

**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;
Contestants,

v.

Scott Runels; Margie Runels;
Claimants/Contestants.

AMENDED PROPOSED ORDER

Case No. 166

Claim No. 19

Contests 2787, 2819,¹ 3437,² 3721, and
4077

HISTORY OF THE CASE

This proceeding under the provisions of ORS Chapter 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

Scott Runels and Margie Runels (Claimants) filed Claim 19 on December 3, 1990 for water as a non-Indian successor to a Klamath Indian Allottee. Claimants claimed an amount of water sufficient to irrigate the allotment's share of the Tribe's "practically irrigable acreage" (PIA), commonly known as "Walton claims."

On October 4, 1999 Richard D. Bailey, the Adjudicator of the Klamath Basin Adjudication, issued a Preliminary Evaluation recommending approval of the portion of the claim for irrigation, with an irrigation rate of 1/40th cfs/acre and a duty of 3.5 af/acre,

¹ On February 20, 2003, WaterWatch of Oregon, Inc. voluntarily withdrew Contest 2819, without prejudice.

² On March 11, 2003, Tulalake Irrigation District, Klamath Irrigation District, Klamath Drainage District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation District, Klamath Hills District Improvement Co., Malin Irrigation District, Midland District Improvement Company, 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 Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Plevna District Improvement Company, and Collins Products, LLC voluntarily withdrew Contest 3437.

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for a period of use of March 1 – October 31, but not addressing the claim for livestock use. Claimants filed Contest 2787 on May 9, 2000. The United States filed Contest 3721 on May 8, 2000. The Klamath Tribes filed Contest 4077 on May 8, 2000. The United States filed an Amendment to its Statement of Contest on June 16, 2004.

On May 7, 2003 a Scheduling Order was issued that outlined a discovery process and scheduled a hearing for July 7, 2004. On February 3, 2004 an Order Modifying the May 7, 2003 Scheduling Order was issued, which required participants to file in writing their witnesses' direct testimony no later than April 23, 2004. Claimants did not file any written direct testimony for any witness by that deadline.

Pursuant to a Notice of Hearing mailed to all participants by certified mail on June 2, 2004, a hearing was held in Salem, Oregon on July 7, 2004, for the purpose of admitting evidence into the record and cross-examining witnesses whose direct testimony had previously been filed and whose presence had been requested for cross-examination. Administrative Law Judge Ken L. Betterton presided at the hearing. Claimants appeared *pro se*. Assistant United States Attorney Bruce D. Bernard represented the United States of America. Attorney at Law Lorna Babby represented the Klamath Tribes. Assistant Attorney General Justin Wirth represented Oregon Water Resources Department (OWRD). The record closed on September 27, 2004, with the filing of the last written closing argument by a participant.

A Proposed Order was issued on November 18, 2004. On November 30, 2004, OWRD filed a request to reopen the record to identify the point(s) of diversion and number of irrigated acres by quarter-quarter section. On or about January 13, 2005, the United States filed a written agreement by the parties as to the points of diversion and number of irrigated acres. Those additions are noted in bold in the Findings of Fact, Opinion and Order sections of this Amended Proposed Order.

EVIDENTIARY RULINGS

At the hearing on July 7, 2004, the United States moved to amend the heading for the paragraph in Exhibit 166 E 00040001 at 53 to read Allotments "530, 534, 533," instead of "530, 534, 530," to correct a typographical error. No participant objected to the request. The amendment is allowed. The United States also moved to amend a reference in Exhibit 166 E 00040022 to read "R 9 E," instead of "R 7 E," to correct a typographical error. No participant objected to the request. The amendment is allowed.

United States' Exhibits Ref. No. 166 E 00040001 through 166 E 00040049, and 166 E 00040051 through 166 E 00040056 were admitted into evidence without objection. Claimants objected to United States' Exhibit 166 E 00040050 on the basis of relevancy. Exhibit 166 E 00040050 is relevant to the issues in this proceeding and Claimants' objection was overruled. Exhibit 166 E 00040050 was admitted into evidence.

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Claimants' Exhibits 166 E 00030001 through 166 E 00030007 were admitted into evidence without objection. The United States and the Klamath Tribes objected to Claimants' Exhibit 166 E 00030008 (an Order as to Plaintiff's First Cause of Action, and Special Findings and Order of Determination filed in Klamath County Circuit Court in 1992 in litigation filed by John Mosby against Claimants), on the grounds that the resulting order was an interim order between Mosby and the Claimants only, and not binding on determinations made in the Klamath Basin Adjudication, and because neither the United States nor the Klamath Tribes was a party to that litigation. [Claimants' Exhibit 166 E 00030008, except for the Order as to Plaintiff's First Cause of Action, is identical to documents found in OWRD's Exhibit 1 at 20 and 107.] Exhibit 166 E 00030008 is relevant for historical background purposes. The objections by the United States and the Klamath Tribes are overruled. Claimants' Exhibit 166 E 00030008 is admitted into evidence for background purposes, not to prove Claimants' claim for *Walton* water rights in the Klamath Basin Adjudication.

OWRD Exhibit 1 was admitted into evidence without objection.

The United States and Claimants reached a settlement as to part of the claim. The United States stipulate that evidence shows that Claimants have established the elements of a *Walton* water right for 138 acres of Allotment No. 208 and for 160 acres of Allotment No. 1122. The Klamath Tribes and OWRD did not object to the stipulation.

ISSUES

- (1) Is there sufficient title information to establish a *Walton* water right for a portion of the claimed Place of Use?
- (2) Is there sufficient information on the development or continuous use of water on this Place of Use to establish a *Walton* right?
- (3) What is the appropriate Period of Use?
- (4) Whether there was a clerical error in the Preliminary Evaluation in the description of the lands covered in that the claimed lands located in NW ¼ SE ¼ of Section 19, T 31, S, Range 8 and all of the claimed lands in Section 7, T 31 S, Range 8 are not listed.³

FINDINGS OF FACT

(1) All 11 allotments claimed by Claimants as the place of use were on lands within the boundaries of the former Klamath Indian Reservation. [See Affidavit and Direct Testimony of Douglas H. Clements, P.E. (Ref. No. 166 E 00040001 ("Clements

³ OWRD concedes that the lands identified above were omitted from the Preliminary Evaluation as a result of a clerical error and should have been listed in the Preliminary Evaluation. The participants agree the lands identified above should have been listed.

Testimony”) at 11-12, ¶ 12; Ex. 166 E 00040021 and 166 E 00040022.] Nine of the 11 allotments were transferred to non-Indian ownership between 1918 and 1924. (Clements Testimony at 52, ¶ 61; Ex. 166 E 00040028.) The remaining two allotments, Allotments Nos. 530 and 534 were transferred to non-Indians in 1960-1961. (*Id.*) Claimants took title to the land in Allotment No. 1122 in July 1989 and to the remaining 10 allotments in December 1987. (Ex. 166 E 00040027.)

(2) Allotment Nos. 11 and 13 were transferred to non-Indians in 1924 and 1920, respectively. (Clements Testimony at 52, ¶ 61.) There was almost no irrigation of Allotments Nos. 11 or 13 prior to the mid-1970s. (*Id.*) A photograph of Allotment 11 taken in 1976 shows approximately three acres of irrigation or spilling from the ditch along the western boundary of that allotment. (*Id.*) The first irrigation on Allotment 13 appears in photographs taken in 1974, 1976 and 1979, in which one to two acres received water. (*Id.*)

(3) Allotment No. 12 was transferred to the first non-Indian in 1918. There is no evidence of development of irrigation near the time of transfer, except a letter in which the owner requested water for use on a few acres of land in about 1919. (*Id.* at 53, ¶ 61.) There is no evidence that the requested water was delivered and no evidence of any irrigation of Allotment No. 12 from 1918 to 1952. (*Id.*) Aerial photographs between 1952 and 1979 show different areas of between 8 and 23 acres receiving water. (*Id.*) Photographs taken between 1987 and 1994 show no irrigation on Allotment No. 12. (*Id.*)

(4) Allotment Nos. 530 and 534 were transferred to non-Indian ownership in 1960-1961. (*Id.*) An aerial photograph from 1961 shows 14 acres and 41 acres being irrigated on Allotment Nos. 530 and 534, respectively. (*Id.*) Allotment No. 533 was transferred to the first non-Indian in 1921 and owned by that first non-Indian until 1928. There is no evidence of any irrigation of that allotment during that period of ownership. (*Id.*) There is no evidence of any irrigation of Allotment No. 533 from 1928 to 1952. (*Id.*) Evidence shows a significant period of non-use of water on these three allotments, from 1976 to 1994 for Allotment No. 530, and at least 1979 to 1994 for Allotment Nos. 534 and 533. (*Id.* at 53-54, ¶ 61.)

(5) Allotment No. 1442 was transferred out of Indian ownership in 1918 and conveyed to the next owner in 1924. (*Id.* at 54, ¶ 61.) There is no evidence of water use on Allotment No. 1442 from 1918 to 1924, nor any evidence of irrigation on the parcel from 1924 to 1952. (*Id.*) Aerial photographs show no irrigation of the land from 1976 to 1987. (*Id.*)

(6) Allotment Nos. 120, 121, 208 and 1122 were transferred out of Indian ownership between 1920 and 1924. They were conveyed to the next owner between 1928 and 1936. (*Id.*) All four allotments were within the boundaries of the Sand Creek Irrigation Project as it was initially completed in about 1920. (*Id.*) The lands within Allotment Nos. 120 and 121 were withdrawn from the project in 1939. (*Id.* at 54-55, ¶ 61.) Although the lands may have been irrigated under the project between 1920 and

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1939, there is no evidence of continuous irrigation of the lands in Allotments 120 and 121 after they were withdrawn from the project in 1939. (*Id.* at 55, ¶ 61.) Aerial photographs of the allotments show that water uses since 1952 have consisted of minor ditch spillage, stock watering or sub-irrigation with long periods of non-use in between. (*Id.*)

(7) Lands within Allotment Nos. 208 and 1122 remained in the Sand Creek Irrigation Project and were irrigated through at least 1965. (*Id.*) The allotments continued to be irrigated by water delivered through the Sand Creek Unit after 1965 through 1983. (*Id.*) Aerial photographs show irrigation in 1974, 1976, 1979 and 1981, and irrigation after 1983. [*Id.*; Oregon Water Resource Department (OWRD) Ex. 1 at 59-60.] One hundred thirty-eight acres of Allotment No. 208 and 160 acres of Allotment No. 1122 have been continuously irrigated. (Stipulation between United States and Claimants.) **The legal description of the irrigated acreage and the points of diversion for the land for the stipulation are as follows:**

Allotment No. 208

SW ¼, Section 7, Township 31 South, Range 8 East, Willamette Meridian:

NE ¼ SW ¼	40.0 acres
NW ¼ SW ¼ (Lot 3)	28.2 acres
SW ¼ SW ¼ (Lot 4)	29.8 acres
SE ¼ SW ¼	40.0 acres

Total 138.0 acres

Allotment No. 1122

SE ¼, Section 7, Township 31 South, Range 8 East, Willamette Meridian:

NE ¼ SE ¼	40.0 acres
NW ¼ SE ¼	40.0 acres
SW ¼ SE ¼	40.0 acres
SE ¼ SE ¼	40.0 acres

Total 160.0 acres

(ORWD Ex. 1 at 3, 35.)

Point of diversion from Sand Creek into ditch to Scott Creek:

NW ¼ NW ¼, Section 28, Township 31 South, Range 7 East, W.M.

Point of diversion from Scott Creek:

NW ¼ SE ¼, Section 16, Township 31 South, Range 7 East, W.M.

(*Id.* at 54.)

ORWD's Preliminary Evaluation of Claim found an irrigation rate of 1/40th cfs/acre and a duty of 3.5 af/acre, and a period of use of March 1 – October 31. (*Id.*) Claimants presented no evidence that the period of use should be outside March 1 – October 31.

(8) In 1988 Claimants' neighbor, John Mosby (Mosby), filed a lawsuit in Klamath County Circuit Court against Claimants over their relative water rights. (OWRD Ex. 1 at 20.) A portion of that lawsuit was settled pursuant to a March 1992 stipulation that a special master would be appointed by OWRD to decide the relative rights of Claimants and Mosby. (*Id.* at 105.) The special master's determination is binding only until the Klamath River System adjudication is completed. (*Id.*) The special master's determination, issued in April 1992, established the relative *Walton* rights and priorities between Mosby and Claimants. (*Id.* at 117.) The determination states: "Examination of the files of the OWRD indicates continuous irrigation activity on both the Mosby and Runels property from at least the mid 1970s to the present." (*Id.* at 112.) The determination, which was adopted by the Circuit Court, states, "it seems appropriate for this Court to render an interim resolution to the water use conflict between Mosby and Runels pending the complete and final adjudication of the Klamath River and its tributaries." (*Id.* at 111.)

OPINION

Claim 19 is a claim for water rights for lands purportedly within the boundaries of the former Klamath Indian Reservation. Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "*Walton*" water rights.⁴

Elements of a *Walton* water right that must be proven are:⁵

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;

⁴ A "*Walton*" right refers to a term derived from the *Colville Confederated Tribes v. Walton* line of cases that address the issue of a claim for a water right of non-Indian successors to Indian allottees. *Colville Confederated Tribes v. Walton*, 460 F Supp 1320 (ED Wash 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir 1981), *cert den* 454 US 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9th Cir 1985), *cert den* 475 US 1010 (1986) (*Walton III*). An Indian "allotment" is a parcel of land on an Indian reservation awarded to an individual member of an Indian tribe, *i.e.*, an allottee, pursuant to the General Allotment Act of 1887, 24 Stat. 388. *See, e.g., Walton II*, 647 F2d at 45.

⁵ *See, Walton II*, 647 F2d at 51; *see also*, Decision by Administrative Law Judge William D. Young, Klamath Basin Adjudication, Case No. 272, dated August 4, 2003.

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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.

If these elements are proven, the claim is assigned a priority date of October 14, 1864, the date the Klamath Reservation was established.⁶

Claimants have the burden of proof to establish the claim by a preponderance of the evidence. ORS 539.110; ORS 183.450(2); *see also, Cook v. Employment Div.*, 47 Or App 437 (1980) (in the absence of legislation adopting a different standard, the standard in administrative hearings is a preponderance of the evidence). Proof by a preponderance of the evidence means that the fact-finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989). Claimants have failed to meet their burden.⁷

Claimants' lands were within the boundaries of the former Klamath Indian Reservation. However, Claimants failed to prove the remaining elements for a *Walton* claim with respect to each of the 11 allotments. Claimants did not prove that irrigation was initiated by Indian predecessors or by the first non-Indian owner of each allotment with diligence within a reasonable period of time after transfer of the land to the first non-Indian owner, and that the land has been irrigated continuously.

There was no evidence of any irrigation of Allotments 11 and 13, which were transferred to non-Indians in the 1920s, before the 1970s. There was no evidence of any irrigation of Allotment 12, which was transferred to the first non-Indian in 1918, from 1918 to 1952. Although aerial photographs taken between 1952 and 1979 show some areas in Allotment 12 receiving water, photographs from 1987 to 1994 show no irrigation.

⁶ The Klamath Reservation was established on October 14, 1864. *Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians*, October 14, 1864, 16 stat. 707. "The priority date of Indian rights to water for irrigation and domestic purposes is 1864 [date of reservation creation] * * *. For irrigation and domestic purposes, the non-Indian landowners and the State of Oregon are entitled to an 1864 priority date for water rights appurtenant to their land which formerly belonged to the Indians." *United States v. Adair*, 478 F Supp 336, 350 (D Or 1979).

⁷ With the exception of 138 acres of Allotment No. 208 and 160 acres of Allotment No. 1122, to which the United States has stipulated that Claimants have established a *Walton* water right.

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Claimants have failed to meet the requirements for a *Walton* water claim for Allotments 11, 12 and 13.

Allotment Nos. 530 and 534 were transferred to non-Indian ownership in 1960 or 1961. Allotment No. 533 was transferred to the first non-Indian in 1921. There is no evidence of any irrigation on Allotment No 533 from 1921 to 1928, the period the allotment was owned by that non-Indian, or from 1928 to 1952. Although a 1961 aerial photograph shows 14 acres and 41 acres being irrigated on Allotment Nos. 530 and 534, respectively, that year, there were long periods of non-use of water on Allotment Nos. 530, 533 and 534 between 1976 and 1994. Claimants failed to establish a *Walton* water right for Allotment Nos. 530, 533 and 534.

Allotment No. 1142 was transferred to the first non-Indian in 1918, and transferred to the next owner in 1924. There is no evidence of irrigation on the land in this allotment from 1918 to 1924, from 1924 to 1952, or from 1976 to 1987. Claimants failed to establish the elements of a *Walton* water right on Allotment No. 1442.

Allotment Nos. 120, 121, 208 and 1122 were transferred out of Indian ownership between 1920 and 1924, and conveyed to the next owner between 1928 and 1936. All four of these allotments were within the boundaries of the Sand Creek Irrigation Project, which was initially completed in about 1920. The lands within Allotment Nos. 120 and 121 were withdrawn from the project in 1939. While those lands may have been irrigated under the project between 1920 and 1939, there was no evidence of irrigation of these two allotments after 1939. Claimants failed to prove the elements of a *Walton* water right for Allotment Nos. 120 and 121.

Based on the stipulation of the United States of irrigation of lands within Allotment Nos. 208 and 1122, Claimants have established the elements of a *Walton* water right for 138 acres for Allotment No. 208 and 160 acres for Allotment No. 1122, **the legal description for the irrigated acreage and points of diversion of which are specifically described in Finding of Fact No. 7 above.** The Preliminary Evaluation done by ORWD found an irrigation rate of 1/40th cfs/acre, a duty of 3.5 af/acre, and a period of use of March 1 – October 31. Claimants failed to establish a period of use outside of March 1 – October 31.

Claimants make a number of assertions in their written Closing Argument which warrant discussion.

Claimants contend that they have established a *Walton* water right for Claim 19 because of the determination made by the special water master in 1992, which was adopted by the Circuit Court. That determination established relative water rights between Claimants and Mosby, as a result of a civil lawsuit filed by Mosby against Claimants. However, the outcome of that lawsuit has no bearing on this proceeding. The determination states it is an interim resolution to the water use dispute only between Claimants and Mosby, pending final adjudication of the Klamath Basin. The purpose of

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this proceeding is to determine whether Claimants have presented evidence to establish a *Walton* water right. Moreover, the United States and the Klamath Tribes were not parties to the lawsuit filed in Circuit Court and are not bound by it. Claimants cannot establish a *Walton* water right in this proceeding based on the interim determination by the special water master.

Claimants also make assertions in their Closing Argument without any evidence in the record to support those assertions, or which while they may possibly be true, do nothing to establish the elements of a *Walton* water right.

Claimants' reliance on language in the 1992 Interim Order, that files of the OWRD show continuous irrigation activity on Mosby's and their property from at least the mid-1970s to the present, does nothing to establish the initiation of irrigation by the first non-Indian owner on any of the allotments, nor does it establish continuous irrigation on the allotments.

Claimants' assertions that maps or other evidence in the record show irrigation from Sand Creek, show irrigation on some sections of land, or that OWRD issued water permits out of Sand Creek during the 1950s, '60s and '70s, do not establish the elements of a *Walton* water right for Claimants on the allotments. As discussed earlier in this decision, Claimants failed to establish irrigation by Indian predecessors or by the first non-Indian owner within a reasonable period of time after transfer of the land to the first non-Indian owner, and that the land has been irrigated continuously.

Claimants charge in their Closing Argument that, "whenever someone tried to claim an Indian right * * * the neighbors would complain and the water master would try to shut them down." (Claimants' Closing at 1, ¶ 9.) There is no evidence in the record to support this assertion.⁸

AMENDED PROPOSED ORDER

I recommend that the Adjudicator for the Klamath Basin General Stream Adjudication enter a Final Order as follows:

(1) Claimants have established the elements of a *Walton* water right for 138 acres of Allotment No. 208 and for 160 acres of Allotment No. 1122 of Claim 19, **more specifically as follows:**

Allotment No. 208

SW ¼, Section 7, Township 31 South, Range 8 East, Willamette Meridian:

⁸ The February 3, 2004 Scheduling Order informed all participants of the requirement that they file in writing their witnesses' direct testimony no later than April 23, 2004. Claimants filed no written direct testimony.

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NE ¼ SW ¼	40.0 acres
NW ¼ SW ¼ (Lot 3)	28.2 acres
SW ¼ SW ¼ (Lot 4)	29.8 acres
SE ¼ SW ¼	40.0 acres

Total 138.0 acres

Allotment No. 1122

SE ¼, Section 7, Township 31 South, Range 8 East, Willamette Meridian:

NE ¼ SE ¼	40.0 acres
NW ¼ SE ¼	40.0 acres
SW ¼ SE ¼	40.0 acres
SE ¼ SE ¼	40.0 acres

Total 160.0 acres

Point of diversion from Sand Creek into ditch to Scott Creek:

NW ¼ NW ¼, Section 28, Township 31 South, Range 7 East, W.M.

Point of diversion from Scott Creek:

NW ¼ SE ¼, Section 16, Township 31 South, Range 7 East, W.M.

The irrigation rate should be 1/40th cfs/acre, the duty 3.5 af/acre and the period of use March 1 – October 31. The Priority Date for the right is October 14, 1864.

(2) Claimants failed to establish the elements of a *Walton* right for the remaining allotments of Claim 19 (i.e., Allotment Nos. 11, 12, 13, 120, 121, 530, 533, 534 and 1442). The claim for water rights on those allotments should be denied.



Ken L. Betterton, Administrative Law Judge
Office of Administrative Hearings

Date: February 22, 2005

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

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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 Amended Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

Richard D. Bailey
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Salem, Oregon 97301

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2005, I mailed the following: **AMENDED PROPOSED ORDER**, by depositing the same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid thereon, and addressed to:

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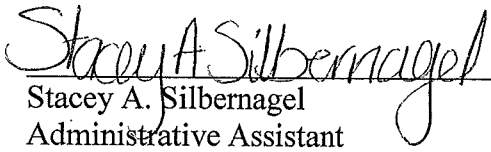
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