

**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 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  
Johnson & 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

**PROPOSED ORDER ON  
STIPULATION BY PARTICIPANTS  
FOR RULING ON LEGAL ISSUES  
AND DISMISSAL OF CLAIMANT'S  
CLAIM**

Case No. 175

Claim No. 31

Contests 3443, 3728 and 4087

v.

J-Spear Ranch Co., Claimant/Contestant.

On or about February 21, 2005 the participants filed a Stipulation of Facts and a stipulation for entry of an order dismissing Claim No. 31, based on a previous legal ruling in Case No. 157 which ruled on legal issues and dismissed claimant's claim.

The letter authorizing this disposition of the case and the Stipulation of Facts submitted by the participants is marked as Exhibit A and incorporated by reference herein.

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, is marked as Exhibit B and incorporated herein.

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**WATER RESOURCES DEPT  
SALEM, OREGON**

*J-Spear Ranch Co. (175)*

Proposed Order on Stipulation for Ruling and Dismissal of Claim (03-05)

Page 1 of 2

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**ORDER**

Based upon the facts as set forth in the Stipulation of Facts in Exhibit A and the legal rulings in the Order in Exhibit B:

- (1) An irrigation claim based on natural overflow and sub-irrigation is not entitled as a matter of law to a *Walton* water right.
- (2) A claim for wildlife purpose of use is not entitled as a matter of law to a *Walton* water right.
- (3) Claimant's Claim No. 31 is dismissed.



Ken L. Betterton, Administrative Law Judge  
Office of Administrative Hearings

Date: April 15, 2005

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

Exceptions: Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Administrative Law Judge. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

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

Richard D. Bailey  
Klamath Basin Adjudication  
Oregon Water Resources Department  
725 Summer Street N.E., Suite "A"  
Salem, Oregon 97301

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**WATER RESOURCES DEPT  
SALEM, OREGON**

**ORIGINAL**

**Ref. No. 175 F 00040002  
BEFORE THE HEARING OFFICER PANEL  
STATE OF OREGON  
for the  
WATER RESOURCES DEPARTMENT**

**In the Matter of the Determination of the Relative Rights of the Waters of the Klamath  
River,  
a Tributary of the Pacific Ocean**

United States of America; The Klamath Tribes; **STIPULATION OF FACTS**  
Klamath Irrigation District; Klamath Drainage  
District; Tulelake Irrigation District; Klamath Case No. 175  
Basin Improvement District; Ady District  
Improvement Company; Enterprise Irrigation Claim: 31  
District; Klamath Hills District Improvement  
Co.; Malin Irrigation District; Midland District Contests: 3443, 3728, 4087  
Improvement Co.; Pine Grove Irrigation District;  
Pioneer District Improvement Company; Poe  
Valley Improvement District; Shasta View  
Irrigation District; Sunnyside Irrigation District;  
Don Johnston & Son; Bradley S. Luscombe;  
Randy Walthall; Inter-County Title Company;  
Winema Hunting Lodge, Inc.; Van Brimmer  
Ditch Company; Plevna District Improvement  
Company; Collins Products, LLC;

Contestants

vs.

J-Spear Ranch Co.;

Claimant/Contestant

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**FEB 23 2005**

**THE OFFICE OF  
ADMINISTRATIVE HEARINGS**

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 31:

a. The places of use (hereinafter "POUs") designated in Claim 31 are owned by

J-Spear Ranch Co. and total 12.8 acres located within the following tracts of land:

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**WATER RESOURCES DEPT  
SALEM OREGON**

**EXHIBIT**

**A**

(1) SESW, Sec. 26, T32S, R10E, W.M. (8.9 acres)

(2) NENE, Sec. 35, T32S, R10E, W.M. (3.9 acres)

- b. The POUs are within the former Klamath Indian reservation.
- c. The POUs are within former Indian Allotment 345 (hereinafter "Allotment 345").
- d. Allotment 345 was conveyed from Indian ownership to Modoc Lumber Company on May 29, 1957. Modoc Lumber Company was the first non-Indian owner of Allotment 345.
- e. Allotment 345 was conveyed by Modoc Lumber Company to J-Spear Ranch, the second non-Indian owner, on December 18, 1975.
- f. The POUs have been leased as livestock pasture since 1965.
- g. The uses claimed are irrigation, livestock watering, and wildlife.
- h. There is no actual physical diversion of water from its natural source; rather, Claim 31 relies upon natural overflow and sub-irrigation.
- i. 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 31.

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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 J-SPEAR RANCH CO:

DATED: February 21, 2005



Steven L. Shropshire  
Jordan Schrader PC  
P.O. Box 230669  
Portland OR 97281  
Telephone: (503) 598-5583  
Telefax: (503) 598-7373  
Email: [steve.shropshire@jordanschrader.com](mailto:steve.shropshire@jordanschrader.com)

ATTORNEYS FOR CLAIMANT/CONTESTANT  
J-SPEAR RANCH CO.

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**WATER RESOURCES DEPT  
SALEM, OREGON**

FOR CONTESTANTS KLAMATH PROJECT WATER USERS:

DATED: February 17, 2005



ANDREW HITCHINGS

PAUL SIMMONS

Somach, Simmons & Dunn

813 Sixth St Third Floor

Sacramento CA 95814

Telephone: (916) 446-7979

Telefax: (916) 446-8199

Email: [ahitchings@lawssd.com](mailto:ahitchings@lawssd.com)

[psimmons@lawssd.com](mailto:psimmons@lawssd.com)

ATTORNEYS FOR CONTESTANTS KLAMATH  
PROJECT WATER USERS

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SALEM, OREGON**

CASE 175 - STIPULATION OF FACTS

PAGE 4  
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FOR CONTESTANT THE KLAMATH TRIBES:

DATED: February 18, 2005



LORNA K. BABBY  
WALTER ECHO-HAWK  
Native American Rights Fund  
1506 Broadway  
Boulder CO 80302  
Telephone: (303) 447-8760  
Telefax: (303) 447-7776  
Email: [babby@narf.org](mailto:babby@narf.org)  
[wechohawk@narf.org](mailto:wechohawk@narf.org)

ATTORNEYS FOR THE KLAMATH TRIBES

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SALEM, OREGON**

CASE 175 – STIPULATION OF FACTS

PAGE 5  
47827-32969 27861.3.DOC\Ref2/11/2005-

KBA\_ACFOD\_00542

FOR CONTESTANT THE UNITED STATES OF AMERICA

DATED: February 14, 2005



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LARRY A. BROWN  
Trial Attorney  
General Litigation Section  
Environment & Natural Resources Division  
U.S. Department of Justice  
P.O. Box 663  
Washington D.C. 20044-0663  
Telephone: 202/305-0435  
Telefax: 202/305-0274  
Email: [larry.brown@usdoj.gov](mailto:larry.brown@usdoj.gov)

ATTORNEYS FOR THE UNITED STATES OF  
AMERICA

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**WATER RESOURCES DEPT  
SALEM, OREGON**

**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:

Larry A. Brown  
United States Department of Justice  
Ben Franklin Station  
PO Box 663  
Washington DC 20044-0663  
[larry.brown@usdoj.gov](mailto:larry.brown@usdoj.gov)

Andrew Hitchings/Paul Simmons  
Somach, Simmons & Dunn  
813 Sixth St Third Floor  
Sacramento CA 95814  
[ahitchings@lawssd.com](mailto:ahitchings@lawssd.com)  
[psimmons@lawssd.com](mailto:psimmons@lawssd.com)

Walter Perry/Justin Wirth  
Oregon Dept. of Justice  
1162 Court St NE  
Salem OR 97310  
[walter.perry@doj.state.or.us](mailto:walter.perry@doj.state.or.us)  
[justin.wirth@doj.state.or.us](mailto:justin.wirth@doj.state.or.us)

Walter Echo-Hawk/Lorna K. Babby  
Native American Rights Fund  
1506 Broadway  
Boulder CO 80302  
[wechohwk@narf.org](mailto:wechohwk@narf.org)  
[babby@narf.org](mailto:babby@narf.org)  
and First Class Mail

Bruce D. Bernard  
United States Department of Justice  
North Tower Ste 945  
999 18th St  
Denver CO 80202  
[bruce.bernard@usdoj.gov](mailto:bruce.bernard@usdoj.gov)

Richard D. Bailey  
Oregon Water Resources Department  
725 Summer St NE Ste A  
Salem Oregon 97301  
[richard.d.bailey@wrds.state.or.us](mailto:richard.d.bailey@wrds.state.or.us)

William M Ganong  
Attorney at Law  
514 Walnut St  
Klamath Falls OR 97601  
[wganong@aol.com](mailto:wganong@aol.com)

Teri Hranac  
Oregon Water Resources Department  
725 Summer St NE Ste A  
Salem Oregon 97301  
[Teri.k.hranac@wrds.state.or.us](mailto:Teri.k.hranac@wrds.state.or.us)

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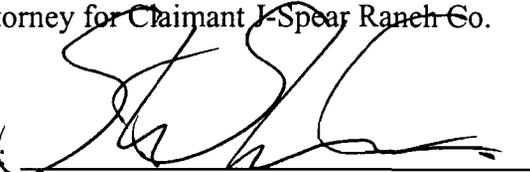
**APR 18 2005**

**WATER RESOURCES DEPT  
SALEM, OREGON**

Carl Ullman  
PO Box 957  
Chiloquin OR 97624  
[bullman3@earthlink.net](mailto:bullman3@earthlink.net)

Dated this 21st day of February 2005.

JORDAN SCHRADER PC  
Attorney for Claimant J-Spear Ranch Co.

By: 

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

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**WATER RESOURCES DEPT  
SALEM, OREGON**

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF OREGON  
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In the Matter of the Determination of the Relative rights of the Waters of the Klamath River,  
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United States of America; The Klamath Tribes;  
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District; Pioneer District Improvement Company;  
Poe Valley Improvement District; Shasta View  
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Hunting Lodge, Inc.; Van Brimmer Ditch Company;  
Plevna District Improvement Company; Collins  
Products. LLC,  
Contestants

**PROPOSED ORDER ON UNITED  
STATES' MOTION FOR  
RECONSIDERATION OF RULING  
ON LEGAL ISSUES AND DISMISSAL  
OF CLAIMANT'S CLAIM**

Case No. 157

Claim No. 4

Contests 2039, 3430, 3710, and 4066

v.

Thomas J. Shaw, Claimant/Contestant.

On September 13, 2004 the United States filed a Motion for Reconsideration of my Ruling on Motions for Ruling on Legal Issues in the August 24, 2004 Interim Order. The United States' Motion for Reconsideration contends that I erroneously held that an irrigation claim based upon natural overflow and sub-irrigation was entitled to a *Walton* water right, and erroneously did not hold that a claim for a wildlife purpose of use was not entitled to a *Walton* water right.

On October 8, 2004, Claimant filed a Response to the United States' Motion for Reconsideration. On October 20, 2004, the United States, the Klamath Tribes and the Klamath Project Water Users filed Replies to the Claimant's Response. The participants presented oral argument for their positions on October 25, 2004.

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SALEM, OREGON

*Thomas J. Shaw* (157)

Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues and Dismissal of Claimant's Claim

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**EXHIBIT**

**8**

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## Reconsideration of an Interim Order

Claimant argues that Oregon administrative law prohibits reconsideration of the August 24 Interim Order. Claimant cites ORS 183.482<sup>1</sup> and OAR 137-003-0675<sup>2</sup> to support his position that reconsideration of an order can be sought only after the agency has issued a final order disposing of the entire case. However, ORS 183.482 addresses judicial review of a contested case by the Oregon Court of Appeals. That statute does not apply to this case at this stage. Likewise, OAR 137-003-0675 addresses agency reconsideration of a final order in a contested case. The United States seeks reconsideration under OAR 137-003-0630(1),<sup>3</sup> which addresses pre-hearing motions. OAR 137-003-0630(1) permits a request for an order or other relief by filing a motion. The United States seeks such relief with its Motion for Reconsideration.

No participant cites any administrative rule or other authority that prohibits the relief sought by the United States. It logically follows that some mechanism should exist to allow the correction of an incorrect legal ruling, and not require parties to plod through the entire administrative and appeal processes to correct a legal error. Other administrative law judges have allowed reconsideration of interim orders in the Klamath Basin Adjudication. (*See*, Administrative Law Judge Young's Order Amending Ruling on Motions for Ruling on Legal Issues, Case No. 900, Claim Nos. 37 *et al*, issued April 20, 2004, and Administrative Law Judge Upite's Order Withdrawing Portion of Order Requiring Discovery, Case No. 235, Claim No. 128, issued October 12, 2004.)

Claimant raises a legitimate concern that allowing reconsideration of an interim ruling or order may encourage participants on the losing end of such a ruling or order to file for reconsideration until they get an outcome they like. However, the law of the case should permit the administrative law judge to end that practice appropriately.

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<sup>1</sup> ORS 183.482 provides, in part:

(1) Jurisdiction for judicial review of contested cases is conferred upon the Court of Appeals. \* \* \*. The petition shall be filed within 60 days only following the date the order upon which the petition is based is served \* \* \*.

ORS 183.480 provides, in part:

(1) \* \* \*, any person adversely affected or aggrieved by an order or any party to an agency proceeding is entitled to judicial review of a final order \* \* \*.

(2) Judicial review of final orders of agencies shall be solely as provided by ORS 183.482, \* \* \*.  
\* \* \* \* \*

<sup>2</sup> OAR 137-003-0675 provides, in part:

(1) \* \* \* a party may file a petition for reconsideration or rehearing of a final order in a contested case with the agency within 60 calendar days after the order is served. \* \* \*.  
\* \* \* \* \*

<sup>3</sup> OAR 137-003-0630 provides, in part:

(1) A request for any order or other relief may be made by filing a motion in writing. The motion need not be in any particular form.  
\* \* \* \* \*

*Thomas J. Shaw* (157)

Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues and  
Dismissal of Claimant's Claim

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I conclude that I have authority to address the United States' Motion for Reconsideration.

Claimant also contends that the scope of the United States' Motion is impermissibly broad and should be limited to my alleged misunderstanding of *Walton III* [(*Colville Confederated Tribes v. Walton*, 752 F2d 397 (9<sup>th</sup> Cir 1985), *cert den* 475 US 1010 (1986)]. However, the United States seeks relief under its motion based on erroneous interpretations of the law. The United States' arguments center on a failure to follow federal law to determine the elements of a *Walton* water right for natural overflow and sub-irrigation, and for wildlife purposes. Those arguments are the bases for the United States Motion for Reconsideration of the issues decided in the Ruling on Legal Issues. The United States' arguments are not impermissibly broad.

### **Walton Water Right Issues**

I have read the participants' written arguments and considered their oral arguments concerning *Walton* water rights and conclude that I incorrectly decided both legal issues in my August 24, 2004 Interim Order.

It is clear to me after reading the District Court's Memorandum Decision in *Colville Confederated Tribes v. Walton*, No. 3421 (D E Wash, filed December 31, 1983, which *Walton III* reversed and remanded with a mandate in 1985, and the District Court's Order, *Colville Confederated Tribes v. Walton*, No. C-3421-RJM (D E Wash, filed June 25, 1987), based on the Ninth Circuit's mandate in *Walton III*, that sub-irrigation does not constitute a valid *Walton* water right.<sup>4</sup> "Reserved rights are 'federal water rights' and 'are not dependent upon state law

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<sup>4</sup> In its 1983 Memorandum Decision, the District Court stated the following:

Walton's lands passed out of Indian ownership between 1921 and 1925. More specifically, the Whams purchased allotment 2371 in 1921; 894 in 1923; and 525 in 1925 \* \* \*. The Whams ran some 100 head of cattle and in addition to water diverted for stock, also irrigated about 30 acres employing gravity flow rill method as well as a small gasoline-powered pump. Additionally, because of the unique geological characteristics of this area, allotments 2371 and 894 were sub-irrigated at that time and required no application of water. Sub-irrigated acreage was estimated at about 40 \* \* \*.

Walton acquired 2371, 894 and 525 in July of 1948. The following month he applied to the state for a permit to divert 1.0 c.f.s. for irrigation of 75 acres. The next year, after successful negotiations and the commitment of substantial capital, Walton was able to bring electricity into the valley for the first time.

The availability of electricity led to the installation of two five-horsepower pumps in the creek which, together with the use of newly available aluminum pipe, allowed Walton to engage in considerably more sprinkler irrigation as opposed to the less efficient rill method. During the period of 1949 and 1950, Walton had a minimum of 104 acres under irrigation \* \* \*. I have no difficulty finding that Walton exercised reasonable diligence in irrigating a minimum of 104 acres.

*Thomas J. Shaw* (157)

Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues and Dismissal of Claimant's Claim

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**WATER RESOURCES DEPT  
SALEM, OREGON**

or state procedures.” *Walton III*, 753 F2d at 400, quoting *Cappaert v. United States*, 426 U S 128, 145 (1976). “It is appropriate to look to state law for guidance” although the “volume and scope of particular reserved rights” remain federal questions. (*Id.*, quoting *Colorado River Water Conservation Dist. v. United States*, 424 U S 800, 813 (1976).)

I have also concluded that *In re Water Rights of Silvies River*, 115 Or 27 (1925), which dealt with water rights on lands in non-Indian fee ownership prior to 1909, does not apply to federal reserved water rights based on a treaty. Even if controlling federal law were unclear, the lands involved in Claim No. 4 were held in Indian ownership until 1957. Oregon’s statutory water rights scheme controlled in 1957 and requires application for permit and an actual diversion of surface water. (Oregon Revised Statutes (ORS) §§ 537.130, 537.140, 537.150.) Federal law establishes that non-Indian successors to Indian land are “subject to those general rules of law governing the appropriation and use of public water of the state” as

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Memorandum Decision, *Colville Confederated Tribes v. Walton*, No. 3421 (D E Wash, filed August 31, 1983) at 2-5.

The District Court initially qualified Walton’s allocation to include both the 30 acres irrigated by artificial means and the 40 acres irrigated by sub-irrigation. The Ninth Circuit reversed and remanded the District Court in *Walton III*. On remand, the District Court stated:

Rarely has this Court had a case returned with a mandate so precise in direction and limited in scope:

On remand, the district court will allocate the reserved water among the parties in accord with our opinion: 120 acres feet per year to Walton; 66.4 to the Indian Allotees; and 350 to the Tribe’s fishery \* \* \*.

There is no way to read the foregoing and conclude that the court has authority to do anything other than enter a final Order establishing the mathematical allocations quoted above \* \* \*.

The Tribe continues to maintain that Walton is being awarded water for application on his “soggy boggy” lands. That was true at the time the findings were entered, but not at the present time. Findings were made in a two-step process. First, the Court determined that the initial non-Indian purchaser had beneficially applied water to thirty acres and that all subsequent owners continued such irrigation. Second, it was determined that if Walton’s diligence (as opposed to the diligence of intervening owners) was controlling, then he had beneficially applied water to a minimum of 104 acres. The circuit expressly adopted the first finding, and just as expressly rejected the second on the dual bases that (1) Walton’s diligence would be of weight only to the extent that his predecessors had exercised like diligence; and (2) to “award additional water [to the water-saturated lands] would result in a double allocation.”

The 104 acres did in fact include the water-saturated lands adjacent to the granitic lip. The 30 acres does not, consisting as it does of the portion of the property referred to by several witnesses as the “corn patch,” which was far removed from the granitic lip.

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**WATER RESOURCES DEPT  
SALEM, OREGON**

Order, *Colville Confederated Tribes v. Walton*, No. C-3421 RJM (D E Wash, filed June 25, 1987) at 2-3.

soon as they became owners of the former Indian land. *United States ex rel Ray v. Hibner*, 27 F2d 909, 912 (D Idaho 1928). As a result, any water right claim based on sub-irrigation or natural overflow on lands in Claim No. 4 would need to meet Oregon's statutory requirements, which could not be done in this case.

I have concluded that a water right for wildlife use for aesthetic and natural values, separate from the Tribes' water right to hunt, fish and gather, does not exist. In *United States v. Adair*, 478 F Supp 336 (D Or 1979) (*Adair I*), the United States made an argument similar to Claimant's argument, that on acquiring the Klamath Reservation lands for a wildlife refuge and national forest it acquired the Indians' rights to use water necessary to maintain the marsh and forest. The Ninth Circuit rejected the United States' wildlife water claim, finding that because the Tribes' reserved water right for wildlife purposes was fully accounted for, then no Indian water right reserved under the Klamath Treaty for wildlife purposes could have been transferred to any first non-Indian owner of a former Indian allotment. *United States v. Adair*, 723 F2d 1394, 1419 (9<sup>th</sup> Cir 1984) (*Adair II*). Because the Tribes continue to hold the federal reserved water rights for the Klamath Reservation for wildlife purposes, and because those rights cannot be transferred to a third party, claimant cannot acquire a water right for a wildlife purpose.

### ORDER

(1) The United States' Motion for Reconsideration is allowed. The Ruling on Motions for Ruling on Legal Issues in the August 24, 2004 Interim Order is set aside.

(2) The United States' Motion for Ruling on Legal Issues filed June 28, 2004 is allowed:

(a) An irrigation claim based on natural overflow and sub-irrigation is not entitled as a matter of law to a *Walton* water right.

(b) A claim for a wildlife purpose of use is not entitled as a matter of law to a *Walton* water right.

(3) Claimant's Motion for Ruling on Legal Issues, *i.e.*, that an irrigation claim based on natural overflow and sub-irrigation is entitled to a *Walton* water right, and that a claim for a wildlife purpose of use is entitled to a *Walton* water right, is denied.

(4) Claimant's Claim No. 4 is dismissed.

  
\_\_\_\_\_  
Ken L. Betterton, Administrative Law Judge  
Office of Administrative Hearings

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**WATER RESOURCES DEPT  
SALEM, OREGON**

Dated: December 10, 2004

*Thomas J. Shaw* (157)

Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues and Dismissal of Claimant's Claim

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KBA\_ACFOD\_00550

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

**EXCEPTIONS:** Parties may file exceptions to this Order with the Adjudicator within 30 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusions of law, summary of evidence, or recommendations of the Administrative Law Judge. A copy of the exceptions shall also be delivered or mailed to all participants in this contested case.

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

Richard D. Bailey  
Klamath Basin Adjudication  
Oregon Water Resources Dept  
725 Summer Street N.E., Suite "A"  
Salem OR 97301

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SALEM, OREGON**

*Thomas J. Shaw (157)*

Proposed Order on United States' Motion for Reconsideration of Ruling on Legal Issues and Dismissal of Claimant's Claim

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KBA\_ACFOD\_00551

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2005, I mailed a true copy of the following:  
**PROPOSED ORDER ON STIPULATION BY PARTICIPANTS FOR RULING ON  
LEGAL ISSUES AND DISMISSAL OF CLAIMANT'S CLAIM**, by depositing the  
same in the U.S. Post Office, Salem, Oregon 97309, with first class postage prepaid  
thereon, and addressed to:

Richard D. Bailey  
Oregon Water Resources Department  
725 Summer Street N.E., Suite "A"  
Salem, OR 97301  
[richard.d.bailey@wrds.state.or.us](mailto:richard.d.bailey@wrds.state.or.us)

Carl V. Ullman  
Water Adjudication Project  
The Klamath Tribes  
PO Box 957  
Chiloquin, OR 97624  
Phone: 541-783-3081  
Fax: 541-783-2609  
[bullman@internetcds.com](mailto:bullman@internetcds.com)

Walter Echo-Hawk/Lorna Babby  
Native American Rights Fund  
1506 Broadway  
Boulder, CO 80302  
Phone: 303-447-8760  
Fax: 303-443-7776  
[wechohwk@narf.org](mailto:wechohwk@narf.org)  
[babby@narf.org](mailto:babby@narf.org)

Steven L. Shropshire  
Jordan Schrader PC  
PO Box 230669  
Portland, OR 97281  
Phone: 503-598-7070  
Fax: 503-598-7373  
[Steve.shropshire@jordanschrader.com](mailto:Steve.shropshire@jordanschrader.com)

Teri Hranac  
Oregon Water Resources Dept.  
725 Summer Street N.E., Suite "A"  
Salem, OR 97301  
Phone: 503-986-0826  
Fax: 503-986-0901  
[Teri.Hranac@wrds.state.or.us](mailto:Teri.Hranac@wrds.state.or.us)

Paul S. Simmons/Andrew M. Hitchings  
Somach, Simmons & Dunn  
Hall of Justice Building  
813 Sixth Street, Third Floor  
Sacramento, CA 95814-2403  
Phone: 916-446-7979  
Fax: 916-446-8199  
[psimmons@lawssd.com](mailto:psimmons@lawssd.com)  
[ahitchings@lawssd.com](mailto:ahitchings@lawssd.com)

William M. Ganong  
Attorney at Law  
514 Walnut Ave.  
Klamath Falls, OR 97601  
Phone: 541-882-7228  
Fax: 541-883-1923  
[wganong@aol.com](mailto:wganong@aol.com)

Bruce D. Bernard  
United States Dept. of Justice  
999 18th St., Ste 945, North Tower  
Denver, CO 80202  
Phone: 303-312-7319  
Fax: 303-312-7379  
[bruce.bernard@usdoj.gov](mailto:bruce.bernard@usdoj.gov)

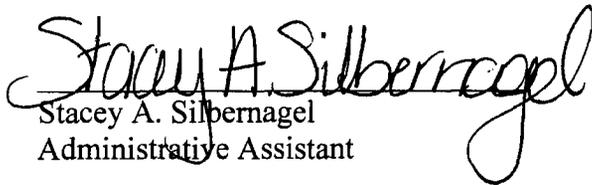
Larry A. Brown  
United States Department of Justice  
Environmental & Natural Resources Div.  
General Litigation Section  
Ben Franklin Station  
PO Box 663  
Washington D.C. 20044-0663  
Phone: 202-305-0435  
Fax: 202-305-0274  
[larry.brown@usdoj.gov](mailto:larry.brown@usdoj.gov)

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**WATER RESOURCES DEPT  
SALEM, OREGON**

Jesse D. Ratcliffe / Stephen E.A. Sanders  
Oregon Dept. of Justice  
1162 Court St NE  
Salem, OR 97310  
Phone: 503-378-4500  
Fax: 503-378-3802  
[Jesse.d.ratcliffe@doj.state.or.us](mailto:Jesse.d.ratcliffe@doj.state.or.us)  
[Steve.sanders@doj.state.or.us](mailto:Steve.sanders@doj.state.or.us)

  
Stacey A. Silbermagel  
Administrative Assistant

**RECEIVED**

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**WATER RESOURCES DEPT  
SALEM, OREGON**