

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
WATER RESOURCES DEPARTMENT

In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River,
a Tributary of the Pacific Ocean

~~WaterWatch of Oregon, Inc.;~~ United States of America; ~~the Klamath Tribes;~~ Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland District Improvement Co.; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S. Luscombe; Randy Walthall; Inter-County Title Company; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC;
Contestants

AMENDED PROPOSED ORDER

Case No. 253

Claim: 704

Contests: 1693, 3074¹, 3512², 3818, and 4243³

vs.

Nature Conservation Trust;
Claimant/Contestant.

This AMENDED PROPOSED ORDER is issued pursuant to OAR 137-003-0655(3), and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130. This AMENDED PROPOSED ORDER un-consolidates Case 253, and addresses only Claim 704. As a result, it incorporates only the portions of the Proposed Order, issued on March 28, 2007, that pertain to Claim 704. With respect to the portions of the Proposed Order that pertain to Claim 704, this AMENDED PROPOSED ORDER incorporates the Proposed Order except to the extent that it is modified as described herein. Per OAR 137-003-0655, the Oregon Water Resources Department ("OWRD") provides an explanation for any "substantial" modifications to the portions of the Proposed Order that address Claim 704.

¹ WaterWatch of Oregon, Inc.'s Contest 3074 were dismissed. See ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003

² Don Vincent voluntarily withdrew from Contest 3512 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3512 on June 24, 2002. On January 15, 2004, Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3512.

³ The Klamath Tribes voluntarily withdrew Contest 4243. See, KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST dated April 1, 2005.

A. MODIFICATIONS TO THE “HISTORY OF THE CASE”

Within the section titled “History of the Case” of the Proposed Order, the first Paragraph is modified as follows (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text):

Claimant seeks a water right as a non-Indian successor to Klamath Indian Allottees, claiming an amount of water sufficient to irrigate the allotments’ share of the Tribe’s “practically irrigable acreage” (“PIA”).⁴ Claim 703 is for 10,145.85 acre-feet of water per year at a total rate of 22.24 cfs for irrigation of 889.6 acres of land. (OWRD Ex. 1 at 3.) Claim 704 is for 26.23 acre-feet of water per year at a total rate of 0.06 cfs for irrigation of 2.3 acres of land. (OWRD Ex. 2 at 3.) Other claimed uses are domestic, stock and other non-agricultural uses. (OWRD Ex. 1 at 3; OWRD Ex. 2 at 3.) The claimed period of use for both claims is ~~May 3~~ March 1 through October 16 for irrigation and “year-round” for all other uses. (OWRD Ex. 1 at 4; OWRD Ex. 2 at 4.) The claimed priority date is October 14, 1864.⁵

Reasons for Modifications: Using evidence on the record, to provide more specific information with reference to what was claimed; the ALJ’s proposed finding of fact failed to fully set forth the evidence on the record; to provide corrected and additional citations to the record. In addition, OWRD has determined that the ALJ’s finding that a begin date of May 3 for the claimed period of use is not supported by a preponderance of evidence on the record; in the Claimant’s Statement and Proof of Claim the “Current Annual Period of Use of Water” is clearly described as beginning on March 1.

B. MODIFICATIONS TO THE “FINDINGS OF FACT”

Findings of Fact #1, 2, 4, 5, and 14 of the ALJ’s Proposed Order are adopted as modified below (additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text). The Proposed Order Findings of Fact #3, 6-13, 15-25 are not incorporated because they pertain solely to Claim 703. In addition, certain of the modifications to Findings of Fact #14 remove, for clarity, findings that pertain solely to Claim 703.

⁴ Such claims are known as *Walton* claims, named after a line of cases culminating in *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Circuit, 1985).

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.

a. Proposed Order Finding of Fact #1 is adopted as modified below:

- 1) For all allowed water rights in Claims 703 and 704, the Rate is 1/40th cfs per acre. The Duty is 3 acre-feet per acre per year.⁶ The Period of Use for irrigation is ~~May 3 through October 18~~ March 1 through October 16. (OWRD Ex. 1 at 4; OWRD Ex. 2 at 4.) The Priority date is October 14, 1864.⁷

Reason for Modification: To provide corrected and additional citations to the record. In addition, OWRD has determined that the ALJ's finding that the period of use is May 3 through October 18 is not supported by a preponderance of evidence on the record. The ALJ's finding appears to have been based on evidence in the record pertaining to the growing season for a specific type of crop (pasture grass). Use of water for irrigation is not limited to the growth a specific crop. OWRD finds that the season for use claimed, March 1 through October 16, is supported by a preponderance of evidence on the record.

b. Proposed Order Finding of Fact #2 is adopted as modified below:

- 2) The property subject to ~~these~~ Claims 703 and 704 was originally part of the Klamath Indian Reservation. ~~It~~ Claim 703 is composed of 19 parcels that were allotted to Klamath Indians, and one parcel of 2.1 acres that was conveyed directly by the Klamath Tribe. Claim 704 is composed of one parcel that was allotted to Klamath Indians. (Book Direct at 11; Ex. U3.) The property was subsequently transferred to non-Indian ownership, as discussed in more detail, below.

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to provide an additional citation to the record.

c. Proposed Order Finding of Fact #4 is adopted as modified below:

- 4) Prior to the date when the original claim was filed, Klamath Allottee Water Users, an association chartered by the Klamath Tribes (OWRD Ex. 1 at 135-138; OWRD Ex. 2 at 119-122), entered into a stipulation with OWRD whereby the tribal members could file their claims in stages, with all required information and fees to be filed no later

⁶ The original claim sought a duty in excess of 11 acre-feet per acre, but no evidence justifying that duty was submitted or argued. ~~I have~~ Therefore, the adopted ~~the rate and~~ duty is as proposed by the United States, and supported by the testimony of Dale Book. (Affidavit and Correction to Direct Testimony of Dale Book at 3.) **Reason for modification of footnote:** The duty as claimed calculates to 11.4 acre-feet per acre (26.23 ac-ft / 2.3 acres), and the rate as claimed calculates to 1/40 of one cfs per acre (2.3 acres / 0.06 cfs). Thus the rate is as claimed, and the duty is as proposed by the United States.

⁷ This is the date the Klamath Indian Reservation was created by treaty. Proven *Walton* rights relate back to the date of the Indian treaty that reserved the water rights in the tribes. *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Circuit, 1985).

than November 2, 1992. (~~Id.~~ OWRD Ex. 1 at 145-150.) Claimant timely filed the original claim for 28,219 acre-feet of water for 3,100 acres irrigation and “non-agricultural uses” on January 31, 1991. (*Id.* at 11.) Within the time allowed, the original claimant paid \$989.60 in fees for 889.6 acres of irrigation in Claim 703, and \$30 for the minimum fee for irrigation in Claim 704. (*Id.* at 145.) Because the original claimant lost the property through bankruptcy, counsel for the claimant sent a letter to the Department on October 30, 1992 purporting to withdraw the claims. The Department accepted this withdrawal and provided a credit for the fees paid, thus effectively refunding them. (*Id.* at 149.) On May 13, 1999, the Department sent a letter to TJ Lindbloom and Tim Cummins, who were at that time the owners of the property, advising that the purported withdrawal of the claims had been invalid, as the withdrawal was not filed by the owner of the property. Consequently, the Department allowed Lindbloom and Cummins to continue processing the claims, provided fees were again paid. (~~Id.~~ OWRD Ex. 1 at 40; OWRD Ex. 2 at 26.)

Reasons for Modifications: To provide additional citations to the record.

d. Proposed Order Finding of Fact #5 is adopted as modified below:

5) By letter of July 31, 1999, counsel for the predecessors of the current claimant sought to amend the claim by adding 100.6 acres in Allotments 441, 442, 833, 836, 837, and 838 for an area known as Riddle Field. This area had been omitted from the original claim. In this letter, counsel clarified that the “non-agricultural uses” claimed were for wildlife. (~~Id.~~ OWRD Ex. 1 at 46.) The same letter also sought to include a storage right for an additional 20.5 acres in Allotments 794, 795 and 1139 that had not been claimed in the original claim. (*Id.* at 47-49.) On August 31, 1999, \$200 was paid for livestock use. (*Id.* at 51.) After checks for irrigation fees had been returned once for insufficient funds, \$990 was paid for irrigation in Claim 703 and \$30 was paid for irrigation in Claim 704 on September 1, 1999. (Ex. U44.)

Reasons for Modifications: To provide clarification to a citation to the record.

e. Proposed Order Finding of Fact #14 is adopted as modified below:

14) **Allotment 795 (2.3 acres claimed)**

This allotment, located in SE¼ SW¼, SW¼ SE¼ of Section 16 (Allotment 795-North) (Claim 703), and E½ E½ NE¼ of Section 28, T36S R10E, W.M. (Allotment 795-South) (Claim 704), was allotted to Birdie Jackson, a Klamath Indian, by instrument dated February 11, 1921. (OWRD Ex. 1 at 78; OWRD Ex. 2 at 60.) The property was apparently conveyed to Hiram Robbins, also a Klamath Indian, at some time before 1978, when it was conveyed by Robbins' heirs to the Hi Robbins Corporation, an Oregon Corporation. (Ex. U8 at 5-13.) The property was subsequently conveyed to Alan B. Tyler, also a non-Indian, on September 16, 1991. (*Id.* at 14-15.)

~~The portion of the property subject to Claim 703 is composed of 22.8 acres irrigated by water diverted from Diversion Point #3 on Cherry Creek. (Ex. U3; OWRD Ex. 1 at 6, 7, 9-10, 14.) Claimant attempted to add 5.2 acres to Claim 703 by letter in 1999 (OWRD Ex. 1 at 47-49.)~~ The portion of the property subject to Claim 704 is composed of 2.3 acres irrigated by water from the only Diversion Point for Claim 704, diverted from a pool and ditch constructed at a spring at the headwaters of Cherry Creek some time before 1986,⁸ when the pond and an "old ditch" were observed. (Ex. U3; OWRD Ex. 2 at 6, 14 7.) The source of water for Claim 704 is an unnamed stream (a.k.a. West Fork Cherry Creek) that originates in the SE¼ NE¼, Section 28. It is tributary to Cherry Creek. (OWRD Ex. 2 at 3-7, 25.)

¶ In 1973, prior to transfer of the property out of Indian ownership, Rayson Tupper made an application on behalf of the Estate of Hiram R. Robbins for a water right that included lands appurtenant to Claim 704 (Permit No. 43051). Nine (9.0) acres of Allotment 795-South were included in the permit. (Ex. U26; OWRD Ex. 2 at 25). Although the permit was cancelled in 1983 for failure to return proof of appropriation (Ex. C101), an OWRD field inspection found portions of the acreage

⁸ This is the Diversion Point for Claim 704, located in the SW¼ SE¼ NE¼ Section 28, T36S R10E.W.M. **Reason for modification of the footnote:** In addition, OWRD has determined that the ALJ's finding the point of diversion is located in the SW¼ NE¼ is not supported by a preponderance of evidence on the record; the Claimant's Statement and Proof of Claim shows the point of diversion located in the SE¼ NE¼. (OWRD Ex. 2 at 3.)

described in the permit under irrigation. (OWRD Ex. 2 at 140-143). The field inspection found the 2.3 acres appurtenant to Claim 704 were irrigated as marked on a 1979 aerial photograph and drawn on the OWRD Investigation Map for T36S R10E. (OWRD Ex. 2 at 125, 133; Ex. C101.) In the late 1960s or early 1970s, Phil Tupper installed the first irrigation facilities for the part of the property subject to original Claim 703, a check dam on Cherry Creek (Declaration of Phil Tupper.)

Water rights recognized for 2.3 acres are found to have a diversion rate of 0.06 cfs from an unnamed stream, tributary to Cherry Creek, at a point of diversion located within the SE¼ NE¼, Section 28.

Reasons for Modifications: The ALJ's proposed finding of fact failed to fully set forth the evidence on the record; to add clarification using evidence on the record; to provide corrected and additional citations to the record. In addition, the portions of this finding that pertain exclusively to Claim 703 were stricken for the sake of clarity.

C. MODIFICATIONS TO THE "CONCLUSIONS OF LAW"

Conclusions #3-6, 8-11, 13-16, 18, 22-24, 26, 33, and 35-38 are adopted in their entirety. Conclusions #7, 12, 17, 20, 21, 25, and 28 - 31, are adopted as modified below (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text). Conclusions of Law #1, 2, 19, 27, 32, and 34 are not incorporated because they are not pertinent to Claim 704.

a. Conclusion #7:

The record does not support the ~~rate and duty~~ claimed, but does support ~~some of the~~ actual use, points of diversion ~~and re-diversion~~, place of use, season of use, the rate, and ~~per-acreage~~ claimed.

b. Conclusion #12:

The record establishes the water use season claimed ~~as to a portion of the claim~~ for Claim 704.

c. Conclusion #17:

~~Part of~~ Beneficial use of water for the current use was ~~developed~~ made for Claim 704 within a reasonable time after the claimed date of appropriation.

d. Conclusion #20:

There is sufficient title information to establish a Walton right on a ~~portion~~ of the claimed place of use for Claim 704.

e. Conclusion #21:

There is sufficient information on ~~the development or continuous use~~ beneficial use of water having been made with reasonable diligence on a ~~portion~~ of the place of use for Claim 704 to establish a *Walton* right.

f. Conclusion #25:

A map sufficient to satisfy the requirements of statute and rule was submitted for ~~portions~~ of the claimed place of use for Claim 704.

g. Conclusion #28:

Beneficial use of water for irrigation of portions of on the claimed place of use for Claim 704 was made developed with reasonable diligence by the first non-Indian purchaser from an Indian owner following transfer from Indian ownership to non-Indian ownership.

h. Conclusion #29:

Beneficial use of water for Any irrigation not developed made with reasonable diligence after transfer of the property from the first to non-Indian owner successors cannot be allowed as the basis for a *Walton* claim. Beneficial use of water for irrigation of the 2.3 acres claimed under Claim 704 was made with reasonable diligence after transfer of the property to non-Indian ownership.

i. Conclusion #30:

Irrigation ~~of~~ has been continued on ~~portions~~ of the claimed place of use, ~~has been~~ continuous.

j. Conclusion #31:

The total acreage in the claimed place of use for Claim 704 ~~exceeds~~ equals the irrigated acreage supported by the evidence.

Reasons for modifications to the Conclusions of Law section: The evidence on the record, as described in the modified findings of fact, and the application of the appropriate legal bases to

the evidence on the record, as described in the modified opinion section, below, supports conclusions other than those in the 2007 Proposed Order. Conclusions of Law #1, 2, 19, 27, 32 and 34 were not adopted because they are not pertinent to Claim 704.

D. MODIFICATIONS TO THE “OPINION”

OWRD has not incorporated the ALJ’s discussions regarding a Klamath Termination Act claim, the first non-Indian purchaser rule, and natural overflow and subirrigation of water as a basis for a *Walton* claim because they do not pertain to Claim 704. The deleted paragraphs are noted below as “*****”. In addition, except for the discussion of Allotment 795 (the only allotment which pertains to Claim 704), OWRD has not incorporated the ALJ’s discussions pertaining to the separate properties.

The remaining portions of the Opinion section of the ALJ’s Proposed Order have been labeled “Application of Walton Elements to the Modified Proposed Order Findings of Fact.” Except where deleted paragraphs are noted below as “*****”, additions are shown in “underline” text, deletions are shown in “~~strikethrough~~” text.

Application of Walton Elements to the Modified Proposed Order Findings of Fact

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 seeks a Walton water right claim for Claim 704. ~~under two somewhat different categories. Walton claims are those in which [o]riginally, individual Indians owned most of the property, under an allotment of reservation land by the Federal Government. The property then transferred to non-Indians, who acquired the water rights held by the Indians, with some limitation. These are called Walton claims. The tribe itself, however, held a small part, and transferred that property in fee after the allotment system had been terminated. This is called a Klamath Termination Act claim. These two types of claims have similar, but slightly different attributes.~~

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 a *Walton* 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.

~~Although, as discussed below, Claimant takes issue with these elements, I adopt ALJ Young's formulation as the correct interpretation of the *Walton* line of cases. is adopted with the following modifications to Items 4 and 5:~~

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~~ put to beneficial use with reasonable diligence ~~by the first purchaser of land from an Indian owner~~ following transfer from Indian ownership.
5. ~~After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors.~~

As discussed below, water was put to use beneficial use within a year after it was transferred to the first non-Indian owners of the property, so the existence or non-existence of a "first non-Indian owner" requirement is not at issue in Claim 704, and it is unnecessary to

discuss this issue in greater detail. Likewise, the continuous use by subsequent successors is not an issue in this claim, and it is unnecessary to discuss this issue in greater detail.

1. Hi Robbins Corporation, an Oregon Corporation

The property in question in this case (for Claims 703 and 704) was pieced together by Hiram Robbins, a Klamath Indian, over a period of years. Robbins acquired some of the property from allottees, or their Indian successors. He obtained other parcels from non-Indian purchasers. After Robbins died, his heirs transferred their various interests in the property into Hi Robbins Corporation, an Oregon Corporation. While there is some indication that the heirs formed the corporation to hold their various interests, the quit-claim deeds from the heirs to the corporation recite substantial consideration for their conveyances. Moreover, the corporation is recited in these conveyances as “an *Oregon* corporation.” Consequently the existence and incidents of the corporation are controlled by Oregon law, rather than the law of the tribe. Generally speaking, a corporation is a separate entity from its shareholders, such that, for example, the shareholders have no liability for corporate actions other than the value of their shares. *Amfac v. International Systems*, 294 Or 94, 108 (1982); ORS 60.151. Thus, the fact that a corporation has been formed by, or held exclusively by, Klamath Indians, does not make it an Indian owner. In any event, the claimants have the burden of proof in this case. The evidence is not sufficient to show the governance of the corporation or who its shareholders were, apart from a general statement by Phil Tupper that “The Hi Robbins Corp. was all owned by my family members, who are members of the Klamath Tribe.” (Declaration of Phil Tupper.) When the heirs of Hiram Robbins sold their inherited properties to the corporation, they transferred the property out of Indian ownership, triggering the requirement of due-diligence, and causing any inchoate rights conveyed to the corporation to be cut off, at the latest, when the property was subsequently transferred to Alan Tyler in 1991.

2. Amendment of the Original Claim

In 1999, Claimant sent OWRD a letter seeking to increase the acreage included in the claim. Claimant argues that this increase was effective. The United States argues that any

attempt to increase the claim after the deadline was invalid. OWRD agrees, but in addition notes that fees were only timely paid for the 889.6 acres originally claimed in Claim 703 and the 2.3 acres claimed in Claim 704. Consequently, OWRD opines, the claim is limited to 889.6 acres for Claim 703, and 2.3 acres for 704, and any increase in acreage over acres in the places of use claimed prior to the deadline may not be allowed.

Both the United States and OWRD are correct. ORS 539.210 provides that a claim must be filed “at the time and in the manner required by law.” If a claim is not filed within the time provided, the claimant is “barred and estopped from subsequently asserting any rights theretofore acquired.” ORS 539.210. Additionally, OAR 690-030-0085 expressly prohibits the Water Resources Director from permitting any alteration or amendment of the claim after the commencement of the period of open inspection. In this case, OWRD entered into a stipulation with the Klamath Allottee Water Users Association, providing for a staged filing of claims, with the last part of the required information to be filed no later than November 2, 1992. To the extent Claimant’s letter of 1999 sought to include land not previously included in filings prior to November 2, 1992, it was not effective. Moreover, as noted, the original claimant only paid fees enough for the number of acres originally claimed, and no fees for livestock. Although OWRD refunded those fees by mistake, the Department allowed Lindbloom and Cummins to pay the same fees to revive the claim. Even though Claimant attempted to pay additional fees to secure a livestock claim, those additional fees cannot be held to have permitted an upward amendment of the claim, or a claim for livestock that was not filed within the time allowed. Thus, the claim as discussed below will only include the property described in the initial claim. All property and uses described in the 1999 letter but not in the initial claim will be denied as outside the claim.⁹

⁹ The original claim also sought a *Walton* right for fish and wildlife. However, this was not pursued in any of the briefs submitted by the parties, and in any case cannot be allowed. The Ninth Circuit held, in *United States v. Adair*, 723 F2d at 1418, that water rights for fish and wildlife reserved to the Tribes by treaty are still held by the Tribes, and are not transferable.

3. Application of *Walton* Elements to Allotment 795

Allotment 795:

The first evidence of non-Indian ownership on Allotment 795 is when it passed from Indian ownership (Hiram Robbins) in 1978, ~~when it was acquired by~~ to the Hi Robbins Corporation. It was divided between Claim 703 and 704. ~~Most of that~~ The portion that is subject to Claim 703 was irrigated while still in Indian ownership beginning in the 1960s when Phil Tupper installed check dams to ~~baek~~ control water for irrigation. This portion of the claim, 22.8 acres, should be allowed.

The portion subject to claim 704 was irrigated by a diversion from a small spring at the head of Cherry Creek, prior to 1986, while held by the first non-Indian owner, Hi Robbins Corporation. Given its description as an “old ditch,” it is likely that this diversion was put in place some time before, either while the property was in Indian ownership or soon after it was transferred to the Corporation. Because a federal reserved water right claim is at issue, and not a state-issued water permit or certificate, the cancellation of Permit S-43051 for failure to return proof does not establish that none of the lands had been irrigated; to the contrary, a field inspection made by OWRD found that irrigation on the portion of the permitted lands appurtenant to Claim 704 (2.3 acres) was occurring by 1979. This provides evidence that irrigation was occurring within one year of transfer to non-Indian ownership, demonstrating that the water claimed for irrigation in this parcel was put to beneficial use with reasonable diligence. Thus, the portion of the property subject to Claim 704, 2.3 acres, should be allowed.

Reasons for Modification: To correct and clarify the elements of a *Walton* right; to provide clarity of evidence on the record and provide further support for the conclusions reached herein; to apply the appropriate legal bases to the Proposed Order’s modified findings of fact; to include only those portions of the ALJ’s opinion that pertain to Claim 704.

E. MODIFICATIONS TO THE "ORDER"

The "Order" section of the March 28, 2007 Proposed Order is deleted and replaced with the following:

1. A water right for Claim 704 should be confirmed as set forth in the following Water Right Claim Description:

Water Right Claim Description

CLAIM NO. 704

CLAIM MAP REFERENCE:

CLAIM # 704, PAGE 7 (OWRD Ex. 2 at 7) ; OWRD INVESTIGATION MAP – T 36 S, R 10 E

CLAIMANT: THE NATURE CONSERVATION TRUST

PO BOX 298

ROSEBURG, OR 97470

SOURCES OF WATER:

UNNAMED STREAM ("WEST FORK" CHERRY CREEK), tributary to CHERRY CREEK,

PURPOSE OR USE:

IRRIGATION OF 2.3 ACRES

RATE OF USE:

0.06 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINT OF DIVERSION.

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/40 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

DUTY:

3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR.

PERIOD OF ALLOWED USE: MARCH 1 - OCTOBER 16

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

Pod Name	TwP	Rng	Mer	Sec	Q-Q
"West Fork" Cherry Creek	36 S	10 E	WM	28	SE NE

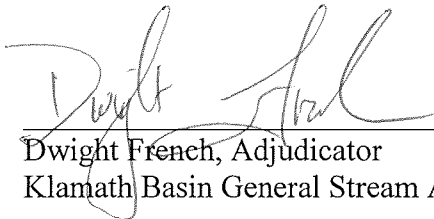
THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	10 E	WM	28	NE NE	1.2
36 S	10 E	WM	28	SE NE	1.1

Reasons for modifications to the Order section: To reflect the modifications made to the Findings of Fact, Conclusions of Law and Opinion sections.

IT IS SO ORDERED.

Dated at Salem, Oregon on January 6th, 2012


Dwight French, Adjudicator
Klamath Basin General Stream Adjudication

NOTICE TO THE PARTIES: If you are not satisfied with this Order you may:

EXCEPTIONS: Parties may file exceptions to this Amended Proposed 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 contained within this Amended Proposed Order. 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 Amended Proposed 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 Amended Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

**Dwight French, Adjudicator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301**

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2012, I mailed a true copy of the following: **AMENDED PROPOSED ORDER** (Claim 704), by depositing the same in the U.S. Post Office, Salem, Oregon 97301, with first class postage prepaid thereon, and addressed to:

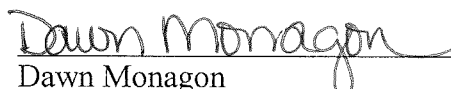
Ronald S. Yockim
Attorney at Law
430 SE Main Street
PO Box 2456
Roseburg, OR 97470

Paul S. Simmons/Andrew M. Hitchings
Somach, Simmons & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814

Jesse D. Ratcliffe
Oregon Dept. of Justice
1162 Court St NE
Salem, OR 97310

William M. Ganong
Attorney at Law
514 Walnut Street
Klamath Falls, OR 97601

David W. Harder
United States Department of Justice, ENRD
Indian Resources Section
1961 Stout Street – 8th Floor
Denver, CO 80294


Dawn Monagon
Adjudications Specialist
Oregon Water Resources Department