BEFORE THE HEARING OFFICER PANEL
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; 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

vs.

John M. Mosby; Marilyn Mosby;
Claimants/Contestants.

AMENDED[1] PROPOSED ORDER

Case No. 165

Claim: 18

Contests: 2818[2], 3099, 3436[3], 3720, and 4076[4]

HISTORY OF THE CASE

Claimants John M. and Marilyn Mosby filed their claim (claim 18) on December 7, 1990, making a claim for water as non-Indian successors to a Klamath Indian Allottee.

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[1] This order is amended pursuant to OAR 137-003-655(1) to add a housekeeping provision to the Order portion requiring claimant to prepare a more specific description of the place of use in the approved portion of the claim. Additions are in **bold.**

[2] WaterWatch of Oregon, Inc. voluntarily withdrew, without prejudice, Contest 2818 on February 20, 2003.

[3] Don Vincent voluntarily withdrew from Contest 3436 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3436 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3436 on January 15, 2004.

[4] The Klamath Tribes voluntarily withdrew Contest 4076 on August 12, 2004. *See* KLAMATH TRIBES' VOLUNTARY WITHDRAWAL OF CONTEST (August 12, 2004).

This *Walton* claim[5] is for 77.73 cubic feet per second (cfs) of water for irrigation of approximately 5,376.7 acres of land, and for livestock use, with a claimed period of use of April through October for irrigation, and year round for livestock. On October 4, 1999, Richard D. Bailey, the Adjudicator of the Klamath Basin Adjudication, issued a Preliminary Evaluation for this claim preliminarily denying the claim. Various contests were filed, including Contest 2818 filed by WaterWatch,[6] Contest 3099 filed by Claimants, Contest 3436 filed by Klamath Project Water Users (KPWU),[7] Contest 3720 filed by the United States, and Contest 4076 filed by the Klamath Tribes.[8]

On August 4, 2004, the OAH issued a Notice of Hearing, setting the case for hearing for the purpose of taking cross-examination testimony for September 14, 2004, and specifying the issues to be considered at hearing.

On September 14, 2004, a hearing was conducted in Salem, Oregon before Maurice L. Russell, II, Administrative Law Judge, for the purpose of cross-examination of witnesses who had submitted written direct and rebuttal testimony prior to the hearing. This hearing was to determine the rights to the use of the water enumerated in the claim and contests listed above, and as to the relative rights of Claimant and contestants to the use of water as provided under ORS Chapter 539, including more particularly ORS 539.021 and OAR Chapter 690, Division 30. Attorney Ron Yockim appeared in person representing Claimant, John Mosby, who was present and testified. David Mosby and Steven Mosby were also present and testified for Claimant. Bruce Bernard appeared in person as attorney for Contestant the United States. Douglas Clements appeared in person and testified on the United States' behalf. Justin Wirth, Assistant Attorney General, appeared in person for the Oregon Water Resources Department (OWRD), and Andrew Hitchings appeared by telephone for Contestants Klamath Project Water Users. The record remained open for written argument.

On October 6, 2004, a Scheduling Order was issued, providing due-dates for submission of written argument. On February 11, 2005, Claimants filed their Closing Argument. On March 30, 2005, the United States filed a motion seeking an extension of time to file its brief in response. This motion was denied, but, upon renewal of the motion a short extension, until April 6, 2005 was allowed. On April 6, 2005 the United

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[5] 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 (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*).

[6] Withdrawn on February 20, 2003.

[7] KPWU is a group of separate water users and districts within the Klamath Basin who have filed joint contests in Adjudication proceedings. The group is composed of the following parties: 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.

[8] Withdrawn on August 12, 2004.

States filed its Posthearing Brief. Also on April 6, 2005, KPWU filed its Response to Claimants' closing brief. On April 29, 2005, OWRD filed its Reply Brief. Also on April 29, 2005, Claimants filed their Reply Brief. The record closed on April 29, 2005.

EVIDENTIARY RULINGS

OWRD Exhibit 1 (hereafter "Ex. 20002") including the Affidavit and Testimony of Teri Hranac was offered and admitted into evidence.

Exhibits 50001 through 50151, were offered by Claimant prior to hearing. Exhibit 50093 was inadvertently omitted from Claimant's filing. Claimant was directed to file the exhibit after the hearing, subject to the objection of the United States. This exhibit was subsequently filed and admitted without objection. The United States' objection to Exhibit 50094 was sustained as to pages 1 and 2, pursuant to stipulation of the parties, and overruled as to pages 3 and 4. The United States' objections to Exhibits 50098, 50100, 50102, 50104, 50106, 50113, 50114, 50132 and 50142 were overruled, with the proviso that claimant supply a complete copy of Exhibit 50142, at the request of the United States, which was performed. Exhibits 50152 through 50155 were offered at hearing and admitted over the objections of the United States. Exhibits 50156 through 50171 were filed after the hearing was completed, based on instructions of the Administrative Law Judge. Except as noted, the rest of Exhibits 50001 through 50171 were admitted into the record without objection.

Also offered and admitted were the Affidavits of John Mosby, David Mosby and Steven Mosby, the Rebuttal Affidavit of John Mosby, and the Affidavit and Rebuttal Affidavits of Ron Yockim. The United States objected to these affidavits on relevance grounds, to the extent they discuss subirrigation and natural overflow as forming the basis for a *Walton* right. That objection was taken under advisement and will now be addressed. Although, as discussed below, I have concluded that subirrigation and natural overflow cannot be treated as beneficial use for purposes of establishing a *Walton* right, I nonetheless overrule the objection, as the evidence offered forms part of the context in which water use was developed on the property in question, and the record would be incomplete without it.

Exhibits 40001 through 40111, offered by the United States, were admitted without objection. After the hearing, on November 11, 2004, the United States offered four additional maps under an agreement with Claimants, which were marked Exhibits 50169 through 50173, and admitted into the record without objection. The new Exhibits 50169 and 50170 were clearer copies of maps which Claimant had already offered at hearing, and were admitted in replacement of those maps.

ISSUES

1. Was the land appurtenant to the claim transferred from Klamath Indian ownership to non-Indian ownership?

2. Was water for the claimed use developed and used by the last Indian owner of the property and/or diligently developed and used by the non-Indian owners of the property after transfer from the last Indian owner?

3. Are the *Walton* elements satisfied for this claim?

4. Is there sufficient title information to establish a *Walton* right for a portion of the Place of Use?

5. Is there sufficient information on the development or continuous use of water on this Place of Use to establish a *Walton* right?

FINDINGS OF FACT

1. Claim 18 involves property that was originally part of the Klamath Indian Reservation, and has subsequently been transferred to non-Indian ownership. It was originally 43 parcels, all but three of which were originally allotted to Klamath Indians as part of the termination of the Reservation. The remaining three parcels were transferred by the United States to the Klamath Indian Tribes after the Reservation was terminated, and then transferred by the Tribes. The total claim is for 5,376.7 acres.[9] (Ex. 20002 at 8.)

2. The Allotments are located on both sides of the Williamson River, west of the Klamath Marsh. (Exs. 40008, 50172, 50183.) Prior to development, part of the land was subject to periodic flooding, while other portions were subject to subirrigation from the Williamson River or its tributaries. (Exs. 40061, 40065, 40067; Affidavit of John Mosby at 2.)[10] Early in the 1900s, several studies were conducted as to the feasibility of developing drainage ditches to drain portions of the reservation that were inundated much of the year. (Ex. 50105.) By 1920, several irrigation systems were under construction or completed on the reservation, including the Sand Creek Unit, which was reported to irrigate 3,614 acres in the area. (Ex. 50105 at 10.) It was found, however, that the Sand Creek Unit was difficult and expensive to maintain, and the area irrigated from the Unit was reduced to 1,150 acres in 1939. (Ex. 20002 at 143.) In approximately 1955, the Sand Creek Ditch was developed by D.O. Williams. Laterals were extended from the Sand Creek Ditch in 1969. (Ex. 40001 at 96.)

ALLOTMENTS 133, 38, 39, 123, and 122:

3. These properties were part of the property served by the Sand Creek Unit, an irrigation system developed prior to 1964. Pursuant to the Act of August 20, 1964 (Public Law 88-

[9] As stated in the claim document. Claimant asserted in briefing that the actual irrigable acreage was 5,587. Since the claim controls, that will be the figure used in this case.

[10] The exhibits listed are appraisals of the area shortly after 1900 that refer to the lands as "wet" or "marsh land." Since no irrigation works were in place at the time, I infer from these descriptions that the property was receiving water by natural subirrigation.

456, 78 Stat 554) Allotments 39 and 123 were identified in a contract between the United States and the property owners for assessments based upon the number of total acres in each allotment, 160 acres each. The contract does not refer to either acreage recited as "irrigable" or "under cultivation." (Ex. 50112.)

4. The parties agree that Allotment 122, located in the NE 1/4 of Section 17, Township 31 S, Range 8 E, W.M. should be allowed as a *Walton* claim, with at least 110 acres irrigated. The parties agree that at least 134 acres have a developed water right for Allotment 39, located in the NE 1/4 of Section 7, Township 31 S, Range 8 E, W.M. and that at least 119 acres have a developed water right for Allotment 123, located in the NW 1/4 of Section 17, Township 31 S, Range 8 E, W.M., based upon the evidence of water actually beneficially applied to the allotments. The source for these properties is Sand Creek, a tributary of Williamson River. The diversion point is located in the NW 1/4 SE 1/4, section 16, Township 31 S, Range 7 E, W.M. (Exs. 20002 at 45, 40008, 40010; Claimant's Reply Brief at 25, United States' Posthearing Brief at 41.)

5. In 1915, Grover Neil acquired title to both Allotments 133 and 38. He was the first non-Indian owner. (Ex. 50085.) In 1914, prior to his obtaining title to this property, Grover Neil filed an application for a water right for irrigation of this land with the State of Oregon. (Ex. 40054.) Neil transferred the property to another non-Indian owner on August 23, 1915. (Ex. 20002 at 83.) There is no evidence that water was diverted to the property before this second transfer. In 1914, the Superintendent of the Klamath Indian Reservation sent a letter concerning the water right application of Grover Neil in connection with these Allotments. (Ex. 40054.)

ALLOTMENTS 168, 91, 94, 184 and 84:

6. In the letter discussed above in relation to Allotments 133 and 38, the Superintendent stated: "The Indians tell me that the waters of Sand Creek have been used by them for irrigation purposes and for livestock for more than 20 years." (Ex. 40054.) The distance between Allotments 133 and 38 and Allotments 84, 91, 94, 168, and 184 is more than one mile. (Ex. 40008.)

7. In 1920, a farming and grazing lease entered into respecting Allotment 94 made provision for the lessee to clean out a ditch. The lease does not recite whether this ditch is for irrigation or drainage. (Ex. 40068.) In 1951, a Final Proof Survey was filed for a state water right covering a portion of this block of allotments. This Survey shows an "old ditch" passing through Allotment 170, west of this block of allotments. It does not show any connection between that "old ditch" and Allotments 84, 91, 94, 168 and 184. (Ex. 20002 at 27.)

8. Allotment 91 was transferred to B.S. Grigsby, a non-Indian, on April 20, 1921. (Ex. 50012.) Allotment 94 was transferred to B.S. Grigsby, a non-Indian, on June 29, 1927. (Ex. 50020.) Allotment 184 was transferred to Emma R. Grigsby, a non-Indian on February 18, 1918. (Exs. 50010, 50011.) Allotment 84 was transferred to B.S. Grigsby,

a non-Indian, on March 9, 1914. (Ex. 50002.) Allotment 168 was transferred to D.O. Williams, a non-Indian, on December 20, 1937. (Ex. 40016 at 2.)

ALLOTMENTS 170, 92, 93, 16, 80, 81, 83, 82, 95, 97, 100, 101, 103, 104, 266, 559, 591, 1311, 1374, 1493:

9. There is no evidence of an artificial diversion of water to these allotments prior to the transfer of the property to the second non-Indian owner.

ALLOTMENT 532:

10. Ditches have been identified that could have supplied water to Allotment 532 in 1955, prior to its acquisition by Ernest Bubb, the first non-Indian owner, in 1957. However, there is no evidence that water was applied to this allotment at that time. (Ex. 40016 at 1.) The first evidence of application of water to Allotment 532 is in 1969. (Ex. 40001 at 96.)

ALLOTMENTS 105 and 267:

11. These allotments were acquired by the first non-Indian owner, McAuliffe, in 1926, and sold to D.O. Williams, also a non-Indian, in 1939. (Exs. 50035, 50041.) In 1926 McAuliffe entered into an agreement, as part of the purchase of Allotment 267, to pay irrigation assessments for the portion of the property that is irrigated, and described the property as "under a constructed ditch." (Ex. 40088.) At the same time, a Certificate of Appraisement was prepared, which shows that Allotment 267 was appraised as land for grazing, and did not show any part of the property under irrigation. (Ex. 40089.) There is no evidence of irrigation of Allotments 105 or 267 prior to 1961. (Testimony of Clements.)

ALLOTMENTS 86, 142, 143, 593, 1383, 1347½, and 1387:

12. Allotment 86 was transferred to H.R. Dunlap, a non-Indian on June 30, 1920. (Ex. 20063.) This parcel was transferred to B.S. Grigsby, also a non-Indian, on July 3, 1920. (Ex. 20064.)

13. Allotment 142 was transferred to B.S. Grigsby, a non-Indian, on August 27, 1918. (Ex. 50018.) This parcel was transferred to W.B. Stevens, also a non-Indian, on July 25, 1921. (Ex. 50021.)

14. Allotment 143 was transferred to B.S. Grigsby, a non-Indian, on March 24, 1927. (Ex. 50014.) This parcel was transferred to a second non-Indian no later than 1948. (Ex. 50043.)

15. Allotment 593 was transferred to B.S. Grigsby, a non-Indian, on July 14, 1915. (Ex. 50010.) This parcel was transferred to a second non-Indian owner no later than 1948. (Ex. 50043.)

16. There is no evidence for irrigation of Allotments 86, 142, 143, or 593 prior to 2000. (Ex. 40001 at 97.)

17. Allotment 1383 was transferred to B.S. Grigsby, a non-Indian, on March 24, 1927. (Ex. 50016.)

18. Allotment 1347½ was transferred out of Indian ownership no later than 1962. (Ex. 40005 at 36.)

19. Allotment 1387 was transferred out of Indian ownership in 1955. (Ex. 50031.) It was subsequently transferred to D.O. Williams, also a non-Indian, in 1957. (Ex. 50032.) Allotments 1347½ and 1387 were not irrigated until at least 1969, when the ditches were constructed connecting these parcels to the Sand Creek Ditch. (Ex. 40001 at 96.)

UNALLOTTED PARCELS A, B, C-1 and C-2:

120. Parcels A, B, C-1 and C-2 were transferred directly by the Klamath Tribes to others after the dissolution of the Klamath Indian Reservation. In 1959, Clarence and Beulah Clinton, members of the Klamath Tribe, acquired Parcel C-2, amounting to 55.5 acres, located in the E 1/2 NW 1/4 of Section 6, Township 32 S, Range 8 E, W.M.. (Exs. 50140, 40010.) It was subsequently acquired by D.O. Williams, a non-Indian, who included it within land planned to be under irrigation in a Final Proof Survey in 1964. (Ex. 20002 at 31.)

21. The record does not establish when parcels A, B and C-1 were transferred by the Tribes, but by 1964, parcel C-1 was held by D.O. Williams and was part of the property planned for irrigation. (Ex. 20002 at 31.)

RATE AND DUTY:

22. The Standard Rate for irrigation in the Klamath Basin is 1/40th cubic foot per second per irrigated acre. The Standard Duty in the Klamath Basin is 3.5 acre-feet for each acre irrigated. The Standard Season in the Klamath Basin is March 1 through October 1. (Ex. 20002 at 285.) None of the parties has contested these standards.

CONCLUSIONS OF LAW

1. The land appurtenant to the claim was transferred from Klamath Indian ownership to non-Indian ownership.

2. Water for part of the claimed use was developed and used by the last Indian owner of the property and/or was diligently developed and used by the non-Indian owners of the property after transfer from the last Indian owner.

3. The *Walton* elements are satisfied for a portion of this claim.

4. There is sufficient title information to establish a *Walton* right for a portion of the Place of Use.

5. There is sufficient information on the development or continuous use of water on part of this Place of Use to establish a *Walton* right.

OPINION

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 has raised several arguments which must be addressed before a consideration of the allowable scope of the appropriation can be determined. These have to do with the elements of a *Walton* claim, and whether, or under what conditions, a claimant in the Klamath Adjudication may raise alternative legal theories in support of a claim.

First, claimant asserts that the federal courts were incorrect in the *Walton* line of cases in limiting the appropriation of water to the first non-Indian appropriator. *Walton* rights are a creature of federal law. While the decision by the Ninth Circuit Court of Appeals limiting such rights may be open to question, and could someday be reversed, the decision is very clear in requiring this result,[11] is binding precedent at this point, and may not be revisited in these proceedings.

Second, claimant argues that a *Walton* right may be established through natural overflow of water, without any artificial diversion works. Claimant argues that the *Walton* line of cases has been misconstrued, and does not actually prevent appropriation of water from natural overflow. Claimant supports this argument by including a document said to be the Colville Confederate Tribes' analysis and submission to the District Court. That document was never offered in evidence, and will not be considered.

[11] See the concurring opinion of Judge Sneed, reported in *Colville Confederated Tribes v. Walton*, 757 F2d 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 F2d at 1324.

I am persuaded by the opinion of Administrative Law Judge Ken Betterton in Klamath Adjudication Case 157, which was noted in the arguments of the United States, that subirrigation and natural overflow are not contemplated as a basis for a *Walton* right under federal law. As Judge Betterton noted:

> It is clear to me after reading the District Court's Memorandum Decision in *Colville Confederated Tribes v. Walton*, No. 3421 (D E Wash, filed December 31, 1983, which *Walton III* [*Colville Confederated Tribes v. Walton,* 752 F2d 397 (9th Cir 1985)] reversed and remanded with a mandate in 1985, and the District Court's Order, *Colville Confederated Tribes v. Walton*, No. C-3421-RJM (D E Wash, filed June 25, 1987), based on the Ninth Circuit's mandate in *Walton III*, that sub-irrigation does not constitute a valid *Walton* water right. (*note omitted.*) (Klamath Adjudication Case 157, *Amended Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues,* December 10, 2004, at pages 3, 4.)

In *Walton III*, the Ninth Circuit concluded that 40 acres of land that had been subject to subirrigation, could not be included as land subject to a federally reserved water right. The court noted:

> Walton argues that each preceding owner has farmed the water-saturated or subirrigated portion of his allotments, near the granitic lip. This, he urges, demonstrates reasonable diligence for purposes of perfecting a reserved right to water for irrigating other areas of his land.
>
> We find his argument unpersuasive. The record indicates that this same acreage is subirrigated today. *See, e.g.,* Reporter's Transcript, May 7, 1982, p. 612 (testimony of Walton, Sr.). Thus, assuming arguendo that the subirrigated acreage may give rise to an entitlement, it is being satisfied by the present subirrigation. To award additional water on this basis would result in a double allocation.
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> *Colville Confederated Tribes v. Walton,* 752 F2d at 403.

Claimant urges that *Walton III* was based not on federal law, but on the fact that the land, being already saturated throughout the year, could not be benefited by additional irrigation. However, that argument is not supported by the decision. The court concluded "[A]ssuming arguendo that the subirrigated acreage may give rise to an entitlement, it is being satisfied by the present subirrigation." *Id.* This shows that the court was aware of the possibility that subirrigation could be used as the basis for a water appropriation under state law, but did not consider it appropriate as the basis for a reserved right under federal law. If Walton wanted to use the subirrigation as the basis for a water right, he needed to do so through the procedures provided under state law, and not by claiming a federally reserved right.

> Reserved rights are 'federal water rights' and 'are not dependent upon state law or state procedures.' *Cappaert v. United States*, 426 U S 128, 145 ***(1976); (citations omitted). It is appropriate to look to state law for guidance*** although the "volume and scope of particular reserved rights... [remain] federal questions." *Colorado River Water Conservation Dist. v. United States*, 424 U S 800, 813 (1976).

Walton III 752 F2d at 400

Based on the foregoing, I agree with Judge Betterton that natural overflow and sub-irrigation cannot form the basis for a *Walton* claim. The water must have been artificially diverted in order for it to be appropriated.

Claimant argues, in the alternative, for a hybrid water right, in which the right should be treated as a pre-1909 appropriation (thus allowing natural overflow and subirrigation to be used as the basis for the right) while carrying the 1864 priority date from the federal reservation. This is incorrect. As noted above, the court in *Walton III* treated appropriations under state law as entirely distinct from a water right based on a federal reservation.

Claimant also asserts that the claim should be considered, in the alternative, as a "pre-1909" case, thereby allowing natural overflow to form the basis for the right. OWRD, however, has argued that claimant has consistently asserted that this was a *Walton* claim, and cannot at this juncture convert it into a pre-1909 claim.

A change of legal theory after close of the record is not an improper attempt to amend the claim, as long as such a change does not increase the incidents of a water right, such as rate, duty, priority date or place of use. However, claimant did not assert this new legal theory until April 2005, seven months after the hearing. ORS 539.110 provides: "The evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest." In this case the Notice of Hearing listed the "subjects enumerated in the notice of contest" as issues for consideration in the case. All were framed in terms of a *Walton* right, and cannot be read to allow consideration of the claimed water right as a pre-1909 right.

The elements of the two theories are very different. In a *Walton* claim, as this case has been described up to now, the claimant must show:

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.

In a pre-1909 claim, by contrast, the following elements must be shown to have been present on February 24, 1909:

1. An intent to apply the water to some beneficial use existing at the time or contemplated in the future;

2. A diversion from the natural channel by means of a ditch, channel or other structure; and

3. The application of the water within a reasonable time to some useful beneficial purpose. *In re Water Rights of Deschutes River*, 134 Or 623 (1930).

4. Where the claim is based on natural overflow, the appropriation may be established by evidence that the "proprietor of the land accepts the gift made by nature and garners the produce of the irrigation by harvesting or utilizing the crops grown on the land***." *In re Silvies River* 115 Or 27, 66 (1925).

Based on the differences in the facts required to be proven in order to establish a case under these two theories, it would be mere coincidence if the evidence offered by a party under one of these theories would also address the issues presented by the other theory.

Thus, claimant deprived the other participants in this case of the opportunity to present evidence addressed to this legal theory, or to cross examine claimant's witnesses based upon the theory now proposed. In such a circumstance, assertion of a new legal theory places the other parties at a disadvantage and cannot be countenanced. *Morrill v. Rountree,* 242 Or 320 (1965).

The water rights sought by claimant will stand or fall based upon the ability of claimant to satisfy the elements of a *Walton* claim. As discussed below, the various

allotments have very different histories. Those different histories control the outcome as to each parcel.

ALLOTMENTS 133, 38, 39, 123, and 122:

The parties agree that Allotment 122 should be allowed as a *Walton* claim, with 110 acres irrigated.

The United States concedes that Allotments 39 and 123 are subject to a *Walton* right, but asserts that the water right should be limited to 134 and 119 acres respectively, based upon the evidence of water actually beneficially applied to the allotments. Claimant asserts, to the contrary, that the water right should be for 160 acres in each case, because that was the amount identified in the Act of August 20, 1964 (P.L. 88-456, 78 Stat 554) as the acreage included within the Sand Creek Unit. Claimant argues that this identification constitutes a federal reservation of rights that overshadows any other law to the contrary. Claimant is mistaken. First, federal reservations of water right apply to property in control of the United States. No authority has been cited for the proposition that such rights appertain to property that was already in private hands when a federal law was enacted. Moreover, the contract asserted as an expression of intent to appropriate water for 160 acres is devoid of any such expression. While it measures the assessment of charges for construction and maintenance of the water system by a specified number of acres, it does not describe those acres as "irrigable" or "under cultivation." Without some such expression, the evidence for claimant's position does not reach a preponderance. Since it is claimant's burden to prove all the elements of a water right, and claimant has not done so as to 160 acres in each allotment, the water right should be limited to 134 acres for Allotment 39, and 119 acres for Allotment 123.

Claimant argues that Allotments 133 and 38 are the subject of federal reserved rights, because they were in Indian ownership until after the Sand Creek Unit was under study. However, claimant does not explain how the reservation of a federal water right for development of an irrigation project can be translated into an appropriation of water for application to a particular parcel of land. Claimant does not provide any authority for such a novel assertion. Claimant's water rights in Allotments 133 and 38 stand or fall based upon whether claimant has, as to them, satisfied the elements of a *Walton* right.

Claimant states that an application for a water right was filed in 1914 by Grover Neil, who acquired title to both Allotments 133 and 38 in 1915 and was the first non-Indian owner. Claimant argues that this shows that the elements of a *Walton* right were satisfied in 1914.[12] This is not correct. Unlike a pre-1909 water right, where intent is sufficient to commence the appropriation, so long as other factors are present, in a *Walton*

[12] Claimant (Claimant's Reply Brief, at 30) describes a letter from the Superintendent as expressing concerns as to whether Mr. Neil's filing for a water right would adversely affect the Indians' use of Sand Creek water, and contends that the United States may not argue that the water was not timely developed when the United States objected to the water right application. The letter is not an objection to the application, does not "express concerns" or even mention adverse effects of the application on the Indians. It merely reports the application, and that some Indians had reportedly used water from Sand Creek for 20 years. (Ex. 40054.)

right water must be actually applied. There is no evidence that water was actually applied to the property during Grover Neil's tenure of ownership. This is especially so when the property was conveyed to a second non-Indian owner on August 23, 1915. Under the circumstances, the elements of a *Walton* right are not satisfied as to Allotments 133 or 38.

ALLOTMENTS 168, 91, 94, 184 and 84:

Claimant argues that Allotments 168, 91, 94, 184 and 84 were irrigated out of Sand Creek before the allotments passed out of Indian ownership. This argument is based on the conclusion that a ditch listed in a farming and grazing lease in 1920 is the same as an "old ditch" shown on a Final Proof Survey in 1951. Claimant asserts that this ditch was used for irrigation for some time before 1920, as evidenced by the description of the Superintendent in the letter of 1914 about the water right application of Neil, discussed in connection with Allotments 133 and 38, above, in which the Superintendent notes, "The Indians tell me that the waters of Sand Creek have been used by them for irrigation purposes and for livestock for more than 20 years." Thus, Claimant asserts, the "old ditch" must have been used prior to 1900 by "the Indians" who discussed irrigation with the Superintendent in 1914.

So much cannot be drawn from the evidence, particularly when the allotments to which the Superintendent referred in his letter were more than a mile away from any of the allotments in this group. Moreover, there is no evidence that the ditch described in the farming and grazing lease is actually the ditch shown in the Final Proof Survey. It cannot be established when the "old ditch" in the Final Proof Survey was constructed, except to say it was constructed at some time prior to 1951. The evidence also does not show what land was irrigated out of this ditch. The most that Claimant can provide is the speculation that, given the slope and contours of the ground, water from that ditch could have irrigated the parcels in question. Since Allotments 91, 94, 184 and 84 passed out of Indian ownership at the latest in 1927, it has not been shown that the property was irrigated prior to transfer from Indian ownership. In addition, the only evidence in the record shows a ditch serving the property in 1951. The actual date of development of that ditch is unknown. The most that can be said, then, is that the ditch was developed at some time within the 24 years after the property passed out of Indian ownership. This is not sufficient to establish diligent development by the first non-Indian owner. Allotment 168 was transferred to the first non-Indian owner in 1937, but the "old ditch" did not pass through Allotment 168. According to the Final Proof Survey, it passed through Allotment 170, to the west. It is therefore, again, speculative whether water from this ditch ever was applied to Allotment 168.

ALLOTMENTS 170, 92, 93, 16, 80, 81, 83, 82, 95, 97, 100, 101, 103, 104, 266, 559, 591, 1311, 1374, 1493:

Claimant's entire argument for a water right as to these allotments depends on natural overflow as the basis for a *Walton* right. Since, as discussed above, a *Walton*

right requires a diversion of water, and may not be based upon natural irrigation, a water right cannot be allowed for these allotments.

ALLOTMENT 532:

Claimant argues that the ditches providing water to Allotment 532 were in place in 1955, prior to its acquisition by the first non-Indian owner, Earnest Bubb, in 1957. However, the existence of artificial diversion works that could have served a parcel is not sufficient evidence of application of water to the ground. In order to make out a *Walton* right, Claimant must show not only that water was applied to the property before it transferred, but how much water and to what portion of the property it was applied. Claimant does not controvert the evidence presented by Clements that "no irrigation is evident until 1969-12 years after acquisition by the first non-Indian owner." Because a *Walton* claimant must show diligent development of irrigation by the first non-Indian owner, and such a delay does not establish the necessary diligence, a *Walton* right cannot be allowed for this allotment.

ALLOTMENTS 105 AND 267:

These allotments were acquired by the first non-Indian owner, McAuliffe, in 1926, and sold to D.O. Williams in 1939. Claimant asserts that Clements testified that a ditch was visible in aerial photos taken in 1952, that Clements testified that he could see irrigation water coming from this ditch, and that since there was a reference to a ditch in a Certificate of Appraisement from 1926 for Allotment 267, that Clements' testimony shows that Allotments 105 and 267 were being irrigated in 1926, soon after transfer to the first non-Indian owner. This mischaracterizes Clements' testimony. He testified at hearing that he could see a feature on several maps, including the map dated 1952, and that at the southern end of the feature, on a map from 1961 he could see signs of irrigation which, in his opinion, came from "the ditch at the South end of that parcel." He also, however, testified that he did not know if the feature noted "was a water structure or not." Clearly, then, Clements was not referring to that feature when he mentioned a "ditch at the south end of the parcel." Indeed, although the printed language of the Certificate of Appraisement refers to property as being "now under constructed ditch," the actual space for acreage under irrigation was left blank, and the property appraised as grazing land.

Additionally, the reference from the Certificate of Appraisement to Allotment 267 as being "now under constructed ditch" clearly does not refer to the feature noted on the aerial photograph, since that feature does not cross Allotment 267 at any point. It would therefore be unlikely to be the "ditch" referred to in the Certificate of Appraisement. If the feature discussed above is not the ditch, as is probably the case, there is no evidence showing where the ditch, if any, referred to in the Certificate of Appraisement was

located. Thus, the evidence does not establish the existence of a ditch serving even 267. There is even less evidence for a ditch that could have served Allotment 105.

The evidence is not sufficient to show artificial diversion of water in a specified amount to benefit specified property prior to the transfer of the property to the second non-Indian owner in 1939. Consequently, a *Walton* right has not been established.

ALLOTMENTS 86, 142, 143, 593, 1347½, 1383, 1387:

Claimant's brief did not discuss these allotments. Allotments 1347½ and 1387 could not have been irrigated until 1969, when ditches were extended to these properties from the Sand Creek Ditch. Allotment 1387 was transferred out of Indian ownership in 1955, and transferred to D.O. Williams in 1957. The evidence does not show, therefore, that it was irrigated before the subsequent non-Indian owner. The evidence is unclear as to when Allotment 1347½ was transferred. Therefore, because it is claimant's burden to establish all the elements of a *Walton* right, this lack of evidence defeats the claim as to this parcel.

There is no evidence showing that Allotments 86, 142, 143, 593, or 1383 were irrigated prior to 2000. All of these parcels had been transferred to the second non-Indian owner by 1948. No *Walton* right can be found as to these parcels.

Unallotted Parcels, A, B, C-1 and C-2:

These properties were transferred directly by the Klamath Tribes without a prior allotment. All parties agree that although, strictly speaking, they are not *Walton* claims as they did not come through the Allotment process, they are subject to a similar analysis. Although the United States asserted that there was no evidence as to when they had transferred from Indian ownership, Exhibit 50140 shows that a portion of the property was transferred to Clarence and Beulah Clinton, who were members of the Klamath Tribe, in 1959. The legal description does not, however, match the description for any of the parcels noted except Parcel C-2. That property apparently transferred to D.O. Williams prior to 1964, since it was included in a Final Proof Survey filed by Williams in that year. The actual date of transfer out of Indian ownership is unknown. However, there is no evidence of an intervening owner between the Clintons and Williams. The property was developed for irrigation by Williams, a non-Indian owner, so soon after it was originally sold by the Klamath Tribe, that it should be considered to have been diligently developed by either the Indian owners, or the first non-Indian owner. Consequently, the acreage in Parcel C-2 was under irrigation shortly after it was transferred out of Tribal ownership, and should be allowed as a water right. Parcel C-1 was also included in that Final Proof Survey, but the description of the property transferred to the Clintons does not include that parcel, so it cannot be determined when it left Tribal ownership, or whether an intervening non-Indian owner may be in the chain of title. Parcels A and B were outside the Final Proof Survey, so there is no evidence that they have been irrigated.

A Tribal Right, analogous to a *Walton* right, should be allowed as to Parcel C-2. A water right subject to this adjudication has not been shown as to Parcels A, B and C-1.

ORDER

I propose that the Adjudicator issue the following order:

Claim 18 is allowed in part as follows:

Season of Use (all parcels): March 1 to October 31.
Purpose of Use (all parcels): Irrigation

Allotment 122,
Source: Sand Creek, a tributary of Williamson River,
Point of Diversion: NW 1/4 SE 1/4 Section 16, Township 31 S, Range 7 E, W.M.
Priority: October 14, 1864.
Place of Use: NE 1/4 of Section 17, Township 31 S, Range 8 E, W.M.,
Acres: 110 acres,
Rate: 2.75 cfs
Duty: 385 acre-feet

Allotment 123,
Source: Sand Creek, a tributary of Williamson River,
Point of Diversion: NW 1/4 SE 1/4 Section 16, Township 31 S, Range 7 E, W.M.
Priority: October 14, 1864
Place of Use: NW 1/4 of Section 17, Township 31 S, Range 8 E, W.M,
Acres: 119 acres
Rate: 2.98 cfs
Duty: 416.5 acre-feet

Allotment 39
Source: Sand Creek, a tributary of Williamson River,
Point of Diversion: NW 1/4 SE 1/4 Section 16, Township 31 S, Range 7 E, W.M.
Priority: October 14, 1864
Place of Use: NE 1/4 of Section 7, Township 31 S, Range 8 E, W.M.,
Acres: 134 acres
Rate: 3.35 cfs
Duty: 469 acre-feet

Parcel C-2

Source: Williamson River
Point of Diversion: SW 1/4 NW 1/4 of Section 33, Township 31 S, Range 8 E, W.M.
Priority October 14, 1864
Place of Use: E 1/2 NW 1/4 of Section 6, Township 32 S, Range 8 E, W.M.
Acres: 55.5 acres
Rate: 1.39 cfs
Duty: 194.25 acre-feet

Claimant shall prepare and submit to the Department more specific descriptions by quarter-quarter sections of the place of use in allotments 122, 123 and 39, consistent with this order.

The remaining portions of the claim should be denied.

Maurice L. Russell, II, Presiding Administrative Law Judge
Office of Administrative Hearings

Dated: June 2, 2006

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 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 Proposed Order.

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

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

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2006, I mailed a true copy of 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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