

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

Roger Nicholson; Richard Nicholson; Agri Water, LLC; Maxine Kizer; Ambrose McAuliffe; Susan McAuliffe; Kenneth L. Tuttle and Karen L. Tuttle dba Double K Ranch; ~~Dave Wood; Kenneth Zamzow~~; Nicholson Investments, LLC; William S. Nicholson; John B. Owens; Kenneth L. Owens; William L. Brewer; Mary Jane Danforth; Jane M. Barnes; Franklin Lockwood Barnes, Jr.; Jacob D. Wood; Elmore E. Nicholson; Mary Ann Nicholson; Gerald H. Hawkins; Hawkins Cattle Co.; Owens & Hawkins; Harlow Ranch; Terry M. Bengard; Tom Bengard; Dwight T. Mebane; Helen Mebane; Sevenmile Creek Ranch, LLC; James G. Wayne, Jr.; Clifford Rabe; Tom Griffith; William Gallagher; Thomas William Mallams, River Springs Ranch, Pierre A. Kern Trust, William V. Hill, Lillian M. Hill, Carolyn Obenchain; Lon Brooks; Newman Enterprise; ~~William C. Knudtsen~~; Wayne Jacobs; Margaret Jacobs; Robert Bartell; Rodney Z. James; Hilda Francis for Francis Loving Trust; David M. Cowan; James R. Goold for Tillie Goold Trust; Duane F. Martin; 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 Company; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Bradley S Luscombe; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Co.; Plevna District Improvement Company; and Collins Products, LLC;

Contestant(s)

vs.

United States Department of Interior, Fish and Wildlife Service
Claimant/Contestant.

CORRECTED¹ PROPOSED ORDER

Case No. 272

Claims: 301, 302, 303, 304, 305, 306, and
307

Contests: 3290, 3291, 3292, 3293, 3294,
3295, 3296², 3661, 3662, 3663,
3664, 3665, 3666, 3667³, and
3993

¹ This Corrected Proposed Order is issued to correct reference to the claims at issue in the History of the Case on Page three.

² Dave Wood voluntarily withdrew from Contests 3290-3296 on October 26, 2004. Kenneth Zamzow voluntarily withdrew from Contests 3290-3296 on July 8, 2005. Change of Title Interest for Contests 3290-3296 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3290-3296 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3290-3296 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3290-3296 from Walter Seput to Wayne James, Jr. (5/2/05). Change of Title Interest for Contests 3290-3296 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3290-3296 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3290-3296 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). William Knudtsen voluntarily withdrew from Contests 3290-3296 on September 13, 2005.

*U.S. Fish and Wildlife Service (272),
Proposed Order – page 1 of 24*

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DEC 11 2006

WATER RESOURCES DEPT
SALEM, OREGON

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HISTORY OF THE CASE

On April 30, 1997, the United States of America, Department of Interior, Fish and Wildlife Service (Claimant) filed seven claims (Claims 301 through 307). Claimant amended Claims 302 and 307 and supplied additional supporting documents for Claim 301 on October 1, 1999. On October 4, 1999, OWRD issued its Preliminary Evaluation for these claims preliminarily approving all the claims based on information available as of August 2, 1999.

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, Berlva Pritchard⁴, Don Vincent⁵, Randy Walthall, Inter-County Title Company, Winema Hunting Lodge, Inc., Reames Golf and Country Club, Van Brimmer Ditch Company, Plevna District Improvement Company and Collins Products, LLC (hereinafter "KPWU"), filed contests 3661, 3662, 3663, 3664, 3665, and 3666 on May 8, 2000.

Roger Nicholson, Roger Nicholson Cattle Co., Lloyd Nicholson Trust, Dorothy Nicholson Trust, Richard Nicholson, Jim McAuliffe, McAuliffe Ranches, Maxine Kizer, Ambrose McAuliffe, Susan McAuliffe, Joe McAuliffe Company, Kenneth L. Tuttle and Karen L. Tuttle dba Double K Ranch, Dave Wood, Kenneth Zamzow, Anita Nicholson, William S. Nicholson, John B. Owens, Kenneth L. Owens, William L. Brewer, Mary Jane Danforth, Jane M. Barnes, Franklin Lockwood Barnes, Jr., Jacob D. Wood, Elmore E. Nicholson, Mary Ann Nicholson, Gerald H. Hawkins, Hawkins Cattle Co., Owens & Hawkins, Harlow Ranch, Terry M. Bengard, Tom Bengard, Dwight T. Mebane, Helen Mebane, Walter Seput, Clifford Rabe, Tom Griffith, William Gallagher, Thomas William Mallams, River Springs Ranch, Pierre A. Kern Trust, William V. Hill, Lillian M. Hill, Carolyn Obenchain, Lon Brooks, Newman Enterprise, William C. Knudtsen, Wayne Jacobs, Margaret Jacobs, Robert Bartell, Rodney Z. James, Hilda Francis for Francis Loving Trust, William J. Rust, Ethel J. Rust, James R. Goold for Tillie Goold Trust, and Duane F. Martin (hereafter The Nicholson Group) filed contests 3290, 3291, 3292, 3293, 3294, and 3295 on May 8, 2000.

The USFWS filed contest 3993 (to Claim 301 only) on May 8, 2000.

On May 16, 2003, Claimant filed a Motion for Ruling on Legal Issues and a memorandum supporting the grounds for the Motion. On June 20, 2003, Nicholson *et al* and the KPWU filed memoranda opposing Claimant's Motion. Claimant filed its Reply Memorandum on July 7, 2003.

³ Don Vincent voluntarily withdrew from Contests 3661-3667 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3661-3667 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3661-3667 on January 16, 2004.

⁴ Berlva Pritchard voluntarily withdrew from contests 3516, 3661, 3662, 3663, 3664, 3665, and 3666. *See* Notice of Withdrawal of Claimant dated June 24, 2002.

⁵ Don Vincent voluntarily withdrew from contests 3516, 3661, 3662, 3663, 3664, 3665, and 3666. *See* Notice of Withdrawal of Claimant dated November 28, 2000.

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DEC 11 2006

WATER RESOURCES DEPT
SALEM OREGON

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On August 4, 2004, Administrative Law Judge (ALJ) William Young issued a Ruling on United States' Motion for Ruling on Legal Issues, in which ALJ Young defined the standards for establishing a so-called *Walton* right.

This matter came to hearing on June 8, 2004 at 9:00 a.m. PDT in Salem, Oregon, pursuant to a notice served upon the participants by certified mail on May 3, 2004. Administrative Law Judge Rick Barber of the Office of Administrative Hearings presided. This hearing was to determine the relative water rights regarding Claim 301, 302, 303, 304, 305, 306, and 307 in the Klamath Basin General Stream Adjudication.

The United States was represented by Attorneys Bruce Bernard and Barbara Scott-Brier. Attorney Carol Skerjanec appeared for the Nicholson Group. Attorney William Ganong appeared for KPWU. Assistant Attorney General Justin Wirth appeared for OWRD. Paul Rauch testified on behalf of the United States and submitted to cross-examination. Thereafter, ALJ Barber noted a small gap in the hearing record, and provided the participants to supplement the record if any material testimony or questioning was missing. No response was filed by any participant, and the evidentiary record was closed effective the close of the hearing on June 8, 2004.

Following the hearing on June 8, 2004, participants had an opportunity to submit written closing arguments. After being allowed an enlargement of the briefing schedule, on September 10, 2004, the United States filed closing argument. On October 21, 2004, the Nicholson Group and KPWU filed their Response Briefs. After further enlargement of the briefing schedule, the United States and OWRD filed Reply Briefs on December 3, 2004. The record closed December 3, 2004, the deadline for filing reply briefs.

This matter was subsequently assigned to me to complete the Proposed Order in this case. I have reviewed the record in its entirety in preparation for writing this order.

ISSUES⁶

1. Whether the United States may claim a *Walton* right for lands to which it holds title.
2. Whether there is sufficient evidence to establish of a valid *Walton* right.
3. Whether the United States' claim significantly increases the rate of use, duty of use, and season of use from the use of the water applied prior to purchase of the land included in this Claim.
4. Whether the United States has changed the use of the claimed water from irrigation to waterfowl management, without complying with Oregon statutory procedures for securing a change of use.

⁶ These issues are stated as listed in the Notice of Hearing in this case. As will be discussed in the Opinion, the issues were defined further in the course of argument.

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DEC 11 2006
WATER RESOURCES DEPT
SALEM OREGON

5. Whether the State of Oregon did not recognize non-agricultural irrigation as a beneficial use of water on the date for which the United States claims its water right priority and whether, therefore, the United States may not claim a water right for a use not recognized as beneficial on the date of appropriation.
6. Whether the United States abandoned any rights acquired with lands included in the Claim when it was purchased by the United States Fish and Wildlife Service under authorization changing its primary use to waterfowl management.
7. Whether the evidence demonstrates the amount of water minimally required for the primary purpose of the waterfowl refuge.
8. Whether the United States' changed use and application of the water is detrimental to the Klamath Project Water Users' priority water rights.
9. Whether the United States is using water for the use claimed.
10. Whether the United States' use of the claimed water is wasteful.
11. Whether the claim asserts a right amounting to a wilderness servitude.
12. Whether the current use was developed within a reasonable time after the claimed date of appropriation.
13. Whether the Klamath River and its tributaries were over-appropriated at the time the United States began its use of the claimed water.
14. Whether the purposes of the Klamath Reclamation Project, as authorized by Congress, may not be realized in the event that water used pursuant to this claim interferes with the purpose of the Klamath Reclamation Project.
15. Whether any rights to use or store water under these claims are subordinate to domestic and irrigation rights of contestants as provided in Articles II and XIII of the Klamath River Basin Compact.
16. Whether the United States asserts a right to store water which interferes with the direct diversion and storage of waters for domestic and irrigation uses in violation of Article III.C. of the Klamath River Basin Compact Between the States of Oregon and California, ORS § 542.620 and ratified by the State of Oregon on April 17, 1957, (ORS 542.610, Chapter 142, Oregon State Laws, 1957) by the State of California on April 17, 1957 (Chapter 113, California Statutes, 1957) and by the United States Congress (Act of August 30, 1957, 71 Stat. 497).
17. Whether, based on information submitted by the United States on October 1, 1999, with respect to Claim 301, the correct number of acres under Claim 301 should be 4859.3 instead of 4858.9.

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DEC 11 2006

**WATER RESOURCES DEPT
SALEM OREGON**

EVIDENTIARY RULINGS

Exhibits 40001 through 40154, offered by the United States, were admitted into the record. Exhibit 50001, offered by the Nicholson Group, was admitted into the record. OWRD Exhibit 1, as supplemented by Exhibit 20001 was admitted into the record.

FINDINGS OF FACT

1. The land subject to claim 301 is composed of 4,858.9 acres, all of which was once within the Klamath Indian Reservation. All the property subject to this claim was purchased by the United States in 1990. It was originally divided into different parcels allotted to Klamath Indians, and was subsequently transferred to non-Indians, as follows:
 - a. Allotment 798, located in the SE $\frac{1}{4}$, SE $\frac{1}{4}$, Section 10, the S $\frac{1}{2}$ SW $\frac{1}{4}$ and the SW $\frac{1}{4}$, SE $\frac{1}{4}$ Section 11 T 30 S, R 9 E. W. M. was originally allotted to Ben Mitchell, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1921. Kittridge then transferred the property to Nicol, also a non-Indian, in 1975.
 - b. Allotment 799, located in the E $\frac{1}{2}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ SW $\frac{1}{4}$ Section 14, T 30S R 9 E.W. M. was originally allotted to Peter Jones, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1921. Kittridge then transferred the property to Nicol, also a non-Indian, in 1975.
 - c. Allotment 797, located in the W $\frac{1}{2}$ E $\frac{1}{2}$ Section 14, T 30 S R 9 E.W.M. was originally allotted to Mary Mitchell, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1921. Kittridge then transferred the property to Nicol, also a non-Indian, in 1975.
 - d. Allotment 792, located in the W $\frac{1}{2}$ W $\frac{1}{2}$ Section 14, T 30 S, R 9 E. W. M. was originally allotted to Sally Jackson, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1919. Kittridge then transferred the property to Nicol, also a non-Indian, in 1975.
 - e. Allotment 794, located in the E $\frac{1}{2}$ SE $\frac{1}{4}$ Section 15, T 30 S, R 9 E. W. M. was originally allotted to Eda Jackson, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge,

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DEC 11 2006

**WATER RESOURCES DEPT
SALEM, OREGON**

- a non-Indian, in 1920. Kittridge then transferred the property to Nicol, also a non-Indian, in 1975.
- f. Allotment 795, located in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ Section 15, T 30 S, R 9 E. W. M. was originally allotted to Birdie Jackson, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1919. Kittridge then transferred the property to Nicol, also a non-Indian, in 1975.
 - g. Allotment 1070, located in the W $\frac{1}{2}$ NE $\frac{1}{4}$ and the E $\frac{1}{2}$ NW $\frac{1}{4}$, Section 15, T 30 S, R 9 E. W. M. was originally allotted to Manuel Faithful, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to Fred Duke, a non-Indian, in 1922. Fred Duke then transferred the property to Bertha Duke, also a non-Indian, in 1925.
 - h. Allotment 1214, located in the SW $\frac{1}{4}$, Section 15, T 30 S, R 9 E. W. M. was originally allotted to Hessie Moses, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to F.E. Bolliger, a non-Indian, in 1929. Bolliger then transferred the property to William Kittridge, also a non-Indian, in 1929.
 - i. Allotment 471, located in the NE $\frac{1}{4}$, NE $\frac{1}{4}$, Section 15, T 30 S, R 9 E. W. M. was originally allotted to Louis Allen, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1929. Kittridge then transferred the property to Nicol, also a non-Indian, in 1975.
 - j. Allotment 1132, located in the W $\frac{1}{2}$ SE $\frac{1}{4}$, Section 15, T 30 S, R 9 E. W. M. was originally allotted to Joseph T. Jackson, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1947. Kittridge then transferred the property to Bertha Duke, also a non-Indian, in 1975.
 - k. Allotment 572, located in the E $\frac{1}{2}$ SE $\frac{1}{4}$, Section 16, and the E $\frac{1}{2}$ NE $\frac{1}{4}$, and NW $\frac{1}{4}$, NE $\frac{1}{4}$, Section 21, T 30 S, R 9 E. W. M. was originally allotted to Clarence Moses, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to F.E. Bolliger, a non-Indian, in 1929. Bolliger then transferred the property to William Kittridge, also a non-Indian, in 1929.
 - l. Allotment 1212, located in the S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 16, T 30 S, R 9 E. W. M. was originally allotted to Nonoljoth Moses, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to F.E. Bolliger, a non-Indian, in 1929. F.E. Bolliger then transferred the property to William Kittridge, also a non-Indian, in 1929.
 - m. Allotment 1271, located in the SW $\frac{1}{4}$, Section 21, T 30 S, R 9 E. W. M. was originally allotted to Eldred Stokes, a Klamath Indian. Water use was developed

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DEC 11 2006

WATER RESOURCES DEPT
SALEM, OREGON

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- on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1919. Kittridge then transferred the property to Nicol, also a non-Indian, in 1975.
- n. Allotment 1272, located in the NW $\frac{1}{4}$, Section 21, T 30 S, R 9 E. W. M. was originally allotted to Jesse Stokes, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1919. Kittridge then transferred the property to Nicol, also a non-Indian, in 1975.
 - o. Allotment 1170, located in the W $\frac{1}{2}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 21, T 30 S, R 9 E. W. M. was originally allotted to Louis Knight, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to Warner V. Stock Co., a non-Indian, in 1957. The property was then transferred to D.F. Nicol et al., also a non-Indian, in 1967.
 - p. Allotment 1465, located in the E $\frac{1}{2}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 21, T 30 S, R 9 E. W. M. was originally allotted to Anna (Myrtle) Jackson, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to F.E. Bolliger, a non-Indian, in 1929. The property was then transferred to William Kittridge, also a non-Indian, in 1929.
 - q. Allotment 1215, located in the NW $\frac{1}{4}$, Section 22, T 30 S, R 9 E. W. M. was originally allotted to Hazel Moses, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to F.E. Bolliger, a non-Indian, in 1929. The property was then transferred to William Kittridge, also a non-Indian, in 1929.
 - r. Allotment 1213, located in the SW $\frac{1}{4}$, Section 22, T 30 S, R 9 E. W. M. was originally allotted to Delpha Moses, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1923. The property was then transferred to Nicol, also a non-Indian, in 1975.
 - s. Allotment 109, located in the SE $\frac{1}{4}$, Section 22, T 30 S, R 9 E. W. M. was originally allotted to Jason Charlie, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1921. The property was then transferred to Nicol, also a non-Indian, in 1975.
 - t. Allotment 659, located in the NE $\frac{1}{4}$, Section 22, T 30 S, R 9 E. W. M. was originally allotted to Daily Essex, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1918. The property was then transferred to Nicol, also a non-Indian, in 1975.

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DEC 11 2006

WATER RESOURCES DEPT
SALEM, OREGON

- u. Allotment 108, located in the SW ¼, Section 23, T 30 S, R 9 E. W. M. was originally allotted to Bella Charlie, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1921. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- v. Allotment 107, located in the SE ¼, Section 23, T 30 S, R 9 E. W. M. was originally allotted to Enola Charlie, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1921. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- w. Allotment 658, located in the NW ¼, Section 23, T 30 S, R 9 E. W. M. was originally allotted to Samuel Essex, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1927. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- x. Allotment 110, located in the NE ¼, Section 23, T 30 S, R 9 E. W. M. was originally allotted to Lydia Sampson, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1925. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- y. Allotment 202, located in the NW ¼, Section 24, T 30 S, R 9 E. W. M. was originally allotted to Hugh Johnson, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1923. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- z. Allotment 201, located in the SW ¼, Section 24, T 30 S, R 9 E. W. M. was originally allotted to David Johnson, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1923. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- aa. Allotment 19, located in the NE ¼, Section 25, T 30 S, R 9 E. W. M. was originally allotted to Susie Pompey, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1925. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- bb. Allotment 364, located in the S ½ S ½ SE ¼, Section 25, T 30 S, R 9 E. W. M. was originally allotted to Mollie Brown, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to

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DEC 11 2006

WATER RESOURCES DEPT

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- William Kittridge, a non-Indian, in 1920. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- cc. Allotment 1185, located in the N $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$, Section 25, T 30 S, R 9 E. W. M. was originally allotted to Morris Lotches, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1920. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- dd. Allotment 33, located in the NW $\frac{1}{4}$, Section 25, T 30 S, R 9 E. W. M. was originally allotted to Brick Jim, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1926. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- ee. Allotment 232, located in the N $\frac{1}{2}$ S $\frac{1}{2}$ SE $\frac{1}{4}$ and S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$, Section 25, T 30 S, R 9 E. W. M. was originally allotted to Clay Lotches, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1918. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- ff. Allotment 35, located in these SE $\frac{1}{4}$, Section 26, T 30 S, R 9 E. W. M. was originally allotted to Lillian Jim, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1922. The property was then transferred to Nicol, also a non-Indian, in 1975.
- gg. Allotment 34, located in the NE $\frac{1}{4}$, Section 26, T 30 S, R 9 E. W. M. was originally allotted to Missie Jim, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1924. The property was then transferred to Nicol, also a non-Indian, in 1975.
- hh. Allotment 951, located in the NW $\frac{1}{4}$, Section 26, T 30 S, R 9 E. W. M. was originally allotted to Cecil Hoches, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1926. The property was then transferred to Nicol, also a non-Indian, in 1975.
- ii. Allotment 213, located in the NE $\frac{1}{4}$, Section 27, T 30 S, R 9 E. W. M. was originally allotted to Hazel Kirk, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1918. The property was then transferred to Nicol, also a non-Indian, in 1975.
- jj. Allotment 211, located in the NW $\frac{1}{4}$, Section 27, T 30 S, R 9 E. W. M. was originally allotted to Annie Kirk, a Klamath Indian. Water use was developed on

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DEC 11 2006

WATER RESOURCES DEPT
SALEM, OREGON

the property prior to 1880, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1917. The property was then transferred to Nicol, also a non-Indian, in 1975.

- kk. Allotment 214, located in the NE $\frac{1}{4}$, Section 28, T 30 S, R 9 E. W. M. was originally allotted to Sissy Kirk, a Klamath Indian. Water use was developed on the property prior to 1880, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1917. The property was then transferred to Nicol, also a non-Indian, in 1975.
- ll. Allotment 364, located in the N $\frac{1}{2}$ NE $\frac{1}{4}$, Section 26, T 30 S, R 9 E. W. M. was originally allotted to Mollie Brown, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1920. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- mm. Allotment 48, located in the E $\frac{1}{2}$ SW $\frac{1}{4}$ and Lots 3 and 4, Section 19, T 30 S, R 10 E. W. M. was originally allotted to Alice Cholah, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1925. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- nn. Allotment 47, located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ and Lot 2, Section 19, and NE $\frac{1}{4}$ NW $\frac{1}{4}$ and Lot 1, Section 30, T 30 S, R 10 E. W. M. was originally allotted to Peter Cholah, a Klamath Indian. Water use was developed on the property prior to 1918, as shown by a Notice of Complete Application of Water to Beneficial Use (C-11956). The land was conveyed to William Kittridge, a non-Indian, in 1925. The property was then transferred to D.L. Nicol, also a non-Indian, in 1973.
- (Testimony of Paul Rauch; Ex. 40003; OWRD Ex. 1 at 27.)

Water has been beneficially applied to the property as follows:

Rate: 60.7 cubic feet per second (cfs)

Duty: 14,576.7 acre/feet

Place of Use: See Attachment 1.

Points of Diversion: From the Williamson River, tributary to Upper Klamath Lake, at the following locations:

NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 24, T 30 S, R 9 E. W.M.

SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 18, T 30 S, R 10 E.W.M.

SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 19, T 30 S, R 10 E.W.M.

Use: Irrigation of 4,858.9 acres

Season of Use: March 1-October 31 for irrigation, January 1 to December 31 for livestock.

Priority Date: October 14, 1864.

(Testimony of Paul Rauch, OWRD Ex. 1 at 24.)

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DEC 11 2006

**WATER RESOURCES DEPT
SALEM, OREGON**

2. The land subject to claim 302 is composed of 5,677.1⁷ acres. Except for 80 acres, the property subject to this claim was purchased by the United States in 1989 or 1990. It was originally held directly by the Klamath Tribes, and transferred by the Tribes to the Nicol Land and Cattle Company in 1976. (Affidavit and Testimony of Paul Rauch.) The other 80 acre parcel, Allotment 1596, located in E ½ NE ¼, Section 2, T 30 S, R 9 E. W. M. was allotted to Dolly Lawvor, a Klamath Indian. Allotment 1596 was sold to the Nicol Land and Cattle Company in 1976. (Correction to Testimony and Affidavit of Paul Rauch, at 3.) In 1979, Mark Nicol and Dana Nicol, formerly partners in the Nicol Land and Cattle Company, which had been dissolved after acquiring the property, applied for a Water Use Permit for all the land subject to this claim, (P-44425), and completed the works that year. (OWRD Ex. 1 at 289-92.)

(Testimony of Paul Rauch; OWRD Ex. 1 at 287, 288..)

Water was not beneficially applied to the property prior to transfer to the second non-Indian Owner. (Correction to Testimony and Affidavit of Paul Rauch, at 3; OWRD Ex. 1 at 289-92.)

3. The land subject to claim 303 is composed of 69.4 acres located in the NE ¼ NW ¼ (40 acres) and NW ¼ NW ¼, (29.4 acres) Section 19, T 30 S. R 10 E. W. M. It which was originally allotted to Jim Hart, a Klamath Indian, and transferred to J.C. Horton, a non-Indian, in 1978. Horton immediately transferred the property to the Horton Family Trust, an entity composed of Lawrence J. Horton, Ann S. Horton, and John C. Horton, in July 1978 (OWRD Ex. 1 at 485). Water use was developed on the property in 1982, as shown by a Water Use Permit. (P-44426 *cf.* OWRD Ex. 1 at 476) The property was transferred by Horton to the United States in 1988.

(Testimony of Paul Rauch; Ex. 40004.)

Water was not beneficially applied to the property prior to transfer to the second non-Indian owner. (OWRD Ex. 1 at 476, 485.)

4. The land subject to claim 304 is composed of 160 acres located in the SW ½ SW ¼, Section 12. T 30 S. R 9 E. W. M. and N ½ NW ¼, Section 13, T 30 S. R 9 E. W. M. It was originally two allotments, as follows:
- a. Allotment 111, located in the SW ½ SW ¼, Section 12. T 30 S. R 9 E. W. M. was originally allotted to Walter Checaskane, a Klamath Indian. The land was conveyed to J.C. Horton, a non-Indian, in 1978. Horton immediately transferred the property to the Horton Family Trust, in July 1978 (OWRD Ex. 1 at 722). Water use was developed on the property by the Horton Family Trust prior to 1982, as shown by a Water Use Permit. (P-44427 *cf.* OWRD Ex. 1 at 585-86.) The property was then transferred to the United States in 1988.
 - b. Allotment 32, located in the N ½ NW ¼, Section 13, T 30 S. R 9 E. W. M. was originally allotted to Mary, or Sokes-te-um-be-ta-at-ea, a Klamath Indian. The land was conveyed to J.C. Horton, a non-Indian, in 1978. Horton immediately

⁷ Although the original claim was for 5694.7 acres, the Preliminary Evaluation found that actual acreage was 5,677.1. Claimant did not contest this figure.

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DEC 11 2006

WATER RESOURCES DEPT
SALEM, OREGON

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transferred the property to the Horton Family Trust, in July 1978. (OWRD Ex. 1 at 722.) Water use was developed on the property in 1982, as shown by a Water Use Permit. (P-44427 *cf.* OWRD Ex. 1 at 585-86.) The property was then transferred to the United States in 1988.

(Testimony of Paul Rauch; Ex. 40005.)

Water was not beneficially applied to the property until after the property had been transferred by the first non-Indian owner. (OWRD Ex. 1 at 722, 585-86.)

5. The land subject to claim 305 is composed of 320 acres within the former Klamath Indian Reservation. It was originally four allotments, as follows:
 - a. Allotment 29, located in the S $\frac{1}{2}$ SW $\frac{1}{4}$, Section 13, T 30 S. R 9 E. W. M., was originally allotted to Elva Ball, a Klamath Indian. The land was conveyed to J.C. Horton, a non-Indian, in 1978. Horton immediately transferred the property to the Horton Family Trust, in July 1978. (OWRD Ex. 1 at 722.) Water use was developed on the property in 1982, as shown by a Water Use Permit (P-44428 *cf.* OWRD Ex. 1 at 697-98.). The property was then transferred to the United States in 1988.
 - b. An Allotment, located in the NW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 24, T 30 S. R 9 E. W. M., was originally allotted to an unknown Klamath Indian, who transferred the property to Ora Summers, a Klamath Indian. The land was conveyed to J.C. Horton, a non-Indian, in 1978. Horton immediately transferred the property to the Horton Family Trust, in July 1978. (OWRD Ex. 1 at 722.) Water use was developed on the property in 1982, as shown by a Water Use Permit (P-44428 *cf.* OWRD Ex. 1 at 697-98.). The property was then transferred to the United States in 1988.
 - c. Allotment 1350, located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, Section 24, T 30 S. R 9 E. W. M., was originally allotted to Maxwell Johnson, a Klamath Indian. The land was conveyed to J.C. Horton, a non-Indian, in 1978. Horton immediately transferred the property to the Horton Family Trust, in July 1978. (OWRD Ex. 1 at 722.) Water use was developed on the property in 1982, as shown by a Water Use Permit (P-44428 *cf.* OWRD Ex. 1 at 697-98.). The property was then transferred to the United States in 1988.
 - d. Allotment 204, located in the SE $\frac{1}{4}$, Section 24, T 30 S. R 9 E. W. M., was originally allotted to James Johnson, a Klamath Indian. The land was conveyed to J.C. Horton, a non-Indian, in 1978. Horton immediately transferred the property to the Horton Family Trust, in July 1978. (OWRD Ex. 1 at 722.) Water use was developed on the property in 1982, as shown by a Water Use Permit (P-44428 *cf.* OWRD Ex. 1 at 697-98.). The property was then transferred to the United States in 1988.

(Testimony of Paul Rauch; Ex. 40006.)

Water was not beneficially applied to the property prior to its transfer to the second non-Indian owner. (OWRD Ex. 1 at 722, 697-98.)

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DEC 11 2006

WATER RESOURCES DEPT
SALEM OREGON

6. The land subject to claim 306 is composed of 320 acres within the former Klamath Indian Reservation. It was originally two allotments, as follows:

- a. An Allotment of unknown number, located in the SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$ and the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Section 29, T 30 S. R 9 E. W. M., was originally allotted to an unknown Klamath Indian. The land was then transferred to Ora Summers, a Klamath Indian. The land was conveyed to J.C. Horton, a non-Indian, in 1978. Horton immediately transferred the property to the Horton Family Trust, in July 1978. (OWRD Ex. 1 at 722.) Water use was developed on the property in 1982, as shown by a Water Use Permit. (P-44534 *cf.* OWRD Ex. 1 at 831-33.) The property was then transferred to the United States in 1988.
- b. An Allotment, located in the E $\frac{1}{2}$ NE $\frac{1}{4}$, Section 29, and W $\frac{1}{2}$ NW $\frac{1}{4}$ Section 28, T 30 S. R 9 E. W. M., was originally allotted to an unknown Klamath Indian, who transferred the property to Ora Summers, a Klamath Indian. The land was conveyed to J.C. Horton, a non-Indian, in 1978. Horton immediately transferred the property to the Horton Family Trust, in July 1978. (OWRD Ex. 1 at 722.) Water use was developed on the property in 1982, as shown by a Water Use Permit. (P-44534 *cf.* OWRD Ex. 1 at 831-33.) The property was then transferred to the United States in 1988.

(Testimony of Rauch, Ex. 40007.)

Water was not beneficially applied to the property prior to its transfer to the second non-Indian Owner. (OWRD Ex. 722, 8331-833.)

7. The land subject to claim 307 is composed of 813 acres, all of which were once within the Klamath Indian Reservation. All the property subject to this claim was purchased by the United States in 1989. It was originally divided into different parcels allotted to Klamath Indians, and was subsequently transferred to non-Indians, as follows:

- a. Allotment 1366, located in lots 3, 4, Section 35 and Lots 5, 6, Section 2, T 31 S, R 8 E. W. M. were originally allotted to Ollie White, a Klamath Indian. Water use was developed on the property prior to 1926, as shown by a Water Rights Permit. (Permit 7374, *cf.* OWRD 1 at 950.) The land was conveyed to C.V. Loosely, a non-Indian, in 1926. Loosely then transferred the property to William Kittridge, also a non-Indian, in 1930.
- b. Allotment 632, located in the N $\frac{1}{2}$ SE $\frac{1}{4}$, Section 35, T 30 S, R 8 E. W. M. was originally allotted to Horace White, a Klamath Indian. Water use was developed on the property prior to 1926, as shown by a Water Rights Permit. (Permit 7374, *cf.* OWRD 1 at 950.) The land was conveyed to C.V. Loosely, a non-Indian, in 1927. Loosely then transferred the property to William Kittridge, also a non-Indian, in 1930.
- c. Allotment 670, located in S $\frac{1}{2}$ NE $\frac{1}{4}$, Section 35, T 30 S, R 8 E. W. M. was originally allotted to Susan Klamath, a Klamath Indian. Water use was developed on the property prior to 1926, as shown by a Water Rights Permit. (Permit 7374, *cf.* OWRD 1 at 950.) The land was conveyed to C.V. Loosely, a non-Indian, in

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DEC 11 2006

WATER RESOURCES DEPT
SALEM, OREGON

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1927. Loosely then transferred the property to William Kittridge, also a non-Indian, in 1930.

- d. Allotment 693, located in N ½ NE ¼, Section 35, T 30 S, R 8 E. W. M. was originally allotted to Iva Scott, a Klamath Indian. The land was conveyed to B.S. Grigsby, a non-Indian, in 1920, and from Grigsby to A.A. Bellman, also a non-Indian, in 1921. The land was conveyed to C.V. Loosely, a non-Indian, in 1926. (Correction to Testimony and Affidavit of Paul Rauch, at 4.) Water use was developed on the property prior to 1926, as shown by a Water Rights Permit. (Permit 7374, *cf.* OWRD 1 at 950.)
- e. Allotment 1160, located in NE ¼, Section 36, T 30 S, R 8 E. W. M. was originally allotted to Vera Johnson, a Klamath Indian. Water use was developed on the property prior to 1926, as shown by a Water Rights Permit. (Permit 7374, *cf.* OWRD 1 at 950.) The land was conveyed to C.V. Loosely, a non-Indian, in 1925. Loosely then transferred the property to William Kittridge, also a non-Indian, in 1930.
- f. Allotment 639, located in Lots 1, 2, and 3, Section 36, T 30 S, R 8 E. W. M. was originally allotted to Mike Weeks, a Klamath Indian. Water use was developed on the property prior to 1926, as shown by a Water Rights Permit. (Permit 7374, *cf.* OWRD 1 at 950.) The land was conveyed to C.V. Loosely, a non-Indian, in 1926. Loosely then transferred the property to William Kittridge, also a non-Indian, in 1930.
- g. Allotment 618, located in N ½ SW ¼, Section 36, T 30 S, R 8 E. W. M. was originally allotted to Mollie Weeks, a Klamath Indian. Water use was developed on the property prior to 1926, as shown by a Water Rights Permit. (Permit 7374, *cf.* OWRD 1 at 950.) The land was conveyed to E.E. Mettler, a non-Indian, in 1956. Mettler then transferred the property to Warner V.S.C., also a non-Indian, in 1956.
- h. Allotment 1296, located in NW ¼ SE ¼, Section 36, T 30 S, R 8 E. W. M. was originally allotted to Joe Weeks, a Klamath Indian. Water use was developed on the property prior to 1926, as shown by a Water Rights Permit. (Permit 7374, *cf.* OWRD 1 at 950.) The land was conveyed to Warner V.S.C., a non-Indian, in 1956. Warner V.S.C. then transferred the property to D.L. Nicol, also a non-Indian, in 1967.
- i. Allotment 670, located in S ½, NE 1/4, Section 2, T 31 S, R 8 E. W. M. was originally allotted to Susan Klamath, a Klamath Indian. Water use was developed on the property prior to 1926, as shown by a Water Rights Permit. (Permit 7374, *cf.* OWRD 1 at 950.) The land was conveyed to C.V. Loosely, a non-Indian, in 1927. Loosely then transferred the property to William Kittridge, also a non-Indian, in 1930.

(Testimony of Paul Rauch; Ex. 40008.)

With the exception of Allotment 693, Water has been beneficially applied to the property as follows:

Rate: 3.61 cubic feet per second (cfs)

Duty: 1,823.5 acre/feet

Place of Use:

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DEC 11 2006

WATER RESOURCES DEPT
SALEM, OREGON

SW ¼ NE ¼
SE ¼ NE ¼
NE ¼ SE ¼
NW ¼ SE ¼
Lot 3 SW ¼ SE ¼
Lot 4 SE ¼ SE ¼
Section 35, T 30 S R 8 E.W.M.

NE ¼ SW ¼
NW ¼ SW ¼
SW ¼ SW ¼
SE ¼ SW ¼
Section 36, T 30 S R 8 E.W.M.

NE ¼ NE ¼
NW ¼ SW ¼
SW ¼ NE ¼
SE ¼ NE ¼
Section 2, T 31 S R 8 E.W.M.

Points of Diversion: From Lenz Creek, tributary to the Williamson River,
tributary to Upper Klamath Lake, at SE ¼ NW ¼ Section 35, T 30 S. R 8 E. W. M.

Use: Irrigation of 521 acres

Season of Use: March 1-October 31 for irrigation

Priority Date: October 14, 1864

Part of the property has also been irrigated by natural overflow. (OWRD Ex. 1 at
1021-1024.)

(OWRD Ex. 1023, 1024, Ex. 4008, Testimony of Rauch, Corrected Affidavit and Testimony of
Rauch.)

CONCLUSIONS OF LAW

1. The United States may claim a *Walton* right for lands to which it holds title.
2. There is sufficient evidence to establish a valid *Walton* right as to a portion of the claims.
3. The United States' claim does not significantly increase the rate of use, duty of use, and season of use from the use of the water applied prior to purchase of the land included in this Claim.
4. The United States has not changed the use of the claimed water from irrigation to waterfowl management, without complying with Oregon statutory procedures for securing a change of use.
5. The use of water by the United States is indistinguishable from agricultural irrigation.

6. The United States did not abandon any rights acquired with lands included in the Claim when it was purchased by the United States Fish and Wildlife Service.

7. The question whether the evidence demonstrates the amount of water minimally required for the primary purpose of the waterfowl refuge is not at issue in this case.

8. The United States' use and application of the water is not improperly detrimental to the Klamath Project Water Users' priority water rights.

9. The United States is using water for the use claimed.

10. The United States' use of the claimed water is not wasteful.

11. The claim does not assert a right amounting to a wilderness servitude.

12. For some of the property, the current use was developed within a reasonable time after the claimed date of appropriation.

13. The question whether the Klamath River and its tributaries were over-appropriated at the time the United States began its use of the claimed water is not a proper issue in these proceedings.

14. The question whether the purposes of the Klamath Reclamation Project, as authorized by Congress, may not be realized in the event that water used pursuant to this claim interferes with the purpose of the Klamath Reclamation Project is not a proper issue in these proceedings.

15. The rights to use or store water under these claims are not necessarily subordinate to domestic and irrigation rights of contestants as provided in Articles II and XIII of the Klamath River Basin Compact.

16. The United States assertion of a right to store water is not in violation of Article III.C. of the Klamath River Basin Compact Between the States of Oregon and California, ORS § 542.620 and ratified by the State of Oregon on April 17, 1957, (ORS 542.610, Chapter 142, Oregon State Laws, 1957) by the State of California on April 17, 1957 (Chapter 113, California Statutes, 1957) and by the United States Congress (Act of August 30, 1957, 71 Stat. 497).

17. Based on information submitted by the United States on October 1, 1999, with respect to Claim 301, the correct number of acres under Claim 301 should be 4858.9.

OPINION

Claimants have the burden of establishing their claim by a preponderance of the evidence. ORS 539.110; 183.450(2); *see Cook v. Employment Div.*, 47 Or App 437 (1980) (In the absence of legislation adopting a different standard, the standard in administrative hearings is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact-

finder is persuaded that the facts asserted are more likely true than false. *Riley Hill General Contractors v. Tandy Corp.*, 303 Or 390 (1989).

BASIS OF CLAIMS:

Except for a portion of Claim 302, the claims in this case are for water as a non-Indian successor to a Klamath Indian Allottee. Such claims are known as “*Walton* claims,” deriving their name from *Colville Confederated Tribes v. Walton*, 647 F2d 42, 51 (9th Cir 1981) (“*Walton II*”). In his Ruling on United States’ Motion for Ruling on Legal Issues in this case, Administrative Law Judge William Young stated the elements of such a claim as follows:

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.

Ruling on United States’ Motion for Ruling on Legal Issues, at 9.

With respect to Claim 301, all the required elements of a *Walton* claim have been met, as stated in the Findings of Fact, above. All the required elements of a *Walton* claim are also satisfied for the 80 acres of Allotment 1596 that were included in Claim 302, and that portion of Claim 307 that is not based upon natural overflow (except Allotment 693, which passed through several non-Indian owners before the water right was developed.).

Claimant did not, however, establish a *Walton* right to the property subject to Claims 303 through 306. In those cases, the first non-Indian owner, John Horton, conveyed the properties to the Horton Family Trust prior to developing the water rights in those properties. “[A] trust is a legal entity that is separate from the creator of the trust and its beneficiaries.” *U.S. Bancorp v. Mulrooney*, 198 Or App 93, 99 (2005). This is particularly clear in this case, since John Horton was only one of three trustees. Because the water right in these claims was

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DEC 11 2006

WATER RESOURCES DEPT
SALEM, OREGON

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developed under the Horton Family Trust, the second non-Indian owner, these properties do not meet the requirements for a *Walton* right.⁸

Claim 302, (aside from Allotment 1596) is not a *Walton* right, as that right is defined in the authorities. The property subject to that claim was not conveyed to by a member of the Klamath Tribe, but by the Tribe, itself. Thus, this claim is distinguishable from a *Walton* claim. However, this does not end the matter. The policies underlying the decisions in the *Walton* cases, together with peculiarities within the Klamath Termination Act, require recognition of a water right similar to a *Walton* right, and having the same priority, October 14, 1864.

Generally, a person acquiring land from the public domain does not acquire a water right by virtue of that acquisition. *California Oregon Power Co. v. Beaver Portland Cement Co.* 295 U.S. 142, 158-162 (1935). This is true even if the land was previously part of an Indian Reservation, so long as it has been treated as surplus and returned to the public domain. *United States v. Anderson* 736 F2d 1358, 1362 (9th Cir. 1984). However, in this case, the property was not treated as surplus and returned to the public domain. To the contrary, under the Klamath Termination Act, 25 USC Section 564a, the parts of the Klamath Indian Reservation that were not previously allotted to individual members of the Tribes were retained in tribal ownership and conveyed directly by or on behalf of the Tribes, and the proceeds distributed to the Tribal members pro-rata. 25 USC 564d. The Act also retained the ownership of the water rights in the Tribes until the property was transferred. 25 USC Section 564a.

In the *Walton* line of cases, the federal courts concluded that Congress, in the General Allotment Act, ch. 119, 24 Stat. 388, intended that Indians acquiring a portion of the reservation should be able sell the allotment with its accompanying water rights, thereby maximizing its value to the Indians. *Colville Confederated Tribes v. Walton*, 647 F2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981). Only after allotments come into non-Indian hands is the protection afforded by treaty and federal oversight changed in any way. Once an allotment has transferred to a non-Indian, the *Walton* courts have concluded that the first non-Indian owner obtains the rights of the Indian seller, but must use diligence in developing beneficial use of the water in order to retain the benefit acquired, and may not sell the undeveloped right to another. *Walton* 647 F 2d at 51. The same factors are present with respect to land retained by the Klamath Tribes, and sold directly by the Tribes. Particularly in cases such as this, where Congress has expressed the intent to preserve the Tribes' interest in a water right appurtenant to Tribally-owned properties, I conclude that Congress also intended that the Tribes be able to transfer that water right, as a way of maximizing the value of the property to the members of the Tribe. Once the property has passed from the Tribe to a non-Indian owner, there is no particular reason to distinguish the water right obtained from the water rights obtained from allottees. In both cases, the federal interest in protecting the water right is limited to the means necessary to assure that the Tribes and Tribal members received the appropriate value for their properties. Consequently, I conclude that the property subject to Claim 302 that was transferred directly from the Tribes into private ownership, should be treated in a fashion analogous to a *Walton* right, with the following required elements:

⁸ The same analysis does not apply to the dissolution of the Nicol Land and Cattle Company partnership involved in Claim 302. In that claim, while the form in which the property was held was changed, the actual owners remained the same people who had previously acquired the property as partners.

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DEC 11 2006

WATER RESOURCES DEPT
SALEM, OREGON

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- a. The property must have been part of the Klamath Indian Reservation.
- b. The property must have been transferred directly by or on behalf of the Klamath Tribes to a non-Indian, without becoming part of the public domain.
- c. The amount of water claimed for irrigation is based on the number of acres under irrigation at the time of transfer from Indian ownership; except that:
- d. The claim may include water use based on the 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.
- e. After initial development, the water claimed must have been continuously used by the first non-Indian successor and by all subsequent successors.

Those portions of Claim 302 that are not part of Allotment 1596 were, however, not developed by the first non-Indian Owner, Nicol Land and Cattle Co. Rather, the application for a Water Right Permit was submitted by Mark and Dana Nicol after the partnership was dissolved. Property brought into the partnership or purchased by a partnership is property of the partnership, and not of the individual partners. Partners do not themselves have an interest in any particular piece of partnership property, but only a personal property interest in the profits and surplus of the partnership as a whole. ORS 68.130, ORS 68.420⁹; *Claude v. Claude*, 191 Or 308, 330 (1951); *Shinn v. Vaughn*, 83 Or App 251 (1986). As a partnership, Nicol Land and Cattle Co. was a different legal entity from its individual partners, who held an interest in the partnership, not its assets. When the partnership dissolved, the partners acquired the property from the partnership as an entity. They were, therefore, the second non-Indian owners, not the first. Since the beneficial use of water was developed by the successors in interest to the partnership, and not the partnership, itself, the requirements for a water right as successor to the Tribe under the Klamath Termination Act have not been met.

It is further argued¹⁰ that the United States originally characterized Claim 302 as a *Walton* right, and that the change to a right under the Klamath Termination Act constitutes an impermissible amendment to the claim. So long as the parameters of the water right, such as the amount of water or the land upon which it is to be applied is not increased, however, a change in the legal theory under which a claim is made is not an amendment to the claim that is prohibited under ORS 539.210 and OAR 690-030-0085. A change in legal theory, alone, is permissible in these proceedings, so long as it does not prejudice the ability of the contestants to fairly challenge the evidence or constitute surprise. Such prejudice is not present on the record of this case. The evidence required to prove the elements of the claim is not different in any way that would prevent the parties from conducting meaningful discovery or investigation or finding

⁹ These statutes were repealed in 1997, but were in effect in the 1970s when the property subject to this claim was acquired by Nicol Land and Cattle Company, and subsequently transferred to the former partners.

¹⁰ Although, given the conclusion that the water use was developed by the second non-Indian owner, it is not strictly necessary to address this additional contention against claim 302, I will discuss it to facilitate review.

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DEC 11 2006

WATER RESOURCES DEPT
SALEM, OREGON

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contrary evidence if it exists. Nor were the parties prevented from meaningful cross-examination of witnesses by this change in legal theory.

It is also argued that the United States is precluded from making any of these claims because of a Supplementary Declaratory Judgment and Stipulation of Consent entered into by the United States in 1986 in *United States v. Adair*, Civil No. 75-914-SO, in the United States District Court for Oregon. That stipulation was not offered as evidence in this case, as it should have been. Strictly speaking, therefore, it would be subject to an objection as late-filed. However, Claimant has not objected to its consideration, and instead has chosen to address the argument the stipulation is offered to support. Consequently, that argument is properly before me, and will be here addressed.

The stipulation in question was entered on October 16, 1986 in the U.S. District Court for Oregon to settle the claim of the United States to a reserved water right for 16,377 acres located in the Klamath Forest National Wildlife Refuge. By the stipulation, the parties, including as defendants Donovan L. Nicol, Mark Edward Nicol, Dana Marie (Nicol) Morasch, and the Nicol Land and Cattle Company, agreed to entry of a supplemental judgment in the case. The stipulation also provides that:

[The parties] agree that the Government does not, as to any persons not parties to this stipulation, waive its rights or recede from its position that, by operation of law, it would be entitled to a federal reserved water right with priority date of September 7, 1960. The parties defendant hereto do not waive their rights to claim, assert and perfect any water rights they may have in the litigation area, regardless of their priority dates.

(Contestant Nicholson's Response to Post Hearing Memorandum of United States "Nicholson Response," Attachment 3 at 5.)

The Supplemental Declaratory Judgment agreed to by the Stipulation quoted above contained, *inter alia* the following provisions:

"3. The water right declared by this supplemental judgment pertains to all Klamath Marsh lands *now within the Refuge*, which has a land area of 16,377 acres." (Nicholson Response, Attachment 3 at 2.)

* * * However, this supplemental judgment will not bind officials of the State as to decisions to be made in their official capacity affecting the rights or interests of nonparties to this litigation. This supplemental judgment will bind State officials acting in their official capacity as to decisions concerning interests within the litigation area affecting actual parties to this litigation and their successors in interest. The parties defendant hereto do not waive their rights to claim, assert and perfect any water rights they may have in the litigation area, regardless of their priority dates.

5. As to all person who are not parties to this action and the judgments entered herein, the Government retains the right to claim a federal reserved water right for the Refuge with a priority date of September 7, 1960.

(Nicholson Response, Attachment 3 at 3.)

“7. Water rights within the litigation area having a priority date prior to July 23, 1985, are not affected by this supplemental judgment.” (Nicholson Response, Attachment 3 at 4.)

The Second Amended Complaint in that case asserted a Federal Reserved Water Right with a priority date of September 7, 1960, based on the provisions of 25 U.S.C. 564w-1(f). While the provision was part of the Klamath Termination Act, 25 U.S.C. 564w-1(f) specified that a portion of the Klamath Indian Reservation would be transferred to the title of the United States, to be administered under the Migratory Bird Hunting and Conservation Stamp Act, 48 Stat 451.

Several observations can be made from the above. First, by its terms the Supplemental Declaratory Judgment only applied to water rights appurtenant to property within the boundaries of the Refuge, as it existed in 1986. It did not purport to bind any of the parties, including the United States, as to any water rights for land outside the Refuge as it then existed. Second, both the United States and the parties defendant, including the Nicols, expressly retained their right to assert against any non-party to the litigation any claims to a water right, including the very water rights that were the subject of the litigation before the court, essentially as if no stipulation had been entered. Third, the Declaratory Judgment, on its face, expressly excluded any water right having a priority earlier than July 23, 1985 from being affected by the Judgment. Finally, the water right asserted in the litigation and governed by the Stipulation and Declaratory Judgment was a Federally Reserved Water Right administered under the Migratory Bird Hunting and Conservation Stamp Act, placing it in a completely different status than property conveyed to private parties under the Klamath Termination Act.

The property that is subject to these claims was acquired by the United States from private parties, including the Nicols, and Nicol Land and Cattle Company, in 1989 and 1990. The United States has made the claims for water rights for irrigation and stock-watering as successors to the private owners, and has not asserted a Federal Reserved Water Right under the Migratory Bird Hunting and Conservation Stamp Act. By itself, this would tend to exclude the property subject to these claims from the scope of litigation in *Adair*. At the time the Stipulation was entered, the United States had not acquired the property in question. Indeed, In some cases, the property was in the ownership of the very defendants in that case who reserved the right to assert whatever claim they chose against any non-party to the litigation regardless of the stipulation. The United States succeeded to that right when the property was purchased. There is simply no support for the notion that the Supplemental Declaratory Judgment or the Stipulation was intended to convert a *Walton* right with an 1864 priority held by a private party at the time of the Stipulation into a Federal Reserved Water Right with a 1985 priority simply by virtue of its acquisition by the United States for inclusion in the Wildlife Refuge, particularly at the behest of a non-party to the litigation as against whom none of the parties were bound.

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It is also argued that the water right asserted by the United States is not an agricultural water right for irrigation, but a so-called "wilderness servitude" or other use that is different from the right acquired by the United States. "Irrigation" is defined as "the action or process of irrigating: as A: the artificial watering of land(as by canals, ditches, pipes, or flooding) to supply moisture for plant growth." (Webster's Third New International Dictionary, Merriam-Webster Inc. 1986). That is the use claimed by the United States. There is no principled way to distinguish between species of plants to which irrigation may be applied. This is especially so in those cases where the irrigation was for hay or grazing, where the plant species being watered may well be a native plant whose growth is encouraged to provide feed for animals. It cannot, therefore, be held that the use of the water was changed when the property was included within the Wildlife Refuge. Water is still applied to the land to supply moisture for plant growth.

With respect to Claim 307, the claim as allowed is based upon the artificial application of water to the property, as noted in the report of the Water Rights Examiner. This is less than the amount claimed because the Water Rights Examiner observed that much of the water used on the site was from natural overflow, not water diverted to the property. As noted by Administrative Law Judge Ken L. Betterton in Klamath Adjudication Case Case 157, subirrigation and natural overflow are not contemplated as a basis for a *Walton* right under federal law.

Issues 7 and 14 were raised on the assumption that the claims were for Federally Reserved Water Rights. Since the claims were presented as *Walton* rights, those two issues are inapposite.

Issues 9, 10, 13, 15 and 16 relate to regulation of the water, rather than the establishment of the amount, use and priority of a water right. They are, therefore, not properly before me in these proceedings.

PROPOSED ORDER

It is proposed that Claims 302, 303, 304, 305 and 306 be denied in their entirety.

Claim 301 should be allowed as follows:

Rate: 60.7 cubic feet per second (cfs)

Duty: 14,576.7 acre/feet

Place of Use: See Attachment 1.

Points of Diversion: From the Williamson River, tributary to Upper Klamath Lake, at the following locations:

NE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 24, T 30 S, R 9 E. W.M.

SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 18, T 30 S, R 10 E.W.M.

SE $\frac{1}{4}$ NW $\frac{1}{4}$, Section 19, T 30 S, R 10 E.W.M.

Use: Irrigation of 4,858.9 acres

Season of Use: March 1-October 31 for irrigation, January 1 to December 31 for livestock.

Priority Date: October 14, 1864.

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Claim 307 should be allowed as follows:

Rate: 3.61 cubic feet per second (cfs)

Duty: 1,823.5 acre/feet

Place of Use:

SW ¼ NE ¼

SE ¼ NE ¼

NE ¼ SE ¼

NW ¼ SE ¼

Lot 3 SW ¼ SE ¼

Lot 4 SE ¼ SE ¼

Section 35, T 30 S R 8 E.W.M.

NE ¼ SW ¼

NW ¼ SW ¼

SW ¼ SW ¼

SE ¼ SW ¼

Section 36, T 30 S R 8 E.W.M.

NE ¼ NE ¼

NW ¼ SW ¼

SW ¼ NE ¼

SE ¼ NE ¼

Section 2, T 31 S R 8 E.W.M.

Points of Diversion: From Lenz Creek, tributary to the Williamson River,
tributary to Upper Klamath Lake, at SE ¼ NW ¼ Section 35, T 30 S. R 8 E.
W. M.

Use: Irrigation of 521 acres

Season of Use: March 1-October 31 for irrigation

Priority Date: October 14, 1864



Maurice L. Russell, II, Administrative Law Judge
Office of Administrative Hearings

Date: December 8, 2006

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:

Dwight W. French
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 December 8, 2006, I mailed a true copy of the following: **CORRECTED PROPOSED ORDER**, 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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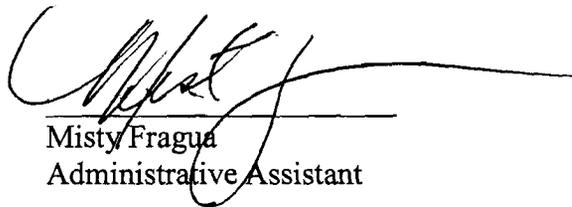
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