

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; ~~The Klamath Tribes~~;
Klamath Irrigation District; Klamath Drainage
District; Tulelake Irrigation District; Klamath Basin
Improvement District; Ady District Improvement
Company; Enterprise Irrigation District; ~~Klamath
Hills District Improvement 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. 232

Claim No. 124

Contests 2845,¹ 3500,² 3766 and 4154³

v.

Claude Taylor and Richard Duarte,
Claimants.

HISTORY

Richard Duarte and Claude Taylor (Claimants) seek a water right as non-Indian successors to Klamath Indian Allottees, claiming an amount of water sufficient to irrigate

¹ By an Order dated May 20, 2003, WaterWatch of Oregon, Inc. was dismissed as a party contestant from all proceedings in the Klamath Basin Adjudication.

² On December 2, 2000, Don Vincent voluntarily withdrew from Contest 3500. On June 24, 2002, Berlva Pritchard voluntarily withdrew from Contest 3500. On January 15, 2004, Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3500.

³ The Klamath Tribes voluntarily withdrew their Contest 4154 on March 24, 2005.

the allotments' share of the Tribe's "practically irrigable acreage" ("PIA"). This *Walton*⁴ claim is for 17.34 cubic feet per second (cfs) for irrigation of 695.1 acres of land. The claimed period of use is March 10 through November 10. The claimed priority date is October 14, 1864.⁵

On December 3, 1990, John House filed Claim 124 with the Oregon Water Resources Department (OWRD) for a water right in the Klamath Basin. The property to which Claim 124 is appurtenant was subsequently purchased by Claimants. On October 4, 1999 Richard D. Bailey, the Adjudicator of the Klamath Basin Adjudication, issued a Preliminary Evaluation recommending approval of this claim for a smaller quantity than originally claimed, and for a period of use of March 1 through October 31. On May 8, 2000 the following contests were filed: WaterWatch of Oregon, Inc. filed Contest 2845, which was subsequently dismissed. The Klamath Project Water Users⁶ (KPWU) filed Contest 3500. The United States of America (United States) filed Contest 3766. The Klamath Tribes filed Contest 4154, which was subsequently withdrawn. Claimants did not file a contest. The remaining contestants are the United States and KPWU.

On March 23, 2006, Administrative Law Judge (ALJ) Lawrence S. Smith of the Office of Administrative Hearings (OAH) issued a Ruling on Objection, overruling the United States' objection to the Rebuttal Testimony of Richard Fairclo on behalf of Claimants.

A telephone hearing was held in this matter on March 22, 2006, before ALJ Lawrence S. Smith. Claimants were represented by Attorney Ron Yockim. KPWU were represented by Attorney Jacqueline McDonald. Attorney Vanessa Boyd Willard represented the United States. Jesse Ratcliffe, Assistant Attorney General, represented OWRD. No one testified at the hearing, and only documentary evidence was offered. The record remained open for closing arguments. Claimant filed a closing argument by the deadline of June 7, 2006. The United States and KPWU responded by the deadline of

⁴ 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 (E.D. Wash. 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986) (*Walton III*).

⁵ This is the priority date of all allowed *Walton* claims in the Klamath Adjudication, as it is the date on which the Klamath Reservation was formed by treaty.

⁶ 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 are collectively referred to as the Klamath Project Water Users.

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July 7, 2006. Claimant replied by the deadline of August 4, 2006, and the record was closed.

EVIDENTIARY RULINGS

The following evidence was admitted into the record:

OWRD Ex. 1, including the Affidavit and Testimony of Teri Hranac

Attorney Ronald Yockim's Affidavit on behalf of Claimants

Claimant Claude Taylor's Direct Testimony on behalf of Claimants

Paul Fairclo's Rebuttal Testimony on behalf of Claimants

Richard Fairclo's Direct and Rebuttal Testimony on behalf of Claimants

Jay Walters' Direct and Rebuttal Testimony on behalf of Claimants

Exhibits C1 through C58 in support of Claimants' claim

Expert Dale Book's Direct and Rebuttal Testimony on behalf of the United States

Exhibits U1 through U22 on behalf of the United States

Dale Book was qualified and recognized as an expert witness

ISSUES⁷

1. Whether the first purchaser rule, as defined in the *Walton* line of cases, dictates that Klamath County was the first non-Indian owner of Allotment 449.
2. Whether natural overflow can establish a *Walton* water right.
3. Whether irrigation of part of Allotments 314N, 1126 and the unallotted portion of the Northern Parcel has been continuous.
4. Whether Claimants' *Walton* water right should be reduced for an area of natural overflow in Allotments 314(S) and 316.

⁷ In Contest 3500 and its Pre-Hearing Statement, KPWU raised the basic issue of whether Claimants have established a *Walton* water right. In Contest 3766, its Pre-Hearing Statement, and its Contest Amendment dated January 13, 2006, the United States raised specific issues regarding the *Walton* factors. Claimants concede that they do not meet these specific requirements for a *Walton* claim, except for the specific issues raised below.

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FINDINGS OF FACT

(1) On December 3, 1990, John House filed Claim 124 with OWRD for a water right in the Klamath Basin. (OWRD Ex. 1 at 1-10.) The claimed lands cover eight former Indian Allotments that were allotted to individual Indian allottees as well as 8.2 acres of unallotted tribal lands. (Book Direct at 7.) The property to which Claim 124 is appurtenant was subsequently purchased by Richard Duarte and Claude Taylor (Claimants). (Book Direct at 4.) Richard Duarte owns 307.3 acres located north of the Sprague River (North Parcel) within Allotments 314(N), 449, and 1126, including 8.2 acres within an unallotted tribal parcel. Claude Taylor owns 387.8 acres located south of the Sprague River (South Parcel) within allotments 314(S), 315, 316, 317, 318, and 447. (Book Rebuttal at 7.)

(2) Claimants are asserting a *Walton* claim for water as non-Indian successors to a Klamath Indian Allottee, claiming sufficient water to irrigate each allotment's share of the Tribe's "practically irrigable acreage" (PIA). Claim 124 is for diversion of 17.34 cubic feet per second (cfs) from the Sprague River, tributary to the Williamson River, to irrigate 695.1 acres of hay and pasture grass. (*Id.*) The claimed place of use is located in Section 5, Section 8, and Section 13 in Township 36 South, Range 12 East, W.M. (OWRD Ex. 1 at 4-5.) The claimed point of diversion for the North Parcel is located in the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 8 and for the South Parcel is located in SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 17. (OWRD Ex. 1 at 3.) The claimed period of use is March 10 through November 10. The claimed priority date is October 14, 1864, the date the Klamath Indian Reservation was created. Claimants have state water rights on all of the claimed lands with priority dates ranging from 1963 to 1967 for surface water rights and one groundwater certificate with a priority date of 1966. (OWRD Ex. 1 at 88-96.) The United States concedes that Claimant Taylor has established *Walton* water rights to 366.4 of his acres and Claimant Duarte 58.4 of his acres. (Book Rebuttal at 7.)

(3) On October 4, 1999, the Adjudicator of the Klamath Basin Adjudication, issued a Preliminary Evaluation, recommending approval of this claim for a smaller quantity than originally claimed, and for a period of use of March 1 through October 31. (OWRD Ex. 189-193.)

North Parcel Allotments

(4) Allotment 449 of the North Parcel was originally allotted to Thomas G. Smith, a Klamath Indian, and conveyed to him from the United States in fee simple on November 15, 1920. (Book Direct at 11; Ex. U3.) On July 30, 1927, Klamath County filed a Complaint against Mr. Smith for failure to pay taxes from 1921 through 1925. (Klamath County Complaint, Paragraph IV; Ex. U18 at 5.) In its Complaint, Klamath County requested a "judgment, order and decree" against Mr. Smith's property for "the amount of taxes, interest and penalties and costs due and charged against said property." (*Id.* at Paragraph VIII; Ex. U18 at 6.) The sheriff was directed to sell each tract and parcel of Mr. Smith's land in a public sale. (*Id.*) The allotment was sold by auction on

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June 2, 1928. (Sheriff's Deed, Ex. U18 at 9.) Klamath County submitted the only bid and acquired the property on October 10, 1930. (Sheriff's Return of Sale, Ex. U18.) In 1935, Klamath County sold the property to George A. Default, a Klamath Indian. (Bargain Sale Deed, Ex. U18 at 22; C25.) Allotment 449 remained in Indian ownership until 1966, when it was sold by Klamath Indian Effie Driscoll to Paul Fairclo. (Ex. C15.) Paul Fairclo established a state water right on this parcel with a priority date of November 10, 1967. (Book Direct at 17.)

(5) Regarding Allotment 314 (N) of the North Parcel, a fee simple patent was granted to Margaret David Johnson, an Indian, on September 12, 1958. (Ex. U6 at 1.) On February 14, 1962, the first non-Indians, Paul and Ann Fairclo, purchased it. (Book Direct at 10.) Paul Fairclo has unsuccessfully attempted irrigation in this Allotment. (*Id.* at 18.) Paul Fairclo has admitted that, after a ditch was severed, irrigation "wasn't too successful" and that "we didn't always irrigate it." (Book Rebuttal at 6, quotes from Paul Fairclo's deposition.) A 1986 OWRD Field Investigation Report noted that the northern pump was missing and that there were no means to irrigate this land. (Book Direct at 22.)

(6) Regarding Allotment 1126 of the North Parcel, the first non-Indian owners, Paul and Ann Fairclo, acquired the property in 1966. (Book Direct at 12; Ex. U3.) Starting in 1967, a portion of Allotment started being irrigated from the Sprague River via Paul Fairclo's diversion, Certificate 49275. (*Id.* at 19.) This diversion did not reach 15.9 acres of Allotment 1126 lying north of the functioning ditch. (*Id.* at 23.) The Sprague River did not continuously reach 24.5 acres in the northeastern portion of the allotment. (*Id.*) These 24.5 acres have been irrigated with well water pursuant to Certificate 49274, starting in 1966. (*Id.* at 19-20.) This groundwater certificate for supplemental irrigation covers all of Allotment 1126. (*Id.*; Ex. U19.) The United States concedes that Claimants and Paul Fairclo have met their burden of establishing *Walton* water rights for 58.1 acres within Allotment 1126 because these acres were reasonably developed by the first non-Indian owner, Paul Fairclo, from a Sprague River diversion with a state water right certificate 49275. (*Id.*, Book Rebuttal at 6.)

(7) Regarding the 8.2 acres of the unallotted tribal part in the Northern Parcel, the first non-Indian owners were Paul and Ann Fairclo in 1966. (Book Direct at 13.) This unallotted parcel is located in the far northeastern portion of Claim 124 and does not appear irrigated in most aerial photographs. (Book Direct at 23-24.) The acres that do appear to be irrigated are covered by the groundwater from the well subject to Certificate 49274. (*Id.*; Ex. U20.) Only .3 acres of the 8.2 acres in the unallotted parcel appear to receive Sprague River water from the Fairclo diversion, Certificate 49275. (*Id.* at 23-24.) The United States concedes that Claimants and Fairclo have established *Walton* water rights for these .3 acres. (Book Rebuttal at 7.) The remaining 7.9 acres are mostly irrigated by groundwater. (*Id.*; Ex. U20.)

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South Parcel Allotments

(8) Allotments 314(S), 315, 316, 317, 318 of the South Parcel (all of the South Parcel allotments except for Allotment 447) were first purchased by a non-Indian, Paul Fairclo, in 1962. (Book Direct at 8-11; Ex. U3.) The record contains no deed evidence to identify the first non-Indian purchaser of Allotment 447 of the South Parcel. (Book Direct at 10-11.) In 1963, Paul Fairclo developed an irrigation system in the South Parcel. (*Id.* at 16.) He secured state water certificate 48357. (Book Direct at 20; Ex. U19.) Based on his analysis of aerial photos of the South Parcel Allotments, Book opined that 366.4 acres within Allotments 314(S), 315, 316, 317, 318 have been continuously irrigated. (*Id.* at 21-22.) Book opined that 10.3 acres within Allotments 314(S), 315, 316, 317, 318 have not been continuously irrigated because the area has been under water in repeated aerial photographs. (Book Rebuttal at 3-4.) The latest photo during a year was in late July and revealed flooding in the area. (*Id.* at 4.) The area dries up later in the season. (Direct Testimony of Taylor). The water duty should be reduced by at least one-half to account for the limited period of growth and the season limited to August and September. (Book Rebuttal at 4.) The water rights granted for the 366.1 acres within these allotments should have the following attributes: the rate of diversion should be 1/cfs per 40 acres, the water duty should be 3.0 acre-feet per acre, and the irrigation season should be March 1 to October 31. (Book Direct at 24-25.) Claimants did not contest these attributes.

CONCLUSIONS OF LAW

1. The first purchaser rule, as defined in the *Walton* line of cases, dictates that Klamath County was the first non-Indian owner of Allotment 449, which was acquired initially through foreclosure and subsequently through Sheriff's public auction.
2. Natural overflow cannot establish a *Walton* water right.
3. Irrigation of part of Allotments 314N, 1126 and the unallotted portion of the Northern Parcel has been continuous.
4. Claimants' *Walton* water right is not reduced for areas of open water in portions of Allotments 314(S) and 316, but the water duty for these areas is reduced by one-half.

OPINION

Claimants of water rights have the burden of establishing their contested claims, by a preponderance of the evidence. ORS 539.110; OAR 690-028-0040(1). The proponent of a fact or position has the burden of proving that fact or position. ORS 183.450.

Because Claimants are claiming water rights as non-Indian successors to a Klamath Indian Allottee, the water right is governed by the *Colville Confederated Tribes*

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v. *Walton* line of cases⁸ and is commonly referred to as a *Walton* water right. As stated by Administrative Law Judge Young in *Nicholson et al. v. United States*, OAH Case No. 272, in the context of the Klamath Basin Adjudication, the following elements must be proved to establish a *Walton* water right:

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.

OAH Case No. 272, Ruling on United States' Motion for Ruling on Legal Issues at 9 (August 4, 2003).

The issues in contention are listed above for the 270.3 acres in dispute. The issues are considered separately below.

1. Klamath County as first non-Indian purchaser

Claimants assert *Walton* water rights for 152.3 acres within Allotment 449 located in the North Parcel of this claim. (Book Direct, Ex. U3.) They concede that Klamath County is the first non-Indian owner of Allotment 449, purchased in a foreclosure sale of the property.⁹ They argue that such ownership should not count as the first non-Indian

⁸ The claims of successors of Indian allottees are known as "*Walton*" claims because they were recognized in the case of *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981). *Walton* water rights originate in federal water rights that were implicitly reserved for the benefit of Indian tribes upon the establishment of Indian reservations by treaties with the United States. Upon the "allotment" of reservation lands pursuant to the General Allotment Act of 1887, 24 Stat. 388, such water rights were transferred to individual Indian allottees. Once these allotted lands were acquired by non-Indians, these rights were transformed into rights more in the nature of state water rights, subject to reasonable diligence and continuous use requirements. *Id.* *Walton* rights deriving from the Klamath Indian Reservation are entitled to a priority date corresponding to the date of establishment of that reservation, *i.e.*, October 14, 1864.

⁹ Claimants argued that Klamath County acquired the property through foreclosure, which seems to imply that it was only foreclosing on a note it held. Such was not the case. Klamath County acquired the land at a public auction as any other purchaser could.

purchaser because Klamath County acquired the allotment through foreclosure and public auction. See their Closing Brief at 22-28. They assert that the *Walton* line of cases is distinguishable on their facts from the present case with respect to the limitation on the appropriation of water by the first non-Indian appropriator. They suggest that the court in the *Walton* cases was not confronted by the situation presented in this case, where the property was acquired in foreclosure. The court in *Walton III* held that the water right is limited to what was developed by the Indian owner or the first non-Indian owner with reasonable diligence, specifically concluding:

The immediate grantee of the original allottee must exercise due diligence to perfect his or her inchoate right to the allottee's ratable share of reserved waters. This interpretation is supported by our references to *Walton II* in subsequent cases. See, e.g., *United States v. Anderson*; *United States v. Adair*.

Walton III, 752 F.2d at 402 (emphasis added) (citations omitted).

Walton water rights are a creature of federal law. While the decision by the Ninth Circuit Court of Appeals limiting *Walton* water rights could someday be reversed, the decision is very clear.¹⁰ The opinion is binding precedent at this point and may not be revisited in these proceedings. Moreover, it is not entirely clear that the Ninth Circuit would rule as Claimants suggest. In the *Walton* cases, the court was concerned about preserving the value to the Indian allottees of an undeveloped water right with an early priority date. The court had no such interest in preserving that value to the non-Indian successors. Claimants' argument is contrary to the plain reading of the court's holdings above. Moreover, the argument is contrary to the purpose of the holding, which is to give the Indian owner the best possible value for his or her land. Granting the Indian's inchoate rights to subsequent owners would not in this case increase the value for the Indian owner of the Allotment. In other words, the purpose of the federal law to protect the Indian's inchoate right to water is not affected by limiting development rights to a later purchaser because the Indian seller will not receive benefit if the second buyer receives any of the Indian's inchoate right to water.

Claimants also argue that Klamath County should not be treated as the first non-Indian purchaser because of Klamath County's alleged inability to develop the property it purchased. Claimants rely on the language that "a non-Indian purchaser, under no competitive disability vis-à-vis other water users, may not retain the right to that quantity of water despite non-use." *Walton II*, 647 F.2d at 51 (emphasis by Claimants). Claimants argue that Klamath County was not a user of water and was at a competitive disability because it had no legal right to develop irrigation. Such inability, if it existed,

¹⁰ See the concurring opinion of Judge Sneed, reported in *Colville Confederated Tribes v. Walton*, 757 F.2d 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 F.2d at 1324.

has no impact on the full value of property to the Indian seller. Maybe the policy as stated in *Walton II* does not squarely apply in this case, but the purchaser's limitations do not affect the basic policy for limiting development to the first non-Indian purchaser. See also, *United States v. Anderson (Anderson)*, 736 F.2d 1358, 1362 ("The court's rationale in *Walton* was that, in order for an Indian allottee to enjoy the full benefit of his allotment, he must be able to sell his land together with the right to share in the reserved waters.")

Claimants further argue that such rights cannot be lost by inaction by a governmental entity, but as the United States points out, the authority cited by Claimants involves public rights, which are not at issue in Claimants' claim because Klamath County owned the property without any public duty.

Claimants finally argue that Klamath tribal members who later purchased the property reacquired the inchoate rights after the first sale to a non-Indian. Claimants cite *Anderson* at 1362, but failed to quote the entire language in which the court concluded, "Consequently, on reacquisition the Tribe reacquires only those rights which have not been lost through nonuse * * *." There is no evidence that Klamath County used the rights and therefore, the rights were lost by nonuse.

2. Natural flooding/ natural overflow

There is no dispute that the land in Claim 124 was formerly part of the Klamath Indian Reservation, that the land was allotted to Klamath tribal members, and that the land was transferred to non-Indians. Claimants claim a water right for grass hay and pasture for livestock, based in good part on natural overflow of the Sprague River.

Walton water rights derive from federal reserved water rights. They "are not dependent upon state law or state procedures." *Walton III*, 752 F.2d at 400. Claimants rely on state authority for their claim based on natural overflow and have provided no persuasive federal authority to support their allegation that natural overflow can establish a *Walton* water right. In *Walton III*, the Circuit Court of Appeals reversed and remanded to the District Court with specific instructions regarding how to allocate the water at issue. In fulfilling the Circuit Court's mandate, the District Court held:

The Tribe continues to maintain that Walton is being awarded water for application on his "soggy boggy" lands. That was true at the time the findings were entered, but not at the present time. Findings were made in a two-step process. First the Court determined that the initial non-Indian purchaser had beneficially applied water to thirty acres and that all subsequent owners continued such irrigation. Second, it was determined that if Walton's diligence (as opposed to the diligence of intervening owners) was controlling, then he had beneficially applied water to a minimum of 104 acres. The circuit expressly adopted the first findings, and just as expressly rejected the second on the dual bases that (1) Walton's diligence would be of weight only to the extent that his

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predecessors had exercised like diligence; and (2) to “award additional water [to the water-saturated lands] would result in a double allocation.”

Order, *Colville Confederated Tribes v. Walton*, No. C-3421 RJM (DE Wash, filed June 25, 1987) at 2-3.

Based on the circuit court’s holding in *Walton III*, as implemented by the District Court by Order filed June 25, 1987, ALJ Betterton concluded in Klamath Adjudication Case No. 157 that, “[a]n irrigation claim based on natural overflow and sub-irrigation is not entitled as a matter of law to a *Walton* water right.” *Amended Proposed Order on United States’ Motion for Reconsideration of Ruling on Legal Issues and Dismissal of Claimant’s Claim*, December 10, 2004 at 5. Although not legally binding, this Amended Proposed Order is persuasive, based on a plain reading of the various *Walton* holdings.

Claimants argue that nothing in the *Walton* holdings says that intent to divert water can only be established by artificial, manmade irrigation and that Oregon law, specifically *In re: Water Rights of the Silvies River*, 115 Or 27 (1925), recognizes that a diversion from the natural channel is not necessary to establish a water right by appropriation where land is naturally irrigated. 115 Or at 66. ALJ Betterton specifically concluded that *Silvies River* “does not apply to federal reserved rights based on a treaty.” *Amended Proposed Order* at 5. Natural overflow has been the basis for pre-1909 claims, but not after 1909, when permits were required. ORS 537.140(1). In any event, the circuit court of appeals in *Walton III* concluded that *Walton* water rights were “[r]eserved rights [that] are ‘federal water rights’ and ‘are not dependent upon state law or procedures.’” *Walton III* at 400, citing from *Cappaert v. United States*, 426 US 128, 145 (1976). It further concluded, “It is appropriate to look to state law for guidance. [Citation omitted.] * * * The dispute involves relative shares of [the Indian tribe’s] reserved waters, and is governed by federal law. We look to state law only for guidance.” *Id.* Claimant must establish an initial diversion of water in order to show “prior appropriation”, the intent and due diligence to establish a water claim. *Walton III* at 402, again citing *Colorado River* at 805. Therefore, to the extent that Claimants’ *Walton* water right claim is based on natural overflow or subirrigation, it is denied.

3. Continuous Use

Regarding Allotment 314(N) of the North Parcel, Dale Book, who was qualified as an expert and whose testimony was not rebutted by expert testimony, has opined that, based on aerial photographs, no irrigation has occurred within Allotment 314 (N) because the parcel appears dry in aerial photographs after a tailwater ditch at the south end of allotment 449 was severed prior to 1968. Paul Fairclo reported that there was such irrigation, but then also admitted irrigation was unsuccessful in this Allotment. He admitted that, after a ditch was severed, irrigation “wasn’t too successful” and that “we didn’t always irrigate it.” (Book Rebuttal at 6, quotes from Paul Fairclo’s deposition.) A 1986 OWRD Field Investigation Report noted that the northern pump was missing and that there were no means to irrigate this land. (Book Direct at 22.) Claimants have not

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established that the acres in Allotment 314(N) were continuously irrigated. They are therefore not entitled to Walton water rights for Allotment 314(N).

Regarding Allotment 1126 of the North Parcel, Book opined that, based on aerial photographs, the first evidence of irrigation was a small stream originating in the rimrock north of the Allotment as early as 1960. (Book Direct at 22.) Book opined that several small dams built on this stream were breached at some point and that runoff from the rimrock stream had a limited season of use that was expected only through June. (*Id.* at 16; OWRD Ex. 1 at 72.) Starting in 1967, a portion of Allotment started being irrigated from the Sprague River via Paul Fairclo's diversion, Certificate 49275. (*Id.* at 19.) This diversion did not reach 15.9 acres of Allotment 1126 lying north of the functioning ditch. (*Id.* at 23.) The Sprague River did not continuously reach 24.5 acres in the northeastern portion of the allotment. (*Id.*) These 24.5 acres have been irrigated with well water pursuant to Certificate 49274, starting in 1966. (*Id.* at 19-20.) This groundwater certificate for supplemental irrigation covers all of Allotment 1126. (*Id.*; Ex. U19.) The United States concedes that Claimants and Paul Fairclo have met their burden of establishing *Walton* water rights for 58.1 acres within Allotment 1126 because these acres were reasonably developed by the first non-Indian owner, Paul Fairclo, from a Sprague River diversion with a state water right certificate 49275. Book opined that Claimants and Paul Fairclo have not established *Walton* water rights for the remaining acres in Allotment 1126 because the 24.5 acres within the northeastern portion are only irrigated by well and not the Sprague River (Book Direct at 23; Ex. U20) and the remaining 15.9 acres within Allotment 1126 are located above the functioning ditch and have not been continuously irrigated, per aerial photos analyzed by Book. (*Id.*; Book Rebuttal at 6.) His expert testimony is accepted.

Regarding the 8.2 acres of the unallotted tribal part in the Northern Parcel, this unallotted parcel is located in the far northeastern portion of Claim 124 and does not appear irrigated in most aerial photographs. (Book Direct at 23-24.) The acres that do appear to be irrigated are covered by the groundwater from the well subject to Certificate 49274. (*Id.*; Ex. U20.) Only .3 acres of the 8.2 acres in the unallotted parcel appear to receive Sprague River water from the Fairclo diversion, Certificate 49275. (*Id.* at 23-24.) The United States concedes that Claimants and Fairclo have established *Walton* water rights for these .3 acres. (Book Rebuttal at 7.) Book opined that Claimants and Fairclo have not met their burden regarding the remaining 7.9 acres because they were not diligently developed or continuously used in that they mostly appear dry on aerial photos. (*Id.*; Ex. U20.) Book's expert testimony is accepted. Claimants and Fairclo have not established Walton water rights for these 7.9 acres. These acres are mostly irrigated by groundwater and are not subject to a *Walton* water right.

4. Open water surface, Allotments 314(S) and 316

As explained above, natural overflow cannot be a basis for a *Walton* water right. Book opined that 10.3 acres within Allotments 314(S) and 316 have not been continuously irrigated because the area has been under water in repeated aerial photographs. (Book Rebuttal at 3-4.) The latest photo during a year ~~in~~ late July and

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revealed flooding in the area. Testimony on behalf of Claimants establishes that this flooding recedes later in the season. Therefore, Claimants have established *Walton* water rights, but because the season is shortened, the water duty is reduced by one-half to account for the limited period of growth and the season limited to August and September.

The water rights granted for the 366.1 acres within these allotments should have the following attributes: the rate of diversion should be 1/cfs per 40 acres, the water duty should be 3.0 acre-feet per acre, and the irrigation season should be March 1 to October 31. (Book Direct at 24-25.) Claimants did not contest these attributes.

Finally, Claimants have not established *Walton* water rights for the 11.1 acres in Allotment 447 because the first non-Indian purchaser is not identified.

Claimants have established *Walton* water rights for 58.4 acres within Allotment 1126 and the unallotted portion, as explained above. The specific right is described in the Order.

Claimants have established *Walton* water rights for 366.4 acres within Allotments 314(S), 315, 316, 317, 318 and reduced rights for three acres in Allotment 314(S) and 7.3 acres in Allotment 316, as explained above. The specific right is described in the Order.

ORDER

I propose that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as specifically set out below. The elements of a *Walton* water right are established for Claim 124 as follows:

POINT OF DIVERSION No. 1 (North Parcel):

LOCATION: (SE $\frac{1}{4}$ SW $\frac{1}{4}$), Section 8, Township 36 South, Range 12 East, W.M

SOURCE: Sprague River.

USE: Irrigation of 58.4 acres

DIVERSION RATE: 1.46 cubic feet per second (cfs) for irrigation.

DUTY: 401.4 acre-feet per years (3.0 acre-feet/acre/year x 133.8 acres)

PLACE OF USE: S $\frac{1}{2}$ S $\frac{1}{2}$ (58.1 acres), N $\frac{1}{2}$ S $\frac{1}{2}$ (.3 acres), (Allotments 1126 and unallotted), Section 5, Township 36 South, Range 12 East, W.M.

POINT OF DIVERSION No. 2 (South Parcel):

LOCATION: (SE $\frac{1}{4}$ NE $\frac{1}{4}$), Section 17, Township 36 South, Range 12 East, W.M

SOURCE: Sprague River.

USE: Irrigation of 366.4 acres

DIVERSION RATE: 9.11 cfs for irrigation (366.4 acres x 1/40 cfs/acre).

DUTY: 1,099.2 acre-feet per year (3.0 acre-feet/acre/year x 366.4 acres)

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PLACE OF USE: SW¼ (53.9 acres), Section 8; NE¼ (98.2 acres), NW¼ (138.8 acres), N½S½ (69.5 acres), Lots 25, 26, 27, 28 (6.0 acres), Section 17, all in Township 36 South, Range 12 East, W.M

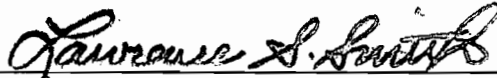
DUTY: 15.5 acre-feet per year (1.5 acre-feet/acre/year x 10.3 acres)

PLACE OF USE: SW¼ (53.9 acres), Section 8; NW¼ (138.8 acres), Section 17, both in Township 36 South, Range 12 East, W.M

For both points of diversion:

PERIOD OF USE: March 1 to October 31

PRIORITY DATE: October 14, 1864.



Lawrence S. Smith, Administrative Law Judge
Office of Administrative Hearings

Date: February 20, 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 Hearing Officer. 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:

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

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FEB 20 2007

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2007, I mailed a true copy of the following: **PROPOSED ORDER**, by electronic mail referenced below and by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

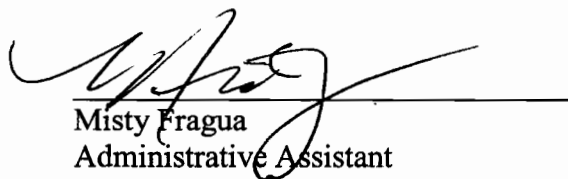
Dwight W. French / Teri Hranac
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Misty Fragua
Administrative Assistant

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FEB 22 2007
WATER RESOURCES DEPT
SALEM, OREGON