

APR 06 2007

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGONWATER RESOURCES DEPT
SALEM, OREGONfor the
WATER RESOURCES DEPARTMENTIn 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

PROPOSED ORDER

Case No. 242

Claim: 242

Contests: 3281, 3507¹, ~~3811~~², and 4203³

vs.

Ambrose W. McAuliffe and Susan J. McAuliffe;
Claimants/Contestants.

HISTORY

Lawrence Hall filed Claim 242 on January 31, 1991. Subsequently, Ambrose W. McAuliffe and Susan J. McAuliffe (Claimants) purchased the property appurtenant to this claim. Claimants seek a *Walton*⁴ water right in the total amount of 597.3 acre-feet per

¹ Don Vincent voluntarily withdrew from Contest 3507 on December 4, 2000. Berlva Pritchard voluntarily withdrew from contest 3507 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contest 3507 on January 15, 2004.

² By stipulation filed November 30, 2005, the United States withdrew its Contest 3811. *See* STIPULATION BETWEEN AMBROSE MCAULIFFE, SUSAN MCAULIFFE AND THE UNITED STATES AND WITHDRAWAL OF CONTEST BY THE UNITED STATES, effective November 29, 2005.

³ On August 3, 2004, the Klamath Tribes voluntarily withdrew Contest 4203, without prejudice.

⁴ Claims for water rights of non-Indian successors to Indian water rights are commonly referred to as "*Walton*" water rights. *See* Opinion part of this order for discussion of rights.

year. The claim divides into 425.4 acre-feet per year at a flow rate of 2.47 cubic feet per second (cfs) for irrigating 98.9 acres, 169.3 acre-feet for irrigating 54.6 acres of practicably irrigable land, and 2.7 acre-feet per year for stock watering (200 head). The claimed water would be diverted from Crooked Creek and Fort Creek, both tributaries to the Wood River. The claimed period of use is March 1 through October 16 for irrigation and year-round for livestock. The claimed priority date is October 14, 1864, when the Klamath Indian Reservation was established.

On October 4, 1999, OWRD issued a Preliminary Evaluation, denying this claim because the claimed source was previously adjudicated as part of the Wood River Adjudication.

On May 8, 2000, Claimants filed Contest 3281. The same day, the following also filed contests with respect to this claim: Klamath Project Water Users⁵ (KPWU) filed Contest 3507; the United States filed Contest 3811, which was subsequently withdrawn pursuant to a stipulation between the United States and Claimants on November 30, 2005; and the Klamath Tribes filed Contest 4203, which was subsequently withdrawn. The remaining contestants are Claimants and KPWU.

Pursuant to an Order Granting Motion to Consolidate dated April 29, 2003, this claim was consolidated with a number of other claims in the Office of Administrative Hearings (OAH) Case 900. The purpose of Case 900 was to determine whether common law and/or statutory preclusion principles barred this claim and other similarly situated claims after prior water rights adjudications of the Wood and Sprague River Systems.

On May 27, 2004, an order vacating the April 29, 2003 was issued. The Order Vacating Order to Consolidate provides that “the cases associated with this consolidated case shall proceed through the contested case process in the same manner as if they had not been consolidated, except that the law of the case in each case is set out in the April 20, 2004 Order Amending Rulings On Motions For Ruling On Legal Issues.” The April 20, 2004 Order held, among other rulings, that “[p]arties asserting preclusive effect of a prior adjudication have the burden of presenting evidence and the burden of proof on the issue raised by that assertion.”

⁵ 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 are collectively referred to as the Klamath Project Water Users.

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No party has asserted that Claim 242 is precluded by a prior adjudication. Therefore, the issues raised by Claimants opposing the preclusive effect of a prior adjudication are moot.⁶

A telephone hearing in this matter was conducted on January 24, 2006, by Lawrence S. Smith, Administrative Law Judge for the OAH. Attorney Ronald Yockim represented Claimants. Attorney Jacqueline McDonald represented KPWU. Assistant Attorney General (AAG) Jesse Ratcliffe represented the Oregon Water Resources Department (OWRD). No witnesses testified or were cross-examined.

Claimants filed their Closing Argument by the deadline on March 1, 2006. Contestant KPWU filed their Response by the deadline of March 31, 2006. Claimants filed their reply by the deadline of May 3, 2006. The record was then closed.

EVIDENTIARY RULINGS

The following evidence was admitted to the record at the hearing:

OWRD Ex. 1

Direct Testimony of Ambrose McAuliffe, with January 17, 2006 correction

Direct Testimony of Douglas E. Adkins

Exhibits C2 through C96, except that KPWU's objection to C5, C9, and C11 through C20 and page 3 of Ambrose Direct, based on lack of foundation, is overruled. Foundation was established.

⁶ Claimants identified the following issues in their Pre-hearing Statement that relate to the preclusive effect of the prior adjudication:

Does a State Adjudication of the relative rights to use public water bar a federal reserved right (*Walton* Right) if:

- (a) the claimant or his predecessor in interest was not lawfully embraced in the determination,
- (b) the State Adjudication preceded the McCarran Amendment,
- (c) the public water arose on, was diverted within, and benefited land within the Klamath Indian Reservation,
- (d) The benefited land was in fee title to an Indian or non-Indian,
- (e) The benefited land was within the perimeter of the Agency Project and served by an irrigation district created by the Indian Irrigation Service of the United States Department of the Interior?

Has the OWRD adjudicator sustained the burden of non-persuasion that the claimant or his predecessor in interest were lawfully embraced in the determination identified in issue Number 2.

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ISSUES

In closing arguments, the remaining contestants raised the following issues:

(1) Whether Claimants' claim for *Walton* water rights is limited to the rights in their stipulation with the United States.

(2) Whether Claimants established that, in regards to the claimed *Walton* water rights for the 43 acres from the second diversion, the water diversion systems in these 43 acres were developed by the first non-Indian purchaser.

FINDINGS OF FACT

(1) Lawrence Hall filed Claim 242 with OWRD on January 31, 1991. He was certified as Klamath Enrollee No. 792 on the Klamath Final Roll. (OWRD Ex. 1 at 34.) In 1997, Ambrose W. McAuliffe and Susan J. McAuliffe (Claimants) purchased the property appurtenant to this claim. (OWRD Ex. 1 at 85.) Claimants sought a *Walton*⁷ water right in the total amount of 597.3 acre-feet per year. Their claim was 425.4 acre-feet per year at a flow rate of 2.47 cubic feet per second (cfs) for irrigating 98.9 acres, 169.3 acre-feet for irrigating 54.6 acres of practicably irrigable land, and 2.7 acre-feet per year for stock watering (200 head). The claimed water would be diverted from Crooked Creek and Fort Creek, both tributaries to the Wood River. The claimed period of use was March 1 through October 16 for irrigation and year-round for livestock. The claimed priority date was October 14, 1864, when the Klamath Indian Reservation was established.

(2) On October 4, 1999, OWRD issued a Preliminary Evaluation, denying Claim 242 because the claimed source was previously adjudicated as part of the Wood River Adjudication.

(3) On May 8, 2000, Claimants filed Contest 3281. The same day, the following also filed contests with respect to this claim: KPWU filed Contest 3507; the United States filed Contest 3811, which was subsequently withdrawn pursuant to a stipulation between the United States and Claimants on November 30, 2005; and the Klamath Tribes filed Contest 4203, which was subsequently withdrawn. The remaining contests are by Claimants and KPWU.

(4) The stipulation between Claimants and the United States that led to the withdrawal of the U.S.'s Contest 3811 concluded that Claimants' *Walton* water rights shall not exceed the rate, duty, and period of use set forth below:⁸

⁷ See footnote 9.

⁸ The Stipulation also says that Claimants' *Walton* water rights shall "conform to the place(s) of use and point(s) of diversion shown on the Claim Map, attached hereto as Exhibit 'A' . . ." The Claim Map is OWRD Ex. 1 at 28.

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POINT OF DIVERSION LOCATION: (SW¼ NE¼),
Section 26, Township 33 South, Range 7½ East, W.M
SOURCE: Crooked River, tributary to the Wood River
USE: Irrigation of 98.9 acres and livestock watering
DIVERSION RATE: 2.47 cubic feet per second (cfs) for irrigation (1/40 cfs/acre X
98.9 acres).

AMOUNT ACTUALLY BENEFICIALLY USED FOR LIVESTOCK: 2,400
gallons per day for 200 head of livestock; livestock drink directly from all sources and
ditches

DUTY: 346.15 acre-feet (3.5 acre-feet/acre/year x 98.9 acres) for irrigation and 2.7
acre-feet/year for livestock

IRRIGATION PERIOD OF USE: March 1 to October 16

LIVESTOCK PERIOD OF USE: January 1 through December 31

PRIORITY DATE: October 14, 1864

PLACE OF USE:

SW¼ NE¼ (3.4 acres)	Irrigation and livestock
SE¼ NW¼ (11.2 acres)	Irrigation and livestock
NW¼ SE¼ (15.9 acres)	Irrigation and livestock
SW¼ SE¼ (16.3 acres)	Irrigation and livestock
NE¼ SW¼ (21.1 acres)	Irrigation and livestock
SE¼ SW¼ (31.0 acres)	Irrigation and livestock

All in Section 26, Township 33 South, Range 7½ East, W.M.

POINT OF DIVERSION LOCATION: (SW¼ NW¼),
Section 26, Township 33 South, Range 7½ East, W.M

SOURCE: Fort Creek, tributary to the Wood River

USE: Irrigation of 43.0 acres and livestock watering incidental to irrigation

DIVERSION RATE: 1.1 cfs for irrigation (1/40 cfs/acre X 43.0 acres).

DUTY: 133.3 acre-feet (3.1 acre-feet/acre/year x 43.0 acres)

IRRIGATION AND LIVESTOCK PERIOD OF USE: March 1 to October 16

PRIORITY DATE: October 14, 1864

PLACE OF USE:

SE¼ NW¼ (17.9 acres)	Irrigation and livestock
NE¼ SW¼ (18.0 acres)	Irrigation and livestock
SE¼ SW¼ (7.1 acres)	Irrigation and livestock

All in Section 26, Township 33 South, Range 7½ East, W.M.

(5) In their Response to Claimants' Closing Argument, KPWU do not dispute the *Walton* water rights outlined in the diversion for 93.9 acres, but argue that in regards to the 43 acres from the other diversion, Claimants have not shown that they were the first non-Indian successors and therefore, they have not established *Walton* water rights for these acres.

(6) The lands included in Claimant's Claim 242 were part of the Klamath Indian Reservation. (OWRD Ex. 1 at 20.) On March 15, 1915, the lands were allotted to Klamath Indian Kate Brown (Allottee 975) under the General Allotment Act. (Ex. AMc-74.)

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(7) Kate Brown died in 1938 and her allotment passed to her heirs, Klamath Indians Joseph Beatty Ball, Cassie Ball Parazoo, Mabel Ball Shuey, Osborne Ball, Leroy Barkley, Barbara Fay Barkley Luhr Unive, and Silas Barkley, Jr. in the form of undivided interests. (OWRD Ex. 1 at 39-40.) They were all listed in the Federal Register (Vol. 22, No. 226, issued November 21, 1957) that listed the final roll of members of the Klamath Tribe, who were living on August 13, 1954. (Ex. AMc-2.)

(8) In the 1958 Land Status Report, the Bureau of Indian Affairs (BIA) identified the lands of Kate Brown, including the claimed lands, as being with the Agency Irrigation Project (Agency Project). (OWRD Ex. 1 at 39; Exs. AMc-6 to AMc-8 and AMc-10.) The United States started development of the Agency Project prior to 1899 with the construction of the Crooked Creek Canal. The Agency Project was designed and built by the United States Indian Irrigation Service for the benefit of lands within the Klamath Indian Reservation. (Direct Testimony of Ambrose McAuliffe at 3; OWRD Ex. 1 at 39--reference that these lands were within the Agency Project). The first three miles of the Crooked Creek Canal were completed by 1899. (Ex. AMc-21 at 6.) The claimed lands are situated along this original three miles of the canal. (Ex. AMc-10 at 1; OWRD Ex. 1 at 23 and 28.)

(9) The United States continued to assert ownership and control of the Agency Project until termination of the Klamath Tribes and the Klamath Indian Reservation in 1954, at which time it was turned over to the landowners. (Exs. AMc-5 to AMc-21; AMc-94 to AMc-96.) While it was owned by the United States, the day to day management was by the Indian and non-Indian landowners. ((Exs. AMc 12 and AMc21.)

(10) The BIA concluded that the Kate Brown allotment was still held in trust by the United States for Joseph Beatty Ball, Mabel Ball Shuey, Osborne Ball, Leroy Barkley, Barbara Fay Barkley Luhr Unive, and Silas Barkley, Jr. (OWRD Ex. 1 at 39-40.) Later that year, the trust status was removed for all the heirs except Cassie Ball Parazoo. (*Id.*) The interest of Cassie Ball Parazoo was conveyed in trust for her by the United States to the United States First National Bank of Portland. (*Id.*; Ex. AMc-85.)

(11) In 1963, Cassie Ball Parazoo's interest was conveyed out of trust to her heirs, Klamath Indians Floyd Alan Parazoo, Yvonne Gentry, Michael Parazoo, Sherri Parazoo, and Peter Lynn Parazoo. (OWRD Ex. 1 at 36; Ex. AMc-86.) As a result of various estate proceedings, the allotment was divided among her heirs, resulting in fractionalized, undivided ownership. Some of their fractionalized, but undivided interests were conveyed in 1960 and 1962 to Osborne Lee Hall, a Klamath Indian also on the list. (*Id.*) Osborne Lee Hall conveyed some of this property to Patrick J. Kenneally (aka Paddy Kenneally), a non-Indian, in 1970. Michael Parazoo and Peter Lynn Parazoo conveyed some of the property to Patrick J. Kenneally on October 8, 1975. On May 3, 1977, Yvonne E. Parazoo (aka Yvonne E. Gentry) conveyed some of this property to Patrick J. Kenneally. Patrick J. Consolidation of these undivided interests was attempted by non-Indian Patrick J. Kenneally when he acquired theses undivided interests. (Ex. AMc-83.) Consolidation by Keneally was not successful, and he sold his interest to Lawrence Allen Hall and his wife, Ann Hall,

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on January 26, 1978. (Exs. Amc-77 to AMc-92 (specifically 83, 88, 89, 90 and 93); OWRD Ex. 1 at 35-37.)

(12) Some of the fractional interests remained in Indian ownership from 1970 to 1978, when there was at least one Indian owner of the Claimed Lands. (OWRD Ex. 1 at 35-37.) At the time that Keneally sold his partial interest to Lawrence Hall, the outstanding undivided ownership interest was owned by Klamath Indian Sherri Parazoo. (OWRD Ex. 1 at 37; Ex. AMc-92.) Ms. Parazoo's interest was eventually conveyed to Lawrence Hall in 1978 and all of the interests completely consolidated into one ownership. (Ex. AMc-92.)

(13) In 1992, the Natural Resources Consulting Engineers, Inc. (NRCE) designed an irrigation system to irrigate the 54.6 acres of practically irrigable lands and determined the suitability and feasibility of irrigating these lands (in addition to the irrigation of the 98.9 acres from the other diversion, which is not contested). (OWRD Ex. 1 at 22-33.)

(14) After he purchased the 54.6 acres, Claimant Ambrose McAuliffe designed and installed an irrigation system that brought 43.0 acres out of the 54.6 acres of practically irrigable acres under production. (Direct Testimony of Ambrose McAuliffe at 4-5.)

CONCLUSIONS OF LAW

(1) Claimants' claim for *Walton* water rights is limited to the rights in their stipulation with the United States.

(2) Claimants have established *Walton* water rights in 43 acres by establishing that the section was developed by the first non-Indian purchaser of the undivided interest.

OPINION

Claimants of water rights have the burden of establishing their contested claims, by a preponderance of the evidence. ORS 539.110; OAR 690-028-0040(1). Also, the proponent of a fact or position has the burden of proving that fact or position. ORS 183.450.

Because Claimants are claiming water rights as non-Indian successors to a Klamath Indian Allottee, the water rights are governed by the *Colville Confederated Tribes v. Walton* line of cases⁹ and are commonly referred to as *Walton* water rights. As stated by Administrative Law Judge Young in *Nicholson et al. v. United States*, OAH Case No. 272, in the context of the Klamath Basin Adjudication, the following elements must be proved to establish a *Walton* water right:

⁹ The claims of successors of Indian allottees are known as "*Walton*" claims because they were recognized in the cases of *Colville Confederated Tribes v. Walton* line of cases. *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320 (E.D. Wash. 1978) (*Walton I*); *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, 454 U.S. 1092 (1981) (*Walton II*); *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985), cert. denied, 475 U.S. 1010 (1986) (*Walton III*).

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1. The claim is for water use on land formerly part of the Klamath Indian Reservation, and the land was allotted to a member of an Indian tribe;
2. The allotted land was transferred from the original allottee, or a direct Indian successor to the original allottee, to a non-Indian successor;
3. The amount of water claimed for irrigation is based on the number of acres under irrigation at the time of transfer from Indian ownership; except that:
4. The claim may include water use based on the Indian allottee's undeveloped irrigable land, to the extent that the additional water use was developed with reasonable diligence by the first purchaser of land from an Indian owner.
5. After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors.

OAH Case No. 272, Ruling on United States' Motion for Ruling on Legal Issues at 9 (August 4, 2003).

Walton water rights originate in federal water rights that were implicitly reserved for the benefit of Indian tribes upon the establishment of Indian reservations by treaties with the United States. *Walton II*, 647 F.2d at 46. Upon the "allotment" of reservation lands pursuant to the General Allotment Act of 1887, 24 Stat. 388, such water rights were transferred to individual Indian allottees. *Id.* at 49. Once these allotted lands were acquired by non-Indians, these rights are more like state water rights, subject to reasonable diligence and continuous use requirements. *Walton* rights deriving from the Klamath Indian Reservation are entitled to a priority date corresponding to the date of establishment of that reservation, *i.e.*, October 14, 1864. *Id.* at 51.

The only remaining contests are from KPWU and Claimants. KPWU do not dispute that Claimants have established *Walton* water rights to the 93.9 acres from one diversion point, as outlined in the stipulation between Claimants and the United States. KPWU argue that Claimants' *Walton* water rights are limited to the amount in the stipulation, and Claimants agree, so there is no dispute regarding Claimants' *Walton* water rights on the 93.9 acres.

Regarding the 43 acres from the other diversion point, KPWU argue that "Claimants failed to demonstrate that [Claimants] are the first non-Indian successors to the land comprising the claimed place of use." Klamath Project Water Users' Response to Claimants' Closing Argument at 5.

Claimants have established that an Indian or Indians have continuously had an ownership interest in these 43 acres until they were sold to Claimants. Prior to this sale, a non-Indian, Patrick Keneally, had a fractionalized, undivided ownership in these 43 acres, which he shared with the other owners, most of whom were Indians. He and the

other owners of the undivided ownership were in effect tenants in common. As such, they had equal right to the enjoyment of the entire property, unless there were specific limitations in the deeds. *United Bank of Denver v. Gardos*, 80 Or App 342, 346-47 (1980). There is no evidence of such limitations. The remaining question is whether Mr. Keneally's ownership as a tenant in common along with Indians prevents Claimants from establishing *Walton* water rights for these 43 acres.

The court in *Walton III* held that the water right is limited to what was developed by the Indian owner or the first non-Indian owner with reasonable diligence, specifically concluding:

The immediate grantee of the original allottee must exercise due diligence to perfect his or her inchoate right to the allottee's ratable share of reserved waters. This interpretation is supported by our references to *Walton II* in subsequent cases. See, e.g., *United States v. Anderson*; *United States v. Adair*.

Walton III, 752 F.2d at 402 (emphasis added) (citations omitted).

In the *Walton* cases, the courts were concerned about preserving the value to the Indian allottees of an undeveloped water right with an early priority date. See *Walton II*, 647 F.2d at 51. In this case, some of fractionalized interest in the 43 acres remained in Indian ownership until Claimants purchased the property in fee from Klamath Indian Lawrence Hall. If KPWU's argument is accepted, the Indians who were tenants in common with Patrick Keneally would lose the value of their interest because they could not transfer any of their right to develop the property. As explicitly stated in *Walton II*, 647 F.2d at 51, "The full quantity of water available to the Indian allottee thus may be conveyed to the non-Indian purchaser. There is no diminution in the right the Indian may convey." While the *Walton III* court had no such interest in preserving that value to the non-Indian successors, the purpose of the holding, which is to give the Indian owner the best possible value for his or her land, is not met when Patrick Keneally is considered the first non-Indian purchaser. Granting the Indian's inchoate rights to subsequent owners would in this case increase the value for the various Indians who have had an interest in the Allotment, including Lawrence Hall, who sold the allotment containing the 43 acres to Claimants. Moreover, the transfer in *Walton II* involved transfers in fee to Walton. *Walton II*, 647 F.2d at 49. Patrick J. Keneally did not acquire such an interest when he acquired a fractionalized, undivided ownership. For these reasons, Claimants have established that they were the first non-Indian purchasers in fee and their subsequent development of the water rights sold to them qualify for *Walton* water rights.

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ORDER

The Adjudicator for the Klamath Basin General Stream Adjudication may enter a Final Order consistent with the Findings of Fact and Conclusions of Law stated herein, and as specifically set out below. The elements of a *Walton* water right are established for Claim 242 as set out in Finding of Fact (4) above.


Lawrence S. Smith, Administrative Law Judge
Office of Administrative Hearings

DATE ISSUES AND MAILED: April 5, 2007

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 Hearing Officer. 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:

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

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CERTIFICATE OF SERVICE

I hereby certify that on **April 5, 2007**, I mailed a true copy of the following:
PROPOSED ORDER, by depositing the same in the U.S. Post Office, Salem, Oregon
97309, with first class postage prepaid thereon, and addressed to:

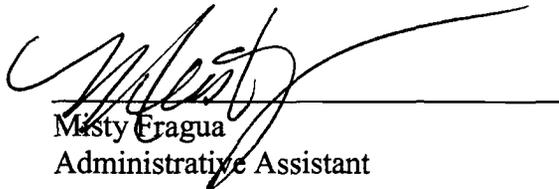
Dwight W. French / Teri Hranac
Oregon Water Resources Dept.
725 Summer Street N.E., Suite "A"
Salem, OR 97301
Phone: 503-986-0826
Fax: 503-986-0901
dwight.w.french@state.or.us
Teri.k.hranac@wrд.state.or.us

Jesse D. Ratcliffe
Oregon Dept. of Justice
1162 Court St. NE
Salem, OR 97301
Phone: 503-947-4500
Fax: 503-378-3802
Jesse.D.Ratcliffe@doj.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
ahitchings@lawssd.com

Ronald S. Yockim
Attorney at Law
430 SE Main Street
PO Box 2456
Roseburg, OR 97470
Phone: (541) 957-5900
Fax: (541) 957-5923
ryockim@cmspan.net

William M. Ganong
Attorney at Law
514 Walnut Street
Klamath Falls, OR 97601
Phone: 541-882-7228
Fax: 541-883-1923
wganong@aol.com


Misty Fragua
Administrative Assistant

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