affidavit at 3.)

11. An early Bureau of Indian Affairs (BIA) report for Allotment 409 did not show the Trout Creek Ditch irrigating this allotment, although the Trout Creek Ditch appears to extend a short distance onto this allotment. (Book Affidavit at 13-14.) Mr. Bodnar knew of a ditch from Trout Creek on the edge of this allotment, but he did not recall it ever being used to irrigate land in Allotment 409. (Bodner Affidavit at 3.) In the 1930s, David Skeen built a small dam on the Sprague River to obtain water for a ditch that ran onto allotment 409. (*Id.*) The dam lasted two years and was not used again after that time. (*Id.* at 4.) A pump installed in the Sprague River in Allotment 638 provided water to Allotment 409 and 1252 but was used for only one year. (*Id.* at 3.) The pump and ditch were not used after that. (*Id.*) A 1957 appraisal by the General Services Administration noted that there was no developed source of water to the allotment. (Book Ex. 20 at 3.) Any development of irrigation of Allotment 409 was temporary and sporadic. (Book Affidavit at 21.) Vincent Bodner did not irrigate Allotment 409 during his

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<sup>12</sup> Documentation for the conveyance from David Skeen to B.S. Grigsby, or some other sequence of ownership in 1918, has not been provided. (Book Affidavit at 8.)

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period of ownership from the early 1960s to 1967. (Bodner Affidavit at 2-4.) There was no irrigation on the property from 1967 to 1976, when Claimants purchased the property. (Bodner Affidavit at 2-4.) Claimants started the irrigation system on this allotment in 1976. (Rabe Direct Testimony at 8-9.)

**Allotment 637**

12. The property is located in the NW ¼, Section 31, Township 35 S, Range 10 E, W. M. The allotment was confirmed to Neffie Weeks, a Klamath Indian, by trust patent dated 1910. (Claimants Ex. 17.) The property was passed to the heirs of Weeks, Caroline Cowen and Cinda Checaskane, Klamath Indians. The property was conveyed to Vincent Bodner Jr. in 1942. (Claimants Ex. 21.) The property was conveyed to California Land Co. in 1967. (Claimants Ex. 50.)

13. Allotment 637 was not irrigated until the Claimants acquired it and started their development in 1976. (Rabe Direct Testimony at 8-9.)

**Allotment 638**

14. The property is located in the SW ¼, Section 31, Township 35 S, Range 10 E, W. M. The allotment to Ella Cowen, a Klamath Indian, was confirmed by the allotment ledgers and township allotment maps. (OWRD Ex. 1 at 9.) David Skeen received a fee patent in 1923. (Claimants Ex. 15.) The property was conveyed to Albert Thalhofer in 1927. (Claimant Ex. 16.) Mr. Thalhofer was white. (Stipulation.) The property was subsequently conveyed to Klamath County by Sheriff's deed in 1941. (Claimants Ex. 40.) The property was then conveyed to Leroy Gienger in 1942. (Claimants Ex. 20.) Mr. Gienger was not an Indian. (Bodner Affidavit at 2.) Mr. Gienger conveyed the property to Vincent Bodner Jr. in 1964. (OWRD Ex. 1 at 9.) The property was conveyed to the California Land Co. in 1967. (Claimants Ex. 50.)

15. There was no irrigation on the land prior to 1950, when Leroy Gienger started development of irrigation. Permit 20509 was granted in 1952 to Mr. Gienger. (OWRD Ex. 1 at 94.) A water right was granted to Mr. Gienger for lands in Allotment 638. (*Id.*) A permit application was filed in 1950 to irrigate lands on both sides of the Sprague River. Mr. Gienger submitted proof of appropriation in 1958 for irrigation of 286.5 acres and was granted a certificate in 1959. (OWRD Ex. 1 at 93.) Only 67.2 acres were located on Allotment 638. (Book Affidavit at 16.) Mr. Gienger's irrigation development started 23 years after the conveyance to Mr. Thalhofer, the first non-Indian owner. Irrigation was discontinued on this allotment from the time that Mr. Bodner acquired it in 1964 until the Claimants acquired the property in 1976. (Bodner Affidavit 3.) Claimants started on the irrigation system on this allotment in 1976. (Rabe Direct Testimony at 8-9.)

**Allotment 1091**

16. This property is located in the E ½, NE ¼, Section 1, Township 35 S, Range 9 E, W. M. The allotment to Julia Hart, a Klamath Indian, was confirmed by a 1913 trust patent. (Claimants Exs. 1 and 5.) Julia Hart died in 1911. The ownership by heirs was described in the

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1958 Land Status Report issued for allotment 1091. (Claimants Ex. 5.) The heirs conveyed the property to the Bly Lumber Co. in 1959. (Claimants Exs. 6 - 9.) Bly Lumber Co. was the first non-Indian owner. (Book Ex. 12 at 2, paragraph 5.d.) The property was subsequently conveyed to Leroy Gienger in 1959. (Claimants Ex. 11.) Vincent Bodner Jr. acquired the property in 1964 and conveyed it to the California Land Co. in 1967. (Claimant Ex. 50.)

17. Allotment 1091 was not irrigated from 1940-1979. (Book Affidavit at 22 and Book Ex. 6, 1968 photograph.) There was no way to serve this land historically from Trout Creek or the Sprague River pump. (Book Affidavit at 22.) Claimants developed the ditch serving this allotment several years after they acquired the property in 1976. (OWRD Ex. 1 at 99-100.)

### CONCLUSIONS OF LAW

1. The period of use is not relevant because a *Walton* right has not been established on any allotment.

2. The record does not support the rate, duty, actual use, points of diversion and re-diversion, place of use, seasons of use and/or acreage claimed because a *Walton* right has not been established on any allotment.

3. Title information does not establish a *Walton* right on any portion of the Place of Use.

4. There is insufficient continuous use of water on the Place of Use to establish a *Walton* right for any allotment.

5. The diversion rate for the Place of use is not relevant because a *Walton* right has not been established for any allotment.

6. The diversion rate for livestock watering is not relevant because a *Walton* right has not been established for any allotment.

7. The period of use for irrigation in the preliminary evaluation is not relevant because a *Walton* right has not been established for any allotment.

8. The claimed place of use was not under irrigation by the Indian owner before the land was transferred to the first non-Indian owner.

9. Irrigation of the claimed place of use was not developed with reasonable diligence by the first non-Indian purchaser from an Indian owner.

10. Irrigation of the claimed place of use was not developed with reasonable diligence by the non-Indian owner(s) after 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 sub-irrigation) – not through a diversion system created by humans – does not constitute irrigation under a *Walton* right.

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12. If any part of the claimed place of use was ever irrigated by the Indian owner before the land was transferred to the first non-Indian owner or developed with reasonable diligence by the first non-Indian purchaser from an Indian owner, the water claimed for that part of the claimed place of use has not been continuously used by the first non-Indian successor and by all subsequent successors.

13. The irrigation season of use is not relevant because a *Walton* right has not been established for any allotment.

14. Because none of the claimed place of use is awarded a water right, the water duty for that part of the claimed place is not relevant.

15. Because none of the claimed place of use is awarded a water right, the diversion rate for that part of the claimed place of use is not relevant.

16. The Preliminary Evaluation for Claim No. 95 (including Appendix A to the Preliminary Evaluation entitled "Standards for Rates, Duties, and Seasons of Use Within Previously Adjudicated Areas of the Klamath Basin") should not be accorded any weight in this contested case.

### 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 (DATE), *rev den* 308 Or 660 (1989). Thus, if, considering all of the evidence, it is more likely than not that the facts necessary to establish the claim are true, the claim must be allowed.

The Claimants are non-Indian successors to Klamath Indian Allottees. Therefore, to establish a claim, Claimants must meet the elements of a *Walton* right, as defined by a line of cases<sup>13</sup> and a Ruling from ALJ Young in another Klamath Adjudication case.<sup>14</sup> Having reviewed the relevant authorities, I adopt ALJ Young's statement of the required elements in a *Walton* case. Those elements are:

1. The claim for water use on land formerly part of the Klamath Indian Reservation, and the land was allotted to a member of an Indian tribe;

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<sup>13</sup> *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)(*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9<sup>th</sup> Cir 1985), *cert denied*, 475 US 1010 (1986)(*Walton III*).

<sup>14</sup> Ruling on United States' Motion for Ruling on Legal Issue, Case No. 272, Claim Nos 301-307, dated August 4, 2003, by ALJ William D. Young.

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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, Case No. 272, Claim Nos. 301-307, dated August 4, 2003, by ALJ William D. Young, at 9.

Claimants raised two arguments about the appropriate elements of a *Walton* right. First, Claimants contended that the "first purchaser" rule is too restrictive. Claimants argued that the "arbitrary limitation" that development must occur by the first non-Indian purchaser should be abandoned. Claimants argued that the standard should be "reasonable and diligent development not arbitrarily limited to the immediate non-Indian owner." (Claimants' Closing at 10.)

*Walton* rights are a creature of federal law, established by a line of cases. 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>15</sup> is binding precedent for a decision in this matter, and may not be revisited in these proceedings.

Second, Claimants argued that a *Walton* right may be established by natural overflow of water, without any artificial diversion by ditch, canal or other structure. Claimants argued 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 and order 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,

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<sup>15</sup> See the concurring opinion of Judge Sneed, reported in *Colville Confederated Tribes v. Walton*, 758 F2d 1324 (9<sup>th</sup> 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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1983), which *Walton III* [*Colville Confederated Tribes v. Walton*, 752 F2d 397 (9<sup>th</sup> Cir 1985)] 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.

Claimants urge 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 US 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 US 800, 813 (1976).

*Walton III*, 752 F2d at 400.

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

### **Application of *Walton* Elements to Each Allotment**

The record shows that all of the allotments at issue in this case were formerly part of the Klamath Indian Reservation and the land was allotted to a member of the Klamath tribe. Each of the allotments was transferred from the original allottee, or a direct Indian successor to the original allottee, to a non-Indian successor. Therefore, the first two elements of a *Walton* right, as articulated by Judge Young, have been satisfied by each allotment.

Claimants must also establish that the claimed irrigation was developed by their Indian predecessors or by the first non-Indian purchaser of each allotment with reasonable diligence prior to the conveyance of the allotment to the next owner. To satisfy *Walton* elements, claimants must also show that each allotment was continuously irrigated after the initial development. Following case precedent<sup>16</sup> and Oregon statutes,<sup>17</sup> I adopt a five year rule of thumb as the reasonable time period for diligent development of the irrigation system and to determine the “continuous use” of the irrigation established by the last Indian owner or by the first non-Indian owner, absent extraordinary circumstances. In this case, even if a five year standard did not apply, the extended periods of non-use far exceed any amount of time justified on this record. Below, I apply these elements of a *Walton* right to the facts of each allotment at issue in this claim.<sup>18</sup>

### **Allotment 400**

The first non-Klamath Indian purchaser of this allotment was John Smith in 1918. The record shows irrigation from Trout Creek occurred prior to 1923 but was discontinued by at least 1940 and not resumed until 1976, when the first state water right was granted. Because the water was not used continuously after development by the first non-Indian successor and by all subsequent successors, this allotment fails to meet standards that establish a *Walton* right.

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<sup>16</sup> See, *Seaward v. Pacific Livestock Co.*, 49 Or 157 (1907) (when several appropriators quit expanding their irrigation in 1899 and did nothing for five years, the Oregon Supreme Court limited their claim to the acreage fed by a diversion that they each had developed by 1899).

<sup>17</sup> ORS 537.230(1) provides for five years for the completion of the works necessary to put water to beneficial use, unless good cause to enlarge the period can be shown. See ORS 539.010(5). ORS 540.610(1) creates a rebuttable presumption of forfeiture after five years of non-use of irrigation.

<sup>18</sup> Claimants also argued that the standards should be different for allotments that leave Indian ownership and then at some point return to Indian ownership for a period of time before again returning to non-Indian ownership. Claimants argued lands that return to Indian ownership should provide a new chance for that Indian or his grantee to put in an irrigation system and receive a *Walton* right. (Claimants’ Closing Argument at 8-9) (Vince Bodner’s reacquisition of the property after a seller defaulted allegedly reinstated the reserved water right). This argument is not supported by case law. The *Walton III* court explained that the right flows from the allottee to the first grantee. (752 F2d at 402) (“the immediate grantee of the original allottee must exercise due diligence”). It is the reasonable diligence of the first non-Indian that is at issue to establish a *Walton* right.

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### **Allotment 1252**

The first non-Indian purchaser of this allotment was B.S. Grigsby, who owned the property for a short time in 1918. David Skeen reacquired it and kept it until 1930 when it was conveyed to Klamath County. There is no evidence Mr. Grigsby developed irrigation. However, the record shows a portion of the allotment was irrigated by a ditch from Trout Creek prior to 1923. Even if Mr. Grigsby developed the irrigation described in 1923, use was discontinued some time prior to 1950. The ditch was not used from 1950 to 1976. This allotment fails to establish a *Walton* right because either there is no evidence that the first non-Indian owner developed irrigation or because the irrigation that was developed was not used continuously.

### **Allotment 409**

The first non-Indian purchaser of this allotment was Klamath County in 1930. The County did not develop irrigation on the land. The land was conveyed to David Skeen in 1933 and to Hans Anderson in 1945. The Trout Creek ditch extended onto this allotment, but was not used to irrigate the allotment. In the 1930s, David Skeen built a small dam on the Sprague River to obtain water for a ditch that ran into allotment 409. The ditch was used for two years and was not used after that time. There was no irrigation from the 1950s through 1976. Because the first non-Indian owner did not develop irrigation and because water was not used continuously after Mr. Skeen's development, this allotment fails to meet the standards to establish a *Walton* right.

### **Allotment 637**

The first non-Indian purchaser of this allotment was the California Land Company in 1967. There was no irrigation on this allotment until the Claimants acquired it and started their development in 1976. Because there was no development of irrigation by the first non-Indian purchaser for nine years, this allotment fails to establish a *Walton* right.

### **Allotment 638**

The first non-Indian purchaser of this allotment was Albert Thalhoffer in 1927, who owned the land for 14 years. There is no evidence that Mr. Thalhoffer irrigated the land. The record shows that the first irrigation occurred in 1952 when a water permit was granted to Leroy Gienger, who acquired the land in 1942. Because Mr. Thalhoffer was the first non-Indian purchaser and did not irrigate the land, the irrigation that was begun by Mr. Gienger in 1952 is of no moment. Furthermore, after Mr. Geinger irrigated the land in the 1950s, the land was not irrigated for approximately 20 years until Claimants started development of a system in 1976. The standards of a *Walton* right are not established for this allotment because there has not been diligent development or continuous use.

### **Allotment 1091**

The first non-Indian purchaser was Bly Lumber Company in 1959. There is no evidence that any irrigation occurred from 1940 to 1979. There is no evidence the first non-Indian owner

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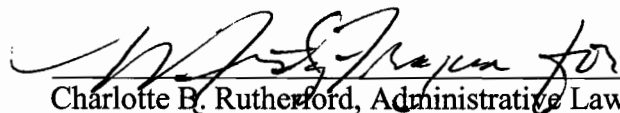
developed irrigation and there is no evidence of continuous use. Therefore, the standards of a *Walton* right are not established for this allotment.

**Summary**

For the reasons stated above, none of the allotments at issue in this case establish a *Walton* right.

**PROPOSED ORDER**

I propose that the Adjudicator DENY Claim 95, filed by Clifford C. Rabe and Mary A. Rabe.

  
Charlotte B. Rutherford, Administrative Law Judge  
Office of Administrative Hearings

ISSUED AND MAILED: February 1, 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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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2007, I mailed a true copy of the following:  
**PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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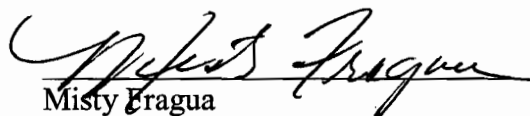
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