

**BEFORE THE DIRECTOR
OF THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON**

KLAMATH BASIN GENERAL STREAM ADJUDICATION

In the Matter of the Claim of)	PARTIAL ORDER OF
THOMAS J. SHAW)	DETERMINATION
)	
_____)	Water Right Claim 4

The GENERAL FINDINGS OF FACT of the FINAL ORDER OF DETERMINATION is incorporated as if set forth fully herein.

**A. FINDINGS OF FACT AND DESCRIPTION OF MODIFICATIONS
TO THE AMENDED PROPOSED ORDER**

1. Claim 4 (Claimant: THOMAS J. SHAW) and its associated contests (2039, 3430, 3710, and 4506) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 157.
2. The Office of Administrative Hearings conducted contested case proceedings and issued an AMENDED¹ PROPOSED ORDER ON UNITED STATES' MOTION FOR RECONSIDERATION OF RULING ON LEGAL ISSUES AND DISMISSAL OF CLAIMANT'S CLAIM for Claim 4 on December 10, 2004. Exceptions were filed to this amended proposed order by Thomas J. Shaw.
3. OWRD referred Claim 4 back to the Office of Administrative Hearings for further proceedings in order to take further evidence in support of or opposition to the Claimant's claim to a Walton right based on beneficial use of water by the method of natural overflow. The Office of Administrative Hearings conducted further proceedings and ultimately issued an AMENDED PROPOSED ORDER AFTER FURTHER PROCEEDINGS (Amended Proposed Order) for Claim 4 on September 11, 2009.
4. The STIPULATION OF FACTS AMONG CLAIMANT AND ALL CONTESTANTS for Claim 4 executed on May 7, 2009 is incorporated in its entirety as if set forth fully herein.
5. Exceptions were filed to the Amended Proposed Order within the exception filing deadline by (1) Thomas J. Shaw, and (2) OWRD.

¹ An earlier Proposed Order was issued on November 8, 2004. This Proposed Order was amended because it was mailed out without the ALJ's signature. No other changes were made to the Proposed Order.

6. The exceptions filed to the Amended Proposed Order along with opposition to the exceptions have been reviewed and considered in conjunction with the entire record for Claim 4. The exceptions are found to be persuasive, and therefore, modifications are made to the Amended Proposed Order as described in Sections A.10, A.11 and A.12, below.
7. The Amended Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
 - a. The “History of the Case” is adopted with modifications, as set forth in Section A.8, below.
 - b. The “Evidentiary Rulings” is adopted in its entirety.
 - c. The “Issue” is adopted in its entirety.
 - d. The “Stipulated Facts” is adopted in its entirety.
 - e. The “Findings of Fact” is adopted in its entirety. In addition, Finding of Fact #4 and is added as set forth in Section A.9, below.
 - f. A new section entitled “Conclusions of Law” is added to the Amended Proposed Order as set forth in Section A.10, below.
 - g. The “Opinion” is replaced in its entirety as set forth under Section A.11, below.
 - h. The section titled “Amended Proposed Order” is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 4, which also incorporates any modifications made under Section A.12, below. Consistent with Sections A.9, A.10, A.11, and A.12, below, the outcome of the Order has been modified to recognize a right for irrigation with incidental livestock watering on 54.0 acres.

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

On September 13, ~~2007~~ 2004, the United States filed a Motion for Reconsideration of Ruling on Legal Issues.

Reason for Modification: To correct a scrivener’s error.

9. **Findings of Fact.** Amended Proposed Order Finding of Fact #4 is added as follows (additions are shown in “underline” text):

4. The Claimant claimed 100 head of livestock for livestock watering. (OWRD Ex. 1 at 1.)

Reason for Additional Finding of Fact #4: The facts in the ALJ’s Amended Proposed Order failed to fully set forth the evidence on the record.

10. **Conclusions of Law.** The entire section titled “Conclusions of Law” with Conclusions of Law #1-4 is added to the Amended Proposed Order as follows:

Conclusions of Law

1. There is sufficient title information to establish a *Walton* right on the claimed place of use.
2. Beneficial use of water for irrigation with incidental livestock watering (for 100 head) by the method of natural overflow was made on 54 acres within Allotment 550 with reasonable diligence after transfer of the property from Indian ownership to non-Indian ownership.
3. Beneficial use of water for irrigation by the method of natural overflow is a valid basis for a *Walton* water right.
4. Wildlife is not a valid purpose of a *Walton* right derived from the 1864 Klamath Treaty.

Reason for Addition of Conclusions of Law Section: Conclusions of Law were not specified in the ALJ’s Amended Proposed Order; 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 these conclusions.

11. **Opinion.** The Amended Proposed Order's “Opinion” section is replaced in its entirety as follows:

OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

In addition, OWRD incorporates into the Opinion section all the paragraphs below which follow after the heading labeled “Application of Walton Elements to the Modified Amended Proposed Order Findings of Fact.”

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

The pertinent facts are not in dispute. Allotment 550 was formerly part of the Klamath Indian Reservation and remained under Indian ownership until 1957. During this time, Allotment 550 was seasonally irrigated by natural overflow from the Williamson River. In late fall of each year, Allotment 550 becomes submerged as the waters of the Williamson River rise. As the waters recede in about April, Allotment 550 becomes suitable for cattle grazing.

In 1957, Allotment 550 was transferred to Modoc Lumber Company, the first non-Indian owner. Modoc Lumber Company held the property until 1965. During this approximately eight year period, the property remained irrigated by natural overflow, and Modoc Lumber Company leased Allotment 500 to the members of the Klamath tribes for grazing purposes.

In 1965, Modoc Lumber Company conveyed Allotment 550 to Claimant. Claimant became the second non-Indian owner of Allotment 550. Allotment 550 remains irrigated solely by means of natural overflow from the Williamson River. Claimant continued to lease Allotment 550 for grazing purposes until at least 1991. Claimant stipulates that at this time there is no actual physical diversion of water from its natural source onto Allotment 550.

Claimant seeks a *Walton* right based upon natural overflow from the Williamson River. *Walton* rights require beneficial use of water be made with reasonable diligence after transfer of property from Indian ownership to non-Indian ownership. Claimant has demonstrated beneficial use of water for irrigation with incidental livestock watering by means of natural overflow from the Williamson River onto Allotment 550.

The elements necessary for a *Walton* claim for 54.0 acres in Allotment 550 have been established. Water rights should be granted for irrigation of 54.0 acres with incidental livestock watering for 100 head (the number of head claimed), on the basis of beneficial use of water by the method of natural overflow from the Williamson River.

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, especially pertaining beneficial use of water by the method of natural overflow being made with reasonable diligence; to apply the appropriate legal bases to the Proposed Order's findings of fact.

12. **Amended Proposed Order.** The entire section titled "Amended Proposed Order" is replaced as follows:

1. Beneficial use of water for irrigation by the method of natural overflow is a valid basis for a *Walton* right;
2. Claim 4 is approved for irrigation of 54 acres with incidental livestock watering for 100 head, the number of head claimed.

Reason for Modifications: (1) To provide consistency with Sections A.9, A.10 and A.11.

B. DETERMINATION

1. The Amended Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
 - a. The "History of the Case" is adopted with modifications, as set forth in Section A.8, above.
 - b. The "Evidentiary Rulings" is adopted in its entirety.
 - c. The "Issue" is adopted in its entirety.
 - d. The "Stipulated Facts" is adopted in its entirety.
 - e. The "Findings of Fact" is adopted in its entirety. In addition, Findings of Fact #4 is added under Section A.9, above.

- f. A new section entitled “Conclusions of Law” is added to the Amended Proposed Order as set forth in Section A.10, above.
 - g. The “Opinion” is replaced in its entirety as set forth in Section A.11, above.
 - h. The section titled “Amended Proposed Order” is replaced in its entirety by the Water Right Claim Description as set forth in Section B of this Partial Order of Determination for Claim 4, which also incorporates any modifications made under Section A.12, below. Consistent with Sections A.9, A.10, A.11, and A.12, above, the outcome of the Order has been modified to recognize a right for irrigation with incidental livestock watering on 54.0 acres.
2. The elements of a Walton claim are established. The GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS is incorporated as if set forth fully herein.
 3. Beneficial use of water by the method of natural overflow is established for 54.0 acres.
 4. Based on the file and record herein, IT IS ORDERED that Claim 4 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

CLAIM NO. 4

CLAIM MAP REFERENCE: OWRD INVESTIGATION MAP – T 29 S, R 30

CLAIMANT: THOMAS J. SHAW
 PO BOX 257
 KLAMATH FALLS, OR 97601

SOURCE OF WATER: WILLIAMSON RIVER, tributary to UPPER KLAMATH LAKE

PURPOSE OR USE:

IRRIGATION OF 54.0 ACRES BY NATURAL OVERFLOW; LIVESTOCK WATERING OF 100 HEAD INCIDENTAL TO IRRIGATION.

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

NO SPECIFIC POINT OF DIVERSION, NATURAL OVERFLOW FROM THE WILLIAMSON RIVER

THE PLACE OF USE IS LOCATED AS FOLLOWS:

IRRIGATION BY NATURAL OVERFLOW WITH INCIDENTAL LIVESTOCK WATERING					
Twp	Rng	Mer	Sec	Q-Q	Acres
30 S	9 E	WM	5	NW NE	38.8
30 S	9 E	WM	5	NE NW	15.2


FURTHER LIMITATIONS TO THE RIGHT TO USE OF WATER BY NATURAL OVERFLOW:

BENEFICIAL USE OF WATER MADE FROM THE METHOD OF NATURAL OVERFLOW IS A PRIVILEGE ONLY. AS LONG AS BENEFICIAL USE OF WATER BY NATURAL OVERFLOW CONTINUES, THE HOLDER OF THIS VESTED WATER RIGHT CANNOT MAKE A CALL ON WATER APPROPRIATED UNDER ANY OTHER WATER RIGHTS.

ANY CONVERSION FROM BENEFICIAL USE OF WATER BY NATURAL OVERFLOW TO BENEFICIAL USE OF THE SAME WATER FROM A SYSTEM RELYING ON A POINT(S) OF DIVERSION WILL BE CONSIDERED A CHANGE IN POINT OF DIVERSION SUBJECT TO APPROVAL OF A TRANSFER OF WATER RIGHT IN COMPLIANCE WITH THE PROVISIONS OF ORS 540.505 TO 540-587. NOTWITHSTANDING APPROVAL OF A CHANGE IN POINT OF DIVERSION, THE FOLLOWING CONDITIONS WILL APPLY TO ANY APPROVED POINT OF DIVERSION TRANSFER: DUTY FOR IRRIGATION MAY NOT EXCEED 3.0 ACRE-FEET PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR. THE SEASON OF USE MAY NOT EXCEED DECEMBER 1 TO JULY 1.

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013


Dwight French, Adjudicator
Klamath Basin General Stream Adjudication