

BEFORE THE OREGON

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; 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,

**AMENDED PROPOSED ORDER**

Case No. 162

Claim: 11

Contests: 2040, 3433<sup>1</sup>, 3717, and 4073

vs.

Thomas J. Shaw,  
Claimant/Contestant.

This AMENDED PROPOSED ORDER is issued pursuant to OAR 137-003-0655(3), and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130. This AMENDED PROPOSED ORDER replaces in its entirety the PROPOSED ORDER ON STIPULATION BY PARTICIPANTS FOR RULING ON LEGAL ISSUES AND DISMISSAL OF CLAIMANT'S CLAIM ("Proposed Order") issued on April 15, 2005. The Proposed Order ruled that (1) an irrigation claim based on natural overflow and sub-irrigation is not entitled as a matter of law to a *Walton* water right; and (2) a claim for a wildlife purpose of use is not entitled as a matter of law to a *Walton* water right. The Proposed Order then dismissed Claim 11 in its entirety, because the irrigation claim was based on natural overflow and subirrigation and because the wildlife claim was not allowed as a matter of law. The Proposed Order did not discuss the Claimant's livestock claim.

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<sup>1</sup> Don Vincent voluntarily withdrew from Contest 3433 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3433 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3433 on January 16, 2004.

This Amended Proposed Order concludes that natural overflow may form the basis for a valid *Walton* right claim and includes findings of fact and an opinion pertaining to that conclusion of law. This Amended Proposed Order accepts the Proposed Order's conclusion that a claim for a wildlife purpose of use is not entitled as a matter of law to a *Walton* water right, and denies that portion of the claim. Finally, the Claimant has withdrawn the portion of Claim 11 that claims a separate right for livestock use.

#### A. FINDINGS OF FACT

1. On January 3, 1991, THOMAS J. SHAW (Claimant) timely submitted a Statement and Proof of Claim (Claim 11) to the Oregon Water Resources Department (OWRD) pursuant to ORS Chapter 539 in the Klamath Basin Adjudication, as a non-Indian successor to allotted Klamath Reservation lands, claiming a vested Indian reserved water right (Walton claim) under the Treaty of October 14, 1864, 16 Stat. 707.
2. Claim 11 was submitted for wildlife habitat, livestock watering of 100 head, and irrigation of 40.0 acres by natural overflow from the Williamson River, a tributary of Upper Klamath Lake. The claimed duty for irrigation is 3.0 acre feet per acre. The claimed periods of use are year-round for wildlife habitat, April 15 to November 15 for livestock watering, and December 1 through July 1 for irrigation. The claimed priority date is October 14, 1864.
3. THOMAS J. SHAW signed Claim 11 attesting that the information contained in the claim is true.
4. The claimant did not include payment of the fee required by ORS 539.081 for livestock or wildlife use by the February 1, 1991 deadline for filing a Statement and Proof of Claim.
5. On October 4, 1999, following investigation of the evidence submitted, the Adjudicator issued a Summary and Preliminary Evaluation of Claims (Preliminary Evaluation) stating the claim was denied because the required Walton elements were not established for the claim.
6. On May 5, 2000, the Claimant timely filed Contest 2040 to the Preliminary Evaluation of Claim 11.
7. On May 8, 2000, the following parties, hereinafter collectively referred to as the "Klamath Project Water Users," filed Contest 3433: 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.<sup>2</sup>, Malin Irrigation District, Midland District Improvement Company,

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<sup>2</sup> Klamath Hills District Improvement Company voluntarily withdrew from Contest 3433 on January 16, 2004. See VOLUNTARY WITHDRAWAL OF CONTEST BY KLAMATH HILLS DISTRICT IMPROVEMENT COMPANY

Pine Grove Irrigation District, Pioneer District Improvement Company, Poe Valley Improvement District, Shasta View Irrigation District, Sunnyside Irrigation District, Don Johnston & Son, Bradley S. Luscombe, Berlva Pritchard<sup>3</sup>, Don Vincent<sup>4</sup>, Randy Walthall, Inter-County Title Co., Winema Hunting Lodge, Inc., Reames Golf and Country Club, Van Brimmer Ditch Co., Plevna District Improvement Co., and Collins Products, LLC.

8. On May 8, 2000, the United States of America timely filed Contest 3717 to the Claim and/or Preliminary Evaluation of Claim 11.
9. On May 8, 2000, the Klamath Tribes timely filed Contest 4073 to the Claim and/or Preliminary Evaluation of Claim 11.
10. These matters were referred to the Office of Administrative Hearings for a contested case hearing. The Office of Administrative Hearings designated this matter as Case 162.
11. On February 21, 2005, the Claimant, Klamath Project Water Users, the United States of America, and the Klamath Tribes executed a STIPULATION OF FACTS (attached) whereby the parties agreed to and stipulated to undisputed facts for Claim 11. The stipulated facts outlined in Paragraph 1 (a-j) are incorporated as if set forth fully herein. The stipulated facts substantiate the following findings:
  - a. The claimed water use for irrigation with incidental livestock watering is on former Klamath Indian Reservation Land.
  - b. The claimed water use for irrigation with incidental livestock watering is on land that was transferred from Indian ownership.
  - c. The claimed water use for irrigation with incidental livestock watering was fully developed at the time of transfer from Indian ownership.
  - d. The claimed use of natural overflow from the Williamson River for irrigation with incidental livestock watering on lands appurtenant to Claim 11 has been demonstrated.
12. On April 15, 2005, Administrative Law Judge Ken L. Betterton, issued a PROPOSED ORDER ON STIPULATION BY PARTICIPANTS FOR RULING ON LEGAL ISSUES AND DISMISSAL OF CLAIMANT'S CLAIM ("Order").
13. On May 17, 2012, the Claimant withdrew the livestock watering portion of Claim 11. (See LETTER dated May 17, 2012, attached.)

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<sup>3</sup> Berlva Pritchard voluntarily withdrew from Contest 3433 on June 24, 2002. See NOTICE OF WITHDRAWAL OF CLAIMANT.

<sup>4</sup> Don Vincent voluntarily withdrew from Contest 3433 on November 29, 2000. See NOTICE OF WITHDRAWAL OF CLAIMANTS.

## B. CONCLUSIONS OF LAW

1. The elements of a *Walton* claim for irrigation and incidental livestock use based on natural overflow are established. The season of use is based on the Stipulation of Facts. The duty for water use is limited to the amount claimed: 3.0 acre-feet per acre.
2. An irrigation claim based on natural overflow may form the basis of a valid *Walton* right claim.
3. The claimant's claim for wildlife use is denied, both because claims for wildlife purpose of use are not entitled as a matter of law to a *Walton* right, and because Claimant failed to timely submit fees for wildlife use. With respect to the wildlife purpose of use, the Proposed Order incorporated the discussion and conclusion on that issue in the Proposed Order on the United States' Motion for Reconsideration and Ruling on Legal Issues and Dismissal of Claimant's Claim issued in Case No. 157 on December 10, 2004 (Case 157 Proposed Order). OWRD adopts and incorporates only that part of the Case 157 Proposed Order herein. With respect to the timely payment of fees, ORS 539.210 provides that "it shall be the duty of all claimants . . . to appear and submit proof of their respective claims, *at the time and in the manner required by law.*" (Emphasis added) Otherwise they will be "barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings." ORS 539.210. The payment of fees by a set deadline is required by law as a component of a claim in the Klamath Basin Adjudication; therefore, the scope of a claim can only extend to the amount of fees timely paid. *See* ORS 539.081; OAR 690-028-0028(1); OAR 690-028-0065(5). For Claimants, the deadline for the filing of claims, and therefore the deadline for payment of fees, was February 1, 1991. Because OWRD did not receive payment for separate rights of use for wildlife by the deadline, this portion of Claimant's claim must be denied.
4. The portion of Claim 11 for a separate right of use for livestock watering has been voluntarily withdrawn by the Claimant, and is therefore denied. Livestock watering approved under Claim 11 must be limited to incidental livestock watering during the irrigation season.

## C. 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.

As discussed in the Conclusions of Law, above, the portions of the claim for wildlife use and for a separate livestock watering use are denied. The remaining claim for irrigation use is based on the *Walton* doctrine, which provides for the establishment of water rights for successors in interest to Indian allottees of land within a federal Indian reservation. *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9<sup>th</sup> Cir 1981). The following elements are required to establish a *Walton* right:

- a. The property must have been part of the Klamath Indian Reservation.
- b. The property must have been transferred by or on behalf of the Klamath Tribes or an Indian successor to the Tribes to a non-Indian purchaser, without becoming part of the public domain.
- c. 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:
- d. The claim may include water use based on the Tribes' undeveloped irrigable land, to the extent that water was put to beneficial use with reasonable diligence following transfer from Indian ownership.

The Stipulation of Facts establishes that the claimed place of use is within the former Klamath Indian Reservation, that the claimed place of use was allotted to a member of the Klamath Tribes, and that the claimed place of use was transferred from Indian ownership to a non-Indian successor (the Modoc Lumber Company) without becoming part of the public domain. The property was conveyed from Indian ownership to the Modoc Lumber company on March 1, 1956. The Stipulation of Facts also establishes that the claimed place of use has been leased as livestock pasture since 1957, prior to transfer from Indian ownership. Based on the Stipulation of Facts, the Claimant has established a *Walton* right for irrigation and incidental livestock watering on the claimed place of use.

The Contestants have argued that the claimed place of use is ineligible for a *Walton* right because it is undisputed that there is no physical diversion of water from its natural source; rather, Claim 11 relies upon natural overflow and subirrigation. The Contestants argue that a *Walton* right requires a physical diversion of water from its natural source, and that beneficial use of natural overflow or subirrigation are insufficient to establish a *Walton* right. As described more fully below, OWRD concludes that beneficial use of natural overflow may form the basis of a valid *Walton* right, but beneficial use of subirrigation may not.

#### **Use of Natural Overflow as the Basis of a *Walton* Right**

Oregon law provides that while the natural overflow as a method of irrigation is only a privilege, beneficial use of natural overflow may nonetheless give rise to a vested water right. The Department concludes that this principle is equally applicable to *Walton* claims made subject to the Department's jurisdiction. The *Walton* line of cases did not create federal law on the subject of natural overflow; therefore, it is appropriate for the Department to rely on Oregon law.

“Natural overflow” refers to the presence of surface water on land without the use of a physical diversion structure or implement. “Subirrigation,” as the term was used in the *Walton* line of cases, refers to the ability to use groundwater for irrigation without a well due to an unusually high groundwater table. *Colville Confederated Tribes v. Walton*, Memorandum Opinion at 19 n4 (E.D. Wash. August 30, 1983, Docket Nos. 3421, 3831). Subirrigation may also refer to the use of water that seeps from a stream a lake through the adjacent banks.

The *Walton* litigation did not involve natural overflow. To the extent that *Colville Confederated Tribes v. Walton*, 752 F2d 397 (9<sup>th</sup> Cir 1985) (*Walton III*) holds that subirrigation may not form the basis for a *Walton* right, it is not at all clear that the court would have intended the same conclusion to apply to natural overflow. In fact, under Oregon law, while beneficial use of natural overflow may form the basis for a valid pre-1909 right, subirrigation may not.

Unlike a subirrigator, a beneficial user of natural overflow may take steps to improve the efficiency of irrigation, by preventing the natural overflow from occurring on the property and instead making a diversion from the stream. The ability to improve efficiency when competing demands for water require it is one of the primary reasons for Oregon’s recognition that beneficial use of natural overflow may form the basis of a vested right. In *Warner Valley Stock Co. v. Lynch*, 215 Or 523, 538 (1959), the court acknowledged that beneficial use of natural overflow was sufficient to acquire a vested pre-1909 water right. The court held, however, that “the method of diversion by way of natural overflow is a privilege only and cannot be insisted upon by the objectors if it interferes with the appropriation by others of the waters for a beneficial use.” *Id.* at 537. In other words, the ability to make a call – one of the central attributes of a water right – is not available to the user of natural overflow until the method of irrigation is improved. Since the user of subirrigation does not have the ability to improve the method of irrigation, the logic of *Warner Valley* dictates that subirrigation may never form the basis for a call, and thus may not form the basis for a vested water right.<sup>5</sup>

The analysis in *Walton III* pertaining to appropriation of water was based on Washington state law. Nearly all of the court’s citations to case law in the “Appropriation” and “Intent/Due Diligence” subsections of the opinion (in which the issue of subirrigation is discussed) are to Washington state court decisions. Even the one cite to a federal district court opinion cites both to the opinion and the “cases cited therein *interpreting Washington law.*” *Walton III*, 752 F2d 397, 402 (1985) (emphasis added). Under Washington law, a diversion is a required element of a valid appropriation. *See* 1891 Wash Laws 142, *R.D. Merrill Co. v. Pollution Control Hearings Board*, 969 P 2d 459, 468-469 (1999), *Ellis v. Pomeroy Improvement Co.*, 21 P 27, 29 (1889) (requiring an “open, physical demonstration” of intent to take water for some valuable use). Because subirrigation and natural overflow do not require a diversion, they may not form the basis for a valid appropriation under Washington law. Even assuming the court had held that, under Washington law, subirrigation or natural overflow could not form the basis for a right held

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<sup>5</sup> Note that depending on the circumstances, under Oregon law subirrigation that is created by an artificial diversion work (e.g., a dam that causes water levels to rise and increases the area of land being subirrigated) may form the basis for a valid pre-1909 or *Walton* right. In such a case, the irrigation is being caused by a diversion. In addition, if circumstances require the diversion method may be improved to increase efficiency.

by a non-Indian successor to an allottee, the court gave no indication that it intended to use Washington law to form the basis for federal law on these issues.<sup>6</sup>

Where no governing federal law principles exist with respect to an issue related to the determination of a *Walton* right, “[i]t is appropriate to look to state law for guidance.” *Walton III*, 752 F2d at 400. The *Walton* line of cases did not create federal law with respect to either beneficial use of natural overflow or subirrigation. Therefore, the Department relies on Oregon law principles governing natural overflow as a method of beneficial use.

More specifically, the Department relies on the pre-1909 principles governing natural overflow as a method of beneficial use. The law relevant to the determination of whether a claimant has established a vested water right is, generally speaking, the law in place at the time the appropriation is initiated, rather than when water is first applied to beneficial use. *See* 539.010(4).<sup>7</sup>

Under Oregon’s pre-1909 common law, an appropriator was entitled to relate the priority date of the right back to the date of first intent to appropriate. Similarly, if the other elements of the claim are proven, *Walton* claimants are entitled to relate the priority date of their rights back to the October 16, 1864 date of the Klamath Treaty. The Klamath Treaty provides the best analog to the “intent” element of Oregon’s pre-1909 common law. Through the Klamath Treaty, Congress effectively established its intent to reserve water for certain uses by the Klamath Tribes and their members. Therefore, it is more appropriate to apply pre-1909 principles with respect to the issue of beneficial use of natural overflow.

Oregon law provides that while the natural overflow as a method of irrigation is only a privilege, beneficial use of natural overflow may nonetheless give rise to a vested water right, where the appropriation was initiated prior to the enactment of the Water Code in 1909.

A “diversion from the natural channel by means of a ditch, canal or other structure” is generally a required element of a pre-1909 water right. *In re Silvies River*, 115 Or 27 (1925). However, no diversion is required where the appropriator’s land is “naturally irrigated” and the appropriator “in some substantial way indicates that it is his intention to reap the benefit of the fruit of the irrigation.” *Id.* at 66. In such a case, the priority date is “deemed to be when the proprietor of the land accepts the gift made by nature...” *Id.* This principle was affirmed and clarified in *Warner Valley Stock Co. v. Lynch*, 215 Or 523 (1959). While acknowledging that

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<sup>6</sup> Indeed, it would have been inappropriate for the court to simply rely on Washington law in creating federal law, at least with respect to use of natural overflow. The western states are divided on the question of whether natural overflow could have formed the basis of a valid appropriation for irrigation use initiated prior to the enactment of the respective state’s modern water code. Colorado and Montana, in addition to Oregon, are examples of states that have answered the question in the affirmative. *Matter of the Adjudication Missouri River Drainage Area*, 55 P3d 396, 406 (Mont 2002); *Humphreys Tunnel & Mining Co. v. Frank*, 105 P 1093, 1095 (Colo 1909). Nevada, New Mexico, and Washington have required a manmade diversion for irrigation use. *Steptoe Livestock Co. v. Gulley*, 295 P 772, 774-775 (Nev 1931); *State ex rel. Reynolds v. Miranda*, 493 P2d 409, 411 (N.M. 1972).

<sup>7</sup> ORS 539.010(4) provides, in part: “The right of any person to take and use water shall not be impaired or affected by any provisions of the Water Rights Act (as defined in ORS 537.010) where appropriations were initiated prior to February 24, 1909, and such appropriators, their heirs, successors or assigns did, in good faith and compliance with the laws then existing, commence the construction of works for the application of the water so appropriated to a beneficial use, and thereafter prosecuted such work diligently and continuously to completion.”

vested rights could be acquired by the beneficial use of natural overflow, the *Warner Valley* court clarified that “the *method of diversion* by way of natural over-flow is a privilege only and cannot be insisted upon by the objectors if it interferes with the appropriation by others of the waters for a beneficial use.”<sup>8</sup> *Id.* at 537-38 (emphasis added). Similarly, in *Masterson v. Pacific Livestock Company*, the court found that prior to the adjudication, the defendants had only irrigated their lands by means of natural overflow. 144 Or 397, 401-2 (1933). The *Masterson* court found that, although the decree had not provided the quantity of water to be taken under the right, the natural irrigation equaled no more than five acres “in the regular way.” 144 Or at 406-8.

Thus, while a vested right may be acquired through beneficial use of natural overflow, the acquired right has unique limits. If the holder of such a right persists in irrigating with natural overflow, the holder may not call for regulation of use by junior water right holders. In order to take advantage of the ability to call junior water right holders, the holder of such a right must construct works that allow for the artificial diversion of water.

For the reasons discussed above, the Department concludes that beneficial use of natural overflow may form the basis for a *Walton* right, but that the natural overflow method of irrigation is a privilege only, and cannot be insisted on by the holder of the right. If the holder of such a right wants to be able to call for regulation of use by junior water right holders, the holder of such a right must construct works that allow for the artificial diversion of water.

#### **D. ORDER**

1. A water right for Claim 11 should be confirmed as set forth in the following Water Right Claim Description.
2. OWRD requests that the claimant submit, within 60 days of the service date of this Amended Proposed Order, a map that depicts the allowed place of use and that meets OWRD’s standards as described in OAR 690-310-0050.

#### **Water Right Claim Description**

**CLAIM NO. 11**  
FOR A VESTED WATER RIGHT

**CLAIMANT:** THOMAS J. SHAW  
PO BOX 257  
KLAMATH FALLS, OR 97624

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

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<sup>8</sup> In 1909, the Oregon Supreme Court reached a similar conclusion in *Hough v. Porter*, 51 Or 318, 420 (1909). The *Hough* court found that “wasteful *methods* so common with early settlers can...be deemed only a privilege permitted merely because it could be exercised without substantial injury to any one; and *no right to such methods of use was acquired thereby.*” *Id.* (emphasis added).

**PURPOSE or USE:**

IRRIGATION OF 6.7 ACRES BY NATURAL OVERFLOW WITH INCIDENTAL LIVESTOCK WATERING OF 100 HEAD

**RATE OF USE:**

20.1 ACRE FEET PER YEAR

**DUTY:**

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

**PERIOD OF ALLOWED USE:** DECEMBER 1 – JULY 1

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

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

| Twp  | Rng  | Mer | Sec | Q-Q   | Irrigation by Natural Overflow with Incidental Livestock Watering |
|------|------|-----|-----|-------|---|
| 30 S | 10 E | WM  | 14  | NE SW | No specific point of diversion                                    |
| 30 S | 10 E | WM  | 14  | SE SW |   |

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

| IRRIGATION BY NATURAL OVERFLOW WITH INCIDENTAL LIVESTOCK WATERING |      |     |     |       |       |
|---|------|-----|-----|-------|-------|
| Twp   | Rng  | Mer | Sec | Q-Q   | Acres |
| 30 S  | 10 E | WM  | 14  | NE SW | 5.6   |
| 30 S  | 10 E | WM  | 14  | SE SW | 1.1   |

**FURTHER LIMITATIONS:**

THE METHOD OF DIVERSION BY WAY OF NATURAL OVERFLOW IS A PRIVILEGE ONLY AND CANNOT BE INSISTED UPON IF IT INTERFERES WITH THE APPROPRIATION OF THE WATERS FOR BENEFICIAL USE BY OTHERS.

IT IS SO ORDERED.

Dated at Salem, Oregon on July 31, 2012.



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Dwight French, Adjudicator  
Klamath Basin General Stream Adjudication

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

**EXCEPTIONS:** Parties may file exceptions to this Amended Proposed 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 contained within this Amended Proposed Order. 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 Amended Proposed Order excepted to and cite to appropriate portions of the record to which modifications are sought. Parties opposing these exceptions may file written arguments in opposition to the exceptions within 45 days of service of the Amended Proposed Order. Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

**Dwight French, Adjudicator  
Oregon Water Resources Department  
725 Summer Street NE, Suite A  
Salem, OR 97301**

Ref. No. 162 F 00040002  
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  
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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  
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Contestants,

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Thomas J. Shaw,

Claimant/Contestant.

STIPULATION OF FACTS

Case No. 162

Claim No. 11

Contest Nos. 2040, 3433<sup>1</sup>, 3717, 4073

The parties in the above-captioned Water Right Claim hereby stipulate and agree as follows:

1. The parties agree and stipulate that the following are undisputed facts for Claim 11:
  - a. The places of use (hereinafter "POUs") designated in Claim 11 are owned by Thomas J. Shaw and total 6.7 acres located within the following tracts of land:

<sup>1</sup> Don Vincent voluntarily withdrew from Contest 3433 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3433 on June 24, 2002.

(1) NESW, Sec. 14, T30S, R10E, W.M. (5.6 acres)

(2) SESW, Sec. 14, T30S, R10E, W.M. (1.1 acres)

b. The POUs are within the former Klamath Indian reservation.

c. The POUs are within former Indian Allotment 63 (hereinafter "Allotment 63").

d. Allotment 63 was conveyed from Indian ownership to Modoc Lumber Company on March 1, 1956. Modoc Lumber Company was the first non-Indian owner of Allotment 63.

e. Allotment 63 was conveyed by Modoc Lumber Company to L.L. Shaw, the second non-Indian owner, on April 18, 1958.

f. Allotment 63 (except that part north and east of the Williamson River) was conveyed by L.L. Shaw and Dorothy Shaw to Thomas J. Shaw on January 22, 1965.

g. The POUs have been leased as livestock pasture since 1957.

h. The uses claimed are irrigation, livestock watering, and wildlife.

i. There is no actual physical diversion of water from its natural source; rather, Claim 11 relies upon natural overflow and sub-irrigation.

j. The period of use claimed is December 1 to July 1 for irrigation, April 15 to November 15 for livestock water, and year-round for wildlife.

2. The parties agree and stipulate that based upon the Administrative Law Judge's (hereinafter "ALJ") Order on United States' Motion for Reconsideration of Ruling on Legal Issues, Case No. 157, Claim 4, attached hereto as Attachment 1, the ALJ may file an Order dismissing Claim 11.

3. The Claimant reserves the right to challenge such dismissal in accordance with

applicable law. This stipulation shall not be deemed a waiver of such rights.

STIPULATED, AGREED AND APPROVED BY:

FOR CLAIMANT/CONTESTANT THOMAS J. SHAW:

DATED: February 21, 2005



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Steven L. Shropshire

Jordan Schrader PC

P.O. Box 230669

Portland OR 97281

Telephone: (503) 598-5583

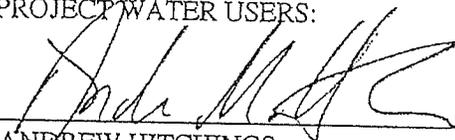
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ATTORNEYS FOR CLAIMANT/CONTESTANT  
THOMAS J. SHAW

FOR CONTESTANTS KLAMATH PROJECT WATER USERS:

DATED: February 17, 2005

  
\_\_\_\_\_  
ANDREW HITCHINGS

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ATTORNEYS FOR CONTESTANTS KLAMATH  
PROJECT WATER USERS

FOR CONTESTANT THE KLAMATH TRIBES:

DATED: February 18, 2005

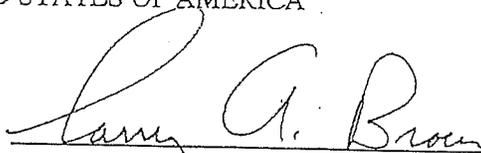
Walter R. Echo Hawk

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ATTORNEYS FOR THE KLAMATH TRIBES

FOR CONTESTANT THE UNITED STATES OF AMERICA

DATED: February 14, 2005



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ATTORNEYS FOR THE UNITED STATES OF  
AMERICA

## CERTIFICATE OF FILING/SERVICE

I hereby certify that on February 21, 2005, I filed the original letter addressed to Judge Ken Betterton and original of STIPULATION OF FACTS with Judge Ken Betterton, Administrative Law Judge, Hearings Officer Panel, P.O. Box 14020, Salem, Oregon 97309-4020, by e-mail to [klamath.adjudication@state.or.us](mailto:klamath.adjudication@state.or.us) and [ken.l.betterton@state.or.us](mailto:ken.l.betterton@state.or.us) and by first class mail. I further certify that a true and correct copy was served via e-mail or where no e-mail address is listed by facsimile, and U.S. Mail, with sufficient first class postage prepaid, on February 21, 2005, where indicated to the following parties:

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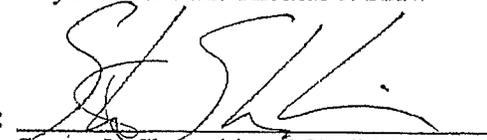
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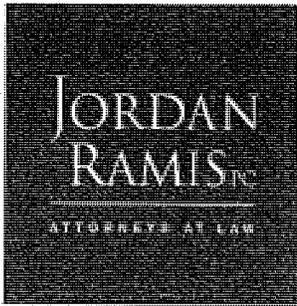
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Dated this 21<sup>st</sup> day of February 2005.

JORDAN SCHRADER PC  
Attorney for Claimant Thomas J. Shaw

By:   
Steven L. Shropshire, OSB # 94437  
[steve.shropshire@jordanschrader.com](mailto:steve.shropshire@jordanschrader.com)



VIA E-MAIL & FIRST CLASS MAIL

May 17, 2012

Jesse D. Ratcliffe  
Assistant Attorney General  
Oregon Department of Justice  
Natural Resources Section  
1162 Court St NE  
Salem OR 97301-4096

Re: **Klamath Adjudication – Case No. 162, Claim No. 11, Contest Nos. 2040, 3433, 3717 and 4073 (DOJ File No. 690-600-GN0133-03)**  
Our File No. 47827-32950

Dear Jesse and Parties:

JUSTIN D. GERICKE

Admitted In:  
Oregon

Direct Dial  
(503) 598-5586

e  
E-mail  
Justin.gericke@jordanschradler.com

In response to OWRD's letter dated April 17, 2012, Claimant Thomas J. Shaw is voluntarily withdrawing the livestock watering portion of Case No. 162, Claim No. 11. However, consistent with Oregon law and prior rulings in the adjudication, Claimant intends to rely upon the natural overflow for livestock watering incidental to the underlying irrigation claim.

Upon withdrawal of this element of the claim, OWRD should proceed with issuing an amended proposed order that addresses the remaining elements of the claim.

Please call with any questions.

Sincerely,

JORDAN RAMIS PC

Justin D. Gericke  
cc (via e-mail): J-Spear Ranch Co.  
All Parties to Case 162 (see enclosed Certificate of Service)

### CERTIFICATE OF SERVICE

I hereby certify that on the 17<sup>th</sup> day of May 2012, I sent, via e-mail ([jesse.d.ratcliffe@doj.state.or.us](mailto:jesse.d.ratcliffe@doj.state.or.us)) and first class mail, the May 17, 2012 Letter to Jesse Ratcliffe, Assistant Attorney General, Oregon Department of Justice, Natural Resources Section, 1162 Court St NE, Salem OR 97301-4096, and served the Letter to All

Parties to Case 162 hereto by e-mail, a true, exact and full copy thereof to:

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97301-1271 [dwright.w.french@state.or.us](mailto:dwright.w.french@state.or.us)  
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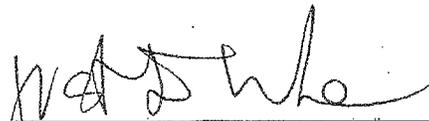
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DATED: May 17, 2012.

JORDAN SCHRADER PC  
Attorney for Claimant Thomas J. Shaw

By:

  
Justin D. Gericke, OSB # 990510  
[justin.gericke@jordanraims.com](mailto:justin.gericke@jordanraims.com)

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2012, I mailed a true copy of the **AMENDED PROPOSED ORDER** (Claim 11), by depositing the same in the U.S. Post Office, Salem, Oregon 97301, with first class postage prepaid thereon, and addressed to:

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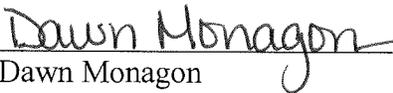
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Dawn Monagon  
Legal Secretary  
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