

**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;
Contestants

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

Case No. 176

Claim: 32

Contests: 2041, 3444, 3729, and 4088

vs.

Thomas J. Shaw;
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. 32, 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**

Thomas J. Shaw (176)
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. 32 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. 176 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
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a Tributary of the Pacific Ocean**

United States of America; The Klamath Tribes;
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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;

STIPULATION OF FACTS

Case No. 176

Claim: 32

Contests: 2041, 3444, 3729, and 4088

Contestants

vs.

Thomas J. Shaw;

Claimant/Contestant.

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 32:

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a. The places of use (hereinafter "POUs") designated in Claim 32 are owned by Thomas J. Shaw and total 71.2 acres located within the following tracts of land:

(1) NENW, Sec. 36, T32S, R10E, W.M. (22.8 acres)

(2) SWNW, Sec. 36, T32S, R10E, W.M. (1.8 acres)

(3) SENW, Sec. 36, T32S, R10E, W.M. (29.3 acres)

(4) NWSW, Sec. 36, T32S, R10E, W.M. (17.3 acres)

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

c. The POUs are within former Indian Allotment 342 (hereinafter "Allotment 342").

d. Allotment 342 was conveyed from Indian ownership to Modoc Lumber Company on May 29, 1957. Modoc Lumber Company was the first non-Indian owner of Allotment 342.

e. Allotment 342 was conveyed by Modoc Lumber Company to Thomas Shaw, the second non-Indian owner, on June 22, 1964.

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 32 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

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Ruling on Legal Issues, Case No. 157, Claim 4, attached hereto as Attachment 1, the ALJ may file an Order dismissing Claim 32.

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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Jordan Schrader PC
P.O. Box 230669
Portland OR 97281
Telephone: (503) 598-5583
Telefax: (503) 598-7373
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ATTORNEYS FOR CLAIMANT/CONTESTANT
THOMAS J. SHAW

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**WATER RESOURCES DEPT
SALEM, OREGON**

FOR CONTESTANTS KLAMATH PROJECT WATER USERS:

DATED: February 17, 2005



ANDREW HITCHINGS
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ATTORNEYS FOR CONTESTANTS KLAMATH
PROJECT WATER USERS

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**WATER RESOURCES DEPT
SALEM, OREGON**

CASE 176 - 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
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Boulder CO 80302
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Email: babby@narf.org
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ATTORNEYS FOR THE KLAMATH TRIBES

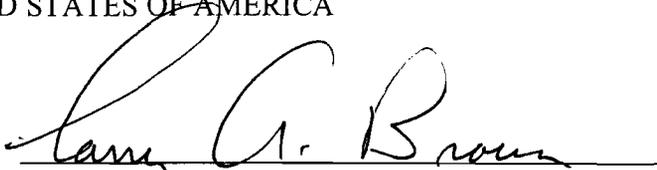
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**WATER RESOURCES DEPT
SALEM OREGON**

FOR CONTESTANT THE UNITED STATES OF AMERICA

DATED: February 14, 2005



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ATTORNEYS FOR
THE UNITED STATES OF AMERICA

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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 and 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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SALEM OREGON**

Carl Ullman
PO Box 957
Chiloquin OR 97624
bullman3@earthlink.net

Dated this 21st day of February 2005.

JORDAN SCHRADER PC
Attorney for Claimant Thomas J. Shaw

By 
Steven L. Shropshire, OSB # 94437
steve.shropshire@jordanschrader.com

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SALEM OREGON

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
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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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Poe Valley Improvement District; Shasta View
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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 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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**WATER RESOURCES DEPT
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

B

Reconsideration of an Interim Order

Claimant argues that Oregon administrative law prohibits reconsideration of the August 24 Interim Order. Claimant cites ORS 183.482¹ and OAR 137-003-0675² 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),³ 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.

¹ 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, * * *.
* * * * *

² 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. * * *.
* * * * *

³ 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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SALEM, OREGON

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 (9th 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.⁴ "Reserved rights are 'federal water rights' and 'are not dependent upon state law

⁴ 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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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

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.

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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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 (9th 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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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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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:

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Oregon Water Resources Department
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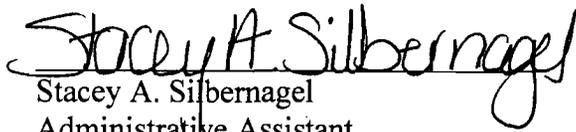
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