

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; 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. 212

Claim: 97

Contests: 38, 2840<sup>1</sup>, 3478<sup>2</sup>, 3747, and 4132<sup>3</sup>

vs.

Donald Lawless; Marlene Lawless; Lewis Lawless;  
Claimants/Contestants.

**HISTORY OF THE CASE**

Claimant Carter Air Balance, Inc., a California corporation, filed this claim (claim 97) on February 1, 1991, making a claim for water as non-Indian successors to a Klamath Indian Allottee. The current claimants, Donald D., Marlene and Lewis Lawless (Claimants) subsequently purchased the property. On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin Adjudication, issued a Preliminary

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<sup>1</sup> WaterWatch of Oregon, Inc.'s Contest 2840 was dismissed. *See* ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

<sup>2</sup> Don Vincent voluntarily withdrew from Contest 3478 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3478 on June 24, 2002. Klamath Hills District Improvement Co., voluntarily withdrew from Contest 3478 on January 15, 2004.

<sup>3</sup> The Klamath Tribes voluntarily withdrew, without prejudice, Contest 4132 on July 28, 2004. *See* KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST (July 28, 2004).

Evaluation for this claim preliminarily denying the claim. Claimants filed Contest 38 on April 28, 2000. WaterWatch of Oregon, Inc.<sup>4</sup> filed Contest 2840 on May 8, 2000. Klamath Project Water Users (KPWU)<sup>5</sup> filed Contest 3478 on May 8, 2000. The United States of America filed Contest 3747 on May 8, 2000. The Klamath Tribes filed contest 4132 on May 8, 2000.<sup>6</sup>

On September 8, 2004, the OAH issued a Notice of Hearing, setting the case for hearing for the purpose of taking cross-examination testimony on October 14, 2004, and specifying the issues to be considered at hearing.

The hearing was convened on October 14, 2004, before Daina Upite, Administrative Law Judge, for the purpose of receiving into evidence the documents, written testimony and exhibits submitted by the parties, considering any objections made to evidence and taking the cross-examination testimony of witnesses. 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 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. Attorney Ron Yockim appeared representing Claimants. Also present were Claimants Donald Lawless and Lewis Lawless. Vanessa Willard appeared as attorney for Contestant the United States. Walter Perry, Assistant Attorney General, appeared in person for the Oregon Water Resources Department (OWRD), and Dan Kelly appeared by telephone for Contestants Klamath Project Water Users. Dale Book, who had submitted written Direct and Rebuttal Testimony appeared and was cross-examined. The record remained open for additional documents and written argument.

On October 15, 2004, a Scheduling Order was issued, providing due-dates for submission of additional documents and written argument. Claimants filed their closing brief on June 14, 2005. The United States filed its closing argument on August 22, 2005, as did Klamath Project Water Users. Claimants filed their Reply Brief on September 26, 2005.

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

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<sup>4</sup> Withdrawn on February 20, 2003.

<sup>5</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>6</sup> Withdrawn on July 28, 2004.

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## 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. (Note: This exhibit was originally submitted under the caption for Klamath Adjudication Case 219, but an affidavit of correction was later filed establishing that the exhibit was actually for this case. The pages continue to be labeled for Case 219, but were admitted in the record of this case.

Stipulation between the United States and Oregon Water Resources Department, Amended Stipulation and documents referred to therein.

Direct Testimony of Donald Lawless

Direct Testimony of James Goold

Direct Testimony of Leroy Gienger

Rebuttal Testimony of Donald Lawless

Rebuttal Testimony of James Goold

Rebuttal Testimony of Lewis Lawless, including Ex. 3, a copy of portions of a transcript of deposition.

Affidavit of R.S. Yockim

Affidavit of Vincent Bodner, Jr.

Affidavit of James Goold

Exhibits submitted by Claimants, marked DL1-7, RS1-17, RS19-38

Direct Testimony of Dale Book

Rebuttal Testimony of Dale Book

Exhibits US1 through US14.

The evidentiary record was held open until November 15, 2004 for the submission of more legible copies of certain exhibits, and a complete copy of Ex. RS3, or a citation to an on-line source for this document. The following documents were received and admitted prior to November 15, 2004:

More legible copies of Pages 71 and 159-162 of OWRD Exhibit 1.

Ex. RS-30 through RS-38.

Ex. RS-39 and RS-40 were also offered at that time.

The evidentiary record closed on November 16, 2004.

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.

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On July 19, 2005, the United States moved for an order to strike all reference in Claimants' closing brief to documents not previously admitted into the record in this case. This motion was granted by order dated August 8, 2005. On October 7, 2005, the United States moved to strike the extra-record documents filed with Claimants' Reply Brief. That motion is granted. 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. On October 10, 2005, Claimants requested that all extra-record documents attached to the briefs of the United States be also stricken. That motion is granted to the extent the documents are offered as evidence in this case. Published opinions of courts providing precedential legal authority for the present case will not be stricken.

### ISSUES

1. **Whether the record establishes that the land appurtenant to the claim was part of the former Klamath Indian Reservation.**
2. **Whether the period of use should be April 1 through October 1 of each year.**
3. **Whether the record establishes a transfer from Klamath Indian ownership for all of the claimed lands, or the first date(s) of transfer to non-Indian ownership.**
4. **Whether the record establishes that water for the claimed use was used by the last Indian owner of the property.**
5. **Whether the record establishes that the water use was diligently developed by non-Indian owners of the property after transfer from the last Indian owner.**
6. **Whether there is sufficient title information to establish a *Walton* right for a portion of the Place of Use.**
7. **Whether there is sufficient information on the development or continuous use of water on this Place of Use to establish a *Walton* right.**
8. **Whether the Place of Use has been continuously irrigated.**
9. **Whether the diversion rate is too large for the valid number of irrigated acres within the Place of Use.**
10. **Whether the period of use for irrigation in the preliminary evaluation exceeded the period of use claimed.**

11. Whether a portion of the claimed place of use was not under irrigation by the Indian owner before the land was transferred to the first non-Indian owner.
12. Whether irrigation of a portion of the claimed place of use was not developed with reasonable diligence by the first non-Indian purchaser from an Indian owner.
13. Whether irrigation of a portion 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.
14. 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-- does not constitute irrigation under a *Walton* right.
15. Whether, even 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 a portion of the claimed place of use has been continuously used by the first non-Indian successor and by all subsequent successors.
16. Whether the irrigation season of use should be limited to the season of use claimed.
17. 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 more than three acre-feet per acre.
18. 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 more than the ratio of the pumping capacity of the claimed diversion to the total number of acres claimed.
19. Whether the Preliminary Evaluation for Claim No. 97 (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 97 seeks a water right for lands owned by non-Indian successors to Indian allottees on the Klamath Indian Reservation. The claim is for a diversion rate of

14 cubic feet per second (cfs) from the Sprague River to irrigate 675.1 acres<sup>7</sup> and stockwater for 150 head of cattle. The claimed priority date is October 14, 1864. The claimed season of use for irrigation is May 1 through October 1. The claim is comprised of eight allotments in the Klamath Indian Reservation, which have been consolidated into the ownership of Donald, Marlene and Lewis Lawless (Claimants). The Claimants acquired the property in 1993 from Jeffrey and Tami Carter who filed this claim on behalf of Carter Air Balance, Inc. in 1991.

The claim for watering of livestock was not addressed in any contest other than claimants'. Livestock has been grazed on the property since before its conveyance out of Indian ownership. (Affidavit of Ronald S. Yockim at 2.) The claim as a whole is based on the assertion that irrigation was developed by the Indian owners, or first non-Indian owners, and has been continuous since that time. (OWRD Ex. 1 at 1-8, 228-232.)

## 2) Allotment 135

This property, located in the NW ¼ Section 6, T 36 S R 10 E.W.M. was allotted to Millie George, a Klamath Indian, by trust patent dated 1910. (OWRD Ex. 1 at 202.) The property was split into two tracts under the ownership of the heirs of Millie George. The allotment includes land on both sides of the Sprague River. (*Id.* at 77.) Only land on the east side is included in Claim 97. (*Id.* at 102.) Tract A includes the south part of allotment 135 within the claim (SE ¼ NW ¼) and Tract B includes the north part of allotment 135 within the claim (NE ¼, NW ¼). (Affidavit and Testimony of Dale Book at 10.)

**Tract A** (6.2 acres) was conveyed from Norma Weeks Jackson, a Klamath Indian, to Gienger Enterprises, a non-Indian business, on March 7, 1968. (OWRD Exhibit 1 at 89.) On September 25, 1968 Gienger Enterprises conveyed the SE ¼ NW ¼ in Section 6, T 36 S, R 10 E.W.M., among other parcels, to Charles Dixon, a non-Indian. (*Id.* at 90.) On June 24, 1969 Charles Dixon conveyed SE ¼ NW ¼ East of the Sprague River, Section 6, T 36 S, R 10 E.W.M. among other parcels to Dale Newman. (*Id.* at 91.)

Although, prior to transfer out of Indian ownership, a small part of this property was sometimes flooded by a temporary dam across the Sprague River, this practice was discontinued at some time prior to conveyance out of Indian ownership in 1968, and the extent of this irrigation is unknown.<sup>8</sup> (Ex. RS-26 at 83.) After conveyance out of Indian ownership, irrigation of Tract A was not initiated prior to conveyance to Dixon, the second non-Indian owner.

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<sup>7</sup> The original claim was for 720 acres in 1991. (OWRD Ex. 1 at 3). The claim was revised by survey submitted January 18, 1999. (OWRD Ex. 1 at 140 – 143.)

<sup>8</sup> Given the direction of the current in the Sprague river, (as shown by OWRD Ex. 1 at 13) a dam located at the Southern end of Tract A, (as described by James Goold in Ex. RS-26 at 83) would have flooded only a very small portion of this tract, or of any land subject to this claim.

**Tract B** (33.4 acres) was under the ownership of David Skeen, a Klamath Indian, in 1948. In 1960 the tract was conveyed by Charles Dixon, a non-Indian to Dale Newman, also a non-Indian. The chain of title between Skeen and Dixon is unknown. (Test. of Book at 10.) Irrigation of Tract B was initiated by Richard Perry, a subsequent non-Indian owner, under Oregon water permit number S-37151 in 1973. (Test. of Book at 13-14; OWRD Ex. 1 at 12, 13.)

**3) Allotment 566**

This allotment, composed of 104 acres located in NW  $\frac{1}{4}$ , Section 5, T 36 S, R 10 E.W.M., was confirmed to Mildred Miller by instrument dated March 7, 1910. (OWRD Ex. 1 at 194 – 195.) The property was conveyed by the heirs of Mildred Miller to Leroy Gienger, a non-Indian, on September 8, 1958. (OWRD Ex. 1 at 73 -74.) The property was subsequently conveyed to Albeit Lang in 1965 (*Id.* at 30-31).

Gienger, the first non-Indian owner, developed irrigation on the property by 1960. Allotment 566 has continuously been irrigated since that time. (Test. of Book at 17-18.) The point of diversion for this parcel is located in the NW  $\frac{1}{4}$ , NW  $\frac{1}{4}$  Section 5, T 36 S, R 10 E.W.M. (OWRD Ex. 1 at 143.) Rate is 2.6 cfs<sup>9</sup>. Duty is 312 acre feet per year. Period of use is May 1 through October 1. Priority date is October 14, 1864.

**4) Allotment 634**

This allotment, composed of 160 acres located in the SE  $\frac{1}{4}$ , Section 31, T 35 S, R 10 E.W.M., was confirmed to Charles Cowan, a Klamath Indian by trust patent dated February 7, 1920. (OWRD Ex. 1 at 183.) The property remained in Klamath Indian ownership until 1923, when it was conveyed by David Skeen, a Klamath Indian, to B.E. Wolford and Dan Wann, both non-Indians. (*Id.* at 63; Ex. 8 at 5.) B. E. Wolford acquired the Wann interest in 1929. (*Id.* at 178.) The property was then conveyed by the Wolford heirs to Leroy Gienger in 1944. (*Id.*) Irrigation on Allotment 634 was first initiated by Leroy Gienger, a subsequent non-Indian owner, in 1950. (Test. of Book at 13.)

**5) Allotment 636**

This allotment, composed of 100 acres located in the NE  $\frac{1}{4}$ , Section 31, T 35 S R 10 E.W.M., was confirmed to Ward Weeks, a Klamath Indian, by trust patent dated 1910. (OWRD Ex. 1 at 186-187.) The heirs of Ward Weeks conveyed the property to Vincent Bodner, Jr., a Klamath Indian, on September 3, 1947. (*Id.* at 188 - 189).

The property was conveyed by Vince Bodner, Jr., to Gienger Enterprises, a non-Indian business, in April 1964. (*Id.* at 87.) The property was subsequently conveyed to James Templeton on May 20, 1965 (*Id.* at 93), and then to Albeit Lang on May 4, 1966. (*Id.* at 95.)

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<sup>9</sup> All rates and duties allowed are calculated at 1/40<sup>th</sup> cfs per acre (?) and 3 acre feet per acre, based on the amount approved in the water use permits issued on these properties. (OWRD Ex. 1 at 10 through 13.) Priority date for all allowed rights is October 14, 1864, the date of the treaty creating the Klamath Indian Reservation.

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Irrigation was developed on the property while under the ownership of Gienger Enterprises, in 1964, prior to the transfer of the property to James Templeton. (Affidavit of Vincent Bodner, Jr.) The point of diversion for this parcel is located in the SE ¼, SW ¼ Section 32, T 35 S, R 10 E.W.M. (OWRD Ex. 1 at 143.) Rate is 2.5 cfs. Duty is 300 acre feet per year. Period of use is May 1 through October 1. Priority date is October 14, 1864.

**6) Allotment 637**

This allotment, composed of 24.4 acres located in the NW ¼, Section 31 T. 35 S. R. 10 E. W.M., was confirmed to Neffie Weeks, a Klamath Indian, by trust patent dated 1910 (*Id.* at 184, 185). The property was passed to the Indian heirs of Neffie Weeks, Caroline Cowen and Cinda Checaskane, on November 1, 1920. (*Id.* at 83 – 84.) The property was subsequently conveyed to Vince Bodner, Jr., a Klamath Indian, on December 21, 1942. (*Id.*) The property was conveyed from Vince Bodner, Jr. to Gienger Enterprises,, a non-Indian business, in 1964. (*Id.* at 87; Test. of Book at 7.)

Like Allotment 636, this property was first irrigated by Gienger Enterprises, the first non-Indian owner, in 1964. (Affidavit of Vincent Bodner, Jr.) The point of diversion for this parcel is located in the SE ¼, SW ¼ Section 32, T 35 S, R 10 E.W.M. (OWRD Ex. 1 at 143.) Rate is 0.61 cfs. Duty is 73.2 acre feet per year. Period of use is May 1 through October 1. Priority date is October 14, 1864.

**7) Allotment 638**

This allotment, composed of 65.8 acres located in the SW ¼, Section 31 T 35 S, R 10 E.W.M., was confirmed to Ella Cowen, a Klamath Indian, prior to 1923. (*Id.* at 204 – 205.) David Skeen, an Indian, received the patent in 1923. (*Id.* at 204 – 205.) The property was conveyed from David Skeen to Albeit Thalhofer, a non-Indian, on February 5, 1927. (*Id.* at 66.) The property was subsequently conveyed from Mr. Thalhofer to Klamath County by Sheriff's deed in 1941 and to Leroy Gienger in 1942. (*Id.* at 179.) Irrigation on Allotment 638 was first initiated by Leroy Gienger, a subsequent non-Indian owner, in 1950. (Test. of Book at 16.)

**8) Allotment 832**

This allotment composed of 158.34 acres located in the NE ¼, Section 6, T 36 S, R 10 E.W.M., was confirmed to Robinson (aka Psissum - Ky - wath) prior to 1921. (OWRD Ex. 1 at 198.) The property was conveyed to Anna Willis, a Klamath Indian, on April 30, 1921. (*Id.*) The property was conveyed from Anna Willis to David Skeen, a Klamath Indian, in 1921. (*Id.* at 179.) The property was conveyed from David Skeen to Albeit Thalhofer, a non-Indian, on February 5, 1927. (*Id.* at 66- 67.) Klamath County subsequently obtained the property. (*Id.* at 179.) The property was conveyed from Klamath County to Gienger Enterprises April 15, 1941. (*Id.* at 70).

Although it is possible that some part of this property was sometimes flooded by a temporary dam across the river, the inception date of this practice and the extent of the irrigation thereby accomplished is unknown. (Ex. RS-26 at 83.) The first clear record of irrigation on Allotment 832 was in 1974, by James Goold. (Test of Book.)

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**9) Allotment 1264/1542**

This allotment, composed of 34 acres located in the S½ SW ¼ Section 32, T 35 S, R 10 E.W.M., was confirmed to Sylvester Smith prior to 1956. (Ex. 9.) The property was then conveyed to Theodore Crume, a Klamath Indian, in 1956. (*Id.*) The property was conveyed from Theodore Crume to Leroy Gienger, a non-Indian, in 1957, and from Leroy Gienger to Albeit Lang in 1965. (OWRD Ex. 1 at 30 - 31; Ex. 10.)

Irrigation of the property was initiated by Theodore Crume, the last Indian owner, and was continued by Mr. Gienger and has been maintained through the present. (Test. of Book at 17-18.) Two points of diversion serve this parcel. One point is located in the NW ¼, NW ¼ Section 5, T 36 S, R 10 E.W.M. The other point is located in the SE ¼ SW ¼, Section 32, T 35 S, R 10 E.W.M. (OWRD Ex. 1 at 143.) Rate is 0.85 cfs. Duty is 102 acre feet per year. Period of use is May 1 through October 1. Priority date is October 14, 1864.

**CONCLUSIONS OF LAW**

- 1. The record establishes that the land appurtenant to the claim was part of the former Klamath Indian Reservation.**
- 2. The period of use should be May 1 through October 1 of each year, as claimed.**
- 3. The record establishes a transfer from Klamath Indian ownership for all of the claimed lands.**
- 4. The record establishes that water for the claimed use was used by the last Indian owner of a portion of the property.**
- 5. The record establishes that the water use was diligently developed by the first non-Indian owners of a portion of the property after transfer from the last Indian owner.**
- 6. There is sufficient title information to establish a *Walton* right for a portion of the Place of Use.**
- 7. There is sufficient information on the development or continuous use of water on a portion of this Place of Use to establish a *Walton* right.**
- 8. Part of the claimed Place of Use has been continuously irrigated.**
- 9. The diversion rate as claimed is too large for the valid number of irrigated acres within the Place of Use.**

10. The period of use for irrigation in the preliminary evaluation exceeded the period of use claimed.
11. A portion of the claimed Place of Use was not under irrigation by the Indian owner before the land was transferred to the first non-Indian owner.
12. A portion of the claimed Place of Use was not developed with reasonable diligence by the first non-Indian purchaser from an Indian owner.
13. Irrigation of a portion of the claimed place of use was not developed with reasonable diligence by the first non-Indian owners.
14. 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.
15. Water claimed for a portion of the claimed Place of Use has been continuously used by the first non-Indian successor and by all subsequent successors.
16. The irrigation season of use should be limited to the season of use claimed.
17. The water duty for that part of the claimed Place of Use that is approved should be three acre-feet per acre.
18. The diversion rate for that part of the claimed Place of Use that is approved should be 1/40<sup>th</sup> cfs per acre approved.
19. The Preliminary Evaluation for Claim No. 97 (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 evidentiary 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 *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.

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>10</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)] 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 pages 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:

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<sup>10</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.

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).

*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 claims. 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, Klamath Adjudication Case 272, 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.

#### **Allotment 135**

A small portion of this property, which was divided into two parcels while still in Indian ownership, may have been irrigated by the Indian owners through flooding as a result of temporary dams across the Sprague River, but the amount of this irrigation, and its date, are unknown. It would have been very little, however, as most of the property in question is downstream from the dam. The first substantial evidence of irrigation of Tract A, the small southernmost of the tracts, appears after the property had been conveyed to Charles Dixon, the second non-Indian owner. Tract A, therefore, does not qualify for a *Walton* right.

Tract B, likewise, was not subject to irrigation until 1973, when Richard Perry applied for a water right permit. The property was first conveyed out of Indian ownership before 1960, and in 1960 was transferred to the second non-Indian owner, Dale Newman. Tract B, also, does not qualify for a *Walton* right.

#### **Allotment 566**

Irrigation on this allotment was developed by Leroy Gienger, the first non-Indian owner, by 1960. These 104 acres, therefore, qualify for a *Walton* right.

**Allotment 634**

Irrigation was developed on this allotment by Leroy Gienger, who acquired the property from the Wolford family in 1944. Since the Wolfords were not Indians, Gienger was at least the second non-Indian owner. The allotment does not, therefore, qualify for a *Walton* right.

**Allotment 636**

The 100 acres of this allotment were first irrigated by Gienger Enterprises, the first non-Indian owner, in 1964. This allotment qualifies for a *Walton* right.

**Allotment 637**

Like Allotment 636, irrigation was developed on this parcel, at the latest, by Gienger Enterprises, the first non-Indian owner. The 24.4 acres of this parcel, therefore, qualify for a *Walton* right.

**Allotments 638 and 832**

Irrigation of these allotments was not initiated prior to their transfer, at a sheriff's sale, to Klamath County, the second non-Indian owner. These allotments do not qualify for a *Walton* right.

**Allotment 1264/1542**

Irrigation of this property was initiated by Theodore Crume, the last Indian owner, and has continued to the present. The 34 acres in this property qualify for a *Walton* right.

As noted, no party other than Claimants addresses stock water in their contest. The evidence establishes that the property in question was used for the grazing of livestock since before conveyance out of Indian ownership. Consequently, the stock water claim for 150 head of cattle should be allowed.

**ORDER**

I propose that the Adjudicator issue the following order:

Claim 97 is allowed in part as follows:

Stock Water for 150 head of cattle.

Irrigation use as follows:

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

Purpose of Use (all parcels): Irrigation

Source: (all parcels) Sprague River, a tributary of the Klamath River

Priority Date: (all parcels) October 14, 1864

**Allotment 566**

Rate: 2.6 cfs

Duty: 312 acre feet

Acres: 104  
Place of Use: NW 1/4, Section 5, T.36 S. R. 10 E.W.M.  
Point of Diversion: NW 1/4, NW 1/4 Section 5, T 36 S R 10 E.W.M.

**Allotment 636**

Rate: 2.5 cfs  
Duty: 300 acre feet  
Acres: 100  
Place of Use: NE 1/4, Section 31. T. 35 S. R. 10 E.W.M.  
Point of Diversion: SE 1/4, SW 1/4 Section 32, T 35 S R 10 E.W.M.

**Allotment 637**

Rate: 0.61 cfs  
Duty: 73.2 acre feet  
Acres: 24.4  
Place of Use: NW 1/4 Section 31 T. 35 S. R. 10 E. W.M.  
Point of Diversion: SE 1/4, SW 1/4 Section 32, T 35 S R 10 E.W.M.

**Allotment 1264/1542**

Rate: 0.85  
Duty: 102 acre feet  
Acres: 34  
Place of Use: S 1/2 SW 1/4 Section 32, T 35 S, R 10 E.W.M.  
Points of Diversion: NW 1/4, NW 1/4 Section 5, T 36 S R 10 E.W.M.; SE 1/4,  
SW 1/4 Section 32, T 35 S R 10 E.W.M.

**Total allowed claim**

Rate: 6.56 cfs  
Duty: 787.2 acre feet  
Acres: 262.4  
Places of Use:  
NW 1/4, Section 5, T.36 S. R. 10 E.W.M  
NE 1/4, Section 31. T. 35 S. R. 10 E.W.M.  
NW 1/4 Section 31 T. 35 S. R. 10 E. W.M.  
S 1/2 SW 1/4 Section 32, T 35 S, R 10 E.W.M.  
Points of Diversion:  
NW 1/4, NW 1/4 Section 5, T 36 S R 10 E.W.M.;  
SE 1/4, SW 1/4 Section 32, T 35 S R 10 E.W.M.

The remaining portions of the claim should be denied.



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

Dated: December 13, 2006

**RECEIVED**  
DEC 14 2006  
WATER RESOURCES DEPT  
SALEM, OREGON

**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 13, 2006, 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:

Dwight W. French / Teri Hranac  
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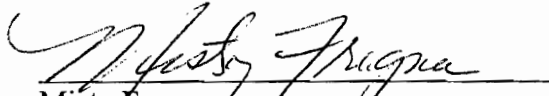
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Misty Fragua  
Administrative Assistant