

RECEIVED

DEC 02 2011

WATER RESOURCES DEPT  
SALEM, OREGON

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

PacifiCorp; John M. Mosby; Marilyn Mosby;                   **PROPOSED ORDER**  
Robert Cook, TPC, LLC; Roger Nicholson;  
Richard Nicholson; NBCC, LLC; AgriWater,                   Case No. 284  
LLC; Maxine Kizer; Ambrose McAuliffe; Susan  
McAuliffe; Kenneth L. Tuttle and Karen L.                   Claims: 615 and 623

<sup>1</sup> On July 17, 2003, Gerda V. Hyde voluntarily withdrew Contests 1774 and 1775.

<sup>2</sup> PacifiCorp voluntarily withdrew that portion of Contest 2062 pertaining to Claims 615 and 623. See NOTICE OF WITHDRAWAL OF PORTION OF CONTEST dated March 13, 2007.

<sup>3</sup> WaterWatch of Oregon, Inc.'s Contests 3019 and 3022 were dismissed. ~~ORDER DISMISSING WATERWATCH OF OREGON, INC'S CONTESTS~~, May 20, 2003.

<sup>4</sup> Change of Title Interest for Contests 3122 and 3124 from Boyd Braren, Boyd Braren Trust to Robert Cook, TPC, LLC (10/25/05).

<sup>5</sup> On October 14, 2003, Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew from Contests 3252 and 3255. On October 21, 2003, Langell Valley Irrigation District and Horsefly Irrigation District voluntarily withdrew, without prejudice, Contests 3252 and 3255.

<sup>6</sup> William Bryant voluntarily withdrew from Contests 3317 and 3325 on October 31, 2003. Dave Wood voluntarily withdrew from Contests 3317 and 3325 on October 26, 2004. Change of Title Interest for Contests 3317 and 3325 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3317 and 3325 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3317 and 3325 from Kenneth Hufford, Leslie Hufford, and Hart Estate Investments to Jerry and Linda Neff (2/11/05). Change of Title Interest for Contests 3317 and 3325 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3317 and 3325 from Walter Seput to James Wayne, Jr. (5/2/05). Change of Title Interest for Contests 3317 and 3325 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3317 and 3325 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Kenneth Zamzow voluntarily withdrew from Contests 3317 and 3325 on July 8, 2005. Change of portion of Title Interest for Contests 3317 and 3325 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). William Knudtsen voluntarily withdrew from Contests 3317 and 3325 on September 13, 2005. Change of Ownership filed for Contests 3317 and 3325 reflecting that William V. Hill is deceased and his ownership rights transferred to Lillian M. Hill (6/15/06). Sevenmile Creek Ranch, LLC voluntarily withdrew from Contests 3317 and 3325 on March 1, 2007. Franklin Lockwood Barnes, Jr. and Jane M. Barnes voluntarily withdrew from Contests 3317 and 3325 on April 6, 2007. Mary Jane Danforth voluntarily withdrew from Contests 3317 and 3325 on June 19, 2008. Modoc Point Irrigation District voluntarily withdrew from Contests 3317 and 3325 on November 13, 2008. Change of Title Interest for Contests 3317 and 3325 from Robert Bartell to Michael LaGrande (1/9/09). Change of Title Interest for Contests 3317 and 3325 from Elmore E. Nicholson and Mary Ann Nicholson to Nicholson Loving Trust (12/8/09). Change of Title Interest for Contests 3317 and 3325 from Peter M. Bourdet to Peter Bourdet & Linda Long (12/10/09). Jacob D. Wood voluntarily withdrew from Contests 3317 and 3325 on January 15, 2010. Change of portion of Title Interest for Contests 3317 and 3325 from Roger Nicholson and Richard Nicholson to NBCC, LLC (3/17/2010). Change of Title Interest for Contests 3317 and 3325 from Dwight & Helen Mebane to Farm Credit West, PCA (7/20/2011), and from Farm Credit West, PCA to PCA Acquired Properties, LLC (7/20/2011), and from PCA Acquired Properties, LLC to Robinson Best, LLC (7/20/2011).

<sup>7</sup> Klamath Project Water Users voluntarily withdrew/dismissed Contests 3647 and 3655 on October 6, 2002. See APPROVAL AND ORDER OF HEARING OFFICER DATED December 6, 2002 (*nunc pro tunc*); and CONTEST DISMISSAL AGREEMENT AND STIPULATION BETWEEN KLAMATH PROJECT WATER USERS, THE KLAMATH TRIBES, AND THE UNITED STATES; [PROPOSED] ORDER OF THE HEARING OFFICER IN CASE 003 dated December 6, 2002.

Tuttle dba Double K Ranch; ~~Dave Wood;~~  
~~Kenneth Zamzow;~~ Nicholson Investments, LLC;  
William S. Nicholson; John B. Owens; Kenneth  
Owens; William L. Brewer; ~~Mary Jane Danforth;~~  
~~Jane M. Barnes;~~ ~~Franklin Lockwood Barnes, Jr.;~~  
~~Jacob D. Wood;~~ ~~Elmore E. Nicholson;~~ ~~Mary~~  
~~Ann Nicholson;~~ Nicholson Loving Trust; Gerald  
H. Hawkins, Hawkins Cattle Co.; Owens &  
Hawkins; Harlow Ranch; Terry M. Bengard;  
Tom Bengard; Robinson Best, LLC; ~~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. Knudtson;~~ Wayne Jacobs; Margaret  
Jacobs; Michael LaGrande; Rodney Z. James;  
Hilda Francis for Francis Loving Trust; David  
M. Cowan; James R. Goold for Tillie Goold  
Trust; Duane F. Martin; ~~Medoe Point Irrigation~~  
~~District;~~ ~~Peter M. Bourdet;~~ Peter M. Bourdet &  
Linda Long; Vincent Briggs; J.T. Ranch Co.;  
Tom Bentley; Thomas Stephens; John Briggs;  
~~William Bryant;~~ Peggy Marengo; Jerry L. and  
Linda R. Neff;

Contestants

vs.

United States, Bureau of Indian Affairs as  
Trustee on behalf of the Klamath Tribes;  
Claimant/Contestant, and

The Klamath Tribes;  
Claimant/Contestant.

RECEIVED

DEC 02 2011

WATER RESOURCES DEPT  
SALEM, OREGON

### PROCEDURAL HISTORY

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

Klamath Case 284 involves claims to the Klamath Marsh located on lands of the former Klamath Indian Reservation. Claimants are the Klamath Tribes (Tribes) and the United States Bureau of Indian Affairs (BIA) as Trustee on behalf of the Tribes.<sup>8</sup> Contestants are individually

<sup>8</sup> Claimants also hold status as contestants in this matter with regard to certain findings and determinations contained in the PEs. For clarity, the Tribes and BIA will be referred to as Claimants throughout this order.

represented landowners as well as a larger conglomeration of landowners referred to throughout this adjudication as the Upper Basin Contestants (UBC).

On or about April 30, 1997, Claimants filed several claims for instream water rights to support the Tribes hunting, fishing, trapping and gathering rights on former reservation land. On October 1, 1999, Claimants filed amendments to each of the claims at issue here. On or about October 4, 1999, OWRD issued preliminary evaluations (PE) on each claim. Thereafter, UBC and other contestants filed the Statements of Contest (Contests) at issue in this case. Claimants also contested those portions of the PEs that proposed reduction, limitation, or denial of portions of the claims filed. The claims were consolidated into eight cases. Unlike the claims for individual water rights filed in this adjudication, Case 284 involves Tribal claims for non-consumptive water rights. In contrast to most claims filed by Claimants in this adjudication, Case 284 does not include claims for instream flows for physical fish habitat. Instead, Case 284 seeks to restore and preserve a portion of the natural marsh within the former reservation, as well as the surrounding riparian environments necessary to support certain treaty species of plants, waterfowl, and other game.

On July 8, 2005,<sup>9</sup> the Tribes and the BIA filed a Joint Motion for Ruling on Legal Issues (Summary Determination). On that same date, UBC filed its own Motion for Ruling on Legal Issues. On February 12, 2007, Administrative Law Judge (ALJ) Maurice L. Russell II issued an Amended Order on Motions for Rulings on Legal Issues (Amended Order). In the Amended Order, ALJ Russell disposed of several contest grounds presented by UBC and other contestants. In addition, ALJ Russell confirmed, *inter alia*, that the Tribes possessed treaty rights to hunt, fish, trap and gather on former reservation lands. Accordingly, ALJ Russell determined, as a matter of law, the Tribes possessed federally reserved water rights to whatever water is necessary to fulfill the purpose of the reservation. The priority date for the Tribes instream water rights was declared as “time immemorial.” Through rulings in the Amended Order, ALJ Russell left only the quantification of Claimants’ water rights for hearing.<sup>10</sup>

---

<sup>9</sup> Between 1999 and 2010, the parties engaged in extensive discovery and motions practice. From its inception, this matter has been presided over by no less than four separate Administrative Law Judges from the Office of Administrative Hearings. The rulings of each are part of the record in this matter. A detailed discussion of all prehearing matters is unnecessary for the purposes of this order.

<sup>10</sup> In the Amended Order, ALJ Russell summarized his rulings as follows:

1. The Tribes have an Article 1 right to hunt, fish, trap and gather on the former reservation lands, and an associated federal reserved water right accompanying it, with a priority of time immemorial.
2. *Adair I* and *Adair II* are controlling precedent throughout the former reservation lands in the particulars noted above.
3. The quantification process for determining the amount of water will be a modified two-step process: Claimants have the burden to show the amount of water necessary to build or preserve a viable and self-renewing population of treaty species, including the healthy and productive habitat necessary to such a population, sufficient for the exercise of the Tribes’ aboriginal rights, and Contestants have the burden to show that a lesser amount of water will accomplish the same healthy, productive habitat.
4. The “as currently exercised” language in *Adair II* does not refer to a level of water based upon any specific date; rather, it refers to determining the appropriate healthy, productive habitat in the present, as opposed to trying to recreate the situation in 1864, at the time the treaty was signed.

RECEIVED

DEC 02 2011

WATER RESOURCES DEPT  
SALEM, OREGON

The schedule of proceedings in this matter permitted Contestants to file an Amended Statement of Contest (Amended Contest) by December 24, 2009. No contestant filed an Amended Contest.<sup>11</sup>

On February 26, 2010, Claimants filed written direct testimony and exhibits. David M. Chapin, Ph.D., A. Noble Hendrix, Ph.D., Michael Ramey, P.E., and Bertie J. Weddell, Ph.D. testified on behalf of the BIA. Perry Chocktoot, Jr., Jeff Mitchell, and Allen Wayne Cole testified on behalf of the Tribes.<sup>12</sup> No contestant filed written testimony or exhibits in this matter. On April 2, 2010, The Office of Administrative Hearings (OAH) assigned Senior ALJ Joe L. Allen to preside over all further proceedings in the Klamath Basin Adjudication. An in-person cross-examination hearing was scheduled for July 26, 2010, in Salem, Oregon with Senior ALJ Allen presiding. Prior to the hearing, the parties notified ALJ Allen that none intended to conduct cross-examination of any witness.

On December 2, 2010, Claimants filed a Joint Opening Post-Hearing Brief. On June 23, 2011, Claimants filed their Joint Post-Hearing Brief. Neither Contestants nor OWRD filed any closing briefs in this matter.

#### EVIDENTIARY RULINGS

Claimant BIA's offered Exhibits 284-US-100 through 284-US-103, 284-US-200 through 284-US-213, 284-US-300 through 284-US-302, and 284-US-400 through 284-US-447.

---

5. There were two primary purposes to the Treaty of 1864. The Article 2 purpose was agricultural, and had a priority date of October 14, 1864. The Article 1 purpose was a reservation of the Tribes' aboriginal right to hunt, fish, trap and gather, with a priority date of time immemorial.

6. The Tribes are entitled to an instream flow through the former reservation lands which is sufficient to fulfill the purposes of the reservation, and no more.

7. The parties are not limited to the evidence provided in the 1970 ODFW report. They may offer whatever evidence they choose, subject to admissibility, including whatever methods they consider appropriate, to determine the amount of water required to satisfy the Tribe's treaty rights on the former reservation lands.

8. The recognition of Tribal water rights on the former reservation lands does not create an equal protection issue under the Constitution.

9. OWRD has a statutory responsibility to provide hydrology data on water availability in these claims on request. The parties may rely upon the OWRD data, or they may attack that data or supplement that data.

(Amended Order at 27 and 28. **Bold** and ~~striketrough~~ omitted.)

<sup>11</sup> ORS 539.110 provides, in relevant part, “\* \* \*[t]he evidence in the proceedings shall be confined to the subjects enumerated in the notice of contest.” Several of Contestants challenges to the claims, contained in the original contests, were disposed of through the Amended Order. Other contests were withdrawn and are therefore no longer at issue. Unlike the other cases pertaining to Claimants' instream water rights, no additional contest grounds were raised in this matter through Amended Contests. As such, only those contest grounds not disposed of through the Amended Order, withdrawal, or through rulings on the record during other proceedings are discussed herein.

<sup>12</sup> Claimants assigned exhibit numbers to the direct testimonies of each witness. For clarity, references to direct testimony in this order will cite to the exhibit number assigned by the party proffering such testimony.

RECEIVED

DEC 02 2011

WATER RESOURCES DEPT  
SALEM, OREGON

Claimant Klamath Tribes' offered Exhibits 284-KT-1 through 284-KT-21, 284-KT-100 through 284-KT-122, and 284-KT-200 through 284-KT-207.<sup>13</sup> OWRD offered Exhibits 1 through 64. All exhibits were admitted into evidence without objection.

RECEIVED

DEC 02 2011

WATER RESOURCES DEPT  
SALEM, OREGON

## ISSUES

Whether the claimed marsh levels are necessary to establish a healthy and productive habitat to allow the exercise of the Klamath Tribes' hunting, fishing, trapping, and gathering rights guaranteed by the treaty of 1864.

## FINDINGS OF FACT

### *The Treaty of 1864 and applicable case law.*

1. The Klamath Tribes (including the Klamath and Modoc Tribes and the Yahooskin Band of Snake Indians) entered into a treaty with the United States on October 14, 1864. Article 1 of the Treaty involved cession of approximately 20 million acres of land to the United States in return for the establishment of the Klamath Reservation. Article 1 also reserved to the Tribes the "exclusive right of taking fish in the streams and lakes, included in said reservation, and of gathering edible roots, seeds, and berries within its limits \* \* \*." Article 2 of the Treaty provided for payment for the cession of the Tribes' lands, and announced the purpose of promoting the Tribes in civilization, particularly agriculture. (Treaty of 1864.)

2. In 1975, the United States, as trustee for the Tribes, filed a lawsuit in federal court against several water users in the Klamath Basin, primarily along the Williamson River and its tributaries. The government sought to establish the priorities of its claimed federal reserved water rights. In 1979, the District Court issued an opinion finding that the Klamath Tribes had an aboriginal water right to accompany their right to hunt, fish, trap and gather on the former reservation lands. The court further found that the Termination Act of 1954 did not extinguish those aboriginal rights. The court considered the Tribes' exercise of its aboriginal rights to hunt, fish, trap and gather<sup>14</sup> to be one of the primary purposes of the Treaty of 1864. *U.S. v. Adair*, 478 F.Supp. 336 (1979) (*Adair I*).

3. In 1983, the Ninth Circuit affirmed *Adair I*, concluding that the District Court had been correct but adding its own ideas about the quantification process. *U.S. v. Adair*, 723 F.2d 1394 (1983) cert den (1984) (*Adair II*).

### *Wildlife species subject to the Tribes' treaty rights.*

4. The Tribes' culture, cosmology, and way of life are based upon hunting, fishing, gathering, and trapping in their aboriginal homeland. Treaty resources provide food, clothing and tools for tribal families. Treaty resources are also central to the Tribes' religious and cultural practices and have been so since before creation of the reservation. This is

<sup>13</sup> Claimant BIA did not submit exhibits using number designations 104 through 199, 214 through 299, or 303 through 399. Claimant Klamath Tribes did not submit exhibits using number designations 22 through 99 or 123 through 199.

<sup>14</sup> The fish, animal, and plant species subject to the Tribes' aboriginal rights are referred to throughout this order as "treaty resources" or "treaty species."

demonstrated by the Tribes' Return of C'waam and First Salmon Ceremonies. (Exs. 284-KT-100 and 284-KT-1.)

5. Traditionally, the Tribes have hunted and trapped several species on former reservation land. These include but are not limited to deer, elk, antelope, bear, beaver, rabbit, ducks, and geese. Tribal members also harvest duck and goose eggs from riparian areas within the former reservation. Hunting of waterfowl such as ducks and geese is centered around marsh areas on the former reservation. Declining water levels in the Klamath Marsh have resulted in a reduction in waterfowl population. (Exs. 284-KT-1, 284-KT-5 through 284-KT-7, 284-KT-100, 284-KT-200, and 284-US-400.)

6. Tribal members traditionally gather several varieties of riparian plant species for use as food or medicine, as well as making traditional hunting and gathering tools. In addition, many riparian plant species are used in traditional tribal ceremonies. These species include apos, aspen trees, camas, cattail roots, chokecherries, currants, dock seeds, elderberries, foxtail grass and seeds, Klamath plums, Oregon grapes, and other wild berries and roots. Several species of trees found in these riparian habitats provide means of drying fish as well as wood for tool making. These include, lodge pole pine, aspen, cottonwood, and willow. (Exs. 284-KT-1, 284-KT-4, 284-KT-10, and 284-KT-100.)

7. Of particular importance to Tribes are the seeds of the yellow pond lily, called "wocus." Wocus were traditionally harvested in great quantities from open water areas, particularly Klamath Marsh. Historically and presently, wocus are a main staple of the Klamath diet. (Exs. 284-KT-1, 284-KT-13 through 284-KT-20, and 284-KT-100.)

8. Wildlife species hunted and trapped by the Tribes use riparian environments adjacent to streams, springs, and the marsh as cover, forage, nesting, and for giving birth. A healthy riparian environment is necessary to attract many species subject to the Tribes aboriginal rights. Likewise, a healthy riparian environment is necessary for the propagation of plant species harvested by the Tribes. (Exs. 284-KT-1, 284-KT-100, 284-US-200, and 284-US-400.)

*Claims 615 and 623.*

9. On or about April 29, 1997, the Klamath Tribes filed a Statement and Proof of Claim to the Use of Surface Waters of the Klamath River and its Tributaries (Claim 615). Through Claim 615, the Tribes adopted Claim 623 by the BIA as trustee on behalf of the Tribes. On October 1, 1999, the Tribes filed an Amended Statement and Proof of Claim. This Amended Claim 615 adopted and incorporated Amended Claim 623 filed by the BIA as trustee. (OWRD Ex. 59 at 1 through 13.)

10. On April 30, 1997, the BIA filed Claim 623. On October 1, 1999, the BIA filed Amended Claim 623. Each claim identified water levels within the Klamath Marsh, which the BIA purported were necessary to fulfill the purposes of the reservation created by the Treaty of October 14, 1864 between the United States and the Klamath Tribes. Each claim filed identifies water level, in feet above mean sea level (ft.), broken down by month. Claim 623 identifies the Silver Lake Highway gauge as the measuring point for the claimed water levels. The priority date for each claim was declared to be "time immemorial." (OWRD Ex. 60.)

11. Claim 623 identifies the place of use as follows:

Klamath Marsh (bounded within the area defined by the following UTM coordinates-Zone 10).

<b>NW Coordinate:</b>	<u>597340.333</u>	<u>4769930.5251</u>
<b>NE Coordinate:</b>	<u>619211.0815</u>	<u>4770321.3831</u>
<b>SE Coordinate:</b>	<u>619738.9107</u>	<u>4740732.2156</u>
<b>SW Coordinate:</b>	<u>597867.7427</u>	<u>4742343.08</u>

(OWRD Ex. 60 at 2 and 148, **bold** in the original.) The Amended Claim 623 claimed water levels ranging from 4,513.6 to 4,515.2 ft. to support marsh vegetation and wildlife habitat. (*Id.* at 147.)

12. In February 2010 Claimants filed their written direct testimony and exhibits. Claimants' evidence reflected downward adjustments of Claim 623. These adjustments reduced claimed levels to a range between 4,513.46 and 4,514.87 ft. These downward adjustments resulted from basin wide stream flow estimates developed by OWRD between 1999 and 2010 as well as basin wide studies conducted by BIA's experts. The BIA based the claim adjustments on a 10-percent exceedence level. (Exs. 284-US-100, 284-US-200, and 284-US-300.)

13. A 10-percent exceedence level represents a high marsh level associated with relatively wet conditions where 10-percent of the daily water level measurements for a given period would be expected to meet or exceed this level and 90-percent would fall below this level. (Exs. 284-US-100 and 284-US-200.)

*Development of the Klamath Marsh claims.*

14. The Klamath Marsh (the marsh) is part of an extensive wetland system located within the boundaries of the former reservation. For the purposes of Claim 623, Klamath Marsh is identified as those lands within the Klamath Marsh National Wildlife Refuge.<sup>15</sup> The marsh encompasses approximately 47,040 acres. Of these 47,040 acres, 755 acres constitute open water or wocus plant communities. The remaining acres are occupied by emergent vegetation, including Bulrush, and a variety of meadow grasses. (Exs. 284-US-200 and 284-US-300.)

15. Wocus typically grow along lakeshores, in ponds, and in marshes where water is too deep for emergent vegetation. In the Klamath Marsh, wocus grow in water ranging from 1.7 to 3.5 ft. deep. Some studies indicate wocus can grow in water up to eight feet deep. The main limiting factor for wocus is the availability of water at suitable depths to promote the species. Sufficient water levels are crucial late in the growing season to ensure seed pods mature. (Exs. 284-US-200 and 284-US-300.)

16. Michael Ramey, Professional Civil Engineer, worked closely with Claimants' other experts to determine water availability in the marsh and how increases in water levels would impact waterfowl and wocus habitat. Mr. Ramey reviewed hydrologic reports and water rights records to evaluate surface water flows into the marsh, existing marsh water levels, and upstream diversions within the Williamson River subbasin. (Ex. 284-US-100.)

<sup>15</sup> The larger Klamath marsh system encompasses about 65,000 acres, many of which lay outside the boundaries of the KMNWR and are not subject to Claim 623.

DEC 02 2011

WATER RESOURCES DEPT  
SALMON, OREGON

17. Mr. Ramey and his staff developed a hydrologic routing model to determine how upstream withdrawals of surface water, for irrigation, impact water levels in the marsh. Mr. Ramey determined that the two main sources of surface water in the marsh are Big Springs Creek and the Williamson River. Mr. Ramey applied the hydrologic routing model to simulate how water levels within the marsh would change if upstream flows were not depleted. (Ex. 284-US-100.)

18. Mr. Ramey compared the model results with historical measurements of water levels in the marsh. Mr. Ramey concluded the hydrologic routing model reliably predicts expected increases in water levels absent depletion of upstream flows. Dr. Hendrix used this information to estimate changes in open water habitats in the marsh. Dr. Chapin used this information, in conjunction with Dr. Hendrix conclusions, to determine the impact such increases would have on wocus communities and riparian wildlife habitat. Dr. Weddell used Mr. Ramey's hydrologic information, along with Dr. Chapin's ecological conclusions, to estimate the benefits to waterfowl populations from both open water and riparian habitat increases. (Exs. 284-US-100, 284-US-200, 284-US-300, and 284-US-400.)

19. Dr. David Chapin, a riparian ecologist, identified the distribution of plant species and communities across the marsh and determined that, among all factors relating to this distribution, water depth is the most important factor for controlling marsh vegetation patterns. The Klamath Marsh currently exists in a degraded condition with Bulrush and other emergent vegetation dominating areas once occupied by open water and/or wocus communities. (Ex. 284-US-200.)

20. Dr. Chapin analyzed the potential impacts of increased water levels on plant communities within the marsh by examining vegetation classifications and mapping the plant communities currently found in the marsh. Dr. Chapin then conducted a historical evaluation of vegetation found within the marsh. Next, Dr. Chapin analyzed the relationship between hydrology and vegetation, known as "hydroperiods." Finally, Dr. Chapin estimated the changes in vegetation, within the marsh, resulting from increased water levels predicted by Mr. Ramey. Dr. Chapin determined if water levels in the marsh increased, as modeled by Mr. Ramey, the amount of wocus and open water habitat would increase accordingly. Dr. Chapin estimated amount of open water and/or wocus habitat would increase by approximately 3,900 acres. (Ex. 284-US 200.)

21. Dr. Noble Hendrix is a biometrician and aquatic ecologist. Dr. Hendrix developed the Klamath Marsh vegetation model which used data from the marsh and statistical techniques to calculate changes in acreage of aquatic plant communities the marsh. Based on the hydrologic data provided by Mr. Ramey, Dr. Hendrix determined the current acreage of aquatic plant communities within the marsh can be increased by increasing the water level. (Ex. 284-US-300.)

22. Dr. Hendrix calculated that the proposed increased water levels would result in an increase in open water wocus habitat from approximately 755 acres to about 4,679 acres. Dr. Hendrix also determined that Bulrush communities would increase from 10,261 acres to approximately 11,066 acres. Finally, Dr. Hendrix forecast decreases in both sedge/rush and wet meadow communities at the proposed claim levels. (Ex. 284-US-300.)

23. Klamath Marsh historically provides important habitat for several species of waterfowl including ducks and geese. The marsh is particularly important to these species

because large, complex wetland environments are scarce in the geographic region. The marsh is particularly important to migratory waterfowl making their way from summer breeding grounds to winter habitats. The marsh is used by a variety of treaty species of waterfowl throughout the year. (Ex. 284-US-400.)

24. A variety of duck and geese species use the marsh for forage, nesting, and protection from predators. Many of these treaty species require large areas of open water, of sufficient depth, to provide food and habitat. (Ex. 284-US-400.)

25. Dr. Bertie Weddell, a wildlife biologist, studied the marsh and determined, in its current state, it does not provide adequate habitat for viable populations of waterfowl. Dr. Weddell determined the quality and productivity of waterfowl habitat in the marsh are limited by insufficient water levels. Dr. Weddell also determined that such habitat would improve, in quantity and quality, if water levels were increased to those proposed by Claim 623. (Ex. 284-US-400.)

26. Dr. Weddell determined that, while not creating an ideal environment for waterfowl, the increased water levels proposed by Claim 623 would result in improved habitat conditions for water fowl resulting in more use of the marsh by these treaty species. (Ex. 284-US-400.)

27. Claimants' ecological and biological experts agree the water level in the marsh necessary to establish and maintain a healthy and productive habitat are consistent with the 10-percent exceedance level predicted by Mr. Ramey. (Exs. 284-US-100, 284-US-200, and 284-US-300.)

28. The updated marsh claims are represented in Table 1 of the affidavits and direct testimonies of Drs. David Chapin and Bertie Weddell and incorporated by reference as Attachment A to this order. (Exs. 284-US-200 and 284-US-400.)

#### CONCLUSIONS OF LAW

The claimed marsh levels are necessary to establish a healthy and productive habitat to allow the exercise of the Klamath Tribes' hunting, fishing, trapping, and gathering rights guaranteed by the treaty of 1864.

#### OPINION

Through the statement of contests, Contestants raised several challenges to the water levels claimed by the Tribes and the BIA in this and other cases in this adjudication. Throughout this adjudication, these parties have also argued extensively over certain issues not specifically raised in this case such as the burden of proof Claimants are required to meet. Contestants remaining contest grounds are discussed below along with those arguments deemed applicable to all cases in this adjudication, even if not specifically raised in closing briefs.

##### *I. Burden of proof.*

The parties in this adjudication have spent significant amounts of time arguing various interpretations and applications of the burdens of proof applicable to this and other cases involving Claimants' instream water rights claims. Much of this argument stems from

DEC 02 2011

WATER RESOURCES DEPT -

SALEM, OREGON

competing interpretations of the district court's opinion in *United States v. Adair*, 478 F. Supp. 336 (1979) (*Adair I*), the Ninth Circuit's opinion in *United States v. Adair*, 723 F. 2d 1394 (1983) (*Adair II*), and the Amended Order on Motions for Rulings on Legal Issues (Amended Order) issued by Administrative Law Judge Maurice "Skip" Russell on February 12, 2007.

As a starting point, in a contested case hearing, the proponent of a fact or position has the burden of proving that fact or position by a preponderance of the evidence. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Cook v. Employment Div.*, 47 Or App 437 (1980) (in 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 convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

1. *Burden of proof under ORS Chapter 539 and the Administrative Procedures Act.*

In addition to the general standards of proof identified above, OWRD has expressly stated the allocation of the burden with regard to claims in this adjudication. The burden of establishing a claim to water in the Klamath Basin lies with the claimant whose claim is contested. ORS 539.110. A claimant of a water right must establish their claim by a preponderance of the evidence. OAR 690-0028-0040(1).

Contestants argue Claimants, in order to satisfy their burden, are required to quantify the Tribes' resource needs and show water claimed is necessary for the current exercise of the Tribes' treaty rights. I cannot agree. Contestants' arguments advocate for the application of a burden of proof that exceeds the scope of this adjudication. As identified more fully below, the purpose of this adjudication is limited to the quantification of the Tribes' instream water rights necessary to fulfill the purposes of the reservation established by the Treaty of 1864. Limitations of that water right based on use of resources are beyond the scope of this adjudication and must be addressed, if at all, by a court of competent jurisdiction.

Likewise, to require Claimants to demonstrate the Tribes' "current exercise" of its treaty rights would exceed the scope of this adjudication and be extremely unhelpful. It is my opinion that the "as currently exercised" language found in the *Adair* line of cases and relied upon by UBC refers to the moderate living standard articulated by the court in *Adair II*. As discussed more fully below, the moderate living standard has no application to the quantification of the instream water rights at issue here; at least not at this stage.

Pursuant to the above statutes and rules, Claimants have the burden to establish their claims by a preponderance of the evidence. Failure to support the claims with reliable, probative, and substantial evidence is detrimental to such claims. See ORS 183.450(5). Having identified Claimants' burden is not, however, the end of the discussion.

Contestants also have concurrent burdens in this matter. The evidence in these proceedings is confined to the subjects identified in the timely filed notice(s) of contest. See, ORS 539.110. Contestants are the proponents of each fact or position raised in the contests. As such, Contestants must present evidence to support each fact or position so raised. This burden of proof encompasses two burdens, the burden of production and the burden of persuasion. *Marvin Wood Products v. Callow*, 171 Or App 175 (2000) (Conceptually, the burden of proof

encompasses two distinct burdens: the burden of producing evidence of a particular fact (*i.e.*, the burden of production), and the burden of convincing the trier of fact that the alleged fact is true (*i.e.*, the burden of persuasion)). To allow Contestants to assert contest grounds without supporting such contests with reliable, probative, and substantial evidence would be antithetical to the statutes and rules governing contested case proceedings generally and this adjudication specifically.

2. *The “moderate living” standard and its applicability to the quantification of instream water rights claimed by the Klamath Tribes and the United States Bureau of Indian Affairs.*

Throughout this adjudication, the parties have struggled with quantification standards and the application of the “moderate living” standard articulated by the court in *Adair II*. After much deliberation, I find the moderate living standard is inapplicable to this adjudication. On this point, I find myself in agreement with United States District Judge Owen Panner, as well as ALJs Barber and Russell. Judge Panner addressed the quantification standards and the moderate living standard in *United States v. Adair*, 187 F. Supp. 2d 1273 (2002) (*Adair III*), later vacated on ripeness grounds. While *Adair III* is not binding upon the parties, I find Judge Panner’s opinion provides instructive guidance on these and other issues relevant to the resolution of the claims before me.

In *Adair III*, Judge Panner declared:

[T]he assertion that the tribes are entitled only to some “minimum amount” of water is an incorrect statement of the law. In quantifying the right under *Adair I*, the Tribe is entitled to “whatever water is necessary to achieve” the result of supporting productive habitat. [Citation to *Adair I* omitted]. *Once the adjudicator has quantified the Tribes’ water rights under the principles announced in Adair I, the moderate living standard may be considered.*

\* \* \* \* \*

Under the traditional application of the moderate living standard, the initial quantification of a reserved right may be limited “if tribal needs may be satisfied by a lesser amount.” [Citation to *Fishing Vessel* omitted]. However, this case is unlike *Fishing Vessel* where the reserved right could be reduced without completely frustrating the purpose of the reservation. For example, if the tribes’ 50% allocation of the harvestable fish run at issue in *Fishing Vessel* would have been reduced to a 35% allocation, the reserved right would still survive after the reduction. In contrast, the Klamath Tribes’ reserved water right does not readily lend itself to such a reduction. *Ultimately, the water level cannot be reduced to a level below that which is required to support productive habitat*, and the Tribes are entitled to “whatever water is necessary to achieve” the result of supporting productive habitat. \* \* \* Reducing the water below a level which would support productive habitat would have the result of abrogating the reserved rights.

*Adair III*, 187 F. Supp 2d at 1284 (emphasis added). Judge Panner correctly points out that application of the moderate living standard might be appropriate, but only *after* the adjudicator

RECEIVED

DEC 02 2011

WATER RESOURCES DEPT  
SALEM, OREGON

has quantified the Tribes' water rights. As such, I believe this is an issue for resolution by the United States District Court or other court of general jurisdiction, not this tribunal.

The application of the moderate living standard would require economic and social analyses beyond the scope of this adjudication. It would likely require a year-by-year analysis of the Tribes' harvest of treaty resources in conjunction with other, possibly innumerable economic resources available to each individual tribal member. The moderate living standard presents a question of "take" of treaty resources, not of quantity of available resources. It would be difficult, if not impossible, to apply the moderate living standard to the quantification of the Tribes water rights. It is possible the Tribes may exceed a moderate living through exploitation of treaty resources; nonetheless, I cannot envision a level of water in the Klamath Basin that would trigger such excess. Because the water rights at issue are non-consumptive, water allocated by such rights is not a resource to be directly exploited by the Tribes. Instead, it is the means by which healthy and productive habitats will be created and maintained to enable the Tribes to exercise their treaty rights.

A healthy and productive habitat may exist independent of the quantity of treaty resources harvested from it. The Tribes' harvest practices, not the water right established herein, will drive their "take" of a given resource. Regardless of the take of a given treaty species necessary to provide the Tribes with a moderate living, the fact remains that the Tribes are entitled to a sufficient quantity of water to fulfill the purposes of the reservation, to wit, the exercise of the Tribes hunting, fishing, trapping, and gathering rights. This requires sufficient water to maintain a healthy and productive habitat for all treaty species subject to harvest. The amount at which harvest of a given treaty species may cause the Tribes to exceed a moderate living standard is irrelevant to the quantification of water necessary to provide a healthy and productive habitat. As such, it is beyond the scope of these proceedings. The moderate living standard serves as a measure of the limits of the Tribes' take of treaty resources. It is not, contrary to UBC's assertions, the appropriate measure of a water right necessary for a healthy and productive habitat. Such considerations are beyond the scope of these quantification proceedings.

## *II. Sufficiency of Claimants' proof.*

Next, Contestants argue Claimants' proof is insufficient to establish the basis for a decree of water rights because it lacks the level of specificity demanded by UBC. I do not agree. Claimants have submitted substantial scientific data supporting each of the elements of the claimed water rights. Claimants' evidence is the product of several years of study and modeling by an expert riparian habitat ecologist (Dr. Chapin), an expert wildlife biologist (Dr. Weddell), a biometrician and aquatic ecologist (Dr. Hendrix), and an expert in hydrologic engineering with over 30 years of experience (Ramey, P.E.). Moreover, Contestants in this matter elected not to dispute Claimants' evidence through evidentiary submissions or legal argument.

In addition to the scientific evidence presented, Claimants have provided significant historical data to support the claimed treaty resources associated with claimed instream flows. This data focused on the historical use of identified treaty resources found both in the marsh and the surrounding riparian habitat. Such historical resource use data derives from several Tribal members (Mitchell, Cole, and Chocktoot) and is uncontested in this case.

RECEIVED

DEC 02 2011

WATER RESOURCES DEPT  
OREGON, OREGON

Contestants' arguments for a greater level of specificity in proof, than that offered by Claimants, essentially advocates for a standard of proof that exceeds a preponderance of the evidence. As discussed above, the standard applicable to this adjudication is proof by a preponderance of the evidence. Contestants provide no legal basis for deviating from this standard of proof. As such, Claimants' evidence is sufficient to prove their claims if it establishes such claims by a preponderance of the evidence. No greater level of proof will be required in this adjudication.

*III. Claimants have demonstrated the claimed water levels within the marsh are necessary to establish and maintain a healthy and productive habitat for treaty species.*

As identified throughout this order, the purpose of this adjudication is the quantification of water rights within the Klamath Basin. Specifically at issue here is the quantification of the Tribes' instream water rights on former reservation land within the basin. Such water rights are limited by the amount of water necessary to allow the Tribes to exercise their treaty protected hunting, fishing, trapping, and gathering rights. This amount has been interpreted, throughout this adjudication, as the amount of water necessary to establish and maintain a "healthy and productive habitat that will enable the Tribes to exercise their aboriginal rights." (Amended Order at 16.)

The Tribes' aboriginal rights apply to those species of fish, fowl, wildlife, and plants traditionally or historically relied upon by the Tribes for subsistence, cultural, and religious practices. At hearing, the Tribes and BIA demonstrated the extensive nature of wildlife and plant treaty species that live within or rely upon Klamath Marsh. Claimants also demonstrated that, without a healthy and productive marsh habitat, these species have diminished in both quantity and quality. This is particularly apparent in the declining number of wocus and waterfowl in the marsh.

A healthy and productive habitat is one that will support a viable and self-renewing population of all treaty species to enable the Tribes to exercise their treaty protected rights. As identified previously, Claimants' burden in this matter is to prove, by a preponderance of the evidence, the water level within the Klamath marsh necessary to establish and maintain a healthy and productive habitat for treaty species. As discussed below, I find Claimants have satisfied their burden.

*1. Marsh claim levels for plant and animal habitat.*

Klamath Marsh is home to the basin's largest concentration of yellow pond lilies, referred to by the Tribes as "wocus." In addition, several plant and waterfowl species thrive within the riparian environments surrounding the marsh in this case. Many of the treaty species of plants are found primarily in these riparian environments. Many of these plants, such as wocus, serve as food staples for tribal members. Others have pharmacological or religious uses. Further, many wildlife treaty species hunted by the Tribes rely on the riparian environments of the marsh for forage, shelter, and reproduction. The Tribes have seen these plant and animal species diminish as riparian areas shrink due to decreased water levels in the marsh. Claimants' marsh level claims seek to capture the water necessary to establish and maintain healthy and productive habitats for those treaty species dependent upon such environments.

To develop the claims, Claimants again engaged in extensive study of the basin environments to determine the minimum amount of water necessary to fulfill the purposes of the reservation. To this end, Mr. Ramey developed a model to estimate water availability in the marsh absent upstream depletions. Drs. Chapin and Hendrix performed detailed studies of the aquatic and riparian environments to determine how such environments would respond to the increased water levels modeled by Mr. Ramey. Finally, Dr. Weddell studied the marsh and determined the impact increased water levels, as proposed in the claims at issue, would have on waterfowl habitat. Each expert agreed that, while not providing ideal conditions, the proposed water levels would greatly improve habitat for plant and animal species within the marsh.

I find Claimants have identified the minimum amount of water necessary, and no more, to establish and maintain a healthy and productive habitat, within Klamath Marsh, that will allow the exercise of the Tribes' treaty rights.

*IV. The Tribes' alleged movement away from reliance on treaty species is irrelevant to the quantification of instream water rights.*

Many of Contestants' original contest grounds seem to advocate for the abrogation of the Tribes' treaty rights due to a suggested movement away from reliance on treaty resources. Such arguments miss the mark. Only congress can abrogate Indian treaty rights and it has not done so here. The Tribes' reliance upon treaty resources is irrelevant to this quantification proceeding. While it may arguably be relevant to a congressional body in deciding whether to efface certain treaty rights, it is not information that tends to prove or disprove the amount of water necessary to establish and maintain a healthy and productive habitat for treaty species.

#### ORDER

I propose OWRD issue the following order:

1. The claimed water levels, reflected in Attachment A, are necessary to establish a healthy and productive habitat to allow the exercise of the Klamath Tribes' hunting, fishing, trapping, and gathering rights guaranteed by the treaty of 1864.
2. Claims 615 and 623 are approved as reflected in Attachment A.

  
\_\_\_\_\_  
Joe L. Allen, Senior Administrative Law Judge  
Office of Administrative Hearings

RECEIVED  
DEC 02 2011  
WATER RESOURCES DEPT  
SALEM, OREGON

**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 117 days of service of this Order. OAR 137-003-0650.

Exceptions may be made to any proposed finding of fact, conclusion 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 88 days after completion of the 120-day period for exceptions in case 285.

Any exceptions or arguments in opposition must be filed with the Adjudicator at the following address:

**Dwight W. French, Adjudicator  
Klamath Basin Adjudication  
Oregon Water Resources Department  
725 Summer Street NE, Suite A  
Salem OR 97301**

RECEIVED

DEC 02 2011

WATER RESOURCES DEPT  
SALEM, OREGON

CERTIFICATE OF SERVICE

I hereby certify that on **December 1, 2011**, 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  
Oregon Water Resources Department  
725 Summer Street N.E., Suite "A"  
Salem, OR 97301  
[Dwight.W.French@wrđ.state.or.us](mailto:Dwight.W.French@wrđ.state.or.us)

Carl V. Ullman  
Water Adjudication Project  
The Klamath Tribes  
PO Box 957  
Chiloquin, OR 97624  
Phone: 541-783-3081  
Fax: 541-783-2609  
[bullman3@earthlink.net](mailto:bullman3@earthlink.net)

David Gover/Sue Y. Noe  
Native American Rights Fund  
1506 Broadway  
Boulder, CO 80302  
Phone: 303-447-8760  
Fax: 303-443-7776  
[dgover@narf.org](mailto:dgover@narf.org)  
[suenoe@gmail.com](mailto:suenoe@gmail.com)

Tom & Althia Stephens  
PO Box 1251  
Chiloquin OR 97624

Alvin & Peggy Marengo  
8475 Marengo Ranch Drive  
Red Bluff, CA 96080  
[buffalomosby@cox.net](mailto:buffalomosby@cox.net)

John & Marilyn Mosby  
PO Box 56  
Summerland, CA 93607  
[buffalomosby@cox.net](mailto:buffalomosby@cox.net)

David W. Harder / Vanessa Boyd Willard  
United States Department of Justice  
Indian Resource Section  
South Terrace, Suite 370  
999 18<sup>th</sup> Street  
Denver, CO 80202  
Phone: 303-844-1372  
Fax: 303-844-1350  
[David.Harder@usdoj.gov](mailto:David.Harder@usdoj.gov)  
[Vanessa.willard@usdoj.gov](mailto:Vanessa.willard@usdoj.gov)

Barbara Scott-Brier  
U.S. Department of Justice  
Office of the Regional Solicitor, PNWR  
805 SW Broadway, Suite 600  
Portland, OR 97205

Jesse D. Ratcliffe  
Oregon Dept. of Justice  
1162 Court St NE  
Salem, OR 97301  
Phone: 503-378-4500  
Fax: 503-378-3802  
[Jesse.d.ratcliffe@doj.state.or.us](mailto:Jesse.d.ratcliffe@doj.state.or.us)

Elizabeth E. Howard / Anne D. Foster /  
Dominic A. Carollo / Kate L. Moore  
Dunn Carney Allen Higgins & Tongue, LLP  
851 SW Sixth Avenue, Suite 1500  
Portland, OR 97204  
[eeh@dunn-carney.com](mailto:eeh@dunn-carney.com)  
[afoster@dunn-carney.com](mailto:afoster@dunn-carney.com)  
[dcarollo@dunn-carney.com](mailto:dcarollo@dunn-carney.com)

RECEIVED  
DEC 02 2011  
WATER RESOURCES DEPT  
SALEM OREGON



---

Misty Fragua  
Administrative Assistant

RECEIVED  
DEC 02 2011  
WATER TREATMENT DEPT  
SALAM, CALIFORNIA

**KBA Case No. 284 - Attachment A- Monthly Marsh Levels**

(The table below is taken from page 41 of KBA Case No. 284, Claimant United States Bureau of Indian Affairs' and Claimant Klamath Tribes' Joint Opening Post-Hearing Brief)

**Table 1.**  
**Updated Marsh Claims – 10% exceedance (From Dr. Chapin Direct Testimony at question 56, Table 5 and Dr. Weddell Direct Testimony at question 24, Table 1).**

<b>Month</b>	<b>Water level (in ft.) at Silver Lake Highway gage</b>
January	4514.32
February	4514.47
March	4514.81
April	4514.87
May	4514.32
June	4514.04
July	4513.51
August	4513.35
September	4513.34
October	4513.46
November	4513.68
December	4513.96