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; 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.; Reames Golf and Country Club; Van Brimmer Ditch Company; Plevna District Improvement Company; Collins Products, LLC;

Contestants

vs.

Lititia Kirk;
Claimant

AMENDED PROPOSED ORDER

Case No. 208

Claim: 83

Contests: ~~3128~~[1], ~~3277~~[2], 3514[3], ~~3877~~[4], and ~~4001~~[5]

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WATER RESOURCES DEPT
SALEM, OREGON

After fully considering the entire record, the Adjudicator issues this AMENDED PROPOSED ORDER pursuant to OAR 137-003-0655(3) to correct a computation error in the total number of irrigated acres to be considered under Claim 83. This AMENDED PROPOSED ORDER modifies the

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1 Horsefly Irrigation District, Langell Valley Irrigation District, and Medford Irrigation District voluntarily withdrew from Contest 3128 on June 30, 2003. Rogue River Valley Irrigation District voluntarily withdrew from Contest 3128 on July 31, 2003.

2 Roger Nicholson, *et al.* voluntarily withdrew Contest 3277 to Claim 83.

3 Don Vincent voluntarily withdrew from Contest 3514 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contest 3514 on June 24, 2002. On December 3, 2002, The remaining entities of Klamath Project Water Users voluntarily withdrew, with prejudice, from contest 3514, as to the BIA/Tribal portion of Claim 83. Klamath Hills District Improvement Co. voluntarily withdrew from Contest 3514 on January 15, 2004.

4 The United States voluntarily withdrew Contest 3877. *See* ORDER ALLOWING MOTION TO WITHDRAW dated March 16, 2006.

5 The Klamath Tribes voluntarily withdrew Contest 4001. *See* ORDER ALLOWING MOTION TO WITHDRAW dated March 16, 2006.

PROPOSED ORDER issued on February 20, 2007 by Administrative Law Judge Maurice L. Russell, II, and is not a final order subject to judicial review pursuant to ORS 183.480 or ORS 539.130.

HISTORY OF THE CASE

THIS PROCEEDING under the provisions of ORS Ch. 539 is part of a general stream adjudication to determine the relative rights of the parties to waters of the various streams and reaches within the Klamath Basin.

Claimant:

On January 31, 1991, Lititia Kirk, an enrolled member of the Klamath Tribe, filed Claim 83, based on water use on land that was formerly part of the Klamath Indian Reservation. This claim is for 2.5 cubic feet per second (cfs) of water for irrigation of 83.2 acres of practicably irrigable acreage and 45 head of livestock. The claim is for a single point of diversion on the Williamson River, a tributary to the Klamath River. The claimed period of use is March 15 to October 15, and the claimed priority date is October 14, 1864.

On September 24, 1992, the Claimant sold a portion of the land to Gienger Investments. After various transactions between 1992 and 1996, Lititia Kirk owned Parcel 1 (Tax Lot 200, 61.71 acres), William Ray owned Parcel 2 (Tax Lot 201, 6.94 acres), and the Klamath and Modoc Tribes owned Parcel 3 (Tax Lot 202, 17.07 acres). On December 16, 1998, the Klamath Tribe conveyed Parcel 3 to the United States, to be held in Trust. All property owners continue to pursue the claim for water rights appurtenant to the land. All private owners pursue their claims as Allottees.

William Ray sold Parcel 2 to the United States as Trustee for the Klamath Tribes on September 8, 2004.

On October 1, 1999, the United States, as Trustee on behalf of the Klamath Tribes, filed an amended claim asking the Oregon Water Resources Department (OWRD) to bifurcate the claim with regards to Parcel 3. The United States claimed 0.2 cfs of water for irrigation of 16.9 acres (of the 17.07 total acres in Parcel 3) from April 1 to October 31.

On February 15, 2005, the participants in this case stipulated to a further bifurcation of the claim to include the parcel transferred by William Ray to the United States as a separate claim numbered 730~~,~~. Claim 730 is composed of 6.94 acres, with a maximum diversion rate of 0.17 cfs.

Preliminary Evaluation:

On October 4, 1999, the OWRD issued its Preliminary Evaluation (P.E.) for this claim, preliminarily denying the Allottee claim. The P.E. did not take the United States' amended claim into consideration.

Contests:

On May 8, 2000, several contests were filed: Horsefly, Langell Valley, Rogue River, and Medford Irrigation Districts (Districts) filed contest 3128; Roger Nicholson, *et al.* filed contest

3277 (addressing only the United States' claim), and Klamath Irrigation District, *et al.* (KPWU) filed contest 3514. Contests 3128 and 3277 were subsequently withdrawn. As claimants, the United States filed contest 3877 and the Klamath Tribes filed contest 4001, both objecting to the preliminary evaluation because it did not consider the amended claim that was submitted on October 1, 1999. No contests were filed by Lititia Kirk or William Ray.

Bifurcation of Parcel 3:

On July 7, 2003, ALJ William Young held the first prehearing conference. ALJ Young postponed a Scheduling Order to allow the parties time to reach a stipulation on bifurcation of the claim. ALJ Young held a brief, second prehearing conference on September 8, 2003. On October ~~10~~ 2, 2003, the parties stipulated that the United States could pursue a separate claim on Parcel 3. ALJ Young ordered bifurcation of Claim 83 and the portion of the claim on Parcel 3 became Claim 729, which was consolidated into Case Number 283. (STIPULATION TO BIFURCATE CLAIM 83, ASSIGN CLAIM 729 TO ONE PORTION OF BIFURCATED CLAIM 83 (Oct. 10, 2003)).

Bifurcation of Parcel 2:

The parties have stipulated that on September 8, 2004, William Ray conveyed Parcel 2 to the United States, to be held in Trust for the Klamath Tribe. After an Unopposed Motion to Modify the Scheduling Order, ALJ Ken L. Betterton issued an Order Modifying Previous Scheduling Order on September 29, 2004. The parties reached a stipulation on February ~~22~~ 15, 2005, agreeing that the United States could pursue a separate claim on Parcel 2. ALJ Michael Andrew Francis ordered a second bifurcation of Claim 83 and the portion of the claim on Parcel 2 became Claim 730. The order consolidated Claim 730 with Case 283. (STIPULATION TO BIFURCATE CLAIM 83, AND ASSIGN CLAIM 730 TO A PORTION OF BIFURCATED CLAIM 83, AND TO CONSOLIDATE CLAIM NO. 730 INTO CASE 283. (Feb. 24, 2005)).

~~Because of~~ After the bifurcation and removal of the property subject to Claims 729 and 730, ~~only~~ the only property ~~remaining after the bifurcation is still~~ subject to this Case~~. That property~~ is the portion of the claimed property east of Highway 97 in Government Lots 2, 3, 8, 9, 12, 18 and 19, Section 16, T 35 S, R 7 E. W.M. This claimed portion ~~is claimed to~~ includes ~~61.71~~ 59.36 acres (of the 61.71 total acres in Parcel 1) of practicably irrigable acreage. (Computation: 83.2 acres originally claimed, minus 16.9 acres assigned to Claim 729, minus 6.94 acres assigned to Claim 730, equals 59.36 acres remaining in Claim 83).

Hearing:

A hearing was conducted on April 13, 2005, in Salem, Oregon before Administrative Law Judge (ALJ) Michael Francis. Claimant, Lititia Kirk, appeared without counsel and submitted to cross-examination. Klamath Project Water Users appeared by telephone through attorney Andy Hitchings. Assistant Attorney General Jesse Ratcliff appeared for the Oregon Water Resources Department. William Ray, formerly a claimant in this case, also appeared, but did not testify.

On May 19, 2005, ALJ Francis issued a scheduling order in the case, specifying due dates for briefing. On June 1, 2005, claimant timely filed her Opening Brief. OWRD and KPWU filed their Response Briefs on June 29, 2005. No Reply Brief having been filed as required by the scheduling order, the record closed on July 13, 2005.

~~I have reviewed~~ The entire record, including the digital recording of the hearing in this case, was reviewed by Administrative Law Judge Maurice L. Russell, II, and a ~~in preparation to write this~~ Proposed Order was issued on February 20, 2007.

EVIDENTIARY RULINGS

OWRD Exhibit 1 was offered and admitted into evidence.

The Direct Testimony of Lititia Kirk was offered and admitted into evidence. Claimant's Exhibits C-1 through C-3, and C-5 through C-9 were offered and admitted into evidence. At hearing, Exhibit C-10 was offered and admitted into evidence. KPWU objected to Exhibit C-4, a report by Natural Resources Consulting Engineers, Inc. (NRCE) dated April 28, 2004, and requested that the ALJ strike paragraphs 14, 15, 17, the last two sentences of paragraph 20, all of paragraph 27, and all reference to the NRCE report in paragraphs 28 and 38 of claimant's Direct Written Testimony. This objection was taken under advisement and ~~now will be~~ was considered by Administrative Law Judge Maurice L. Russell, II.

Contestants argue that the NRCE report submitted as Exhibit C-4 to the Written Direct Testimony of Lititia Kirk is hearsay, and is therefore not substantial evidence that may form the basis for a determination of practicable irrigable acreage in this claim. Since that report is the only evidence addressing the practicable irrigable acreage on the allotment, the report's status as substantial evidence is critical to adjudication of the claim.

Hearsay evidence may be substantial evidence for purposes of an administrative hearing if it is shown to be of sufficient reliability to meet the test provided by ORS 183.450. It must be "of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs * * *." The Oregon Supreme Court has discussed the standard for evaluating the reliability of such evidence in a number of cases, notably *Reguero v. Teacher Standards and Practices* 321 Or 402 (1991) and *Cole v. Driver and Motor Vehicle Services Branch,* 336 Or 565 (2004). In those cases, the Court enunciated a series of factors that were to be considered in deciding whether a particular item of hearsay should be treated as substantial evidence, although in *Cole* the Court emphasized that these factors were not exclusive, and should not be "treated as a checklist." *Cole, Id. at* note 18. In this case, as discussed further below, ~~I conclude that while~~ the report, to the extent it states facts, qualifies as substantial evidence of those facts, the opinions stated in the report are only useful to the extent they assist in evaluating the evidence, and are not evidence of facts themselves. *Brooks Resources Corp. v. Department of Revenue,* 286 Or 499 (1979).

Cole v. DMV. was a consolidated decision on two separate cases that had previously been considered by the Court of Appeals. Those cases involved two drivers whose licenses had been suspended under different statutory provisions, after administrative hearings at which hearsay evidence was a significant part of the case.

In one case, Cole's driver license was suspended after he was arrested for Driving Under the Influence of Intoxicants, based in part on a police report that was admitted at hearing. The report had been prepared by a police officer in the regular performance of his duty and, although Cole objected to admission of the report at hearing, Cole did not put on any evidence that

contradicted the report. In these circumstances, the Court held that the report was substantial evidence, especially where the driver had the right to subpoena the author of the report if cross-examination was desired. However, since the identity of the author of the report was unknown to Cole prior to the hearing, Cole was deprived of a reasonable opportunity to subpoena the officer, which, the Court concluded, was a violation of Due Process.

In the second case, Dinsmore's driver license was alleged to be subject to suspension because her driving caused or contributed to a death due to recklessness or criminal negligence. Two police officers who prepared reports of the incident were subpoenaed by the agency, but did not appear. The Court concluded that the reports could not be treated as substantial evidence because they were the only evidence supporting the agency's action and Dinsmore had submitted evidence that contradicted them in important respects. Significantly, the Court noted that the expert opinion contained in one of the reports was open to question because Dinsmore had submitted evidence contrary to the facts that served as the foundation for that opinion.

The application of the *Cole* decision to this case is obvious. Claimant provided the NRCE report to the other participants some time ago. Based upon the agreement of the parties at a prehearing conference, the other participants expected that Claimant would arrange for an amended report after part of the property was withdrawn from this claim. Claimant did not do so, and instead relied upon the original report at hearing. This did not, however, deprive the contestants of the opportunity to subpoena the author of the report now in evidence, or the report they expected, since the identity of the author was known. Moreover, the facts in the report are for the most part drawn from public sources, including the U.S. Soil Conservation Service's Soil Survey for Klamath County, and costing data prepared by Oregon State University's Extension Service. Additionally, the contestants have questioned the methodology used to prepare the opinion in the report, but they have not presented any evidence directly contradicting the facts upon which that opinion was founded.

~~I conclude, therefore, that~~ The report is substantial evidence of the facts it contains. ~~I will give the opinion presented in the report relatively little weight,~~ In view of the serious criticisms leveled against it, except to the extent that it assists ~~me~~ in understanding the evidence in this case~~.~~, the opinion presented in the report is given relatively little weight. ~~In other words, I will look upon~~ The facts ~~as~~ stated in the report as evidence~~, to~~ will be weighed against the other evidence in this record~~, and draw my own conclusions~~. Subject to consideration as to weight, ~~as discussed herein,~~ the objection is overruled and Exhibit C-4 is admitted into evidence.

KPWU also objected in its Response Brief to additional evidence submitted with Claimant's Opening Brief, arguing that the evidentiary record was closed. This objection is well taken. The documents attached to Claimant's Opening Brief will not be admitted.

ISSUES

1. Whether the Claimant has offered sufficient evidence to support the right claimed.

2. **Whether the required elements have been established for an Allottee water right with a priority date of October 14, 1864.**

3. **Whether the record indicates the practicably irrigable acreage claimed.**

4. **Whether it would be technically possible or economically feasible to develop an irrigation system to serve such acreage.**

5. **Whether the Bureau of Indian Affairs amended the claim as trustee.**

6. **Whether the inchoate rights have been developed or used.**

FINDINGS OF FACT

1. The portion of this claim remaining after bifurcation involves the following-described property: That portion of Government Lots 3 and 8 lying east of U.S. Highway 97 in the NW ¼ NE ¼ Section 16, T 35 S, R 7 E.W.M.; the portion of Government Lots 13 and 18 lying east of U.S. Highway 97 in the SW ¼ NE ¼ Section 16, T 35 S, R 7 E.W.M.; Government Lots 2 and 9 in the NE ¼ NE ¼ Section 16, T 35 S, R 7 E.W.M., and Government Lots 12 and 19 in the SE ¼ NE ¼ Section 16, T 35 S, R 7 E.W.M. (Direct Testimony of Lititia Kirk at 4, 6 and 7.) The property so described was originally part of the Klamath Indian Reservation, and was originally patented to Chris Brown, a Klamath Indian, in 1910 as allotment no. 288. (Ex. C-1 at 19-21.)

2. The claim was originally for 2.5 cubic feet per second (cfs) from one point of diversion on the Williamson River, tributary to the Klamath River, located in the NE¼ NE¼ Section 16, T 35 S R 7 E.W.M, to irrigate ~~approximately~~ 83.2 acres, with a priority date of October 14, 1864. The claim included water for livestock 45 head of cattle. However, claimant submitted no evidence that surface water, as opposed to groundwater not subject to this adjudication, was used to water livestock. (OWRD Ex. 1 at 1-6; Ex. C-4 at 1.) After bifurcation of two parts of the claim totaling 23.84 acres (16.9 acres from Parcel 3 + 6.94 acres from Parcel 2), the remaining acreage subject to this claim is ~~61.71~~ 59.36 acres (83.2 – 23.84 = 59.36). (OWRD Ex. 1 at 79; STIPULATION TO BIFURCATE CLAIM 83, ASSIGN CLAIM 729 TO ONE PORTION OF BIFURCATED CLAIM 83 at 3 (Oct. 10, 2003); STIPULATION TO BIFURCATE CLAIM 83, AND ASSIGN CLAIM 730 TO A PORTION OF BIFURCATED CLAIM 83, AND TO CONSOLIDATE CLAIM NO. 730 INTO CASE 283 at 3 (Feb. 24, 2005)

3. The property presently subject to this claim has been held continuously by Klamath Indians since it was first patented, and is presently owned by Lititia Kirk, a Klamath Indian. (OWRD Ex. 1 at 48; Direct Testimony of Lititia Kirk at 9.)

4. The property retained by Lititia Kirk and subject to this claim is ~~composed 61.71~~ 59.36 acres. Of this acreage, some is used for roads, buildings, and other non-crop uses. A reasonable adjustment for these non-crop uses is 5%. (Ex. C-4 at 3.) After this reduction, the resulting parcel available for farming is ~~58.62~~ 56.39 acres. This parcel is adjacent to the Williamson River. (*Id.* at 60.) The property is composed of soils in Groups 48A, 48B and

48D, which are well drained alluvial and lacustrine soils on terraces with slopes ranging from 2 percent to 25 percent. (*Id.* at 2, 11-13.) These soils are suited to sprinkler irrigation for various crops including alfalfa hay, cereal hay and pasture. (*Id.* at 11-13.) Irrigation of the property would require lifting water 15 feet from the Williamson River. (OWRD Ex. 1 at 99.) Rate is ~~.0189~~ .0199 cfs/acre (based on net practicably irrigable acreage of 65.2 acres at a rate of 1.3 cfs), or ~~1.17~~ 1.12 cfs (.0199 x 56.39). Duty is 3.1 acre-feet per acre, or ~~183.48~~ 174.81 acre-feet per year (3.1 x 56.39). (Ex. C-4.)

5. Alfalfa is a suitable crop for this property. A reasonable yield of alfalfa for the property would be 5.5 tons per acre. (*Id.* at 33.) At $110 per ton, this would yield $605 per acre, gross. (*Id.*) To produce alfalfa on this property, Claimant would have to expend $319 per acre for variable and fixed costs, excluding electricity, assuming amortization of the cost of equipment and assets over a reasonable replacement schedule. (*Id.* at 29, 31.) The NRCE report estimated annual electricity use for operation of the planned irrigation system using a 50 horsepower pump at 78,876 kw/hrs for the entire acreage before the second bifurcation. (*Id.* at 26.) This translates to an electricity cost of $592 per year. The area of the Ray parcel was 11% of the whole property prior to bifurcation. (*Id.* at 50.) Thus, by reducing the annual cost by 11% to account for the withdrawal of the Ray parcel the annual energy charge for the remaining parcel may be derived. Using NRCE's assumptions, this results in an annual energy cost for irrigation of $532.15 or $8.62 per acre per year. However, this estimate assumed energy costs at $0.0075 per kilowatt/hour, based upon a 50-year fixed-rate contract that came into force in 1956, and expired in 2006, two years after the report was issued. (*Id.* at 55.) At this point, it is impossible to determine what the actual energy cost would be. Nonetheless, energy cost would have to increase more than 25 times in order to make the production of alfalfa on this property unprofitable.[6]

CONCLUSIONS OF LAW

1. **The Claimant has offered sufficient evidence to support the right claimed.**

2. **The required elements have been established for an Allottee water right with a priority date of October 14, 1864.**

3. **The record indicates the practicably irrigable acreage claimed.**

4. **It would be technically possible or economically feasible to develop an irrigation system to serve such acreage.**

[6] $605 (the total gross yield per acre for alfalfa) minus $319 (the cost per acre, as calculated by NRCE) equals $286. (Ex. C-4 at 33.) OSU estimated the first year's cost of establishing an alfalfa crop at net $305.15 per acre. (*Id.* at 37.) An alfalfa crop will produce a yield for seven years before a different crop must be planted. (*Id.*) Spreading the first year's cost over the remaining seven years of the crop, with interest at 10%, results in an annual benefit of $238 per acre. This figure, however, does not take into account the cost of electricity to run the pumps. NRCE estimated that cost at $8.62 per acre per year. (*Id.* at 50.) After subtracting that annual electricity cost, the net return per acre in the second through eighth years is $229.14 per acre. This is 25.86 times the annual energy cost ($8.62) per acre as estimated by NRCE.

5. **The Bureau of Indian Affairs, as trustees, amended a portion of the claim related to their ownership and season of use ~~as trustee~~, but did not increase the claim.**

6. **The inchoate rights have not been developed or used.**

OPINION

In basin-wide Adjudications, a claimant has the burden of proof as to all required elements of the claim. ORS 539.110. As this claim is based on the status of Claimant as an Indian Allottee from the former Klamath Indian Reservation, the Claimant has the burden of proving the following elements:

1) That the property to which the claim is appurtenant was formerly part of the Klamath Indian Reservation.

2) That the claimant is a Klamath Indian.

3) That the land is arable.

4) That development of a system to irrigate the land is both technically possible and economically feasible.

5) That the right has not been lost during any intervening non-Indian ownership.

OAR 690-028-0010(17); OAR 690-028-0010.

1. **The Claimant has offered sufficient evidence to support the right claimed.**

Reviewing the elements of a Klamath Indian Allottee claim, the evidence satisfies most of these elements without question. The property was previously part of the Klamath Indian Reservation. Claimant, its current owner, is an enrolled Klamath Indian. The soil on the property is classed as arable, meaning that crops can be grown upon it. There have been no intervening non-Indian owners. Thus, the issue presented in this case is whether irrigation of the property is technically and ~~financially~~ economically feasible. That, in turn, depends on what assumptions are made.

As noted in evidentiary rulings, above, the primary evidentiary issue presented by this case is the weight that the NRCE report should receive. ~~I concluded that~~ The opinions expressed in the report should receive little weight, but that the facts stated in the report were substantial evidence that could be considered in deciding this case. Since no evidence contradicting any of those facts was offered on the record, and much of the information in the report came from public sources, ~~I find~~ that evidence is found to be substantial.

Again, much of the information in the report is from published sources, such as the Oregon State University Extension Service and the United States Soil and Conservation Service. ~~I have~~ There is no reason to doubt the information from these sources.

Respecting the technical feasibility of irrigating the parcel, it is noteworthy that the property in question adjoins the Williamson River. In 1977, U.S. Bank, as trustee for Claimant, applied for a water right permit, in the course of which the trustee submitted specifications for an irrigation system. While that system was not developed, the information contained in the application is still of interest. Particularly significant is the fact, as stated in the application, that at least part of the parcel could be irrigated if water was lifted 15 feet from the river.

NRCE also prepared a plan for irrigation of both the current property, and the property subsequently bifurcated from the claim. Because the plan included separate works for each property, it is relatively easy to segregate the part of the plan related to Claimant's property. There is no reason to believe that the plan, as presented, is not technically feasible. The only real issue in this case is whether it is also ~~financially~~ economically feasible.

In 1998, the Oregon State University Extension Service published a production and establishment budget for growing alfalfa in the Klamath Basin, to be used as "a guide to estimating costs and returns." (Ex. C-4 at 33.) ~~I have adopted~~ The assumptions in that budget have been adopted. Even supposing that costs as used in that study have increased significantly, it seems likely that the price received for the crop would also show a corresponding increase, in general. Given the rate of net return calculated using OSU's assumptions, there is sufficient room in the budget to account for significant changes in both cost and return without rendering the enterprise unprofitable.

The main problem presented in the NCRE study is the assumption that the energy cost would remain $0.0075 per kilowatt/hour. Given that the contract that fixed that rate was established more than 50 years ago, and has since expired, that assumption is no longer applicable. ~~I think~~ It is very likely that the cost of energy has increased significantly. Unfortunately, no evidence as to the current rate is to be found in the record.

However, the cost of energy as included in the study is such a small proportion of the total cost of production that ~~I think~~ it is unlikely that it would have increased so much that it swallowed up the entire net return from the crop. ~~I~~ It is therefore, more likely than not ~~conclude~~ that the cultivation of irrigated alfalfa on this property will generate a net return, making it both technically and ~~financially~~ economically feasible to irrigate the property.

2. The required elements have been established for an Allottee water right with a priority date of October 14, 1864.

As noted, claimant has satisfied the elements for a Klamath Indian Allottee right. As such, she is entitled to a priority of October 14, 1864, the date of the Klamath Treaty.[7]

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[7] The Klamath Reservation was established on October 14, 1864. *Treaty Between the United States of America and the Klamath and Modoc Tribes and Yahooskin Band of Snake Indians*, October 14, 1864, 16 stat. 707. "The priority date of Indian rights to water for irrigation and domestic purposes is 1864 [date of reservation creation] * * *. For irrigation and domestic purposes, the non-Indian landowners and the State of Oregon are entitled to an 1864 priority date for water rights appurtenant to their land which formerly belonged to the Indians." *United States v. Adair*, 478 F Supp 336, 350 (D Or 1979).

3. The record indicates the practicably irrigable acreage claimed.

The NRCE study provided separate plans for the two parcels then under consideration. The parcel remaining after bifurcation was planned to include ~~61.71~~ 59.36 acres, of which ~~58.62~~ 56.39 acres would be irrigable, after deducting 5% for buildings, roads and other non-crop purposes.

4. It would be technically possible or economically feasible to develop an irrigation system to serve such acreage.

See the discussion under 1, above.

5. The Bureau of Indian affairs amended the claim as trustee, but did not increase the claim.

It is true that the Bureau of Indian Affairs (BIA) filed an amended claim, but this was to show that a portion of the property originally subject to the claim had been transferred to the Tribes. Since that part of the claim has been bifurcated to a separate claim, the amended claim filed by the BIA no longer has any relevance to the remaining claim.

6. The inchoate rights have not been used.

There is no evidence in the record that an irrigation system has ever actually been developed on the property, or water beneficially applied to it. This does not, however, change the status of the claim, or prevent its approval. OAR 690-028-0010(17).

ORDER

A water right for Claim 83 should be confirmed as set forth in the following Water Right Claim Description:

WATER RIGHT CLAIM DESCRIPTION:

CLAIM NO. 83
FOR AN INCHOATE WATER RIGHT

CLAIM MAP REFERENCE: CLAIM # 83, NCRE REPORT MAP (May 5, 2004)

CLAIMANT: LITITIA KIRK
PO BOX 69622
PORTLAND OR 97201

SOURCE OF WATER: The WILLIAMSON RIVER, tributary to the KLAMATH RIVER

PURPOSE OR USE: IRRIGATION OF 56.39 PRACTICABLY IRRIGABLE ACRES

RATE OF USE:
1.12 CUBIC FEET PER SECOND (CFS) MEASURED AT THE POINT OF DIVERSION

DUTY:

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

LIMIT:

1/50 CUBIC FOOT PER SECOND PER ACRE IRRIGATED DURING THE IRRIGATION SEASON OF EACH YEAR

PERIOD OF ALLOWED USE: MARCH 15 - OCTOBER 15

DATE OF PRIORITY: OCTOBER 14, 1864

THE POINT OF DIVERSION IS LOCATED AS FOLLOWS:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
35 S	7 E	WM	16	NE NE	312 FEET EAST AND 25 FEET SOUTH FROM N¼ CORNER, SECTION 16

THE PLACE OF USE IS LOCATED AS FOLLOWS:

PRACTICALLY IRRIGABLE ACREAGE						
Twp	Rng	Mer	Sec	Q-Q	GLot	Acres
35 S	7 E	WM	16	NE NE	2	2.23
35 S	7 E	WM	16	NE NE	9	1.55
35 S	7 E	WM	16	NW NE	3	9.89
35 S	7 E	WM	16	NW NE	8	10.48
35 S	7 E	WM	16	SW NE	13	11.06
35 S	7 E	WM	16	SW NE	18	11.16
35 S	7 E	WM	16	SE NE	19	6.06
35 S	7 E	WM	16	SE NE	12	3.96

IT IS SO ORDERED.

Dated at Salem, Oregon on July 1, 2009.

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

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2009, a true and correct copy of the **AMENDED PROPOSED ORDER** was served by depositing the same in the U.S. Post Office, Salem, Oregon, with first-class postage prepaid, to the following:

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