

**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
KENNETH L. TUTTLE, AND	)	DETERMINATION
KAREN TUTTLE	)	
_____	)	
	)	Water Right Claim 49

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 PROPOSED ORDER**

1. Claim 49 (Claimants: KENNETH L. TUTTLE AND KAREN TUTTLE) and its associated contests (2758, 2797, 3452, 3794, and 4104) were referred to the Office of Administrative Hearings for a contested case hearing which was designated as Case 184.
2. On May 6, 2003, Claim 49 was consolidated with Case 900 “for the sole purpose of determining whether [this and other] claims for rights to water from the Wood River system . . . which have been previously adjudicated, bar the Claimants from participation in this adjudication.” *See* ORDER GRANTING MOTION TO CONSOLIDATE AND SCHEDULING PREHEARING CONFERENCE (May 6, 2003) at 3.
3. On April 20, 2004, an ORDER AMENDING RULINGS ON MOTIONS FOR RULING ON LEGAL ISSUES (April 20, 2004) was issued in Case 900, and is adopted and incorporated in its entirety as if set forth fully herein.
4. On May 27, 2004, the consolidation of claims and cases in Case 900 was reversed; the law of the case in each case is set out in the ORDER AMENDING RULINGS ON MOTIONS FOR RULING ON LEGAL ISSUES (referenced in Finding 3, above). *See* ORDER VACATING ORDER TO CONSOLIDATE (May 27, 2004).
5. The Office of Administrative Hearings conducted contested case proceedings and ultimately issued a PROPOSED ORDER (Proposed Order) for Claim 49 on May 8, 2007.
6. No exceptions were filed to the Proposed Order.

7. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
  - a. The “History of the Case” is adopted in its entirety.
  - b. The “Evidentiary Rulings” is adopted in its entirety.
  - c. The “Issue” is adopted in its entirety.
  - d. The “Findings of Fact” is adopted with modifications, as set forth in Section A.8, below.
  - e. The “Conclusion of Law” is adopted in its entirety.
  - f. The “Opinion” is adopted with modifications, as set forth in Section A.9, below.
  - g. The “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 49. Except as identified in Section A.10, below, the outcome of the Order is without modification; it is presented in a format standardized by OWRD.

8. **Findings of Fact.**

- a. The first sentence in Proposed Order Finding of Fact #4 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text):

4. The property in question is within the former Klamath ~~Adjudication~~ Reservation. (OWRD Ex. 1 at 199.)

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

- b. The Proposed Order Finding of Fact #6 is modified as follows (additions are shown in “underline” text, deletions are shown in “~~striketrough~~” text):

6. There is no evidence in the record of any forfeiture proceedings for non-use of the water subject to the water right Certificate 2807 that was issued in 1920. Certain lands encompassed under Claim 49, being those located within the NE¼ SE¼, Section 22, NW¼ SW¼ and SW¼ SW¼, Section 23, T 33 S, R 7.5 E, W.M., have been continuously authorized for irrigation from Fort Creek under Permit S-4158 / Certificate 2807 since 1919 (OWRD Ex. 1 at 4, 161, 162), and have continued to be irrigated as claimed. The property in question has been irrigated continuously since at least 1957. (Direct Testimony of Ambrose McAuliffe at 2.)

**Reason 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. In addition, the ALJ’s statement that the property in question has been irrigated continuously since at least 1957 was stricken because it is not supported by a preponderance of the evidence on the record. The record instead demonstrates that irrigation had continued since 1919.

9. **Opinion.** The Proposed Order's "Opinion" section is modified as described herein.

OWRD has removed the ALJ's discussions regarding the elements of a *Walton* claim. The deleted paragraphs are noted below as "\*\*\*\*\*". In their place, OWRD incorporates into the Opinion section the GENERAL CONCLUSIONS OF LAW CONCERNING WALTON CLAIMS.

The remaining portions of the Opinion section of ALJ's Proposed Order have been labeled "Application of Walton Elements to the Modified Proposed Order Findings of Fact." Additions are shown in "underline" text, deletions are shown in "~~striketrough~~" text.

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

The burden of proof to establish a claim is on the Claimants. 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.

\*\*\*\*\*

The property in question was part of the Klamath Indian Reservation and allotted to an Indian, Francis Kirk, before 1917. By 1920, the property, though still allotted to Francis Kirk, was the subject of a Water Right Certificate 2807 in the name of Walter Dixon, based upon completion of the irrigation ditches that are still shown on the map of the property. This certificate included a description of the property remaining in this claim as part of the place of use. After Francis Kirk received his patent to the property, in 1929, he transferred it to the Mallories in 1930, who were non-Indians. ~~Although there is no direct evidence that the property was continuously irrigated from 1930 and 1957,~~ These lands have been continuously authorized for irrigation from Fort Creek under Certificate 2807 since 1920. Furthermore, no forfeiture proceedings were brought against the certificated water right during this period, suggesting that water was put to beneficial use. ~~From 1957 to the present,~~ The percipient testimony of witnesses in these proceedings and evidence on the record supports the conclusion that the property has ~~been continuously~~ continued to be irrigated, and is irrigated at the

present day. The elements necessary for a *Walton* claim for the 30.8 acres have been established.

Based on the evidence presented, it is recommended that the Adjudicator allow the claim on the terms specified in the stipulation between Claimant and the United States.

**Reasons for Modifications:** To provide consistency with the above Modified Proposed Order Finding of Fact; to provide clarity of evidence on the record; to further substantiate approval of the claim; to apply the appropriate legal basis/bases to the proposed order's modified findings of fact.

10. **Order.** Within the section titled "Order" of the Proposed Order, the following items are modified as follows (additions are shown in "underline" text, deletions are shown in "~~strikethrough~~" text):

- a. Point of Diversion: NE $\frac{1}{4}$  SW $\frac{1}{4}$  Section ~~26~~ 23, Township 33 South, Range 7.5 East, W.M.

**Reason for Modification:** To correct a scrivener's error. The point of diversion was incorrectly listed in the Proposed Order as being within Section 26; the point of diversion is located within Section 23. (OWRD Ex. 1 at 96, 125, 126; Kenneth Tuttle Direct, Ex. B.)

- b. Period of Use: April 1 to October 1 (irrigation with incidental livestock watering); ~~year-round~~

**Reason for Modification:** To provide consistency with the season of use specified in the STIPULATION BETWEEN THE CLAIMANTS AND UNITED STATES TO RESOLVE UNITED STATES' CONTEST 3794 (June 21, 2006). In addition, livestock watering is incidental to irrigation, and as such the season of use is coincidental to the irrigation season.

## B. DETERMINATION

1. The Proposed Order is adopted and incorporated, with modifications, into this Partial Order of Determination as follows:
- The "History of the Case" is adopted in its entirety.
  - The "Evidentiary Rulings" is adopted in its entirety.
  - The "Issue" is adopted in its entirety.
  - The "Findings of Fact" is adopted with modifications, as set forth in Section A.8, above.
  - The "Conclusion of Law" is adopted in its entirety.
  - The "Opinion" is adopted with modifications, as set forth in Section A.9, above.
  - The "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 49. Except as

identified in Section A.10, above, the outcome of the Order is without modification; it is presented in a format standardized by OWRD.

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. Based on the file and record herein, IT IS ORDERED that Claim 49 is approved as set forth in the following Water Right Claim Description.

[Beginning of Water Right Claim Description]

**CLAIM NO. 49**

**CLAIM MAP REFERENCE:**

MAP FROM KENNETH L. TUTTLE DIRECT TESTIMONY, EX. B. PAGE 1

**CLAIMANT:** KENNETH L. TUTTLE  
KAREN TUTTLE  
1696 COVE POINT RD  
KLAMATH FALLS, OR 97601

**SOURCE OF WATER:** FORT CREEK, tributary to the WOOD RIVER

**PURPOSE OR USE:**

IRRIGATION OF 30.8 ACRES INCLUDING INCIDENTAL LIVESTOCK WATERING OF UP TO 759 HEAD

**RATE OF USE:**

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

THE RATE OF USE FOR IRRIGATION MAY NOT EXCEED 1/50 OF ONE CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

**DUTY:**

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

**PERIOD OF ALLOWED USE:** APRIL 1 - OCTOBER 1

**DATE OF PRIORITY:** OCTOBER 14, 1864

**THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
33 S	7 E	WM	23	NE SW	672 FEET SOUTH AND 509 FEET WEST FROM C <sup>1</sup> / <sub>4</sub> CORNER, SECTION 23

**THE PLACE OF USE IS LOCATED AS FOLLOWS:**

IRRIGATION WITH INCIDENTAL LIVESTOCK WATERING					
Twp	Rng	Mer	Sec	Q-Q	Acres
33 S	7.5 E	WM	22	NE SE	10.0
33 S	7.5 E	WM	23	NW SW	12.5
33 S	7.5 E	WM	23	SW SW <sup>1</sup>	8.3

<sup>1</sup> The authorized place of use within the SW<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> lies entirely to the west of Highway 62

[End of Water Right Claim Description]

Dated at Salem, Oregon on March 7, 2013

  
\_\_\_\_\_  
Dwight French, Adjudicator  
Klamath Basin General Stream Adjudication