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Case 285 Amended Order on Motions for Ruling on Legal Issues for Claims 614 and 624

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Administrative Law Judge, Office of Administrative Hearings

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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; Robert Cook, TPC, LLC; ~~Rogue River Valley Irrigation District; Medford Irrigation District; Horsefly Irrigation District; Langell Valley Irrigation District~~; 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.

AMENDED[1] ORDER ON MOTIONS FOR RULING ON LEGAL ISSUES

Case No. 285

Claim: 614 and 624

Contests: 2062, ~~3018, 3023~~[2], 3121[3], ~~3251, 3256~~[4], 3316, 3326[5], ~~3646, 3656~~[6], 3885, 4004, 4014

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[1] This Order is amended to respond to various requests for modification, correction, or reconsideration filed by various parties in this case, as discussed in the ORDER ON REQUESTS FOR MODIFICATION OR CORRECTION/RECONSIDERATION OF ORDER ON MOTIONS FOR RULING ON LEGAL ISSUES on file, herein. Deletions are in ~~strikethrough~~, additions are in **bold** if the text is in regular case. If the amended text is already in bold, then additions will be **underlined.**

[2] WaterWatch of Oregon, Inc.'s Contests 3018 and 3023 were dismissed. ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

[3] Change of Title Interest for Contest 3121 from Boyd Braren, Boyd Braren Trust to Robert Cook, TPC, LLC (10/25/05).

[4] On October 21, 2003, Langell Valley Irrigation District and Horsefly Irrigation District voluntarily withdrew, without prejudice, Contests 3251 and 3256. Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew Contests 3251 and 3256 on June 14, 2006.

[5] William Bryant voluntarily withdrew from Contests 3316 and 3326 on October 31, 2003. Dave Wood voluntarily withdrew from Contests 3316 and 3326 on October 26, 2004. Change of Title Interest for Contests 3316 and 3326 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3316 and 3326 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3316 and 3326 from Kenneth Hufford, Leslie Hufford, and Hart Estate Investments to Jerry and Linda Neff (2/11/05). Change of Title Interest for Contests 3316 and 3326 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3316 and 3326 from Walter Seput to Wayne James, Jr. (5/2/05). Change of Title Interest for Contests 3316 and 3326 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3316 and 3326 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Kenneth Zamzow voluntarily withdrew from Contests 3316 and 3326 on July 8, 2005. Change of portion of Title Interest for Contests 3316 and 3326 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). William Knudtsen voluntarily withdrew from Contests 3316 and 3326 on September 13, 2005.

[6] Klamath Project Water Users voluntarily withdrew/dismissed Contests 3646 and 3656 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 SATES; [PROPOSED] ORDER OF THE HEARING OFFICER IN CASE 003 dated December 6, 2002.

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; 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; Modoc Point Irrigation District; Peter M. Bourdet; Vincent Briggs; J.T. Ranch Co.; Tom Bentley; Thomas Stephens; John Briggs; ~~William Bryant~~; Peggy Marenco; 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.

BACKGROUND OF CASE

Klamath Case 285 involves Claims 614 and 624, involving the seeps and springs in the National Forest on the lands of the former Klamath Indian Reservation. Claimant/Contestants are the Klamath Tribes and the United States Bureau of Indian Affairs as Trustee on behalf of the Tribes. Contestants filing motions in the case include Pacificorp and a group that will be referred to in this order as the Upper Basin Contestants.

On July 8, 2005, a Joint Motion for Ruling on Legal Issues was filed by the Tribes and the United States. On that same date, other Motions for Ruling on Legal Issues were filed by Pacificorp and the Upper Basin Contestants. Each party responded to the opposing motion and had a chance to reply to the responses. The matter was

consolidated with other cases in which the Tribes and the United States are the claimants for the purposes of arguing the motions.[7] Oral argument on the motions was presented on June 20, 2006, in Salem, Oregon, and the motions were taken under advisement.

STANDARD FOR REVIEW

Pursuant to OAR 137-003-0580, a Motion for Ruling on Legal Issues (now known as a Motion for Summary Determination), may be filed by the agency or a party not less than 28 days before the date set for hearing. The rule, as quoted in part below, sets forth the standard by which the motion is to be reviewed:

> (6) The administrative law judge shall grant the motion for a summary determination if:
>
> (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
>
> (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
>
> (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
>
> (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

OAR 137-003-0580. Pursuant to this rule, I must evaluate the issues raised to determine whether there are genuine issues of fact and whether the moving parties are entitled to a favorable ruling as a matter of law.

DOCUMENTS

When considering the motions filed in Case 285, I have read and relied upon the following documents as the record in the case:

- **US and Klamath Tribes Joint Motion for Ruling on Legal Issues;** Responses of the Contestants; US **and Tribes'** Reply to the Response;
- **Contestants' Motions for Ruling on Legal Issues**; US and Tribes' Response to Motion; Replies of the Contestants.

[7] Cases 277, 279, 280, ~~282~~, **281**, 282, 284, 285 and 286 were informally joined together for purposes of these motions.

These documents have been reviewed, together with all attachments to the documents. Pursuant to the administrative rule, I will consider the evidence in a light most favorable to the non-moving parties in each case.

FINDINGS OF FACT

1. The Klamath Tribes (including the Modoc Tribe and the Yahooskin Band of Snake Indians) entered into a treaty with the United States on October 14, 1864. Article 1 of the Treaty of 1864 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. The seeps and springs in Claims 614 and 624 are located in the lands which formerly made up the Klamath Indian Reservation. The Tribes have hunted, fished, gathered and trapped on the Reservation lands and the surrounding lands for over a thousand years, or from "time immemorial."

3. In 1871, when the United States government initially surveyed the land that was part of the Klamath Reservation, it mistakenly excluded over 621,000 acres from the agreed-upon boundaries of the Reservation. The Tribes sought remuneration for the lost portion of its Reservation and, in return, was required to cede those disputed lands from the Reservation.

4. On August 13, 1954, Congress passed the Klamath Termination Act and ended its oversight of the Tribes and the Reservation. Tribal members were given the option of accepting a cash amount in lieu of ongoing membership or, if they preferred, of remaining in the Tribes and having a third party administer the assets of the Tribes. In 1971, the trust was terminated and all land assets of the Tribes were liquidated. **In 1986, however, Congress passed the Klamath Indian Tribe Restoration Act, 25 USC §566 *et seq.* restoring recognition of the Tribes.**

5. In 1975, the United States 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 aboriginal hunt, fish, trap and gather rights were considered to be one of the primary purposes of the Treaty of 1864. *U.S. v. Adair*, 478 F.Supp. 336 (1979) (*Adair I*).

6. 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*).

MOTION OF THE TRIBES AND UNITED STATES

The Tribes and the United States filed their Motion for Ruling on Legal Issues, seeking rulings in their favor as follows:[8]

> **A. The Klamath Tribes and the United States, as trustee on behalf of the Tribes, hold federal reserved water rights.**
>
> **1. The Treaty of 1864 with the United States recognized the Klamath Tribes' preexisting rights to hunt, fish, trap, and gather and reserved the water necessary for those rights. Those tribal water rights, held by the Klamath Tribes and the United States as trustee on behalf of the Tribes, are federal reserved water rights.**
>
> **2. The federal courts in the *United States v. Adair* cases have provided controlling precedent that affirmed the Tribal water rights and determined what water must be provided to maintain the Tribes' treaty-protected hunting, fishing, trapping, and gathering lifestyle rights.**
>
> **Ruling:** Granted.

Discussion: Federal reserved water rights ~~are~~ **may be** created **either** by Congress, under the powers vested in it by the Commerce Clause and the Property Clause of the U.S. Constitution, **or by the Executive.** *Arizona v. California,* 373 U.S. 546, **597-**598 (1963). The reserved water rights apply to any federally-created enclave, including national parks and forests, national wildlife refuges, and Indian reservations. The reserved water right will be inferred from the creation of such an enclave or reservation, if previously unappropriated waters are necessary to accomplish the purposes of the reservation. *Cappaert v. United States,* 426 U.S. 128, 139 (1976). The priority date of a federal reserved water right is the date of its creation.

Article 1 and Article 2 Water Rights. When the Klamath Reservation was created in the Treaty of October 14, 1864, a federal reserved water right was created as a result. As with any other federal enclave, the date of the creation of the Klamath Reservation is the priority date of the federal reserved water right created.[9] The primary purpose of that created water right was to aid in the "civilization" of the Klamath Tribes, through the development of agriculture. I will refer to the federal reserved water right

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[8] The language from the motions filed by the parties is in bold; my analysis, for the most part, uses a regular font.

[9] This priority date explains why the Allottee and *Walton* cases receive a priority date of October 14, 1864, within the Adjudication.

attached to this agricultural purpose as the "Article 2" water right, since the purpose was expressed in Article 2 of the Treaty of 1864.

However, there is a second, far older, reserved water right involved in this case. It is "federal" in that it is recognized by the federal government and was a bargained-for result of the Treaty of 1864. The non-consumptive water right referred to accompanies the Tribes' right to hunt, fish, gather and trap within the former Reservation lands, found in "Article 1" of the Treaty; hence, I refer to it as the Article 1 water right. The priority date of that right is from time immemorial.

It is obvious that the two water rights are different. The Article 2 water rights are tied to the agricultural purposes of the Treaty of 1864; the Article 1 water rights reserved to the Tribes **water to support** their aboriginal fishing, hunting, trapping and gathering rights. The priority dates are also different. As the United States Supreme Court has noted in another case:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there is not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. *In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them, a reservation of those not granted.*

U.S. v. Winans, 198 U.S. 371 (1905) (emphasis added).

Since the Article 1 rights were not created by the treaty that created the Reservation, they were not destroyed by the destruction of the reservation in the Klamath Termination Act of 1954.[10] Recent federal court decisions have consistently held that the Klamath Tribes' hunting and fishing rights survived the termination. *United States v. Adair,* 723 F.2d 1394, 1411-12 (1984) (*Adair II*); *Kimball v. Callahan,* 590 F.2d 768, 777-78 (9th Cir. 1979) (*Kimball II*).

In *Adair,* the District Court recognized the distinction between the two types of reserved water rights set forth in the Klamath treaty:

> The defendants contend that water rights are always appurtenant to the land; when the Tribe disposed of its land, the Tribe also relinquished water rights.
>
> This contention overlooks the nature of the connection between Indian water rights and Indian hunting and fishing rights. *The Indians obtained their reserved right to the water they need to cultivate their land from*

[10] 25 U.S.C. § 564.

> *Article II of the Treaty. Their other rights to water come from the hunting and fishing rights reserved to them in Article I.* Without sufficient water to preserve fish and wildlife on the Reservation lands, Indian hunting and fishing rights would be worthless.

478 F. Supp. 336, 346 (1979) (*Adair I*) (emphasis added). The court distinguished between the Article 1 water rights (hunting, fishing, gathering and trapping), which the Tribes reserved from their previous lifestyle, and the Article 2 water rights, which were created by the Treaty of 1864 and, in most cases were transferred with the transfer of the real property upon its termination.

The Applicability of the *Adair* Decisions. The Claimants have requested a ruling that the *Adair* decisions, cited above, are "controlling precedent" with regard to the Tribes' ongoing right to hunt, fish, gather and trap on the former Reservation lands. I take the motion to refer to *Adair I* and *Adair* II, not to *Adair* III, which was later vacated. *U.S. v. Braren,* 338 F3d 971 (2003).[11]

Claimants argue that the *Adair* decisions require a finding that the Tribes' treaty right to hunt, gather, fish and trap on the former reservation lands survived the termination of the Reservation. I conclude as a matter of law that the Tribes have such rights on the former reservation lands. I consider *Adair* precedentially binding upon the parties in this case with regard to the Tribes' rights on the former reservation lands. Under the federal reserved water rights doctrine, the Tribes have a water right which accompanies those rights on the former reservation lands.

Adair I and *Adair II* are binding on the Klamath Adjudication with regard to the existence of the Article 1 and Article 2 water rights, as to their priority dates, and as to the survival of the Article 1 hunting and fishing rights after the termination of the Klamath Reservation. While the decisions in *Adair* are not preclusively binding on all of the parties in the Adjudication, they serve as precedent as to the federal questions involved. The answers to the federal questions must be consistently applied throughout the former reservation lands; there is no rational basis to only apply *Adair* to the Williamson River and not find the same aboriginal rights in other parts of the former reservation lands. The *Adair* decisions, although preclusively binding on certain of the parties on the Williamson, were clearly written with the entirety of the former reservation lands in mind. That is the way they will be applied.

I conclude as a matter of law that the Claimants have a non-consumptive right to instream flow in the portions of the former reservation lands covered by these claims, to provide for the Tribes' aboriginal right to hunt, fish, trap and gather on those lands. The priority is from time immemorial.

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[11] Claimants do seek to rely upon *Adair* III in a different context. A discussion of the limited effect of *Adair III* will be found in the section concerning the quantification method.

B. Quantification of the Tribal water rights requires a two step process:

1. The first quantification step is for the United States and the Tribes to establish the amount of water necessary for the hunting, fishing, gathering, and trapping purposes of the Reservation based on the necessary habitat requirements of the relevant species.

2. The second quantification step is to allow opponents of the Tribal water rights an opportunity to establish through a multiple factor test addressing the material well-being of Tribal members, that Tribal members exceed a "moderate living" or will do so with any additional treaty resources created by the flows awarded in step one; and if Tribal members do so, to possibly reduce the amount of water awarded during step one.

Ruling: Granted as modified.

Discussion: Claimants seek a ruling that the appropriate quantification method to determine the water right involves a two-step process. As the Claimants describe the two-part test:

> Briefly, the first step is the "necessary habitat" component, which requires Claimants to demonstrate what water is necessary for the treaty-reserved hunting, fishing, trapping, and gathering purpose of the Reservation * * * The second step, the "moderate living" component, then allows the opponents of the Tribal water rights the opportunity to persuade the court to reduce the water right amount determined under step one by demonstrating that Tribal members exceed a "moderate living" or would do so with the water right amount awarded under step one. * * * Under the two-step process, the initial burden of proof is with Claimants in step one, and then shifts to Contestants (opponents of the Tribal water rights) in step two.

(Claimants Joint Reply at 13).

The Contestants disagree with the concept of a two-step process, or at least with the way Claimants portray it. They argue that the Claimants should have the burden of proof to not only determine the correct water levels for habitat in the former reservation lands, but must also take into account the "moderate living" standard. Claimants, on the other hand, argue that the moderate living standard is the "second step" in the quantification process. Contestants also seek limitations on the quantity of water based upon the phrase "as currently exercised" in *Adair II*. I will address the meaning of both "as currently exercised" and "moderate living" in the discussion which follows.

"As currently exercised." The starting point is to determine how much water is needed to provide habitat for fishing and for the hunting, trapping and gathering rights as

well. This is an important determination, and the District Court (in *Adair I*) has stated the Tribal right in no uncertain terms:

> The Indians are still entitled to *as much water on the Reservation lands as they need to protect their hunting and fishing rights.* If the preservation of these rights requires that the Marsh be maintained as wetlands and that the forest be maintained on a sustained-yield basis, then the Indians are entitled to whatever water is necessary to achieve those results.

478 F.Supp. at 345-46 (emphasis added). The District Court's discussion left little doubt as to its interpretation of the priority of the Tribes' instream rights. The Tribes were entitled to whatever it took to enable the exercise of the aboriginal rights.

The Ninth Circuit affirmed the District Court's decision in *Adair I*, quoting from this same passage with approval and adding its own interpretation:

> We interpret this statement to confirm to the Tribe the amount of water necessary to support its hunting and fishing rights *as currently exercised* to maintain the livelihood of Tribe members, not as these rights once were exercised by the Tribe in 1864.

723 F.2d at 1415 (emphasis added). Contestants argue that "as currently exercised" in this passage in *Adair II* should be interpreted to set a date on which the "current exercise" of the right might be determined. However, as Claimants correctly point out, the courts were not intending to set out an artificial date which would serve to determine the correct amount of water. Such a date would defeat the "time immemorial" priority already held by the Tribes.

In *Adair III*, a decision which was later vacated on ripeness grounds, Judge Panner addressed the desire of some of the parties to want to fix a date for the "as currently exercised" language. The most common dates were 1979 (the date of *Adair I*) and 1984 (the date certiorari was denied in *Adair II*). Judge Panner wrote:

> Defendants' interpretations conflict with the meaning of Adair II and inconsistent with the cases relied upon therein. In particular, in Fishing Vessel the Supreme Court did not limit the Indian treaty harvest of the fishery to the number of fish that were currently being harvested as of the date of the opinion, or on any other fixed date. By the time of the Fishing Vessel litigation, the Indian harvest had shrunk to only about 2% of the harvestable fishery and current fishery management "excluded most Indians from participating in it." * * *
>
> Defendants' interpretations have the effect of assigning a 1979 (or 1984) priority date to the Tribes' water right. This result cannot be reconciled with this Court's holding, which was affirmed in Adair II, that the Tribes' priority date is "time immemorial." * * * Fixing the tribal water rights to

> a specific date is not related to the fulfillment of purposes of the Klamath Indian Reservation, which is the paramount consideration mandated by [*Winters*].
>
> The "as currently exercised" phrase refers only to the moderate living standard which recognizes that changing circumstances can affect the measure of a reserved right.

187 F.Supp. 2d at 1278-79.

As noted, *Adair III* was vacated on ripeness grounds. *Braren, supra.* Thus, that decision is not binding, precedentially or otherwise, upon the parties to this case. However, I take Judge Panner's explanation of "as currently exercised" as educated guidance as to the meaning of that phrase. I conclude that the Ninth Circuit was not suggesting a specific date when it made the quoted comment. Rather, the court was comparing the present times with when the Treaty was signed in 1864, and allowing a showing that productive habitat would not need to return to the way it was in 1864.

Moreover, as Claimants point out, a federal reserved water right is determined based upon present *and future* needs of the reservation. To use a fixed date such as 1979 (or 1984) would defeat that aspect of the claim and would, in essence, change the priority date from time immemorial to that later date. The issue of the amount of water necessary for present and future use remains to be determined at hearing.

"Moderate living." The second phrase in *Adair II* which must be interpreted to develop a sound quantification method is the "moderate living" standard. All parties seem to agree that it applies, presumably because of the Ninth Circuit's use of the phrase in *Adair II*:

> We find authority for such a construction [the "as currently exercised" standard] of the Indians' rights in the Supreme Court's decision in *Washington v. Fishing Vessel Ass'n* [citation omitted]. There, citing *Arizona v. California*, [citation omitted], a reserved water rights case, the court stated "that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, [what] is necessary to provide the Indians with a livelihood—that is to say, a moderate living."

723 F.2d at 1415. The Ninth Circuit considered the Claimants' currently-exercised rights to be "limited by the 'moderate living' standard enunciated in *Fishing Vessel,*" but otherwise affirmed the District Court. (*Id.*).

Unfortunately, although all of the parties have attempted to incorporate this standard into their arguments in this case in some fashion, the "moderate living" standard makes little sense in the context of a water right, and particularly in the water rights involved in this case. In *Fishing Vessel*, the tribes there were given a share of the "take"

of a healthy fishery. Their share was based upon what would enable a "moderate living" for tribal members. The presence of a healthy fishery is a key component of the taking right. Whether the tribes in Fishing Vessel received 2% or 50% of the take, there was never a question of sufficient water to allow the take.

In the present case, **it may well be that** the healthy fishery present in the Washington cases does not yet exist. **That remains to be determined at hearing.** Here, the primary issue is having enough water to ~~develop and maintain a healthy fishery, to eventually~~ **assure that a viable and self-renewing population of the treaty species will exist to the extent necessary to** enable the exercise of the Tribal rights to fish, hunt, trap and gather. As with the discussion of current exercise, Judge Panner's critique of the "moderate living" additive in *Adair III* is helpful:

> 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* * * *. 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 1277 (emphasis added). Judge Panner correctly analyzed the problem. Habitat and percentages of the take of fish are two separate things. In *Fishing Vessel*, a reduction of the take of fish allotted to the tribes means less fish. In the Klamath, a reduction below a healthy habitat means *no* fish, because they cannot survive.

Accordingly, with all due respect to the courts, I find the moderate living standard to be of little help in the quantification of water rights in the former reservation lands. The goal is to determine the appropriate level of water on the former reservation lands to allow productive habitat for the exercise of the Tribal rights to hunt, fish, gather and trap. As stated by the Supreme Court in other cases, and as adopted in this Adjudication in other cases, the level of water in each area is to be the amount to fulfill the purpose, and no more. *Cappaert, supra.*

The Appropriate Standard. Since the Tribes are only entitled to enough water to fulfill the purpose of the reservation, it is my considered opinion that all of the parties are making the quantification method far too difficult. As in any claim in the Adjudication, Claimants have the burden to prove their claim. Part of that proof will be to establish the amount of water ~~needed in each area of the former reservation lands for the life cycles of the species of fish and for necessary habitat for hunting, fishing,~~

~~trapping and gathering.~~ **necessary, in time and location, to assure the existence of a habitat sustaining a viable and self-renewing population of the treaty species in question, taking into account the withdrawals from that species' population which the Tribes' harvesting of the species as authorized by the treaty will entail. This will, of necessity, vary depending on the biology of the species involved. In some cases, it may be necessary to quantify the "take" guaranteed by treaty. In those cases, Contestants may raise the "moderate living" standard as a factor to be considered in establishing the appropriate "take." However, the evidence is not sufficient to show that the relationship between changes in the amount of water and changes in the population and viability of the treaty species is linear at all points for all species. Indeed, it seems likely that it is not. Consequently, the quantification of the "take" which the "moderate living" standard implies may not be necessary for all species. For example, perhaps at water levels required for other treaty species a particular treaty species will be so plentiful as to obviate the need for quantification. On the other hand, the Tribe may require such a minimal take of a particular species that a harvest at that level will not significantly impact the viability of the species' population.** If Claimants are able to prove their entitlement to that amount of water by a preponderance of the evidence, they will have established their claims.

The second "step" is not a step at all. Rather, the Contestants' task will be to show that the water levels can be established at a lower level and still support the Tribal rights. It is here that I would expect the Contestants to present their own scientific and habitat-oriented evidence to show that, in fact, a lesser amount of water in each area of the former reservation lands would provide ~~a healthy fishery~~ **a viable population of each species sufficient** for the exercise of the Tribal rights. This would also be the place where, to the extent it becomes relevant, any evidence of a "moderate living" standard would be introduced. It will be the Contestants' burden to show that a lesser amount of water—for any reason—will suffice. ORS 183.450(2).

The best example of this type of quantification method, although on a much simpler scale, is seen in the Supreme Court's analysis of the habitat of the Devil's Hole pupfish, in *Cappaert, supra*. The scientific evidence presented by the United States in that case showed that water in Devil's Hole (a cavern access to a large aquifer under Death Valley) needed to stay at a specific level, three feet below a marker in the side wall:

> The water level in the pool is measured from a copper washer which the U.S. Geological Survey placed on the shelf in 1962. Between 1962 and 1968 the average water level was 1.2 feet below the marker. In 1968, after the Cappaerts began to pump, the summer water level steadily decreased: in 1970 to 3.17 feet below the marker; in 1971 to 3.48 feet and in 1972 to 3.9 feet. At these water levels large areas of the critical rock shelf are exposed * * * The shelf exposure decreases the algae production and limits the spawning area which in turn reduces the Devil's Hole pupfish's chances to survive.

508 F.2d at 316. When the water was at that level, the rock shelf on which the pupfish spawned was covered with water and could support a specific type of algae necessary for fish habitat. However, the water level was decreasing. As a result, the Cappaerts were enjoined from pumping water if it would take the water level in Devil's Hole more than three feet below that mark. The matter was still open, however, to the possibility that a lesser amount of water would be sufficient. In affirming the District Court's decision, the Ninth Circuit noted:

> The District Court held that the water level should be maintained at 3.0 feet below the copper washer in order to preserve the pupfish in Devil's Hole pool. *Pending this appeal, we permitted the Cappaerts to pump as long as the water level did not go below 3.3 feet. We remand this case to the District Court to determine whether, on the facts developed during the pendency of this appeal, the lower water level may be adequate to preserve the pupfish.*

508 F.2d at 322 (emphasis added).

When the case made its way to the U.S. Supreme Court, Chief Justice Burger wrote:

> The implied-reservation-of-water-doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. *Arizona v. California, supra, at 600-601.* Here the purpose of reserving Devil's Hole Monument is preservation of the pool. * * * *Thus, as the District Court has correctly determined, the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved.* The District Court thus tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the Proclamation.

426 U.S. at 141(emphasis added).

The italicized portion of the Supreme Court's decision models the quantification process here: Claimants have the burden of proof to establish the appropriate water levels for the Tribes' already-established right to hunt, fish, trap and gather on the former Reservation lands. It will be Contestants' burden of proof to show that a lower level of water will still accomplish the purpose of the reservation. If it is shown by a preponderance of the evidence that a lower level will accomplish the purpose of the reservation, that will be the level of the water. Again, the issue is productive habitat, not a moderate living as such.

I conclude that this simple quantification method is what must be used to determine the appropriate instream flows on the former Reservation lands.

C. A number of contest grounds asserted by the contestants to the Tribal claims were resolved in *United States v. Adair* by operation of preclusion principles, through explicit rulings, or by direct implication from those rulings, leading to the following determinations here:

Ruling: Granted in part.

General Discussion: As noted above, the *Adair* decisions are applicable to this case, even though this case involves a different part of the former Reservation lands than in the *Adair* case. Some of the decisions reached in the federal courts were specific to the parties in the *Adair* litigation; some of it must be considered applicable basin-wide. *Adair* is controlling precedent, as I have described more fully above.

1. The Tribes have a treaty-reserved gathering right and associated reserved water rights as determined by the Declaratory Judgment in *Adair.*

Ruling: Granted.

Discussion: Although some of the parties in the Adjudication have argued that the Tribes' Article 1 reserved water rights are limited to just hunting and fishing, with no gathering or trapping rights, the District Court in *Adair I* disagreed:

> The Indians have hunted, fished, and gathered food on the Reservation lands since time immemorial.
>
> Article I of the Treaty of 1864 secured for the Indians the exclusive right to fish and gather edible plants on the Reservation. That provision includes the right to hunt and trap. *Kimball v. Callahan* [supra]. This was not a grant of rights to the Indians, but a reservation of rights already possessed. *United States v. Winans* [citations omitted].
>
> Treaty hunting and fishing rights for the Tribe, for all its members on the final tribal roll and for their descendants survived the termination of the Reservation. * * *

Adair I, 478 F.Supp at 345 (emphasis added).

Although the District Court and the Ninth Circuit both use later "shorthand" phrases such as "hunting and fishing rights" (see last paragraph in quotation above), the context shows that the rights of gathering and trapping are included along with the hunting and fishing rights—rights that the Tribes reserved in the treaty and which they exercised for at least a thousand years before the Treaty of 1864 came into being. I find the *Adair* decision to be binding precedent in this regard. However, even if *Adair* had not

specifically addressed the gathering right I would conclude that it should be treated in exactly the same way as the aboriginal hunting and fishing rights. The gathering right was specifically mentioned in the Treaty of 1864, and there would be no reasonable basis to treat the right differently than the fishing right, also mentioned.

2. Quantification standards based on the amount of water present on a particular date, or the amount of treaty resources the Tribes harvested on a particular date conflict directly with the *Adair* decisions and the cases *Adair II* relied upon, are arbitrary and not relevant in this case.

Ruling: Granted.

Discussion: There has been much discussion, and much argument, between the parties concerning whether the "as currently exercised" language in *Adair* II means that water levels are to be determined with a specific date in mind. As I have explained more fully above, I have concluded that the language in the case does not refer to a specific date. Rather, it refers generally to the present habitat needs, as opposed to what the needs might have been in 1864. The previous discussions of the quantification method are hereby incorporated in the discussion of this issue.

3. The promotion of agriculture is not the exclusive purpose of the Reservation. Rather, the *Adair II* court held there are at least two purposes of the Reservation that have an implied water right, i.e., to allow the Tribes to continue their hunting, fishing, trapping, and gathering rights and irrigation for agriculture.

Ruling: Granted.

Discussion: In *Adair II,* the Ninth Circuit reiterated that there were two primary purposes of the Klamath Reservation:

> The State and individual appellants argue that the intent of the 1864 Treaty was to convert the Indians to an agricultural way of life. The Government and the Tribe argue that an equally important purpose of the treaty was to guarantee continuity of the Indians' hunting and gathering lifestyle. Under the guidelines established in *Cappaert* and *New Mexico,* we find that both objectives qualify as primary purposes of the 1864 Treaty and accompanying reservation of land.

723 F.2d at 1409 (emphasis added). Thus, as previously discussed, the courts have recognized the presence of the Article 1 water rights, with a priority date of time immemorial, as well as the Article 2 water rights, with a priority of October 14, 1864.

I conclude, in accord with *Adair II,* that there are two purposes of the Reservation set forth in the Treaty of 1864. One purpose was to help "civilize" the Klamath Tribes

(with an emphasis upon agriculture), leading to the Article 2 water right. The other purpose continued the Tribes' right to hunt, fish, trap and gather, reserving the Article 1 water right.

4. The Adair II court's use of the term "wilderness servitude" is not a separate water rights test but is a part of the "moderate living" standard.

Ruling: Granted, with clarification.

Discussion: In *Adair II*, the Ninth Circuit discussed the "wilderness servitude" argument in the context of the time immemorial priority date for the hunting and fishing rights. The court stated:

> This does not mean, however, as the individual appellants argue, that the former Klamath Reservation will be subject to a "wilderness servitude" in favor of the Tribe. Apparently, appellants read the water rights decreed to the Tribe to require restoration of an 1864 level of water flow on former reservation lands now used by the Tribe to maintain traditional hunting and fishing lifestyles. We do not interpret the district court's decision so expansively.

723 F.2d at 1414. I understand the "wilderness servitude" phrase to mean, as the District Court described it in context, the belief that the former Reservation lands would be "preserve[d] as a suitable habitat for fish and wildlife." *Adair I*, 478 F. Supp at 344. Once again, the goal of recognizing the Tribes' hunting and fishing right is not to return to 1864 and to forever limit growth or other uses of the water in order to maintain the Tribes' non-consumptive right. Rather, the "wilderness servitude" language in both *Adair* decisions is one of the parameters the court used to direct the parties to find the appropriate water levels. It is not a separate test.

In fact, it is not necessarily even part of the test. The issue is to determine the appropriate level of water for the hunting, fishing, trapping and gathering rights to be exercised. To exercise those rights, there must be productive habitat and a fishery healthy enough for the ongoing harvesting of the fish. Please see the previous discussion of the quantification standard, above.

4. The quantification of the Tribal water rights must provide the water necessary for the habitat for the Tribes' treaty resources, not by determining the minimum amount of water necessary for the existence of those resources.

Ruling: Granted.

Discussion: Under the federal reserved water rights doctrine, the Tribes are entitled to enough water to fulfill the purposes of the reservation. In this case, the

purpose of the reservation is the Tribes' ongoing right to hunt, fish, trap and gather on the former reservation lands. Under the doctrine, the Tribes are entitled to the amount of water necessary to fulfill the purpose of the reservation, and no more. *Cappaert,* 426 US at 141.

The Contestants continue to focus on the concept of the "minimum" amount of water necessary to fulfill the purpose; that focus is not necessarily wrong, but it is not helpful. It is unworkable. If the Klamath fishery were analogized to the provision of health care to an ailing person, the appropriate question would not be: What is the minimum we can do to keep this person alive? The appropriate question would be: What are the basic health care needs of this person that will not only keep him alive but allow him to be healthy? Such treatment will contain "no frills," but it will be sufficient to meet the health needs of the person. Similarly, the Tribes are entitled to a healthy habitat for the exercise of their aboriginal rights—no frills, but sufficient to meet the need of the reservation.

Once again, the goal of the reserved water right for the reservation is a healthy and productive habitat that will enable the Tribes to exercise their aboriginal rights. It will be the focus of the Claimants to establish the amount of water needed for that productive habitat, and the focus of the Contestants to show how a lesser amount of water will accomplish the same purpose. That will be the primary issue at hearing.

5. Quantification of the Tribal water rights is not affected by the non-exclusive nature of the Tribes' hunting, fishing, trapping, and gathering rights.

Ruling: Granted.

Discussion: After reviewing the Contestants' argument about the effect of the non-exclusive nature of the Tribes' Article 1 rights, it appears that the argument has more to do with fishing rights than with water rights. Taking their argument from *Fishing Vessel* and *Shellfish*, the Contestants argue that the Stevens Treaties in those Washington cases would not lead to the same share of fish in the Klamath as they have in Washington because the fishery on the former Klamath Reservation ~~in~~ **is** not exclusive to the Tribes. However, this argument misses the point. The two Washington cases focus of take limits in a healthy fishery, while this case must focus on setting the water levels to support a habitat and develop a healthy fishery.

Whether the Tribes are entitled to one fish or one million fish as part of their "share" (an issue not before me), it is clear that there needs to be a habitat that will allow such fish to be taken, along with the exercise of the other aboriginal rights. The goal of the claims filed in this case is to determine the level of the productive habitat for those fish, regardless what percentage of the fish could be taken by the Tribes. The share of fish to which the Tribes are entitled is not a relevant factor in this proceeding.

6. The Tribal water rights cannot be diminished by actions of the Tribes or the United States that may be alleged to have affected the condition of treaty resources. Such alleged actions are not relevant in this case.

Ruling: Denied as unclear.

Discussion: The Claimants' argument as to this point is unclear, due at least in part to the lack of clarity in the underlying contest point to which they object. I do not have sufficient information to be able to understand the issue factually, much less be able to conclude that there is no question of material fact. I will leave it to the discovery process and, if necessary, the hearing to determine the viability of these issues.

D. The following rulings rejecting several contest grounds also apply in this case:

1. The applicable legal test allows ~~Claimant's~~ Claimants to use several different ways to quantify the flows or water levels needed to fulfill the Tribal water rights; the evidence is not limited to a 1970 Oregon Department of Fish and Wildlife report.

Ruling: Granted, with explanation.

Discussion: There is no reasonable basis to limit the evidence to a 1970 ODFW report, nor does there seem to be any party seriously arguing such a position. The parties are now aware of the quantification standard to be used. The method of proof used by the Claimants to set the level of habitat, and the method of proof used by the Contestants to show that a lesser habitat is as good, may or may not be the same method. The ALJ's analysis of the evidence that is presented will most likely focus on the following questions:

- What is the method used to determine the ~~instream~~ flow **or water levels**?
- What other methods are there, and why was this method chosen?
- Has the method been appropriately applied?
- Do other valid methods come to the same or similar conclusions? Why or why not?
- Are the conclusions based upon correct data?
- Is the evidence, including the evidence of the application of the method, clear enough that it is understandable?

Within these and similar questions of proof, there will be no limitation on methodology.

However, I do not mean to exclude the ODFW instream findings. ~~At the time the Oregon Attorney General reviewed these BIA claims for OWRD, he noted that the state~~

~~water levels (for their instream rights for fish) were considerably lower than the levels sought by the BIA:~~

> ~~In most instances, those amounts are substantially below the amounts claimed by the BIA and the Tribes. The disparity * * * suggests that the [BIA] claims are not for the minimum amount necessary to produce a harvestable fishery.~~

~~AG Opinion of September 30, 1999 at 7.[12]~~ The ODFW calculations may be helpful or relevant to the parties in determining the appropriate **flows or** water levels in the former reservation lands, **or elsewhere, if applicable**—the amount of water sufficient to fulfill the purpose of the reservation, and no more.

2. Recognizing the Tribal water rights does not create a constitutional Equal Protection violation.

Ruling: Granted.

Discussion: There has been no argument made by Contestants concerning this request for a ruling as a matter of law. However, I will briefly address the issue just the same. In general, the "equal protection" argument, arising from the Fifth Amendment to the U.S. Constitution, contends that it would be discriminatory to give rights to the Tribes (based upon their ethnicity), which are not available to others.

An assumption to any such argument is that the parties should be in a place of equal status under the law. That assumption is groundless in this case, where the status of the Tribes, under the Treaty of 1864 and their use of the area from time immemorial, is considerably different than any other person or entity involved in the Adjudication. Whatever right will be granted to the Tribes will be on the basis of their Treaty rights and their aboriginal priority. Moreover, even if it was considered special treatment to the Tribes, the U.S. Supreme Court has determined that the special circumstances of tribes who signed treaties do not violate the Fifth Amendment. *Fishing Vessel*, 443 U.S. at 673.

3. The separate water right claims of the Klamath Tribes and the United States should not be merged, nor is the burden to establish the claims on the Tribes alone. The United States is the trustee for Indian tribes, has separate interests and responsibilities in the determination of Indian water rights, and must be a full party to these proceedings.

Ruling: Granted.

Discussion: There is little room to argue that the United States should not be allowed to participate in the hearing as a claimant; that argument has been forestalled by the cases cited by the Claimants. Accordingly, I find that the United States must continue as a Claimant in the proceeding.

~~[12] This document was provided as Exhibit A to Pacificorp's submission.~~

Although I do not profess to understand all of the reasons why the United States needs to be involved, at the oral argument I did see some very good reasons for allowing the Government and the Tribes to appear separately and present their unique interests. The United States presents the strong arguments of federal law as part of its fiduciary obligation to assist the Tribes. Equally as able, the Tribes present their position in a manner which may or may not agree with the Government's statements—even though the two generally end up seeking the same result.[13]

4. The United States and Klamath Tribes are not foreclosed from claiming Klamath Basin water because water is transported to the Rogue River Basin under junior water right permits.

Ruling: Granted.

Discussion: This issue no longer exists, since the Contestants raising the issue (Rogue River Valley Irrigation and Medford Irrigation), have withdrawn their contest.

E. OWRD has a statutory responsibility to provide hydrology evidence on water availability necessary to determine the claims at the parties' request. The claimants and contestants are entitled to rely upon OWRD's evidence but may refute or supplement that evidence where they believe it is necessary or useful to better understand water availability for the claims.

Ruling: Granted, as explained.

Discussion: Claimants correctly establish that OWRD has the initial responsibility to determine instream flow ~~requirements~~. OAR 690-028-0040(5). This information must be available to the parties and is certainly usable **by the parties** as evidence in the proceeding. As with any evidence, it is not immune to attack. If a party demonstrates an error in the method used by the OWRD representative, or if experts show that the information is otherwise incorrect, the ALJ will have the freedom to make the best decision possible on the best available evidence.

I cannot imagine a situation in which the OWRD instream flow ~~requirements~~ **data**, determined according to the Department's responsibilities under statute and rule, would be excluded from evidence. **If it is offered by a party,** OWRD's data will be given a careful review, as will every other piece of evidence, and may be relied upon or attacked by any party.

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[13] This was most notable to me when counsel for the United States made a reference to Tribal members agreeing to the termination of their Reservation. Immediately, counsel for the Tribes made it clear that there had been no agreement from the Tribal members. (Oral argument, 6/20/06).

UPPER BASIN CONTESTANTS' MOTION

The Upper Basin Contestants seek rulings in their favor, as follows:

1. Determinations made on claims for hunting and fishing involving instream rights should be based on legal standards provided by *United States v. Winans,* 198 US 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905) and *United States v. Adair,* 723 F2d 1394 (9th Cir. 1984) (*Adair II*), cert. denied sub nom 467 US 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984).

Ruling: Granted, generally.

Discussion: The two cases cited by the Upper Basin Contestants are important to the adjudication, although *Winans* is technically not a water case. *Winans* is cited with approval to show that the Tribal rights of hunting, fishing, trapping and gathering preexisted the creation of the Reservation and have a priority date of time immemorial. *Adair*, as previously shown, is binding precedent concerning many of the issues initially raised in the Adjudication. There are many other cases which will apply to the issues in this case; in granting this portion of the motion, I do not mean to imply, nor do I conclude, that these are the *only* legal standards or cases applicable to this case.

2. Quantification of the claims for instream rights must be made on the basis of the "needs based" test established in *Washington v. Fishing Vessel Ass'n,* 443 US 658, 99 S.Ct. 3055, 61 L.Ed.2d (1979) *and Adair II.*

Ruling: Denied.

Discussion: The concept of a "needs based" test is confusing and not easily found in the cases cited. In *Fishing Vessel*, the Supreme Court referred to the Tribes' "present-day subsistence and commercial needs" in the context of the number of fish that should be taken (compared to non-Indian fisherman). 443 U.S. at 686. I do not find a separate "needs based" test in that case, or in *Adair II.*

To the extent that the Upper Basin Contestants are arguing in favor of the "moderate living" standard referred to in both cases, I have already addressed the applicability of that standard in my discussion of the quantification standard above. To summarize that position, I do not find the moderate living standard to be a very helpful test for quantification of the water right, because it does not address the real issue, which is the development and protection of a habitat productive for the fishing, hunting, trapping and gathering rights retained by the Tribes. It may be raised, to the extent it becomes relevant, in the Contestants' attempts to lower the amount of water needed for a productive habitat.

"Moderate living" makes sense in the context of an already existing fishery, where the issue (as in *Fishing Vessel*) is the percentage of the take that goes to the Tribes. It is possible that such an issue will become more important down the road, if the fishery on the former reservation lands again becomes healthy. At this point, however, what needs to be quantified are the appropriate levels of water for a ~~productive fishery~~ **viable and self-renewing population of treaty species** on the former reservation lands.

3. Claims for water sources not within the reservation should be summarily dismissed.

Ruling: Denied as irrelevant.

Discussion: The claims in this case involve the seeps and springs in the National Forest within the former reservation lands. Since this argument made by the Upper Basin Contestants focuses on other areas of the former Reservation lands, and appears to focus on the possibility of the Tribes attempting to harvest off the former Reservation lands, I do not find this portion of the Motion relevant to this proceeding.

4. Claims for water sources on ceded lands should be summarily dismissed.

Ruling: Denied.

Discussion: Please see discussion immediately preceding this one. The area of concern in these claims is not part of the ceded lands, so the question is not relevant to this proceeding.

5. Claims for water rights associated with gathering treaty rights should be summarily dismissed.

Ruling: Denied.

Discussion: The Tribes have a water right associated with the gathering rights it reserved when it entered the Treaty of 1864. The priority is from time immemorial. The reader is referred to the previous discussions of the Article 1 reserved water rights and *Adair* above.

6. Quantity determinations for fishing rights are limited to that required to provide a moderate standard of living limited by that actually used at the time of *Adair II*.

Ruling: Denied.

Discussion: It is important to recognize the distinction between the *water right* which is the issue in this case and the *fishing right* in *Fishing Vessel* and *Shellfish*. There is no direct issue concerning "quantity determinations for fishing rights" in this case. I

have already addressed the problems with applying the "moderate living" standard to this water right case. Please see the previous discussions regarding the quantification method.

7. To the extent the Tribes and BIA have failed to submit information to establish the amount of their claims under the applicable test, their claims should be alternatively summarily dismissed or reduced to the extent information was timely provided.

Ruling: Denied.

Discussion: In essence, Contestants seek to limit the evidence in the case to what was provided by Claimants at the time of claim filing. Contestants have confused claims with evidence. The Claimants have filed *claims* for the water rights they seek. They amended their claims before the Preliminary Evaluation issued. They will be entitled to present their *evidence* at the hearing, when it is scheduled. If all parties were limited to only the information they provided at the time the claim was made, the only evidence allowed would be OWRD Exhibit 1, in every case.

8. *Winans'* claims for hunting and fishing must be balanced with *Winters* claims, as describe[d] in *Winters v. United States,* 207 US 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908), to fulfilling the primary purpose of the reservation for agriculture.

Ruling: Granted in part; denied in part.

Discussion: Although the Contestants' argument about the balance between *Winans* (which is not a water case) and *Winters* (which is a water case) is not entirely clear, counsel explained at oral argument that the Upper Basin Contestants mean the following: Allowing water rights for the Article 1 purpose of the Treaty (hunting, fishing, trapping and gathering), should not be allowed to totally defeat the Article 2 purpose of the Treaty (irrigation, agriculture).

The Contestants rightly have the goal of trying to fulfill both purposes of the Treaty of 1864. However, if there is to be disparate treatment of the two purposes of the Reservation, then the priority rights of those water rights may become important. As addressed earlier, the agricultural right in Article 2 has a priority date of October 14, 1864, while the hunting, fishing, trapping and gathering rights have a priority date of time immemorial. Thus, while both purposes of the Reservation are important, the priority date of the Article 1 hunting and fishing rights must control.

9. Section 14 of the Termination Act of 1954 should be read to apply to all Tribal claims.

Ruling: Denied as unclear.

Discussion: Section 14 of the Termination Act of 1954 states:

> Nothing in this Act shall abrogate any water rights of the tribe and its members, and the laws of the State of Oregon with respect to abandonment of water rights by nonuse shall not apply to the tribe and its members until 15 years after the date of the proclamation issued pursuant to section 18 of this Act.

The Upper Basin Contestants quote this section of the Termination Act, then quote *Adair II's* application of the section to agricultural water use. Presumably, the Contestants are alleging that the section applies to the hunting and fishing rights as well as agricultural purposes, arguing that "it may have some applicability to the quantification claims applicable here." (UBC Opening Brief at 15).

The purpose of a Motion for Ruling on Legal Issues is to determine what legal issues may be decided as a matter of law. The request here is to determine whether a portion of the Termination act *may* be applicable. Since the request is unclear, I will deny it.

10. The claims by the Tribes and BIA should be summarily dismissed or reduced to the extent they expanded their claims after the period for inspection was commenced.

Ruling: Denied.

Discussion: Please see the answer to number 7 above.

PACIFICORP'S MOTION FOR RULING ON LEGAL ISSUES

Pacificorp's motion did not clearly lay out its contentions, so the following summary of issues involves some interpretation by the ALJ. As interpreted, Pacificorp seeks the following legal rulings:

A. Only the Tribes [and not the United States] may claim water rights based upon the Treaty.

Ruling: Denied.

Discussion: Although the water rights are the Tribes', the Bureau of Indian Affairs is permitted to participate in these proceedings and to aid the Tribes in their effort to determine the water rights necessary for hunting, fishing, trapping and gathering on the former Reservation lands. There is no basis in law to exclude the BIA from exercising its role as trustee for the Tribes. Both parties, with their unique perspectives, shall be allowed to continue in the case. Please see the previous discussion under the Claimants' Motion, above.

B. The claimants have the burden of proof to prove each element of their claims, including: 1) the scope and extent of the hunting and fishing lifestyle to establish a baseline (including proof of the species and when, where, and how much these species were used by the Tribes); 2) how the ~~three claimed categories (physical habitat maintenance, riparian habitat maintenance and structural habitat maintenance)~~ claims for water levels in the seeps and springs provide habitat for wildlife and plants to support the hunting and fishing lifestyle purpose of the Reservation; 3) that the hunting and fishing rights and water right claimed are within the boundaries of the Reservation; 4) that the amount of water claimed does not exceed the moderate living limitation; and 5) that the amount of water claimed is necessary to accomplish the purpose of the reservation.

Ruling: Granted in part, as modified; denied in part.

Discussion: There is no question that the Claimants have the burden of proof to establish their claims. The quantification standard has been set out in this order.

Contestants correctly argue that Claimants must prove the existence of the species historically on the former reservation lands, and must show the historical interactions of the Tribes with this treaty resource. Claimants must also establish what is required for necessary habitat by a preponderance of the evidence (with Contestants having the concomitant responsibility to seek a lower amount, if appropriate). Claimants do not need to meet a "moderate living" standard, since I consider that argument, if it fits anywhere, to be part of Contestants' defense to the amounts claimed by the Claimants.

C. That federal law allows contestants to assert and to demonstrate at hearing that equity requires that the water rights be denied or limited. In particular, Pacificorp seeks the following rulings:

1. Any contestant may present facts at the hearing that seek to prove that one or more of the claims involved in the Tribal Cases should be denied or limited based on the equitable "impossibility doctrine."

Ruling: Denied.

Discussion: Pacificorp argues that any contestant in the proceeding should be able to invoke the equitable "impossibility doctrine," which it does not define. The Second Circuit, however, did define what it meant by the impossibility doctrine:

> In Yankton Sioux Tribe of Indians v. United States, 272 U.S. 351, 357- 59 (1926), for example, the Supreme Court held that the proper remedy for the wrongful taking of Indian land that was subsequently settled and developed was monetary damages rather than repossession by the tribe. *This principle became known as the "impossibility" doctrine because it*

> *was based on the impracticability of uprooting current property owners where Indians held a valid possessory claim to land on which others had settled.*

Oneida Indian Nation of New York v. City of Sherrill, 337 F.3d 139 (2003) (emphasis added). The Second Circuit concluded that the impossibility doctrine did not apply in the Oneida situation (where those tribes were purchasing land that had been part of their reservation 200 years ago, back at market value), but the Supreme Court reversed. *City of Sherrill v. Oneida Indian Nation,* ____ US ____, 125 S Ct 1478 (2005).

From these cases, I infer that the impossibility doctrine focuses on the impracticality of reverting land which has been sold to innocent purchasers back to the status of an Indian reservation. Whatever the wisdom of the application of that doctrine to the land cases in New York, I conclude it has no bearing on the Klamath Adjudication or the Tribes' non-consumptive right to water to support the exercise of their aboriginal rights.

First, the factual situations are entirely different. The process contemplated in *Oneida* involved "uprooting current property owners" and trying to recreate a reservation out of the Indians' "valid possessory claim[s]" to the land. In short, the Supreme Court applied equitable remedies and determined that it was impractical—impossible—to restore the tribal lands after more than 200 years. In the lands of the former Klamath Reservation, there is no attempt to retake the land. The issue is the non-consumptive right to instream flow, to make sure that the Tribes' aboriginal rights may be exercised.

Second, the issues in this case are legal rather than equitable. While some of the parties would prefer to use equity to balance the interests of the various claimants to the waters of the Klamath Basin, that equitable approach has been repeatedly rejected. *Cappaert,* 426 US at 138-39; *Arizona v. California,* 373 US 546, 597 (1963). Instead of a focus on equitable balance, the important issues are legal, involving the interpretation of the Treaty of 1864, the application of the federal reserved water doctrine, and the priorities set under state law. Contestants have cited no cases which apply the impossibility doctrine, or any other equitable doctrine, to federal reserved water cases. I conclude that the equitable "impossibility doctrine" is not available in this proceeding.

2. Any contestant may present facts at the hearing that seek to prove that one or more of the claims involved in the Tribal Cases should be denied or limited because they are forward-looking claims that have a disruptive effect on existing governmental arrangements and private rights, and that the balance of hardships favors such denial or limitation.

Ruling: Denied.

Discussion: This issue is really a restatement of the impossibility doctrine mentioned above. In the context of an Indian land matter, the Supreme Court recognized

that 200 years of history would make it impossible for the Oneida Tribes to reclaim their previous reservation, at least in part due to the disruptive effect of "forward-looking claims." *Oneida, supra.* It is important to understand that the presence of a disruptive effect is not, by itself, a basis to assert equitable doctrines or avoid difficult decisions. Many legal matters, criminal and civil, can have a disruptive effect upon the party that is unsuccessful.

Here, where it is possible that Claimant will establish claims for instream flow in areas both on and off the former reservation lands, those claims would undoubtedly be disruptive to some people with competing water rights. That is not a basis to apply equitable remedies. Equitable remedies do not apply here, where the legal standards will suffice.

SUMMARY

In summary, the following matters have been determined as a matter of law:

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. Equitable remedies are not available in the Adjudication.

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 ~~for a healthy, productive habitat~~ **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.

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.

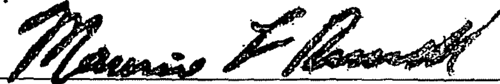
7. The parties are not limited to the evidence provided in the 1970 ODFW report. They may ~~use~~ **offer** whatever evidence they choose, **subject to admissibility,** including whatever methods they consider appropriate, to determine the ~~correct levels of instream flow~~ **amount of water required to satisfy the Tribes' 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 ~~evidence~~ **data** on water availability in these claims **if requested**. The parties may **offer and** rely upon the OWRD ~~evidence~~ **data,** or ~~it~~ **they** may attack that ~~evidence~~ **data** or supplement that **data with other** evidence.

All other issues raised by the parties are denied, insofar as this motion is concerned. It is expected that all preparations for the hearing, including discovery issues and presentation of evidence, will proceed with these points as guides to the direction the hearing will take.

IT IS SO ORDERED.



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

Date: February 13, 2007

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2007, I mailed a true copy of the following: **AMENDED ORDER ON MOTIONS FOR RULING ON LEGAL ISSUES,** 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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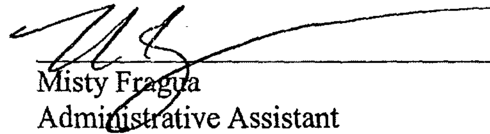

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