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WATER RESOURCES DEPT  
SALEM, OREGON

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; Klamath  
Irrigation District; Klamath Drainage District; Tulelake  
Irrigation District; Klamath Basin Improvement District;  
Ady District Improvement Company; Enterprise Irrigation  
District; Klamath Hills District Improvement Co.; 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; Dwight  
Mebane; Elmore Nicholson; William Nicholson; Mathis  
Family Trust; Daryl Kollman; Marta Kollman; Reyna  
Gruen; LMJ Cattle Company; Lauren Peter Owens; Reames  
Golf and Country Club, Van Brimmer Ditch Co., Plevna  
District Improvement Company, and Collins Products, LLC,

Contestants,

v.

Patrick J. Kenneally; Pauline Mary Kenneally; Christine  
Margaret Kenneally; Raymond J. Driscoll; Barbara A.  
Driscoll; Lawrence Hall; Ann Hall; Lloyd Powell; Rodney  
Murray; Mark Allen Tunno; Richard W. Graham; Lawrence  
Hall; Frank L. Goodson; Lilli Goodson,

Claimants,

And

Gary Grimes; Karen Breithaupt; Eileen Grimes; Lloyd  
Nicholson Trust; Dorothy Nicholson Trust; Roger  
Nicholson; Richard Nicholson; Cell Tech; Kenneth L.

**ORDER AMENDING RULINGS ON  
MOTIONS FOR RULING ON LEGAL  
ISSUES**

Case No. 900

Claim Nos. 37, 39, 41, 45, 46, 48 through 51, 53,  
57 through 64, 66, 67, 129, 131, 235, 242, 262,  
263, 264, 279, 684, 695, 696, 697, 708<sup>1</sup>

Contests 1712,<sup>2</sup> 1713, 1721, 1739, 1740, 1765,  
1766, 2042, 2067, 2068, 2069, 2737, 2746, 2747,  
2748, 2749, 2750,<sup>3</sup> 2751, 2752, 2753, 2754, 2755,  
2756, 2757<sup>4</sup>, 2758, 2782, 2793, 2797, 2825, 2829,  
2830, 2832, 2833, 2834, 2835, 2836, 2837, 2848,  
3075, 3100, 3101, 3102, 3103, 3104, 3108, 3110,  
3118, 3267, 3271, 3272, 3273, 3274, 3275, 3276,  
3281, 3446, 3447, 3448, 3449, 3450, 3451, 3452,  
3453, 3455, 3456, 3457, 3458, 3459, 3460, 3461,  
3462, 3463, 3464, 3504, 3505, 3507, 3508, 3510,  
3513, 3525, 3544, 3545, 3558, 3567, 3575, 3576,  
3738, 3770, 3772, 3786, 3790, 3791, 3793, 3794,  
3795, 3796, 3798, 3799, 3800, 3801, 3802, 3803,  
3804, 3805, 3806, 3811, 3812, 3815, 3816, 3819,  
4093, 4094, 4096, 4100, 4101, 4103, 4104, 4105,  
4106, 4108, 4111, 4112, 4113, 4114, 4115, 4116,  
4117, 4118, 4119, 4158, 4160, 4203, 4206, 4209,  
4240, 4244

<sup>1</sup> On November 28, 2000, Contestant Don Vincent informed the Adjudicator that he had sold his interest in property giving rise to his claims and this contest and was no longer a participant in this contested case. On June 24, 2002, Contestant Berlva Pritchard informed the Office of Administrative Hearings that she had sold her interest in property giving rise to her claims and contests and was no longer a participant in this contested case.

<sup>2</sup> By an Order dated May 20, 2003, WaterWatch of Oregon, Inc. was dismissed as a party contestant from all proceedings in the Klamath Basin Adjudication.

<sup>3</sup> Ambrose W. McAuliffe, Dwight Mebane, Elmore Nicholson, Richard Nicholson, and William Nicholson (McAuliffe *et al.*) withdrew Contest 2750 on February 20, 2003.

<sup>4</sup> McAuliffe *et al* withdrew Contest 2757 by Stipulation signed March 11, 2002.

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Buttle; Karen L. Tuttle; Kurt Gruen; James Root; Valerie Root; Jack Owens Ranches; Jeld-Wen, Inc.; Owens and Hawkins; Stephen S. Napier; Mary Anna Napier; Kurt C. Thomas; Melinda A. Thomas; Pierre A. Kern; River Springs Ranch Co.; Ambrose W. McAuliffe; Susan J. McAuliffe; Allan Klus; Irene Klus; Charlotte M. Mathis, Surviving Joint Trustee, Mathis Family Trust utu 8/11/87; Joy/Doris Effman; Hazel Monteith; Orin Kirk; Robert A. Stayer,

Claimants/Contestants.

**THIS PROCEEDING** under the provisions of ORS Ch. 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. Claim Nos. 37, 39, 41, 45, 46, 48 through 51, 53, 57 through 64, 66, 67, 129, 131, 235, 242, 262, 263, 264, 279, 684, 695 through 697, and 708 (Claims) in this contested case are claims for rights to water from the Wood River system or the Sprague River system, which may have been previously adjudicated under state law. The Adjudicator's October 4, 1999, Summary Preliminary Evaluations of the Claims recommended that each claim be denied, in whole or in part, on the basis that the claimed source had previously been adjudicated.

On February 28, 2003, the individuals and entities commonly referred to as the Klamath Project Water Users<sup>5</sup> (KPWU) filed a motion for an order consolidating the Claims and related contests for the limited purpose of determining whether the Claims are barred by ORS 539.200 and the doctrines of *res judicata* or collateral estoppel.<sup>6</sup> On April 29, 2003, that motion was granted and the administrative law judge (ALJ) ordered consolidation of those claims in Office of Administrative Hearings Case 900 "\* \* \*" for the sole purpose of determining whether claims for rights to water from the Wood River system or the Sprague River system, which have been previously adjudicated, bar the Claimants from participation in this adjudication."

Pursuant to a Scheduling Order for this consolidated case, the participants filed motions, responses to those motions, and replies as follows:

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<sup>5</sup> Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improve-ment District; Ady District Improvement Company; Enterprise Irrigation District; Klamath Hills District Improvement Co.; 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; Dwight Mebane; Elmore Nicholson; William Nicholson; Mathis Family Trust; Daryl Kollman; Marta Kollman; Reyna Gruen; LMJ Cattle Company; Lauren Peter Owens; Reames Golf and Country Club, Van Brimmer Ditch Co., Plevna District Improvement Company, and Collins Products, LLC.

<sup>6</sup> Whether prior litigation bars a party from relitigating an issue or claim has traditionally been referred to by the terms "res judicata" or "collateral estoppel." In the case of *Drews v. EBI Companies*, 310 Or 134, 139 (1990), the Oregon Supreme Court abandoned those terms and substituted the terms "claim preclusion" and "issue preclusion," respectively. This was a change in nomenclature, not a change in the law. *Id.*

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**Motions**

Klamath Allottee<sup>7</sup> Water Users Association — Claimants for Claim Nos. 235, 262, 695 and 696, Joy and Doris Effman, Hazel Erickson and Orin Kirk, all of whom are members of the Klamath Allottee Water Users Association (KAWUA), filed a motion and memorandum asking for a ruling that the 1932 adjudication of the Wood River system does not bar those claims from being adjudicated in the current adjudication.

Nicholson. et al. (Nicholson) — Claimants/Contestants Lloyd Nicholson Trust, Dorothy Nicholson Trust, Roger Nicholson, Richard Nicholson, Ambrose W. McAuliffe and Susan J. McAuliffe (Nicholson) filed a motion and memorandum asking for a ruling that prior adjudications do not bar their *Walton*<sup>8</sup> claims. Nicholson filed its motion "to establish that the burden of producing evidence that the prior adjudications are a bar rests upon the contestants asserting that position." Nicholson asserted that they "do not have the initial burden of producing evidence that their claims are not barred," and reported that they would file responsive memoranda if necessary.

Napier et al. (Napier) — Claimants Stephen S. Napier and Mary Anna Napier (Claim 66); Allan Klus and Irene Klus (Claim 697); Pierre A. Kern (Claim 129); and, River Springs Ranch Co. (Claim 131); and, Lloyd Powell (Claim 131) (Napier) filed a motion asking for rulings that prior adjudication of the Wood River System and the Sprague River System does not bar those claims from being adjudicated, and that the claimants cannot legally be denied participation in the current Klamath Basin Adjudication "on the grounds stated by the Adjudicator in the 1999 Preliminary Evaluation of these claims based on the premise that the claims seek water from sources that were previously adjudicated by the State of Oregon."

United States and Klamath Tribes — The Klamath Tribes and the United States of America (United States) filed a Joint Motion for Ruling on Legal Issues asking for a determination on the issue of whether Claim Nos. 37, 39, 41, 45, 46, 48 through 51, 53, 57, 59 through 64, 66, 67, 129, 131, 242, 263, 279, 697 and 708 (Contested Claims), are barred by the preclusive effect of prior general stream adjudications, the Wood River Adjudication (In the Matter of the Determination of the Relative Rights to the Use of the Waters of Wood River, Crane Creek, Seven-mile Creek and Four-mile Creek, Tributaries of Agency Lake, Equity No. 3727 (Klamath County Circuit Court)), and the Sprague River Adjudication (In the Matter of the Determination of the Relative Rights to the Use of the Waters of Sprague River and its Tributaries (Outside of the Klamath Indian Reservation), a Tributary of Williamson River, Equity No. 2808 (Klamath County Circuit Court)).

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<sup>7</sup> The Indian General Allotment Act provided that land on reservations could be allotted for the exclusive use of individual Indians. The Indian holders of such lands were identified as "allottees." See 25 U.S.C. § 348.

<sup>8</sup> 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 (E.D. Wash. 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9<sup>th</sup> Cir. 1981), cert. denied, 454 U.S. 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9<sup>th</sup> Cir. 1985), cert. denied, 475 U.S. 1010 (1986) (*Walton III*).

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The Klamath Tribes and the United States contend that the common law doctrine of claim preclusion and applicable statutory law codifying this doctrine, when applied to the decrees, findings, and orders entered in the Wood River Adjudication and the Sprague River Adjudication, bars each of the Claims to the extent that: (a) the lands in the claimed place of use were in non-Indian ownership at the time of the relevant prior adjudication; and (b) Claimants or their predecessors-in-interest either participated in the relevant prior adjudication or were duly served with notice of the adjudication but failed to appear, and thereby defaulted.

Klamath Project Water Users (KPWU) — KPWU filed a motion for ruling on legal issues in which they asked for a determination that ORS 539.200 and the doctrine of *res judicata* bar any claims for rights to water in the Klamath River Adjudication that have been previously adjudicated under the Sprague River Adjudication and Decree, or the Wood River Adjudication and Decree. They also contended that the Ninth Circuit's decision in *Coleville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981) does not constitute an intervening change in the law that would render ORS 539.200, or the doctrine of *res judicata* inapplicable in this proceeding.

### Responses

Klamath Allottee Water Users Association — KAWUA filed a combined response to KPWU's motion and to the motion filed jointly by the United States and the Klamath Tribes. The response contended that in 1932, when the Wood River was adjudicated, the State of Oregon lacked jurisdiction to adjudicate federal reserved water rights.

Nicholson, et al. — Nicholson filed a combined response to the motions filed by the KPWU and the joint motion filed by the United States and the Klamath Tribes, renewing their motion for a ruling that prior water adjudications do not bar them from claiming *Walton* rights in their claims. The argument is based on an asserted lack of jurisdiction by the State of Oregon to adjudicate federal reserved water rights.

Napier et al. — Napier filed a response to motions filed by KPWU and KAWUA, and to the joint motion filed by the Klamath Tribes and the United States. They contended that at the time of the Wood and Sprague River adjudications, and until passage of the McClaren Act in 1952 (43 U.S.C. § 666), which waived sovereign immunity of the United States, the State of Oregon lacked jurisdiction to adjudicate federal reserved water rights on the Klamath Reservation.

Mathis Family Trust (Mathis) — Mathis filed a memorandum opposing KPWU's motion on the basis that OWRD and the Oregon courts lacked subject matter jurisdiction over federal reserved water rights, including rights reserved for the Klamath Reservation, at the time of the Wood River Adjudication.

Jeld-Wen, Inc. (Jeld-Wen) — Jeld-Wen filed its response to motions and memoranda filed by other participants, opposing the motion filed by KPWU and that jointly filed by the United States and the Klamath Tribes. Jeld-Wen asserted that the State of Oregon lacked subject matter jurisdiction to adjudicate the Claims at the time of the Wood River and Sprague River adjudications.

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Thomas Family Limited Partnership (Thomas) — Thomas filed its response to the joint motion filed by the Klamath Tribes and the United States, and to the motion filed by KPWU. The response asserted that the State of Oregon lacked subject matter jurisdiction and was powerless to adjudicate the Claims at the time of the Wood River and Sprague River adjudications. Thomas also asserted that both motions failed to demonstrate a lack of genuine issues of fact regarding the subject matter of the motions, and that it was not necessary to reach a decision on whether *Walton* is a change in the law.

James and Valerie Root (Root) — Root filed a response to the joint motion filed by the Klamath Tribes and the United States and to the motion filed by KPWU. Root asserted that the State of Oregon did not have subject matter jurisdiction over federal reserved water rights based on Treaty obligations at the time of the Wood River and Sprague River adjudications, so that Oregon could not have adjudicated the Claims at that time, and that neither ORS 539.200 nor doctrines of issue or claim preclusion preclude adjudicating the Claims. Root also contends that the ALJ need not reach a decision whether *Walton* is a change in the law and that neither motion demonstrates that no genuine issues of material fact relevant to resolution exist.

Grimes et al. (Grimes) — Claimants/contestants Grimes (Claim No. 37), Tuttle (Claim No. 49), Jack Owens Ranches (Claim No. 59), and Owens & Hawkins (Claim No. 64), filed a response opposing the Klamath Tribes and United States' joint motion and KPWU's motion.

United States and Klamath Tribes — The United States and the Klamath Tribes filed a Joint Response to All Motions for Ruling on Legal Issues.

KPWU — KPWU filed response to the motion filed jointly by the United States and Klamath Tribes, and to motions filed by other entities.

### Replies

Water Resources Department (OWRD) — OWRD filed a Reply Brief contending that ORS Ch. 539 binds any person or entity that could have been "lawfully embraced" in the Wood River or Sprague River Adjudications, and that because of sovereign immunity claims that would have required the United States or the Klamath Tribes to participate could not have been "lawfully embraced" by the prior adjudications.

Other Replies — Every party that had filed a motion filed a reply to one or more responses. Additionally, Jeld-Wen, Thomas, and Root filed replies reasserting their positions regarding the effect of ORS Ch. 539 and issues related to the preclusive effect of prior adjudications, and responded to arguments raised by other parties.

Motion for Reconsideration — On March 1, 2004, I issued an order entitled Rulings on Motions for Ruling on Legal Issues (Ruling). On March 19, 2004, the Klamath Project Water Users<sup>9</sup>

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<sup>9</sup> KPWU is comprised of Tulelake Irrigation District, Klamath Irrigation District, Klamath Drainage District, Klamath Basin Improvement District, Ady District Improvement Company, Enterprise Irrigation

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(KPWU) filed a Motion For Reconsideration, Or In The Alternative For Clarification, Of Rulings On Motions For Ruling On Legal Issues, noting reliance in the Ruling on the Ninth Circuit's decision in *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9<sup>th</sup> Cir. 1981), cert. denied, 454 U.S. 1092 (1981) (*Walton II*), and an apparent disregard of that court's subsequent ruling in *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (*Anderson*), in which the Ninth Circuit limited its earlier holding in *Walton II*. The Water Resources Department, the United States of America, and the Klamath Tribes supported the Motion. Jeld-Wen, Inc. opposed the motion, as did the Nicholson<sup>10</sup> and Napier Claimants.<sup>11</sup> The previous Ruling relied entirely on *Walton II*, for it's rational in reaching the conclusions that it did. That reliance was misplaced and resulted in a mistaken analysis. I withdrew the previous Ruling and allowed the Motion for Reconsideration. This amended ruling results after reconsideration.

**LEGAL STANDARD:** Motions and requests for legal rulings are governed by Oregon Administrative Rule (OAR) 137-003-0580, which establishes standards for evaluating the motion, and which states in part:

(1) Not less than 28 calendar days before the date set for hearing, the agency or a party may file a motion requesting a ruling in favor of the agency or party on any or all legal issues (including claims and defenses) in the contested case. The motion, accompanied by any affidavits or other supporting documents, shall be served on the agency and parties in the manner required by OAR 137-003-0520.

\* \* \*

(6) The hearing officer shall grant the motion for a legal ruling if:

The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The hearing officer shall consider all evidence in a manner most favorable to the non-moving party.

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District, 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, Modoc Lumber Co., Bradley S. Luscombe, Randy Walthall and Inter-County Title Co., Winema Hunting Lodge, Inc., Van Brimmer Ditch Co., Plevna District Improvement Company, and Collins Products, LLC.

<sup>10</sup> Claimants/Contestants Lloyd Nicholson Trust, Dorothy Nicholson Trust, Roger Nicholson, Richard Nicholson, Ambrose W. McAuliffe and Susan J. McAuliffe.

<sup>11</sup> Stephen S. Napier; Mary Anna Napier; Pierre A. Kern; River Springs Ranch Co.; Allan Klus; and, Irene Klus.

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**SCOPE OF RULING:** If the memoranda filed in this case are to be believed, there is considerable confusion regarding the scope of the rulings that may be obtained in this consolidated proceeding. As stated above, KPWU's motion sought an order consolidating the Claims and related contests "for the limited purpose of determining whether these claims are now barred by the doctrines of *res judicata* and/or collateral estoppel." I granted that motion on April 29, 2003, and ordered consolidation of those claims in Office of Administrative Hearings Case 900 "\* \* \*" for the sole purpose of determining whether claims for rights to water from the Wood River system or the Sprague River system, which have been previously adjudicated, bar the Claimants from participation in this adjudication."

To reduce confusion on the scope of the issues to be considered, I wrote:

Although the motion has not yet been filed, I expect to focus on a general determination of whether doctrines of issue and claim preclusion (previously known as collateral estoppel and *res judicata*) apply to these claims based on earlier adjudications. I do not expect to focus on facts specific to the various claims. This will allow us to move as expeditiously as possible without duplicating effort.

OAR 137-003-0580 states that "the agency or a party may file a motion requesting a ruling in favor of the agency or *party on any or all legal issues (including claims and defenses) \* \* \**" (Emphasis added.) Although the rule permits a party to file exhibits or affidavits with its motion, where general legal standards have not previously been defined by statute, rule-making or by the contested case process and a party asks for clarification of those standards, it is appropriate to proceed with as little claim-specific factual information as possible, as stated in the order and clarified in the accompanying letter.

Nonetheless, some parties provided detailed factual information regarding the applicability of various legal principles to their specific claims. This consolidated proceeding was not intended to result in factual determinations regarding specific cases. It was intended to allow a common legal issue to be presented in the most expeditious manner possible and to provide all affected parties an opportunity to be heard at the same time, thereby assuring the parties that similarly situated participants would have the same outcome on this crucial legal issue. This order will address only legal issues of general applicability that may be addressed without reference to specific claims. Once the applicable legal standard has been determined, this consolidated case will terminate, after which each of the claims will proceed individually. At that time, appropriate claim-specific motions may be filed in the individual cases to apply the legal standard established in this consolidated case.

**Background.** Despite the need to avoid claim-specific factual information, some background information is necessary for an informed decision regarding the possible impact of the earlier adjudications.

(1) The Wood River formed the western boundary of the Klamath Indian Reservation and the greater part of the lands appurtenant to these claims lie outside the former Reservation. The

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Sprague River is situated partly in Lake County and partly in Klamath County. It is a tributary of the Williamson River, which flows into the north end of Upper Klamath Lake.

(2) Many or all of the properties appurtenant to the claims in this consolidated case are within the boundaries of the former Klamath Reservation. The Adjudicator's Preliminary Evaluations for each of the claims denied the claim, in whole or in part, on the basis that the claimed source had been previously adjudicated under the Wood River Adjudication and Decree or the Sprague River Adjudication and Decree.

#### WOOD RIVER ADJUDICATION

(3) In 1927, in response to petitions filed with the State Engineer during the period 1926-1927, the State Engineer began the necessary investigations and surveys of the use of the Wood River, Crane Creek, Seven-Mile Creek and Four-Mile Creek, and all of their tributaries except Anna Creek, was commenced in 1927. (OWRD Exhibit 1, pages C-3-4, Wood River Findings, 1). The relative rights to the use of waters of Anna Creek had previously been determined in *In the Matter of the Determination of the Relative Rights to the Waters of Anna Creek, a Tributary of Wood River*, In Klamath County Oregon. (OWRD Exhibit 1, pages A-32 and A-37).

(4) On June 7 and June 14, 1928, notice of the Wood River Adjudication (WRA) was published in the Evening Herald, a newspaper of general circulation in Klamath County Oregon. The "Notice to Water Users" informed water users of the Wood River and its tributaries that they were required to appear and assert their claims in the adjudication or be declared to be in default and to have forfeited their claims. Specifically the notice stated:

\* \* \* you are hereby required to appear \* \* \* and submit proof of your claim \* \*  
\* and you are hereby further notified that if you fail to so appear and submit proof  
of your claim \* \* \* default will be entered against you, and you will be barred  
and estopped from subsequently asserting any right to the use of said waters, and  
will be held and deemed to have forfeited all right to the use of said waters  
theretofore claimed by you.

(Exhibit 1 to Affidavit of Walter R. Echo-Hawk).

(5) Statements and proofs of claims asserting rights in the Wood River water sources were received by the State Engineer on July 16 and 17, 1928, and from July 23 to August 21, 1928. (OWRD Exhibit 1, page C-5, Wood River Findings, 6).

(6) Numerous parties filed claims in the WRA, including a number of successors to Klamath Indian allottees claiming water rights on lands within the former boundaries of the Klamath Reservation. (Exhibit 2 to Echo-Hawk Affidavit, *particularly*, Statements and Proofs of Claim filed in the Wood River Adjudication by J. R. and Orville Elliott (Proof No. 18), Cary V. Loosley (Proof No. 29), D. W. and Amy L. Ryan (Proof Nos. 54 and 55) and Dan Savage (Proof No. 56).

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(7) Subsequently, rights to the Wood River water sources were determined. The Wood River Decree was entered on October 5, 1932. (OWRD Exhibit 1, pages C-45 to C-57, Wood River Findings, 28, setting out determination of relative rights of the claimants) (OWRD Exhibit 1, page C-61, Wood River Decree confirming the Wood River Findings, with modifications). The Wood River Supplemental Decree, which determined inchoate water rights recognized in the earlier Wood River Decree, was entered on January 10, 1949. (OWRD Exhibit 1, page C-67, Wood River Supplemental Findings, determining inchoate water rights); (OWRD Exhibit 1, page C-73, Wood River Supplemental Decree, confirming the Wood River Supplemental Findings). Together, the Wood River Decree and the Wood River Supplemental Decree decreed water rights for the irrigation of over 10,500 acres. (OWRD Exhibit 1, page C-1).

(8) The October 5, 1932 decree entered by the Klamath County Circuit Court states:

IT IS HEREBY CONSIDERED, ORDERED AND DECREED THAT all things done and had by said State Engineer in the premises as found and determined, are hereby adopted and approved and made the findings and order of determination of this Court as herein amended, modified and changed \* \* \* \*

(OWRD Exhibit 1, page C-62).

(9) The Wood River Findings, as modified by the Wood River Decree, together with the Wood River Supplemental Findings and Wood River Supplemental Decree, set out in tabular form the name of every appropriator found to have water rights in the WRA, and, for each right adjudicated, the priority date, number of acres, use to which the water was to be applied, name of ditch or other means of diversion, stream(s) from which the water was to be taken, and a description of each tract of land irrigated. The WRA fixed the irrigation season as the period from April 1 to October 1, and limited the duty of water to one cubic foot per second for each 50 acres of land irrigated up to July 20, and thereafter to one cubic foot per second for each 80 acres of land irrigated, with a total limitation of five acre feet per acre during the irrigation season. (OWRD Exhibit 1, page C-43, Wood River Findings, 23).

(10) Certain individuals and entities, although provided notice of the WRA by registered mail and by publication of notice, failed to appear in the adjudication. (OWRD Exhibit 1, pages C-6 to C-7, Wood River Findings, 7 listing parties who received notice but failed to appear).

(11) The Wood River Findings and the Wood River Supplemental Findings were confirmed by the Circuit Court of the State of Oregon for the County of Klamath on October 5, 1932 and January 10, 1949, respectively, and no appeal was taken. (OWRD Exhibit 1, page C-61, Wood River Decree); (OWRD Exhibit 1, page C-73, Wood River Supplemental Decree).

#### **SPRAGUE RIVER ADJUDICATION**

(12) The Sprague River Adjudication (SRA), to determine the relative rights to the use of the waters of the Sprague River and its tributaries outside of the Klamath Reservation ("Sprague River water sources"), was commenced in 1924.

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(13) On May 7 and May 14, 1925, notice of the SRA was published in the Evening Herald, a newspaper of general circulation in Klamath County Oregon. The "Notice to Water Users of the Sprague River" informed water users of the Sprague River and its tributaries outside the Klamath Reservation that they were required to appear and assert their claims in the adjudication be declared to be in default and to have forfeited their claims. Specifically the notice stated:

\* \* \* YOU ARE HEREBY REQUIRED TO APPEAR \* \* \* and submit proof of your claim \* \* \* and you are hereby further notified that if you fail to so appear and submit proof of your claim \* \* \* default will be entered against you and you will be barred and estopped from subsequently asserting any right to the use of said waters, and will be held and deemed to have forfeited all right to the use of said waters theretofore claimed by you.

(Exhibit 3 to Affidavit of Walter R. Echo-Hawk.)

Statements and proofs of claims asserting rights in the Sprague River water sources were received by the State Engineer on June 24, 1925, and from June 29 to July 28, 1925. Sprague River Decree, (OWRD Exhibit 1, page B-64).

(14) Numerous parties filed claims in the SRA. (OWRD Exhibit 1, pages B-64 to B-65, Sprague River Decree, listing parties who filed claims in the Sprague River Adjudication).

(15) Subsequently, rights to the Sprague River water sources were determined. The State Engineer's Findings of Fact and Order of Determination were entered on January 25, 1929. (OWRD Exhibit 1, page B-4, Sprague River Findings). The Sprague River Decree, which confirmed the Sprague River Findings, with modifications, was entered on February 5, 1930. (OWRD Exhibit 1, page B-60, Sprague River Decree). The Sprague River Decree decreed water rights for the irrigation of over 11,000 acres. (OWRD Exhibit 1, page B-1.)

(16) Paragraph 63 of the Modified Findings and Decree (dated February 5, 1930) states:

\* \* \* it is hereby ORDERED, ADJUDGED and DECREED, that the relative rights of the various claimants to the use of the waters of Sprague River and its Tributaries (outside of the Klamath Indian Reservation), a tributary of the Williamson River be, and the same are hereby adjudicated, determined and settled as set forth in the foregoing modified findings and decree.

(OWRD Exhibit 1, page B-123).

(17) The decree sets out in tabular form the name of every appropriator found to have water rights in the SRA, and, for each right adjudicated, the priority date, number of acres, use to which the water was to be applied, name of ditch or other means of diversion, stream(s) from which the water was to be taken, and a description of each tract of land irrigated. (OWRD Exhibit 1, pages B-106 to B-122, Sprague River Decree, 62). The decree fixed the irrigation season as the period from March 1 to October 1, and limited the duty of water to one-fortieth of a cubic foot per

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second per acre of land irrigated prior to June 15, and thereafter to one-eightieth of a cubic foot per second per acre, with a total limitation of three acre feet per acre during the irrigation season. (OWRD Exhibit 1, pages B-104 to B-105, Sprague River Decree, 57).

(18) Certain individuals and entities, although notified of SRA by registered mail and by publication of notice, failed to appear in the adjudication and were thus held to be in default. (See OWRD Exhibit 1, page B-65, Sprague River Decree, 7, listing parties who received notice but failed to appear).

(19) A portion of the Sprague River Decree was appealed, but the decree was affirmed by the Oregon Supreme Court in the case of *Campbell v. Walker*, 137 Or. 375 (1931).

**DISCUSSION.** As a general principle, a water rights adjudication is conclusive upon all those with appropriate notice of the proceedings<sup>12</sup> and their privies, as to all matters actually litigated, or that could have been litigated, whether they participated or not.

It is well settled that an issue once determined in a court of competent jurisdiction cannot again be litigated between the same parties. This suit is between the same parties, or their privies, and is upon the same claim or demand as that involved in the water adjudication proceedings and the decree there entered was upon the merits. That decree, therefore, is an absolute bar and concludes the parties and their privies as to any matter that was actually litigated and as to any other matter that might have been litigated and, hence, is conclusive upon all the parties to this suit as to all matters arising prior to the entry of the decree.

*Adams v. Perry*, 168 Or 132, 145 (1941).

This consolidated case involves two categories of claims that may be precluded by the prior adjudications. First are claims for water rights on lands within areas previously adjudicated in the Wood River or Sprague River Adjudications, which rights have already been actually asserted and determined in the prior adjudications. The second category of potentially precluded claims consists of those claims which, by law, were required to be asserted in the Wood River or Sprague River Adjudications, but which were not asserted. The discussion below applies to both categories of claims.

**Equitable Doctrines of Preclusion.** Virtually all the motions, responses and replies filed in this matter addressed the applicability of equitable doctrines of claim and issue preclusion,<sup>13</sup> which are based on policies aimed at achieving finality in disputes and preventing parties from splitting disputes into separate controversies. *Drews v. EBI Insurance Companies*, 310 Or 134, 141 (1990).

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<sup>12</sup> A prior adjudication could not, however, bar anyone whose predecessors-in-interest were not served with adequate notice of the prior adjudication. *Alexander v. Central Oregon Irrigation District*, 19 Or App 452, 469 (1974), citing *Staub v. Jensen*, 180 Or 682 (1947).

<sup>13</sup> OWRD took no position on applicability of these equitable doctrines, relying on ORS 539.200 and 539.210.

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Sections of the Water Code, ORS 539.200 and 539.210<sup>14</sup> set out below, are based on the same policies of inseparability and achieving finality.

The whole purpose and intent of the water law was to provide a plain and effective method by which any and all persons having or claiming a right to the use of the waters of a particular stream were to be brought into and before the circuit court, and after investigation of the respective rights of each and every claimant the court should then and there render a decree which would forever settle and define not only the rights of each claimant, but settle and define the water rights of all claimants as between each other \* \* \* \*

*In re Chewaucan River*, 89 Or 659, 689 (1918); *see also, In re Silvies River*, 199 Fed. 495, 503 (1912), in which the court described the adjudication process as:

\* \* \* a case where divers and sundry parties are entitled to use so much of the waters of a stream as they have put to beneficial use and the purpose is to ascertain their respective rights by a simple, economical, effective, and comprehensive proceeding, and is not a separable controversy between different claimants.

Equitable doctrines of issue and claim preclusion are generally applicable to administrative hearings. *Drews* at 142. The Oregon Supreme Court has even suggested that the preclusive effect of equitable doctrines of preclusion may be independent of the preclusive effect of the statutes.<sup>15</sup> Some of the cases, in fact, omit entirely any discussion of the relevant statutes and rely entirely on an examination of equitable principles. *See, e.g., Tudor v. Jaca*, 178 Or 126 (1945). Those cases may not be relied upon, however, to establish a principle that the statutes may be ignored in favor of equitable doctrines of preclusion.

**ORS 539.200 and 539.210.** The legislature has directed that questions regarding whether claims on waters that may have been the subject of prior adjudications may proceed must be addressed under the provisions of ORS 539.200 and ORS 539.210, which state:

The determinations of the Water Resources Director, as confirmed or modified as provided by this chapter [ORS chapter 539] in proceedings, shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or the body of water lawfully embraced in the determination.

ORS 539.200.

<sup>14</sup> ORS 539.200 and 539.210 were enacted as part of Oregon's comprehensive water code in 1909. The substance of these statutes has not changed since 1909, with only minor changes made to reflect changes in nomenclature concerning the bodies that were predecessor to OWRD (*e.g., State Engineer, Board of Control, etc.*). *See* Lord's Oregon Laws §§ 6655 and 6656 (1909).

<sup>15</sup> "Thus, *by force of the statute and also under well settled principles of law, which are independent of the statute*, all controversies as to all matters which existed or occurred before the entry of the decree of March 18, 1918, and which were litigated or could have been litigated in the adjudication proceedings, are settled and determined by that decree and are no longer open to question by any of the parties to that litigation or their privies." *Adams v. Perry*, 168 Or 132, 145 (1941). (Emphasis added.)

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Whenever proceedings are instituted for determination of rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law. Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired \* \* \* and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant \* \* \* \*

ORS 539.210.

When read together, these statutes show a clear legislative determination that adjudication of water rights is conclusive with respect to all claimants "lawfully embraced" in the adjudication, and that any claimant who fails to appear in those proceedings is barred from subsequently asserting any claim to a water right. Where the legislature has acted, the appropriate source for determining the preclusive effect of prior adjudications is the statute. Although there may be circumstances in which equitable principles may properly be invoked in the first instance,<sup>16</sup> given the specificity of the standard set out in statute, it is the better rule to examine the effect of the statute first, and only if the statute does not apply to the facts in a particular case, then to consider applicability of court-created doctrines, including equitable doctrines of preclusion. The cases in this consolidated case do not present factual situations to which the statute does not apply. Each case, as outlined in the memoranda filed by the participants, falls squarely within parameters embraced by the legislature's statutory directive of the circumstances of in which preclusion might apply.

Change in the law. Some participants<sup>17</sup> suggest that there have been major changes in the law altering the legal landscape since the earlier adjudications. The cases cited by these claimants generally deal exclusively with equitable doctrines, not with the statutes that control analysis of these cases. The statutes set out no exclusion, nor has an Oregon court suggested that the preclusive effect of a prior adjudication is in any way lessened if the water right was lawfully embraced in the earlier adjudication, despite changes in the law. Claimants cite *Provo Water User's Ass'n v. Morgon*, 857 P2d 927 (1993), to support their position. That Utah case involved changes in the law that resulted in new legal rights and obligations being created after the adjudication in question. Rights and obligations as they existed at the time of the earlier adjudications must be examined to determine whether the adjudication had preclusive effect.

Consequently, the only question is whether the predecessors-in-interest of claimants now making claims in the Klamath Adjudication were "lawfully embraced" in prior adjudications of the Wood and Sprague Rivers. See *In re Willow Creek*, 74 Or. 592, 618 (1915); *Staub v. Jensen*, 180 Or. 682, 688-689 (1947). In order to be lawfully embraced within the determination, the parties must have been subject to the State's civil jurisdiction.

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<sup>16</sup> See, e.g. *Abel v. Mack*, 131 Or. 586 (1930) (invoking *res judicata* to bar a claim of forfeiture); and *Adams v. Perry*, *supra*, (holding that the previous adjudication is not subject to collateral attack) at 144.

<sup>17</sup> E.g., Mathis Family Trust and Jeld-Wen, Inc.

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**Sovereign Immunity.** The various motions, responses and replies address a common legal issue, whether prior adjudications on the Wood River and on the Sprague River bar the affected claimants from pursuing their claims in this adjudication. That discussion begins with questions about Oregon's civil jurisdiction over the United States and the Klamath Tribes, from whom individual allottee and *Walton* water right claims derive.

Before enactment of the McCarran Amendment, 43 USC § 666,<sup>18</sup> sovereign immunity barred involuntary joinder of the United States as a party in state water rights adjudications.<sup>19</sup> *See United States v. District Court for Eagle County*, 401 U.S. 520 (1971). Although the western states, including Oregon, adopted orderly procedures for the allocation and determination of water rights under a system of prior appropriation, the extent and priority of federal water rights, including federal reserved rights, were not subject to adjudication or determination in state courts. By virtue of their federal origin, Indian reserved water rights were protected from state courts by the sovereign immunity of the United States, absent an explicit federal grant of authority to the states. *Walton II; Federal Power Commission v. Oregon* 349 U.S. 435 (1955). The parties, therefore, generally agree that before the 1952 enactment of the McCarran Amendment, which waived sovereign immunity of the United States from suit in state courts in general stream adjudications, Oregon could not have involuntarily required the United States, the Klamath Tribes, or Klamath Allottees holding trust patents to participate in the Wood or Sprague River Adjudications.<sup>20</sup>

The United States and the Klamath Tribes – an Overview. "In the late 19th Century, the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually. The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation

<sup>18</sup> The McCarran Amendment states in part:

(a) Consent is given to join the United States as a defendant in any suit

(1) for the adjudication of rights to the use of water of a river system or other source, or

(2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall

(1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and

(2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

\* \* \* \* \*

<sup>19</sup> "It is elemental, of course, that the state or sovereign cannot be sued in its own courts without its consent \* \* \* ." *Beers v. State of Arkansas*, 20 How. 527, 529.

<sup>20</sup> *See, e.g., Mannatt v. United States*, 951 F.Supp. 172, 176 (E.D. Cal. 1996) ("Prior to the McCarran Amendment, the United States had not waived its immunity in regard to general adjudications of water rights, and therefore was not bound by decrees issued pursuant to such adjudications."). *See also United States v. Nice*, 241 U.S. 591, 597 (1916) (allottees are not "'subject to the laws, both civil and criminal, of the State or Territory' of their residence" until completion of the allotments and the patenting of the lands).

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boundaries, and force the assimilation of Indians into the society at large." *Yakima v. Confederated Tribes*, 502 U.S. 251, 253-254 (1992).

The Indian General Allotment Act of 1887 (Dawes Act), was one of the acts furthering Congressional policy, allowing individual Indians to own rights to reservation lands. Act of Feb. 8, 1887, Ch. 119, 24 Stat. 388 (codified at 25 U.S.C. §§ 331 *et seq.*). Under the Act, the United States awarded reservation lands with reserved rights to Klamath Tribe allottees in two steps: first, the Act provided that individual Indian allottees receive a so-called "patent"<sup>21</sup> in which the United States held title to the land in trust for twenty-five years for the sole use and benefit of the individual Indian; at the end of the trust period, the United States would then convey the allotment in fee to the Indian or his or her heirs, without encumbrances or restrictions. Act of Feb. 8, 1887, Ch. 119, 24 Stat. 389 § 5 (codified at 25 U.S.C. § 348<sup>22</sup>).

Congress subsequently enacted the Act of May 8, 1906 (Burke Act),<sup>23</sup> clarifying the distinction between individual Indian allottees with trust patents, versus individual Indian allottees with patents in fee. Ch. 2348, 34 Stat. 182 (1906) (codified as amended at 25 U.S.C. § 349)<sup>24</sup>. The Burke Act provided that Indian allottees were not subject to state civil and criminal jurisdiction until expiration of the trust period, but also specifically provided that Indian allottees with a patent in fee were subject to the laws of the state in which the land was found.

Two years later, the United States Supreme Court established the doctrine of Indian reserved water rights in *Winters v. United States*, 207 U.S. 564 (1908), holding that when the federal government sets aside lands for an Indian reservation, it reserves by implication then unappropriated water to the extent necessary to accomplish the purposes of the reservation. *Id.* at 573. Subsequently, the courts recognized the jurisdictional distinction between individual Indian allottees with trust patents and those with patents in fee. In *United States v. Nice*, 241 U.S. 591 (1916), the Supreme Court stated that the Dawes Act was not "intended to dissolve the tribal relationship and terminate the national guardianship upon the making of the allotments and the

<sup>21</sup> "In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee." *United States v. Rickert*, 188 U.S. 432, 436 (1903)

<sup>22</sup> The Act required the Secretary of the Interior to "cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever \* \* \* \* 25 U.S.C. § 348.

<sup>23</sup> The Burke Act was passed in reaction to *In re Heff*, 197 U.S. 488, 502-503 (1905), in which the Supreme Court held that the allotment process in effect at the time subjected Indian allottees to state jurisdiction immediately upon issuance of a trust patent (and prior to the expiration of the 25-year trust period). See *Yakima v. Confederated Tribes*, *supra*, at 255.

<sup>24</sup> "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside\* \* \* \* 25 U.S.C. § 349.

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issuance of trust patents." According to the *Nice* decision, the trust period must expire before the state has civil or criminal jurisdiction over the individual Indian allottees because trust patents contained a restraint on alienation. *Id.* at 596. Allottees are not "\* \* \* subject to the laws, both civil and criminal, of the State or Territory of their residence" until completion of the allotments and the patenting of the lands. *Id.*

KPWU and other contestants assert that because the United States authorized allottee trust patents under the Dawes Act, the Burke Act and the court's ruling in *Nice* controlled Oregon's jurisdiction over the water rights for lands allotted to individual Klamath Indian allottees and held in trust by the United States. Claimants' memoranda generally suggest that because allottee and *Walton* water rights are based upon federal reserved water rights and must be quantified under standards established by federal common law, those rights could not have been determined prior to the McCarran Amendment. That is incorrect.

Although fee allottee and *Walton* rights derive from federal water rights, they are not rights owned by the United States or the Klamath tribes, and thus, immune from suit. They are derivative rights without the protection of the United States' or the Tribes' sovereign immunity and are entirely subject to Oregon's civil jurisdiction. If a particular parcel was owned in fee at the time of an earlier adjudication, the water right appurtenant to that property, whether owned by an Indian or by a non-Indian, was no longer protected by sovereign and was subject to Oregon's civil jurisdiction from the date the patent was issued in fee. 25 U.S.C. § 349. Transfer to a non-Indian owner, resulting in a *Walton* water right, resulted in no greater protection from suit than had been enjoyed by the previous Indian owner. To the extent that any claimant urges otherwise, those arguments are rejected.

One of the claimants suggests that reading this interpretation of the Dawes Act and *Nice* conflicts with the provision of the Act vesting authority to regulate water rights on the reservation with the Secretary of the Interior. 24 Stat 388.<sup>25</sup> That argument misses the key point that lands no longer in held in trust by the United States or the Klamath Tribes, even though within the boundaries of the reservation, were no longer part of the reservation for almost all purposes, including adjudication of appurtenant water rights.

On the other hand, because of their immunity from suit, water rights for the Klamath Tribes and individual Indian allottees whose property was held in trust by the United States were outside Oregon's power to regulate, and those rights could not have been determined in the earlier adjudications. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 808-813 (1976). The parties agree that an Indian who owned land that the United States held in trust can not be bound by the earlier adjudications, since to do so would have required joining the United States or the Klamath Tribes to the suit, which was impossible by virtue of their sovereign immunity.

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<sup>25</sup> "In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor." Codified at 25 U.S.C. § 381.

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Jeld-Wen asserts that "even if allottees or Walton claimants had participated in the prior adjudications \* \* \* Oregon could not have determined their claims." I agree that if trust allottees participated in the earlier adjudications without the consent of the United States, Oregon could not have determined the claim, even though the trust allottee participated in the adjudication. Land owned in fee, however, whether by non-Indian *Walton* claimants or by Indians, was no longer protected by the sovereign immunity of the United States or the Tribes and the present owners of those lands are bound by the earlier adjudication if their predecessors-in-interest were lawfully embraced in the earlier adjudications.

Some of the claimants correctly assert that the United States and the Klamath Tribes were holders of federal water rights and were interested and necessary parties to any adjudication of those federal reserved rights. They go on, however, to argue that the earlier adjudications were incomplete without federal and tribal participation. Although not specifically stated that argument, drawn to its logical conclusion, would result in all state adjudications involving land on former reservations in the western United States being void, or at least voidable, due to the inability of the State of Oregon to bring the United States, the various tribes, and trust allottee owners into the adjudications. Neither statute nor case law requires such a result.

*Walton II and Anderson*. This result, while contrary to the earlier ruling in this case, is consistent with the court's decision in *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984) (*Anderson*), which modified the court's ruling in *Walton II*, upon which the previous order relied. In *Anderson*, the Ninth Circuit upheld the power of state governments to regulate waters flowing through and around Indian reservations, as opposed to waters that lay entirely within reservations, going to great lengths to distinguish that case from its earlier ruling in *Walton II*, in which the court held that states had no power to regulate water within watersheds entirely internal to reservations.<sup>26</sup> See *Anderson* at 1365-67.

*Anderson* arose out of the adjudication of water rights in the Chamokane Basin, including the Chamokane Creek, which originates north of the reservation and flows south along its eastern boundary before discharging into the Spokane River which, in turn, joins the Columbia River and ultimately flows into the Pacific Ocean. *Anderson* at 1361. The *Anderson* court held that the State of Washington could regulate the use of water by non-Indian fee owners of land within reservation boundaries. The Wood and the Sprague rivers, like the waters Chamokane Basin, flow through and around the former Klamath Reservation. Similarities between the geographical setting of the Sprague and Wood Rivers and that of the Chamokane Basin leads to the inevitable conclusion that the earlier Ruling, which relied entirely on the court's analysis in *Walton II*, was in error.

The rule drawn from *Anderson* is that Oregon had the authority to regulate waters flowing around and through the Klamath Reservation in the Wood and Sprague River adjudications to the

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<sup>26</sup> "The facts in this case are readily distinguishable from the facts in the Walton decision. By weighing the competing federal, tribal and state interests involved, it is clear that the state may exercise its regulatory jurisdiction over the use of surplus, non-reserved Chamokane Basin waters by nonmembers on non-Indian fee lands within the Spokane Indian Reservation. Central to our decision is the fact that the interest of the state in exercising its jurisdiction will not infringe on the tribal right to self-government nor impact on the Tribe's economic welfare \* \* \* " *Anderson* at 1366.

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extent that sovereign immunity did not preclude jurisdiction, or stating it otherwise, Oregon lacked jurisdiction to regulate the waters of the Wood and Sprague rivers only to the extent that the lands appurtenant were owned by the United States, the Klamath Tribes, or by a patent allottee. Therefore, claims previously adjudicated on the Wood and Sprague Rivers<sup>27</sup> may be barred from this adjudication if the claimed place of use was owned in fee by an Indian or by a non-Indian at the time of the earlier adjudications, whether the land had previously been part of the Klamath Reservation or not. Whether a particular claim may be barred because Oregon had civil jurisdiction over the land and the owner at the time of the previous adjudication, is a matter to be determined in individual claims by reference to ownership at the time of the earlier adjudication.

Allottee<sup>28</sup> Claimants. The position of the KAWUA claimants exemplifies the arguments of many of the affected claimants. KAWUA's motion involves four allottee claims by members of the Klamath Tribes for Indian reserved water rights on lands that were formerly part of the Klamath Reservation. In their motion, KAWUA asked for a ruling that the Wood River adjudication does not bar their claims, identifying the issue in this consolidated proceeding as a "single legal issue," and stating that "the law is clear that the State of Oregon had no jurisdiction prior to 1952 to adjudicate Indian reserved water rights." The KAWUA Motion is based on the premise that because their lands may have been part of the Klamath Reservation, Oregon was powerless to adjudicate water rights appurtenant to those lands during prior adjudications.<sup>29</sup> That premise presupposes immunity from the state's civil jurisdiction that must be determined based on evidence in individual cases, and will not be determined at this time.

In their response to motions filed by KPWU and to the United States' and Klamath Tribes' joint motion, these claimants contend that even tribal members "who owned their on-reservation allotment in fee at that time would still have been entitled to a federal reserved Indian water right the same as if the land had remained in trust." That statement is inaccurate. The United States' sovereign immunity extended only to water rights appurtenant to lands owned or held in trust by the United States. The McCarran Amendment had no effect on state jurisdiction over water rights claimed by individuals who owned their lands in fee. To the extent that the record may establish ownership in fee at the time of the earlier adjudication, the owner, the land, and appurtenant water rights were subject to the regulatory authority of the state's courts.

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<sup>27</sup> The joint motion filed by the United States and the Klamath Tribes originally included the Sprague River Adjudication. After reviewing the facts with respect to the two Sprague River Walton claims in this case (Nos. 129 and 131), the United States and the Klamath Tribes have decided to withdraw preclusion as a basis upon which to contest these claims when they are activated in subsequent contested case proceedings. The United States and the Klamath Tribes thought it unnecessary for this order to determine the preclusive effect of the Sprague River Adjudication regarding their motion. Klamath Tribes' and United States' Joint Response To All Motions For Ruling On Legal Issues, filed December 17, 2003, at page 3 n. 5. The question may still be viable, however, as other contests, including those filed by certain claimants, may raise the issue, and OWRD may maintain the position stated in the Adjudicator's Preliminary Evaluation.

<sup>28</sup> Claims 235, 262, 695 and 696.

<sup>29</sup> These Claimants assert that each of their claims include a title chain report confirming that the subject property was held in trust by the United States for tribal members at the time of the Wood River Decree. If this assertion proves correct, these claimants likely are not barred from asserting their claims. See *Masterson v. Pacific Livestock Co.*, 144 Or. 396, 404 (1046). That, however, is an issue of fact for determination in individual cases. To the extent that they seek a determination of specific rights, the motion is premature.

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Obviously, some land could have been owned in fee, and some owned in trust, with some land remaining in tribal ownership, resulting in a "checkerboard" of land ownership within the boundaries of the Klamath Tribes' Reservation. Although sometimes unwieldy, ownership in such circumstances is not a bar to water rights adjudications, which are *in rem* proceedings, rather than *in personam*. *Adams*, supra at 145. *In rem* state actions regarding lands on Indian reservations have met with the approval of the U.S. Supreme Court even though they may require a checkerboard analysis. See *Yakima*, supra, at 265.

Walton Claims. Claimants<sup>30</sup> in four *Walton* claims for water rights on lands that may have been part of the former Klamath Reservation filed a motion similar to that of the KAWUA, asserting that the State lacked subject matter jurisdiction over tribal or individual Indian reserved water rights and could not have adjudicated the water rights of non-Indian successors at the time of these adjudications. As in the case of the allottee claimants, a specific fact-based motion may be considered regarding their contention. Whether the state had jurisdiction in a particular claim will be determined in subsequent proceedings in individual claims.

These *Walton* claimants point out that the Sprague River Adjudication was entitled in such a way<sup>31</sup> as to exclude land within the Klamath Reservation and that the State Engineer's water supply survey was limited to the Sprague River and its tributaries lying east of the Klamath Reservation. (*Walton* Claimants exhibit B). The United States and the Klamath Tribes have decided to withdraw contest grounds of preclusion on all the Sprague River claims and did not address this argument, nor did it find a response to this argument in the volume of documents associated with this consolidated claim. It is, I think, obvious that if the previous adjudication did not address various waters that claimants of water rights of those waters are not bound by the previous adjudication. See *Adams v. Perry*, supra. That too, will be a fact-specific determination in individual cases.

Other *Walton* claimants<sup>32</sup> assert that each of them owns land in the Wood River Basin, on the east side of the river within the former reservation boundaries, and that they or their non-Indian predecessors-in-interest acquired lands from Indian allottees prior to the 1932 Adjudications of the Wood River System. They contend that their *Walton* rights "are inseparably intertwined with tribal water rights and water rights of individual tribal allottees," that could not have been determined by the 1932 adjudications. According to these claimants:

Because *Walton* holds the non-Indian purchaser acquires the same "ratable share" as the tribal allottee seller, with the same priority date, and is subject to proportionate reduction with the tribal and allottee rights when there is insufficient water to satisfy all valid claims, the State Engineer in 1932 would not have been able to adjudicate *Walton* claims without being able to also adjudicate the claims of the tribes, tribal allottees, and the United States as trustee. He would have needed to quantify all of

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<sup>30</sup> Claims 66, 697, 129 and 131.

<sup>31</sup> The caption reads, "In the Matter of the Determination of the Relative Rights to the Use of the Waters of Sprague River and its Tributaries (Outside of the Klamath Indian Reservation), a Tributary of the Williamson River." (*Walton* Claimants' Exhibit A).

<sup>32</sup> Claims 37, 49, 59 and 64.

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those 1864 water rights, not simply the *Walton* rights. But the State Engineer had no such authority until the 1952 enactment of the McCarran Amendment, 43 USCA § 666.

*Walton II*, to which these claimants refer, states, in relevant part:

In determining the nature of the right acquired by non-Indian purchasers, we consider three aspects of an allottee's right to use reserved waters.

First, the extent of an Indian allottee's right is based on the number of irrigable acres he owns. If the allottee owns 10% of the irrigable acreage in the watershed, he is entitled to 10% of the water reserved for irrigation (*i.e.*, a "ratable share"). This follows from the provision for an equal and just distribution of water needed for irrigation.

A non-Indian purchaser cannot acquire more extensive rights to reserved water than were held by the Indian seller. Thus, the purchaser's right is similarly limited by the number of irrigable acres he owns.

*Walton II* at 51.

OWRD asserts that that it is unnecessary to determine what portion of the reserved right has been obtained by an Allottee or a *Walton* claimant, or to determine the total reserved right, which could not have been done at the time of the earlier adjudications because of the state's inability to join the United States and the Klamath Tribes to the proceeding because of sovereign immunity. Whatever the meaning of the courts language regarding "ratable share," I agree with OWRD that the method of quantifying *Walton* water rights is spelled out in *Walton II* and *Walton III*, which make it clear that determination of the total federal reserved water right unnecessary before quantifying a *Walton* right. Quantification of a *Walton* right requires showing that five elements are satisfied:

- (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.

If these elements are proven, the claim will be assigned a priority date of October 14, 1864, the date the Klamath Reservation was established.<sup>33</sup> The *Walton* cases do not require that the

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<sup>33</sup> *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

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"ratable share" be determined when quantifying a Walton water right, thereby requiring joining all parties having an interest in determination of the total reserved right, including the United States, the Klamath Tribes and holders of trust patents, who could not have been joined in the prior adjudication because of their sovereign immunity.

Burden of Producing Evidence and Burden of Proof. *Nicholson et al.* filed their motion to establish that the burden of producing evidence that the prior adjudications are a bar rests upon the contestants asserting that position and that claimants do not have the initial burden of producing evidence that their claims are *not* barred. The United States and the Klamath Tribes agree with *Nicholson et al.* that the party asserting the preclusive effect of a prior adjudication has the burden of presenting evidence to support that assertion. ORS 183.450(2); *see also Troutman v. Erlandson*, 287 Or. 187, 213, (1979). These parties disagree, however, on the extent to which that burden persists. The United States and the Klamath Tribes contend that once a *prima facie* case has been made out, the burden of presenting evidence challenging the validity of the prior judgment, *i.e.*, showing that a claimant (or a predecessor-in-interest) was not required to participate in a prior adjudication or did not receive appropriate notice shifts to the claimant. *Nicholson et al.* assert that the burden is entirely upon the party claiming preclusion to prove adequate service and all other aspects of the preclusive effect of the previous adjudication. KPWU interpreted *Nicholson et al.*'s motion as stating that "unless the moving parties produce evidence that the Nicholson Claimants, or their predecessors, were served with 'appropriate notice' of the prior adjudications, the Nicholson Claimants may proceed with their claims as a matter of law." KPWU's interpretation of *Nicholson et al.*'s motion may correctly state those claimants' position, even though such a reading is not clear from reading the Motion and Memorandum that they go so far.

As is the case with most evidentiary issues, burdens of producing evidence and burdens of persuasion may shift during the course of the proceeding, depending on the quantity and quality of the evidence produced. ORS 183.450(2) states that "The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position." Under the statute, parties asserting the preclusive effect of a prior adjudication have the burden of establishing the existence and preclusive effect of a prior adjudication regarding a particular claim.

Once the existence and preclusive effect of a prior adjudication is established, parties asserting that the particular adjudication does not have a preclusive effect are, in effect, mounting a collateral attack on that adjudication, so the burdens of producing evidence and the burdens of persuasion shift to them.<sup>34</sup> Whether adequate notice was provided a specific claimant's predecessor-in-interest and whether that notice means that the predecessors-in-interest were

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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).

<sup>34</sup> The United States' and the Klamath Tribes' immunity from suit cannot be waived by their failure to object to the jurisdiction or to appeal from the judgment at the time. In the absence of statutory consent to the suit, the judgment is subject to collateral attack. *See United States v. U.S. Fidelity Co.*, 309 U.S. 506 (1940). Property appurtenant to the affected claims are derivative of federal or tribal interests and claimants may raise issues that the United States or the Klamath tribes may raise.

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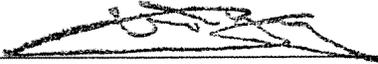
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"lawfully embraced" in prior adjudications is a question of fact to be addressed in individual claims.<sup>35</sup>

### ORDER

Claim-specific motions filed by the parties are **DENIED**, with leave to renew when consolidation of these cases is terminated and the cases are individually activated. The Motions for Ruling on Legal Issues are **GRANTED IN PART AND DENIED IN PART**, in that the general determination of whether doctrines of preclusion apply to these claims based on earlier adjudications shall be as follows:

- (1) It is unnecessary to resort to equitable doctrines of issue and claim preclusion to decide whether claims are barred by previous adjudications. ORS 539.200 and 539.210 provide an adequate standard.
- (2) ORS 539.200 and 539.210 do not include any "change in the law" exception to their applicability.
- (3) Claims may be barred from this adjudication if the present claim was lawfully embraced within an earlier adjudication.
- (4) Parties asserting preclusive effect of a prior adjudication have the burden of presenting evidence and the burden of proof on the issue raised by that assertion.

  
\_\_\_\_\_  
William D. Young, Administrative Law Judge  
Office of Administrative Hearings

Date: April 20, 2004

<sup>35</sup> Contestants' burden of proof, absent contrary evidence, may be relatively easily met. "It is universally held by the courts that a judgment or decree of a court of record is conclusive of every fact necessary to uphold it, and of all matters actually determined." *Abel v. Mack, supra*, 594.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2004, I mailed a true copy of the following: **ORDER AMENDING RULINGS ON MOTIONS FOR RULING ON LEGAL ISSUES**, 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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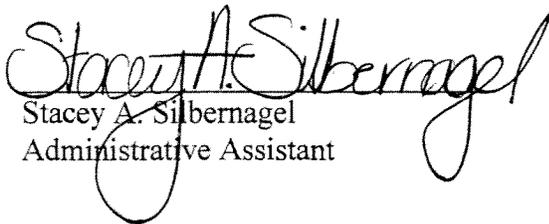
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