

4-17-2012

Case 282 Propsed Order

Joe L. Allen

Senior 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; WaterWatch of Oregon, Inc.; Horsefly
Irrigation District; Langell Valley Irrigation District;
Medford Irrigation District; Rogue River Valley
Irrigation District; Roger Nicholson; Richard Nicholson;
NBCC, LLC; Agri Water, LLC; Maxine Kizer;
Ambrose McAuliffe; Susan McAuliffe; Kenneth L.
Tuttle and Karen L. Tuttle dba Double K Ranch; Dave
Wood; Kenneth Zamzow; Nicholson Investments, LLC;
William S. Nicholson; John B. Owens; Kenneth 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; Mebane; Helen Mebane;~~

PROPOSED ORDER

Case No. 282

Claims: 671, 672, 673, and that Portion
of Claim 612 pertaining to the
Klamath River

Contests: ~~2062, 2064, 2065, 2066¹,
3016, 3070, 3071, 3072², 3249,
3257, 3258, 3259³, 3314⁴,
3373, 3374, 3375, 3644, 3657,~~

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¹ Pacificorp voluntarily withdrew from Contests 2062, 2064, 2065, and 2066 on July 26, 2010.

² WaterWatch of Oregon, Inc.'s contests 3016, 3070, 3071, and 3072 were dismissed. ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

³ Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew from Contests 3249, 3257, 3258 and 3259 on October 16, 2003. Medford and Rogue River Valley Irrigation Districts voluntarily withdrew from Contests 3249, 3257, 3258 and 3259 on June 14, 2006.

⁴ On October 31, 2003, William Bryant voluntarily withdrew from Contest 3314. On October 26, 2004, Dave Wood voluntarily withdrew from Contests 3314 and 3373-3375. Change of Title Interest for Contests 3314, and 3373-3375 from Roger Nicholson Cattle Co. to Agri Water, LLC (2/4/05). Change of Title Interest for Contests 3314 and 3373-3375 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contest 3314 from Kenneth Hufford, Leslie Hufford, and Hart Estate Investments to Jerry and Linda Neff (2/11/05). Change of Title Interest for Contest 3314 and 3373-3375 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contest 3314 and 3373-3375 from Walter Seput to James Wayne, Jr. (5/2/05). Change of Title Interest for Contests 3314 and 3373-3375 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3314 and 3373-3375 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3314 and 3373-3375 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). Kenneth Zamzow voluntarily withdrew from Contests 3314, 3373-3375 on September 2, 2005. William Knudtsen voluntarily withdrew from Contests 3314, 3373-3375 on September 13, 2005. Change of Ownership filed for Contests 3314 and 3373-3375 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 3314, 3373-3375 on March 1, 2007. Franklin Lockwood Barnes, Jr. and Jane M. Barnes voluntarily withdrew from Contests 3314 and 3373-3375 on April 6, 2007. Mary Jane Danforth voluntarily withdrew from Contests 3314 and 3373-3375 on June 19, 2008. Modoc Point Irrigation District voluntarily withdrew from Contests 3373-3375 on November 13, 2008. Change of Title Interest for Contest 3314 and 3373-3375 from Robert Bartell to Michael LaGrande (1/9/09). Change of Title Interest for Contests 3314, 3373-3375 from Elmore E. Nicholson and Mary Ann Nicholson to Nicholson Loving Trust (12/8/09). Change of Title Interest for Contests 3314 from Peter M. Bourdet to Peter Bourdet & Linda Long (1/8/09). Jacob D. Wood voluntarily withdrew from Contests 3314, 3373-3375 on January 15, 2010. Change of portion of Title Interest for Contests 3314, 3373-3375 from Roger Nicholson and Richard Nicholson to NBCC, LLC (3/17/2010). Change of Title Interest for Contests 3314 and 3373-3375 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).

~~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; Michael LaGrande; 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; Peter M. Bourdet and Linda Long; Vincent Briggs; J.T. Ranch Co.; Tom Bentley; Thomas Stephens; John Briggs; William Bryant; Peggy Marengo; Jerry L. Neff & Linda R. Neff; Klamath Irrigation District; Klamath Drainage District; Tulalake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland District Improvement Company; Pee Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Modoc Lumber Co.; Bradley S. Luscombe; Berlva Pritchard; Don Vincent; Randy Walthall; InterCounty Title Co.; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Co.; Plevna District Improvement Company; Collins Products, LLC;~~

~~3658, 3659⁵, 3932, 3933, 3934, 4002, 4061, 4062, 4063~~

Contestants

vs.

United States, Bureau of Indian Affairs, as Trustee on behalf of the Klamath Tribes;

Claimant/Contestant, and

The Klamath Tribes;

Claimant/Contestant.

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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 282 (Case 282) involves three claims, all involving the Klamath River outside the boundaries of the former Klamath Indian Reservation. Unlike the claims for

⁵ Don Vincent voluntarily withdrew from Contest 3644, 3657, 3658, and 3659 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3644, 3657, 3658, and 3659 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3644, 3657, 3658, and 3659 on January 15, 2004. The remaining entities comprising Klamath Project Water Users, conditionally withdrew from Contests 3644, 3657, 3658, and 3659 on May 18, 2009. See STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU'S CONTESTS TO CLAIMS 671, 672, 673, AND THAT PORTION OF CLAIM 612 PERTAINING TO THE KLAMATH RIVER AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES (MAY 18, 2009).

individual water rights filed in this adjudication, Case 282 involves tribal claims for instream water rights. Claimants are the Klamath Tribes (Tribes) and the United States Bureau of Indian Affairs (BIA) as Trustee on behalf of the Tribes.⁶ The remaining Contestants are individually 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 a preliminary evaluation (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 Claimants' claims for instream water rights were consolidated into eight cases. Case 282 addresses those claims to water within the Klamath River.

On July 8, 2005,⁷ the Tribes and the BIA filed a Joint Motion for Ruling on Legal Issues (Summary Determination). On that same date, UBC and other contestants no longer participating in these proceedings filed their own Motions for Ruling on Legal Issues. On February 13, 2007, Administrative Law Judge (ALJ) Maurice L. Russell II issued an Amended Order on Motions for Rulings on Legal Issues (Amended Order).⁸ In the Amended Order, ALJ Russell disposed of several contest grounds presented by UBC. 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 the question of entitlement to off-reservation waters as well as the quantification of Claimants' water rights for hearing.⁹

⁶ 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.

⁷ 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.

⁸ On November 7, 2007, ALJ Rick Barber issued an Order on Motions for Rulings on Legal Issues. ALJ Russell issued the Amended Order to address certain requests for modification, correction, or reconsideration filed by the parties.

⁹ 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. Those rights have not been abandoned under State law, since it does not apply. Claimants are not precluded from their claims for instream rights by the doctrines of preclusion, issue preclusion or claim preclusion. Equitable defenses are not available.

2. *Adair I* and *Adair II* are controlling precedent throughout the former reservation lands in the particulars noted above.

On June 4, 2010, Contestants filed Amended Statements of Contest (Amended Contest) as permitted by the schedule of proceedings in this matter. In the Amended Contests, Contestants incorporated previously raised contests and asserted new contests to the claims.¹⁰

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. On October 1, 2010, the parties filed written direct testimony and exhibits. On February 7, 2011, the parties filed written rebuttal testimony and exhibits. An in-person cross-examination hearing convened

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.

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.

10. The United States Bureau of Indian Affairs, as trustee for the Klamath Tribes, are entitled to participate in these proceedings as a party.

(Amended Order at 34 and 35. **Bold** and ~~strikethrough~~ omitted.)

¹⁰ 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." Contestants raised several new challenges to the claims through the Amended Contests. However, some issues were deemed inapplicable and irrelevant at the outset of the cross-examination hearing. Accordingly, evidence on those issues was excluded as irrelevant. Those rulings are part of the permanent record in this proceeding. A protracted discussion of those rulings is therefore unnecessary in this order. As such, only those contest grounds not disposed of through the Amended Order or through rulings on the record, during cross-examination proceedings, are discussed herein.

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on April 18, 2011, in Salem, Oregon, with Senior ALJ Allen presiding.¹¹ At that time, the parties elected to conduct no cross-examination of any witness in this case. Between October 8 and December 5, 2011, the parties filed closing, response, and reply briefs. The record closed on December 5, 2011.

At the hearing, and in closing briefs, the parties raised several arguments identical to those raised by these same parties in earlier cases.¹² Because those arguments raise legal, rather than factual disputes, the analysis of those arguments, in this order, mirrors that of previous orders.

EVIDENTIARY RULINGS

Prior to the in-person hearing, the parties in this matter filed hundreds of exhibits, consisting of thousands of pages, along with written direct and rebuttal testimony. Pursuant to an instruction from the ALJ, the parties filed written objections to evidence and testimony on or about February 22, 2011. The parties filed responses to objections on or about March 7, 2011. On April 8, 2011, the ALJ issued a Consolidated Ruling on Objections. That ruling is part of the record in this matter and therefore it is unnecessary to reiterate those evidentiary rulings in this order.

EXPERT TESTIMONY

This case presents a less compelling “battle of experts” than previous cases in this adjudication. In fact, Contestants’ only expert evidence on the hydrology in this matter is recycled testimony from case 277 (282-UBC-700, Testimony of Chuck H. Hansen in Case No. 277), which applied to the Sprague, Sycan, Wood, and Williamson rivers. UBC offered no expert testimony directly applicable to the reaches of the Klamath River at issue here.

To the contrary, Claimants and OWRD provided extensive expert testimony regarding the methodologies for the claim levels and the amount of water available in the claimed reaches. In addition, BIA’s hydrologist performed independent testing to confirm stream flow estimates provided by OWRD prior to adopting the results presented in the Cooper 2002 and 2004 reports. OWRD submitted the methodologies used in Cooper 2002 and 2004 to peer review before adopting the results.

The testimony provided by Claimants’ experts and those of OWRD appears well supported by verifiable evidence. It also appears well reasoned in its conclusions. Consequently, where testimony conflicts, greater weight is given to the testimonies of Claimants’ and OWRD’s experts including Dr. Reiser, Mr. Hart, Mr. Ramey, and Mr. Cooper.¹³

¹¹ The parties assigned exhibit numbers to the direct and rebuttal testimonies of each witness. For clarity, references to direct or rebuttal testimony in this order will cite to the exhibit number assigned by the party proffering such testimony.

¹² See post hearing briefs in cases 277 through 281 as well as cases 284 and 285.

¹³ The testimony of Richard E. Cooper, presented as Exhibit 282-OWRD-65, was initially offered in Case 279. However, the testimony applies to streamflow estimates and methodologies applied throughout the Klamath Basin. As such, the testimony is applicable to this case as to any other claiming instream flows within the Klamath Basin.

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ISSUES

1. Whether Claimants are entitled to claim instream flows outside the boundaries of the former reservation in order to fulfill the purposes of the reservation.
2. Whether the claimed instream flows are necessary to establish a healthy and productive habitat to allow the exercise of the Klamath Tribes' on-reservation fishing rights guaranteed by the treaty of 1864.
3. Whether the Tribes' treaty rights have been extinguished on lands no longer owned by the Tribes.
4. Whether the Klamath Restoration Act of 1986 limited the restoration of the Tribes' treaty rights on former reservation land.

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, 16 Stats. 707; Ex. 282-KT-2; emphasis added.)

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 gather¹⁴ 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*). The Court noted the historical importance of hunting and fishing rights to the Tribes and agreed that a primary purpose of the reservation was to "secure to the Tribe a continuation of its traditional hunting and fishing lifestyle." *Id* at 1409.

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

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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 demonstrated by the Tribes' Return of C'waam and First Salmon Ceremonies. (Exs. 282-KT-68 and 282-KT-1, 282-US-100, and 282-US-128.)

5. Treaty resources include several species of fish traditionally taken from rivers and streams within the former reservation by tribal members. These species include various types of trout, as well as various species of suckers (referred to by the Tribes as c'waam). Before construction of dams downstream of the former reservation land, tribal members also fished large quantities of salmon from these rivers and streams. (Exs. 282-KT-1, 282-KT-4, 282-KT-100, 282-US-100, and 282-US-105 through 282-US-110.)

6. Prior to construction of dams downstream of the former reservation, adult Chinook salmon and steelhead trout¹⁵ migrated from the Pacific Ocean, up the Klamath River, into Upper Klamath Lake, and eventually into the rivers and streams within the former reservation to spawn. Their offspring would spend the fry and juvenile life stages in these waters before migrating downstream to the Pacific Ocean. The Tribes relied on these migratory fish runs as a primary food source. Salmon provided up to one-half of the food necessary for subsistence of tribal members each year. The Tribes also traded salmon and other fish with other tribes as well as white explorers and settlers. Beginning in 1914, construction of dams downstream of the former reservation has prevented salmon from entering the rivers and streams on the former reservation. (Exs. 282-US-100, 282-US-105 through 110, 282-US-200, 282-KT-1, and 282-KT 100.)

7. The Tribes, along with federal and state agencies, are working toward reintroduction of anadromous treaty species into the Klamath Basin. To this end, the Federal Energy Regulatory Commission (FERC) has required PacifiCorp, who now operates the dams and hydroelectric facilities on the Klamath River, to provide upstream and downstream passage for the target species as a condition of relicensing. (Exs. 282-US-200, 282-US-203, 282-KT-1, and 282-KT-100.)

Claims and contests.

8. On or about April 29, 1997,¹⁶ the Klamath Tribes filed a Statement and Proof of Claim to the Use of Surface Waters of the Klamath River and its Tributaries¹⁷ (Claim 612). Through Claim 612, the Tribes adopted each claim filed by the BIA as trustee on behalf of the

¹⁵ Case 282 is concerned with passage habitat for salmon and trout species. These treaty resources are referred to as the "target species."

¹⁶ Consistent with the claim filings of the BIA, the letter from the Tribes' counsel transmitting Claim 612 to OWRD is dated April 30, 1997. However, Claim 612 bears a date stamp from OWRD indicating the department received the claim on April 29, 1997.

¹⁷ Statement and Proof of Claims are referred to throughout this order simply as claims.

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Tribes.¹⁸ On October 1, 1999, the Tribes filed an Amended Statement and Proof of Claim (Amended Claim 612). Amended Claim 612 adopted and incorporated the amended claims filed by the BIA as trustee except as to Claim 630. The Tribes' Amended Claim 612 retained the instream flow claims from the BIA's original Claim 630. On March 31, 2000, the Tribes filed an additional Statement and Proof of Claim. By letter attached to this filing, the Tribes informed OWRD of clerical errors in the previous claim filing. The March 31, 2000 claim filing purported to correct such errors. This Statement and Proof of Claim adopted and incorporated the claims filed by BIA without reservation. (OWRD Ex. 1 at 6 through 64.)

9. On April 30, 1997, the BIA filed Claims 671 through 673. On October 1, 1999, the BIA filed amendments to each of these claims. Each claim identified instream flows within the Klamath River, 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 identified stream flow quantities, in cubic feet per second (cfs), broken down by month. The priority date for each claim was declared to be "time immemorial." (OWRD Exs. 49 through 51.)

10. Claim 671 claimed instream flows in a reach of the Klamath River extending from the John C. Boyle Reservoir to the Oregon-California border to support migratory passage of anadromous salmonid fish species into and out of the Klamath River Basin. The claim asserted a water right for the period January 1 through December 31 each year. The claimed flows for physical habitat encompassed the natural up to 700 cfs. (OWRD Ex. 49 at 1 through 19; See also, Exs. 282-US-200 and 282-US-300.)

11. Claim 671 identifies the upper and lower reach boundaries' longitude and latitude coordinates as well as township-range designations. The township-range description for the upper reach boundary is identified as Township 40 south, Range 7 east, Section 6, Southwest ¼, Northeast ¼ (T 40S, R 7E, S 6, SW ¼, NE ¼), distance from NW corner S 14° 24'25" E, 2,138.4 ft. The lower reach boundary is identified as T 41S, R 5E, S 13, NE ¼, NW ¼, distance from NW corner S 70° 58'60" E, 1,918.3 ft. (OWRD Ex. 49 at 17.)

12. In October 2010, Claimants filed their written direct testimony and exhibits. Claimants' evidence reflected downward adjustments of Claim 671. In addition, the updated claim divided Claim 671 into three distinct sub-reaches, designated as 671a, 671b, and 671c. The updated claim resulted from basin wide stream flow estimates developed by OWRD between 2000 and 2004 as well as in-depth studies of the physical passage needs, conducted by BIA's experts. The updated claim was capped at the lesser of necessary stream flow for adult upstream passage habitat, juvenile/smolt downstream travel needs, or the 1997 claim, whichever was lower. For Claim 671, this updated calculation resulted in reduced claim flows in every month and no claimed flows for one and a half months. (Exs. 282-US-200, 282-US-224, 282-US-225, 282-US-300, and 282-US-302 through 282-US-307.)

13. Claim 672 claimed instream flows in a reach of the Klamath River extending from the Keno Dam to the John C. Boyle Reservoir to support migratory passage of anadromous salmonid fish species into and out of the Klamath River Basin. The claim asserted a water right for the

¹⁸ For the purposes of this order, Claim 612 incorporates Claims 671, 672, and 673.

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period January 1 through December 31 each year. The claimed flows for physical habitat encompassed the natural up to 700 cfs. (OWRD Ex. 50 at 1 through 13; *See also*, Exs. 282-US-200 and 282-US-300.)

14. Claim 672 identifies the upper and lower reach boundaries' longitude and latitude coordinates as well as township-range designations. The township-range description for the upper reach boundary is identified as T 39S, R 7E, S 36, SW ¼, NW ¼, distance from SW corner N 45° 26'40" E, 2,306.0 ft. The lower reach boundary is identified as T 39S, R 7E, S 29, SE ¼, NE ¼, distance from NE corner S 11° 16'24" W, 2,580.1 ft. (OWRD Ex. 50 at 12.)

15. In October 2010, Claimants filed their written direct testimony and exhibits. Claimants' evidence reflected downward adjustments of Claim 672. The updated claim resulted from basin wide stream flow estimates developed by OWRD between 2000 and 2004 as well as in-depth studies of the physical passage needs, conducted by BIA's experts. The updated claim was capped at the lesser of necessary stream flow for adult upstream passage habitat, juvenile/smolt downstream travel needs, or the 1997 claim, whichever was lower. For Claim 672, this updated calculation resulted in reduced claim flows for five and one half months and no claimed flows for one and a half months. (Exs. 282-US-200, 282-US-226, 282-US-300, and 282-US-302 through 282-US-307.)

16. Claim 673 claimed instream flows in a reach of the Link River extending from Lake Ewauna to the Link River dam. The claim asserted a water right to support migratory passage of anadromous salmonid fish species into and out of the Klamath River Basin. The claim asserted a water right for the period January 1 through December 31 each year. The claimed flows for physical habitat encompassed the natural up to 700 cfs. (OWRD Ex. 5 at 1 through 4.)

17. Claim 673 identifies the upper and lower reach boundaries' longitude and latitude coordinates as well as township-range designations. The township-range description for the upper reach boundary is identified as T 34S, R 7E, S 9, SE ¼, NE ¼, distance from NW corner S 1°55'54" E, 1,937.7 ft. The lower reach boundary is identified as T 35S, R 7E, S 3, NW ¼, NW ¼, distance from NW corner S 61° 20'14" E, 337.3 ft. (OWRD Ex. 5 at 16.)

18. In October 2010, Claimants filed their written direct testimony and exhibits. Claimants' evidence reflected downward adjustments of Claim 673. In addition, the updated claim divided Claim 673 into two distinct sub-reaches, designated as 673a and 673b. This was necessary to account for alterations in hydrologic conditions resulting from the operation of a hydroelectric power station. The updated claim resulted from basin wide stream flow estimates developed by OWRD between 2000 and 2004 as well as in-depth studies of the physical passage needs, conducted by BIA's experts. The updated claim was capped at the lesser of necessary stream flow for adult upstream passage habitat, juvenile/smolt downstream travel needs, or the 1997 claim, whichever was lower. For Claim 673, this updated calculation resulted in reduced claim flows for four months and no claimed flows for one and a half months. (Exs. 282-US-200, 282-US-224, 282-US-228, 282-US-300, and 282-US-302 through 282-US-307.)

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Stream flow estimates provided by OWRD.

19. In the late 1980s and early 1990s, the Oregon legislature determined it was necessary to establish a water availability program in Oregon. The purpose of the program was to determine how much water was available for appropriation in any given stream. OWRD was tasked with developing a standard for determining and a methodology for calculating the availability of surface water for appropriation. (Ex 282-OWRD-65.)

20. OWRD developed a method to estimate the natural stream flow in watersheds throughout Oregon.¹⁹ This method calculated the 80 percent exceedance flow using stream gauge data and a statistical methodology called regional regression analysis. The numerical model used to perform the statistical analysis consists of computer programs and various data sets available to OWRD. OWRD's method calculated the 80 percent exceedance flow based on mean daily flows. (Ex. 282-OWRD-65.)

21. The exceedance stream flow statistic is an estimate of how often a given stream is expected to exceed a reported flow level. Therefore, an 80 percent exceedance flow indicates that a given rate of stream flow will be exceeded 80 percent of the time. Likewise, a 50 percent exceedance flow for a given stream indicates that stream flows therein will exceed the reported level at least 50 percent of the time. (Ex. 282-OWRD-65.)

22. In 2002, Richard M. Cooper, P.E.,²⁰ developed a report entitled Determining Surface Water Availability in Oregon (Open File Report SW 02-002), referred to herein as "Cooper 2002." Cooper 2002 describes the methodology employed by OWRD for determining surface water availability. (Exs. 282-OWRD-65 and 282-OWRD-69.)

23. In 2004, Mr. Cooper developed a report entitled Natural Flow Estimates for Streams in the Klamath Basin (Open File Report SW 04-001), referred to herein as "Cooper 2004." Cooper 2004 applied the methodologies developed in Cooper 2002 to estimate natural 50 percent exceedance stream flows for watersheds in the Klamath Basin. (Exs. 282-OWRD-65 and 282-OWRD-68.)

24. The estimates in Cooper 2004 used stream flow data from multiple sources, including the United States Geological Survey (USGS), the United States Forest Service (USFS), and OWRD's own gauge measurements. The stream flow measurements were compiled in two hydrographics databases segregating mean daily flow measurements from miscellaneous (instantaneous) measurements. Cooper 2004 also utilized consumptive use information based on data from USGS and from OWRD's Water Rights Information System (WRIS), as well as various other data pertaining to characteristics of watersheds. OWRD analyzed watershed data

¹⁹ Natural stream flow refers to the estimated level of stream flow that would occur without consumptive or storage uses from the stream. Consumptive uses include withdrawals for irrigation, domestic, municipal, and other uses. Natural stream flow is also referred to as undepleted stream flow throughout this order. (Ex. 282-OWRD-65.)

²⁰ Richard Cooper is a registered Professional Engineer and a Master of Agricultural Engineering. Mr. Cooper has over 20 years of experience as an agricultural engineer. OWRD employed Mr. Cooper as Natural Resource Specialist 4 (Hydrologist) from 1992 until approximately 2009. Mr. Cooper maintained primary responsibility for OWRD's Water Availability Program during his employment. (Exs. 282-OWRD-67 and 282-OWRD-65 at 2 through 3.)

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using a Geographic Information System (GIS) developed by Environmental Systems Research Institute, Inc., called ARC/INFO 7.2.1. OWRD compiled all data available up through 1999. (Ex. 282-OWRD-65.)

25. OWRD established a base period of 1958 through 1987 for watershed measurements at index stations.²¹ OWRD collected measurements for the base period from approximately 90 index stations. OWRD also collected measurements from numerous other gauges with shorter records than the index stations. OWRD was able to correct the short-term records to the base period so long as the two had a concurrent period of record. (Exs. 282-OWRD-69 and 282-US-300.)

26. Use of a 30-year base period is the standard set by the World Meteorological Organization (WRO) to represent the normal range of conditions that exist at a given site. The USGS and other federal and state agencies follow the standard set by the WRO. (Exs. 282-OWRD-65 and 282-US-300.)

27. For watersheds without stream flow measurements available, OWRD utilized watershed characteristic data to develop regional regression equations used to estimate stream flows using the methodology identified in Cooper 2002. This data included nine different watershed characteristics including area, relief, slope, aspect, mean January and July precipitation, mean January maximum temperature, mean July minimum temperature, and soil permeability. This allowed OWRD to extrapolate stream flow estimates for watersheds upstream of a gauging station. (Exs. 282-OWRD-65 and 282-US-300.)

28. A regional regression equation is a standard hydrologic technique that uses statistical regression models to estimate stream flow where flow data is not available. Such an equation is based on the premise that stream flow characteristics can be estimated from various watershed characteristics and can be quantified in a mathematical form. (Ex. 282-US-300.)

29. OWRD also used several computer programs, some written by Mr. Cooper, and other data to verify and/or correct stream flow estimates generated through regional regression analysis to match stream flows at downstream gauges. (Exs. 282-OWRD-65 and 282-US-300.)

30. Claimant BIA's expert, Michael Ramey, P.E., reviewed OWRD's methodologies for estimating stream flows as well as its application of those methodologies to the Klamath Basin. Mr. Ramey compared OWRD's estimates of undepleted stream flow with those of the United States Bureau of Reclamation (USBR) and found OWRD's results to be reasonable. Finally, Mr. Ramey, and his staff, performed confirmatory analyses of undepleted flows and found a reasonable correlation between these results and those estimated by OWRD. Based on these findings, Claimants elected to adopt OWRD's stream flow estimates for the purposes of updating the claimed instream flows. (Ex. 282-US-300.)

31. Mr. Ramey, using OWRD's estimates as foundation, provided the hydrologic basis (water availability) for the updated claims and worked closely with ecologist David Chapin,

²¹ A 30-year base period is typical for hydrologic analysis. The period selected here provided the greater amount of data regarding stream flows in the Klamath Basin. (Test. of Cooper at 54 through 56.)

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Ph.D., and senior fisheries scientist Dudley Reiser, Ph.D., to develop the riparian and physical habitat claims. (Ex 282-US-300.)

32. Estimating undepleted stream flows is common in hydrology in situations where long-term gauge records are unavailable or limited or where such long-term records reflect depleted, rather than undepleted, flows. (Ex. 282-US-300.)

Development of physical and riparian habitat claims.

33. The physical habitat claims are intended to identify the monthly stream flows necessary for instream fish habitat in a given reach. This includes passage habitat and juvenile rearing habitat, where appropriate. Dr. Reiser, in conjunction with a team of fisheries biologists, aquatic ecologists, riparian ecologists, aquatic entomologists, water quality specialists, hydrologists and hydrologic engineers, developed the physical habitat claims after more than 15 years of scientific work on the project. (Exs. 282-US-200, 282-US-223, 282-US-226, 282-US-227, and 282-US-300.)

34. The physical habitat claims are designed to ensure instream flows necessary to establish and maintain a healthy and productive habitat for anadromous fish species subject to the Tribes' treaty rights. In this context, habitat refers to the instream environment in which fish species exists throughout all stages of their life cycles. Instream environments provide living space, food, protection from predation, and spawning area. (Exs. 282-US-200 and 282-US-300.)

35. Salmon and steelhead trout are anadromous salmonids, meaning they live their adult lives in saltwater environments but migrate up freshwater rivers and streams for spawning. Salmon and trout species historically present in the basin migrated from the Pacific Ocean in order to spawn in the streams of the Upper Klamath Basin. (Ex. 282-US-200.)

36. In the context of fish passage, healthy and productive habitat must provide sufficient water to allow both upstream and downstream migration of the target species at specific lifestages. To accomplish this, the physical habitat must have sufficient flows and depth to support juvenile downstream rearing and migration and adulthood upstream migration. At present, the target species have been excluded from the basin due to obstructions created by the PacifiCorp dams. As such, they are not available for Tribal harvest. (Exs. 282-US-200, 282-KT-1 and 282-KT-100.)

37. Dr. Reiser developed habitat-flow relationships using the Instream Flow Incremental Methodology coupled with Physical Habitat Simulation models (IFIM/PHABSIM) and the Oregon Method, where appropriate.²² These methodologies allowed Dr. Reiser to ascertain the

²² IFIM/PHABSIM is a common method used by fisheries biologists to evaluate the incremental change in both quantity and quality of fish habitat with stream flow change. This method also evaluates habitat quantity and quality for the various life stages of the target species. IFIM/PHABSIM accomplishes this by combining information and data pertaining to physical and hydraulic characteristics of a stream with information that describes the habitat preferences of different fish species and lifestages. Dr. Reiser used the IFIM/PHABSIM methodology to develop both species and lifestage-specific relationships between habitat and flow (habitat-flow relationship). (Exs. 282-US-200, 282-US-223, 282-US-226, 282-US-227, and 282-US-300.)

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relationship between the quantity of fish habitat in the stream and the amount of water in the stream. The Physical Habitat Simulation system is an integrated collection of hydraulic and microhabitat simulation models designed to quantify the amount of microhabitat available for a target species over a wide range of stream flows. These calculations allowed Dr. Reiser to determine the instream flows necessary to provide adequate upstream passage that will allow the target species to reach the rivers and streams within the former reservation. They also allowed Dr. Reiser to determine the flows necessary to provide adequate rearing habitat and passage velocity to enable target species at the juvenile/smolt stage to migrate downstream to the Pacific Ocean while avoiding predation and obstruction. (Exs. 282-US-200 and 282-US-300.)

38. Use of the IFIM/PHABSIM methodology required extensive data collection. To accomplish this, Dr. Reiser followed a detailed nine-step process to ensure sufficient information necessary to support the physical habitat claims.²³ (Ex. 282-US-300).

39. Both the 1997 Claims and the updated claims presented in 2010 used the Oregon Method and IFIM/PHABSIM as a basis for claimed flows. Between 1997 and 2010, Dr. Reiser and Mr. Ramey continued to collect data from existing and newly established study sites, and obtained new information on water availability in the basin, primarily from Cooper 2004. Based on this continued data collection, Dr. Reiser and Mr. Ramey were able to update the claims to reflect lower instream flows. The updated claims are either lower than, or equal to, the 1997 Claims. Dr. Reiser determined the instream flows reflected in the updated physical habitat claims are sufficient to provide healthy and productive passage and rearing habitats within the streams. Dr. Reiser also concluded these levels meet, but to do not exceed, the habitat needs of the target fish species. (Exs. 282-US-200 and 282-US-300.)

40. The updated claims are represented in Attachment A to this order.

CONCLUSIONS OF LAW

1. Claimants are entitled to claim instream flows outside the boundaries of the former reservation in order to fulfill the purposes of the reservation.

2. The claimed instream flows are necessary to establish a healthy and productive habitat to allow the exercise of the Klamath Tribes' on-reservation fishing rights guaranteed by the treaty of 1864.

²³ Dr. Reiser identifies the nine steps as follows:

- Step 1- Compilation and Review of Relevant Literature and Data;
- Step 2- Identification and Selection of Claim Reaches and Study Sites;
- Step 3- Identification of Target Fish Species and Their Lifestage Periodicity;
- Step 4- Development of Species Habitat Suitability Criteria (HSC) Curves;
- Step 5- Field Data Collection;
- Step 6- Hydraulic/Habitat Modeling and Adult Passage Analysis;
- Step 7- Hydrologic Limitations- Median Flow Threshold;
- Step 8- Travel Time Computation; and
- Step 9- Other Flow Considerations- Limitation of 1997 Flow Claim.

(Ex. 282-US-200 at 92.)

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3. The Tribes' treaty rights have not been extinguished on lands no longer owned by the Tribes.

4. The Klamath Restoration Act of 1986 did not limit the restoration of the Tribes' treaty rights on former reservation land.

OPINION

Previous cases have addressed instream water rights on former reservation lands as well as instream water rights for certain reaches outside the former reservation which flow onto the reservation. Here, Claimants seek to maintain instream flows within several reaches, constituting approximately 35 miles of the Klamath River that begin below the southernmost boundary of the former reservation and end at the Oregon-California border. Below Upper Klamath Lake, the Klamath River flows south until it crosses the California border, and continues to its termination at the Pacific Ocean.

In prior cases, this tribunal has approved Claimants' instream water rights in reaches outside the former reservation as necessary to accomplish a primary purpose of the reservation. These determinations were based upon the necessity of such waters to fulfill important biological needs of treaty species and the claimed reaches' connection to waters within the boundary of the former reservation, as well as the fact that such off-reservation waters flowed onto former reservation lands.

Here, Claimants seek to lay claim to waters outside the former reservation after those waters have left the reservation and traveled through Upper Klamath Lake, heading for the California border. To succeed, Claimants must demonstrate they are entitled, both legally and factually, to such off-reservation waters. (Amended Order at 25.) To do this, Claimants must show that the water right claimed was implied at the time of signing the Treaty and that such water is necessary to accomplish a primary purpose of the reservation created by the Treaty of 1864.

I. Canons of construction for Indian treaties.

It is well established that treaties between the United States and Indian tribes are to be construed liberally in favor of the Indians. Ambiguities in treaty terms are resolved in favor of the Indian tribes. *Antoine v. Washington*, 420 U.S. 194 (1975) (citing *Choate v. Trapp*, 224 U.S. 665 (1912)); *See also, Winters v. United States*, 207 U.S. 564 (1908). Treaty provisions are to be interpreted as the Indians likely would have understood them at the time of signing. *Washington v. Fishing Vessel Assn.*, 443 U.S. 658 at 676 (1979) (citing *Jones v. Meehan* 175 U.S. 1. (1899).); *See also, Tulee v. Washington*, 315 U.S. 681 (1942), and *United States v. Winans*, 198 U.S. 371 (1905). In addition, treaties are to be interpreted in such a manner that supports, rather than defeats, the central purposes of the agreement between the signatory tribes and the United States. *Winters*, 207 U.S. at 576 (1908).

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If Claimants demonstrate the treaty at issue supports an implicit understanding that sufficient water would be available, in the claimed reaches, to provide habitat and passage necessary for anadromous treaty species to reach the former reservation in order to allow the Tribes to exercise their on-reservation treaty rights, they have demonstrated a legal entitlement to the claimed instream waters. Claimants must also demonstrate the Treaty provisions recognized the historical presence and harvest, and contemplated the continued presence and harvest, of the anadromous species at issue, within the former reservation.

II. Burden of proof.

The parties in this matter 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 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 do not 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*

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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 1282 (emphasis added). Judge Panner correctly points out that application of the moderate living standard might be appropriate, but only *after* the adjudicator 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 instream and riparian 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

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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.

III. 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 fish biologist (Dr. Reiser). In addition, Claimants have submitted substantial evidence to support their decision to adopt stream flow estimates provided by OWRD after extensive review by an expert in hydrologic engineering with over 30 years of experience (Ramey, P.E.). As discussed below, these data are the product of more than 30 years of collection and analysis by expert hydrologists employed by OWRD and tasked with establishing accurate estimates of stream flows within the Klamath Basin.

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 salmon and trout within the former reservation. Such historical resource use data derives not only from prominent Tribal members (Chocktoot and Mitchell), but also from an historian with numerous years of expertise in Native American tribes of the Western United States (Hart). This data is also supported by multiple historical texts documenting the presence of the target species as well as the Tribes' reliance upon them.

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.

Interestingly, while Contestants argue for an elevated standard of proof to be applied to Claimants, they elect to proffer no direct testimony or evidence to support their individual contest grounds.

IV. Updated claims.

Contestants argue Claimants impermissibly amended the claims by changing the methodology and data used to calculate instream flow requirements. Contestants assert this information was not raised in the Amended Contests because it was unknown to Contestants until Claimants filed their written direct testimony and exhibits in October 2010.

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As an initial matter, it is important to distinguish between alterations to claims that constitute amended claims and those that simply update claims previously filed. UBC contends that, by changing the basis for and reducing the claimed flows, Claimants have presented amended claims in violation of the applicable statutes and administrative rules. Claimants assert, and OWRD agrees, that the lower claimed flows constitute nothing more than a partial withdrawal of the previous claimed flow. UBC does not contend that withdrawal of a claim, in whole or in part, is impermissible under the applicable laws and rules.

UBC relies on ORS 539.040(3)(a) and OAR 690-028-0027 to support its arguments against the claimed amounts set forth at the hearing. Unfortunately for UBC, these arguments find no support in the text of the statute or rule.

ORS 539.040(3)(a) provides, in relevant part:

For purposes of the Klamath Basin adjudication * * * the claimant or owner shall present in writing all of the particulars necessary for determination of the right of the claimant or owner to contest the claims of others or to the use of the waters of a stream to which the claimant or owner lays claim.

OAR 690-028-0027 provides, in part:

(2) A claimant shall provide supporting documentation of the methods used to estimate water quantities needed to satisfy the purpose or purposes of the reservation. Accepted methodologies for determining habitat needs include, but are not limited to:

(a) Instream Flow Incremental Methodology habitat suitability curves published in a series of technical reports by the U.S. Fish and Wildlife Service;

(b) The Oregon Method developed by the Oregon State Game Commission * * *;

(c) Forest Service Method developed by the Pacific Northwest Region USDA Forest Service, * * *; and

(d) Environmental Basin Investigation Reports conducted by the Oregon State Game Commission between the mid-1960's and the mid-1970's.

ORS 539.040(3)(a) requires, *inter alia*, that a claimant provide sufficient information to allow OWRD to make a determination of the water right claimed, while the relevant portion of OAR 690-028-0027 requires a claimant provide documentation supporting the method used to calculate the claim. Neither of these provisions prohibits either a change in methodology or the submission of additional proof of claim at hearing.

UBC also relies on ORS 539.210 and OAR 690-030-0085. At first blush, UBC's arguments might find more traction under the provisions cited. A careful reading, however, coupled with OWRD's interpretation of the applicable rule, reveals UBC's arguments lack merit.

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ORS 539.210 provides, in relevant part:

Whenever proceedings are instituted for determination of rights to the use of any water, *it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims, at the time and in the manner required by law.* Any claimant who fails to appear in the proceedings and submit proof of the claims of the claimant shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream or other body of water embraced in the proceedings, and shall be held to have forfeited all rights to the use of the water theretofore claimed by the claimant.

(Emphasis added.)

While it is true the cited statute places certain requirements and limitations on claim filings, nothing in the statute prohibits complete or partial withdrawal of claims. Further, the statute does not prohibit a claimant from developing and presenting additional evidence or proof of their respective claims. Rather, in the context of this adjudication, the statute requires presentation of proof sufficient to establish *prima facie* evidence of a claim. This interpretation is supported by the general scheme of the Klamath Basin Adjudication and the administrative rules governing the filing of statements and proofs of claims.

ORS Chapter 539 governs the determination of pre-1909 water rights as well as water rights of federally recognized Indian tribes. As such, it establishes a framework for determining such rights on a stream-wide, or basin-wide, approach. As applied to the current adjudication, this chapter has been interpreted to require a claimant to submit a statement of claim along with enough evidence to allow OWRD to issue a Preliminary Evaluation (PE) of claim. Once OWRD has issued the PE, a contest period is opened to allow any interested party to file a contest to the claimed water right, *or* the PE. Therefore, a claimant who disagrees with the PE can file a contest to dispute the findings of OWRD. Contests filed within the prescribed period result in a contested case hearing at which a claimant is required to present evidence to support his or her claim, and contestants are entitled to present evidence in support of their contest(s). *See*, ORS 539.90 through 539.110.

If UBC's interpretation of the statute were accepted, the only opportunity for a claimant to present evidence in support of his or her claim would be at the time of filing the initial claim. This interpretation finds no support in the statute, the rules, or prior proceedings in this adjudication. In fact, such an interpretation would make contests of the PE by a claimant impermissible because no new evidence would be accepted by OWRD. This has not been the practice for individual claimants, many of whom now constitute the UBC, seeking to establish water rights. Instead, all claimants seeking to prove a claimed water right have been permitted to submit any relevant evidence at hearing.

In this matter, Claimants continued to gather and analyze data after the close of the contest period in order to support their claims in a contested case hearing. In the process, Claimants were able to refine many of the claims in such a way that reduced the amount of water

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claimed in a particular stream. Accordingly, at the hearing, Claimants updated their claims to reflect no greater amount than they were able to prove at hearing. Nothing in ORS 539.210 prohibits such claim refinement. Interestingly, UBC argues against this approach while simultaneously arguing Claimants' obligation to prove the amount of water claimed is the minimum amount necessary.

Finally, OAR 690-030-0085 governs amendments or alterations of claims and provides, in relevant part:

(1) * * * [T]he Water Resources Director (Director) may not permit any alteration or amendment of the original claim after the period for inspection has commenced; but any new matter that the claimant may wish to set forth must be set forth in the form of an affidavit, regularly verified before a proper officer and filed with the Director prior to the close of the period for public inspection.

UBC asserts this provision prohibits any modification of the claims after the inspection period. Claimants and OWRD disagree. OWRD acknowledges the cited rule does prohibit claim amendments after the inspection period. Nonetheless, OWRD does not interpret the cited provision as prohibiting downward adjustments to claims because it does not view such adjustments as claim amendments. Rather, OWRD views downward adjustments to a claimed water right to be a partial withdrawal of the claimed water right. (OWRD Closing Argument at 6 and 7.) In this instance, OWRD's interpretation is entitled to deference.

An agency's interpretation of its own validly promulgated administrative rule is entitled to deference unless "inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law * * *." *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142, 881 P2d 119 (1994). Pursuant to *Don't Waste Oregon*, an agency's interpretation is erroneous and therefore not entitled to deference only if it is: 1) implausible; 2) inconsistent with the wording of the rule; 3) inconsistent with the context of the rule; or 4) inconsistent with any other source of law. *Don't Waste Oregon*, 320 Or at 142.

Here, OWRD's interpretation of OAR 690-030-0085 is not inconsistent with the wording or context of the rule, or with any other source of law. In essence, OWRD interprets "alteration or amendment of the original claim" to apply to amendments that change a claim in such a substantial way that they essentially create a new claim (*i.e.*, alterations claiming a more senior priority date, claiming a longer season of use, or claiming a greater amount of water, *etc.*). OWRD does not interpret the quoted phrase to prohibit downward adjustments of the original claim. When read in context of ORS Chapter 539 and OAR Chapter 690, OWRD's interpretation is plausible and consistent, and is entitled to deference.

Beneficial use is the basis, the measure, and the limit of all water rights in Oregon. ORS 540.610(1). Beneficial use is defined as, "[r]easonably efficient use of water *without waste* for a purpose consistent with the laws and the best interests of the people of the state." OAR 690-250-0010(3), emphasis added. The laws and rules applicable to this adjudication, and water rights generally, require a claimant prove his or her ability to beneficially use the amount of water claimed. To adopt UBC's interpretation would require Claimants to claim a water right in excess

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of the amount they may be able to put to beneficial use. This is inconsistent with the context of ORS Chapter 539 and Oregon water law generally.

To the extent Claimants' updated claims constitute partial withdrawal of earlier claimed flows, they are not prohibited by statute or rule in this adjudication.

V. OWRD's stream flow estimates are the most reliable source of data available for the Klamath Basin.

Contestants assert stream flow estimates provided by OWRD in this matter are insufficient to establish the basis for the claimed instream flows. Instead, Contestants advocate for the use of either individual (or spot) measurements or for adoption of measurements conducted by USBR. Contestants appear to argue OWRD was required to take physical measurements of each stream and reach in the basin. As discussed herein, to do so would be neither practical nor helpful in this adjudication.

ORS 539.120 imposes upon OWRD the obligation to obtain a "measurement of the discharge of a stream." The parties in this matter are at odds over the form such measurement must take. UBC asserts that such measurement must consist of actual spot measurements of each stream and reach at issue. OWRD and Claimants take the position that the term "measurement" in this case may consist of estimates of stream discharge or flow. As discussed more fully herein, I agree with OWRD and Claimants on this issue.

The statute provides no definition of the term "measurement;" therefore one must begin with the plain, ordinary meaning of the term. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993) ("[W]ords of common usage typically should be given their plain, natural, and ordinary meaning."). The usual source for determining the ordinary meaning of statutory terms is a dictionary of common usage. *State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006) ("Absent a special definition, we ordinarily would resort to dictionary definitions, assuming that the legislature meant to use a word of common usage in its ordinary sense.").

In this case, the dictionary provides multiple definitions of the term "measurement" including, "1: the act or process of measuring something; 2 a: a figure expressing extent that is expressed by measuring; b: an area, quantity, degree, or capacity obtained by measuring." *Webster's Third New Int'l Dictionary* 1400 (unabridged ed 2002). "Measuring" is the present participle of the verb "to measure." Therefore, one must look to the definition of the root term, "measure." Here, the dictionary again provides multiple definitions of the verb form of "measure" including, "4 a: to ascertain the quantity, mass, extent, or degree of in terms of a standard unit or fixed amount usu. by means of an instrument * * *; b: to compute the size of (an area, object) from dimensional measurements * * * [.]” *Ibid.*

In the context of ORS 539.120, it is most appropriate to adopt a definition of the term "measurement" that requires OWRD to ascertain the quantity of discharge in the subject stream. The means by which OWRD accomplishes this task must also be examined in context of the statute.

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As previously discussed, ORS Chapter 539 governs the determination of pre-1909 water rights as well as water rights of federally recognized Indian tribes. Such rights are generally determined for a particular season of use, depending upon the claimed use of water. Accordingly, it is important for OWRD, as the agency responsible for managing all water in Oregon, to develop an understanding of how much water is available in a given stream throughout the year. Instantaneous, or spot, measurements, while accurate as to place and time of those particular measurements, are ill suited for the purposes of determining stream-wide, year-round discharge rates. To the contrary, exceedance flow calculations provide a greater range of information and were determined to be much more useful for these purposes. (*See*, Test. of Cooper at 36.) In this instance, OWRD ascertained the quantity of discharge of the streams through the use of methodologies developed and/or implemented by Mr. Cooper. These included long-term and short-term gauge measurements, computer modeling, and the use of statistical analyses, including regional regression. I find these methods constitute measurements within the context of ORS 539.120.

Next, UBC asserts OWRD's streamflow estimates are unreliable and, therefore, cannot serve as the basis for the claimed flows. UBC advocates for the adoption of streamflow measurements found in USBR's *Natural Flow of the Upper Klamath River* (2005). Claimants and OWRD argue the Department's measurements are reliable and entitled to substantial deference in this matter. Again, I agree with Claimants and OWRD on this issue.

Oregon courts have an extensive history of reliance upon OWRD's technical expertise, and that of its predecessors, in matters relating to the adjudication of water rights. *See, In Re Water Rights in Silvies River*, 115 Or. 27 (1925) and *In Re Waters of Deschutes River*, 165 Or. 435 (1940) (the findings of the state engineer are entitled to a presumption of correctness.). As identified above, OWRD is tasked, by statute, with measuring the discharge of a stream subject to adjudication. In this capacity, the courts defer to state agencies as "the expert on the spot." *Deschutes River*, 165 Or. at 463, citing *Moyer v. Peabody*, 212 US 78 (1909).

Cooper 2004 provides comprehensive estimates of water availability throughout the entirety of the Upper Klamath Basin. This report is the result of several years of work compiling more than three decades of streamflow data. Cooper 2004 and its underlying methodologies were subjected to peer review prior to adoption by OWRD. In addition, Claimants' expert hydrologic engineer performed an independent analysis of the methodologies in Cooper 2004 to determine whether the results were reasonable and reliable prior to adopting these results as a basis for the updated claims. While not a party to this adjudication, OWRD has made its methods and measurements available to all parties in order to facilitate resolution of the claims and contests. Contestants have presented no evidence indicating bias on the part of OWRD or, specifically, the results in the Cooper 2002 or 2004 reports. With regard to streamflow measurements and methodologies presented by OWRD, I find no reason not to defer to the Department as "the expert on the spot."

Based on the evidence presented, I find OWRD's estimates of streamflow in the Klamath Basin, contained in Cooper 2004, satisfy the Department's obligations under ORS 539.120. Further, I find OWRD's estimates of streamflow are entitled to deference in this matter. UBC has failed to demonstrate, by a preponderance of the evidence, that such measurements are

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incorrect or that the alternatives presented are entitled to greater weight. Accordingly, I find Claimants' reliance upon the estimates and methodologies contained in the Cooper 2002 and Cooper 2004 reports, as a basis for the claimed flows, to be reasonable.

VI. Claimants have demonstrated instream flows outside the former reservation are necessary to permit exercise of the Tribes' on-reservation fishing rights.

OWRD and UBC argue Claimants are not entitled to off-reservation water to support on-reservation treaty rights. In support of this argument, UBC and OWRD rely on the Court's opinions in *Adair II* and *Oregon Department of Fish and Wildlife (ODFW) v. Klamath Indian Tribe*, 473 U.S. 753 (1985) for the principle that the Tribes' in-stream water rights are confined to the former reservation. As additional support, OWRD argues that no precedential decision has recognized off-reservation water rights to support on-reservation fishing rights. For the reasons set forth below, I do not agree with either argument.

As an initial matter, it must be noted that a lack of binding case law specifically supporting the claimed right is not dispositive. OWRD approaches this fact from the wrong angle. The relevant question is whether there is binding case law contrary to Claimants' position. If not, the question must be addressed as one of first impression. In this case, the parties have presented no case on point. Simply put, it appears no appellate court has addressed this particular question. Before the question can be addressed on appeal, it must be addressed by a trial court of competent jurisdiction. This adjudication presents the ideal vehicle to transport this issue up the appellate ladder, should the parties so choose. This tribunal therefore will endeavor to answer the question posed as one of first impression.

Claims for off-reservation hunting, fishing, trapping, and gathering rights are very different from off-reservation water rights necessary to support the Tribes' on-reservation treaty rights. Here, OWRD and Contestants argue Claimants are not entitled to claim instream water rights outside the boundaries of the former reservation because the 1864 treaty confined the Tribes' rights to hunt fish, trap, and gather to the reservation. The question here, as in previous cases, is whether the claimed off-reservation flows are necessary to fulfill a primary purpose of the reservation. While I agree Claimants cannot claim hunting, fishing, trapping or gathering rights outside the boundaries of the former reservation, I do not agree that instream flows claimed outside the reservation are prohibited in this case.

Contestants' and OWRD's reliance on *Adair II* and *ODFW* are misplaced. While it is true neither of those cases granted the Tribes' off-reservation water rights, the opinions must be viewed in context. Each of those cases dealt with the extent of the Tribes' on-reservation treaty rights and the implied water rights necessary to support those treaty rights. The courts in each case found the Tribes' treaty protected hunting, fishing, trapping, and gathering rights did not extend beyond the reservation. *See, ODFW*, 473 U.S. at 755 (1985). No party in either case raised the issue of whether the Tribes were entitled to off-reservation water to support on-reservation treaty rights. It is not surprising, therefore, that neither court chose to address a question not before it at the time.

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Here, the parties also expend considerable effort arguing over the interpretation and applicability of *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985). OWRD and Contestants argue *Kittitas* is inapplicable because the treaty at issue in that case granted the Yakima Nation off-reservation fishing rights. *Id.* at 1033 (“* * * the right of taking fish at all usual and accustomed places[.]”). These arguments, while technically correct, miss the mark. The underlying issue addressed by the district court, and on appeal in *Kittitas*, was whether it could order the water master to maintain flows necessary to protect approximately 60 beds of salmon eggs. The case made no mention of whether the Yakima actually possessed fishing rights in the area below Cle Elum dam where the eggs were located. Instead, the Yakima sought to protect its fishing rights by preserving the salmon eggs. The same may be said of Claimants’ off-reservation claims. Like the Yakima in *Kittitas* seeking to preserve a treaty resource, the Tribes claim instream flows off-reservation to protect passage habitat necessary for the exercise of their treaty rights.

One of the primary purposes of the reservation was “to secure to the Tribe a continuation of its traditional hunting and fishing lifestyle.” *United States v. Adair*, 723 F.2d 1394 at 1409 (9th Cir. 1984). Article 1 of the Treaty 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 * * *.” *Treaty of 1864*, 16 Stats. 707, emphasis added. The evidence presented at hearing demonstrates the harvest of salmon and other fish species was of central importance to the Tribes. The exclusive right of taking fish implies not only the right to exclude others from the rivers and streams within the former reservation, but also the implied understanding that those rivers and streams would continue to have fish for the Tribes to take. The evidence also suggests that the term “fish” as used in the Treaty included salmon, considering the integral role they played in the Tribes culture and subsistence practices.

At the time of Treaty signing, anadromous fish species made runs up the Klamath River and into the rivers and streams of the former reservation at least twice every year for generations. The fish in these runs were so numerous that tribal members were able to harvest up to one-half of their subsistence needs for an entire year. The Tribes had no reason to believe this would cease after signing of the Treaty with the United States. This is supported by the fact that tribal members continued to harvest salmon and other anadromous species, just as they always had, until construction of the first dam blocked fish passage in 1914. Based on the overwhelming weight of historical evidence, the right to take fish included the right to continue the salmon fishing practices that were central to the Tribes’ subsistence and culture. The exclusive right of taking fish implies fish to be taken; that includes salmon and other anadromous species. Should such species be reintroduced into the basin, the Tribes’ Treaty protected rights would certainly include the right to harvest such fish once again. Because the passage habitat claimed here is necessary for anadromous species to reach the former reservation, the Treaty must be interpreted to protect that right. To rule otherwise would render the Tribes’ fishing rights valueless and would be contrary to the canons of construction for Indian treaties.

For these reasons, I find Claimants are entitled to the claimed flows outside the former reservation identified in Claims 671, 672, and 673.

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Currently, the Tribes, along with state and federal agencies, are working toward the reintroduction of anadromous species into the basin. If successful, salmon and steelhead trout may once again be available for harvest by the Tribes. If unsuccessful, these passage claims would never go into effect. As such, the passage habitat claims represent water necessary to accomplish one of the primary purposes of the reservation once anadromous species are reintroduced. Undoubtedly, these claims cannot be denied because anadromous species find their pathways into the basin temporarily impeded by dams.

VII. Claimants have demonstrated certain instream flow levels are necessary to establish and maintain a healthy and productive passage habitat for the target 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 outside former reservation land within the basin to support the on reservation exercise of treaty harvest rights. In this case, such water rights are limited by the amount of water necessary to allow the Tribes to exercise their treaty protected fishing rights within the boundaries of the former reservation. This is the amount of water necessary to establish and maintain a healthy and productive habitat that will enable the Tribes to exercise their aboriginal rights.

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 demonstrated the extensive history reliance upon several species of fish, including extirpated anadromous species such as Chinook salmon and steelhead trout.

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. In the context of this case, that means instream flow that will allow upstream and downstream passage of the target species into the basin and, ultimately, the rivers and streams of the former reservation. As identified previously, Claimants' burden in this matter is to prove, by a preponderance of the evidence, the level of instream flow necessary in a given stream or reach to establish and maintain a healthy and productive habitat for treaty species. As discussed below, Claimants have satisfied their burden.

1. Instream flows necessary for fish passage habitat.

Anadromous species such as Chinook salmon and steelhead trout live in saltwater environments but require freshwater streams and rivers for spawning, egg incubation, and juvenile rearing. Prior to construction of dams downstream of the former reservation, anadromous species migrated upstream from the Pacific Ocean into the rivers and streams of the Klamath Basin. Historically, the abundance of salmon in the Basin made them a main staple of the Tribes, providing up to one-half of tribal members' dietary reserves. Construction of dams below Upper Klamath Lake prevented anadromous species from accessing waters within the former reservation.

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Claimants' instream flow claims seek to provide a healthy and productive passage habitat for anadromous treaty species once reintroduced to the Basin. In other words, these claims cannot become effective unless and until a viable plan for reintroduction of the target species is developed and implemented.

At the hearing, Claimants provided extensive evidence on the level of water necessary, in each claim, to provide a healthy and productive instream passage habitat. This evidence included extensive data collection, modeling and analysis from highly experienced fish biologists, and hydrologic engineers. Claimants provided sufficient evidence to establish the methods and criteria selected were well accepted within the various industries and scientific communities. Claimants correlated the information derived on habitat needs with information on water availability to determine the minimum amount of water necessary to establish and maintain a healthy and productive habitat for anadromous species currently subject to reintroduction efforts by the Tribes and various other entities. In order to avoid claiming more water than necessary, Claimants capped the physical habitat claims at the lesser of a percentage of the weighted useable area within a stream or the 1997 claim level.

Claimants derived the passage habitat requirements using accepted methodologies. Primary among these were the IFIM/PHABSIM and the Oregon Method. Fishery biologists have used IFIM/PHABSIM for several decades to determine instream flow needs. Both methods are recognized by OWRD as acceptable methods for determining instream flows. See, OAR 690-028-0027(2). In developing the instream flow requirements for target fish species, Claimants considered the upstream passage needs of those species in the adult stage, as well as downstream passage and rearing needs of the target species at the juvenile/smolt stage. Throughout this adjudication, Claimants have continued to collect and analyze data in order to ensure the claimed flows were the no higher than necessary to support passage for the target species.

The passage habitat claims identified in Attachment A reflect the minimum amount of water necessary to establish and maintain healthy and productive instream passage habitats within the designated reaches if anadromous species are reintroduced to the basin. Until then, Claimants assert no claims to instream flows in the reaches at issue and this order should not be construed to grant such rights absent reintroduction of the target species.

VIII. Contestants failed to rebut Claimants' evidence.

Contestants assert Claimants have failed to prove the instream flows claimed are the minimum amount of water necessary to establish a healthy and productive passage habitat. I disagree. Based on the foregoing discussion, I find each of the claims presented represents the minimum amount of water necessary to fulfill the purposes of the reservation. This is supported by the stark differences present in the updated claims versus the claims filed in 1997.

The claims filed in 1997 claimed instream flows up to 700cfs in all reaches during every month of the year. Between 1997 and 2010, Claimants continued to collect data and perform analyses aimed at finding the minimum amount of water necessary. Based, in part, on information not available in 1997, Claimants were able to abandon large portions of the claims in

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favor of lower instream flow levels, which they determined were sufficient to accomplish the purposes of the reservation. The results were significantly reduced passage habitat claims for several moths and no claims for one and one-half months of every year. These significantly lower claim levels are reflected in Attachment A. Contestants offered no evidence indicating a lesser amount of water would accomplish the necessary fish passage into the basin. In fact, Contestants offered no affirmative evidence to support any contest ground raised. I find Claimants have demonstrated, by a preponderance of the evidence, the claimed flows represent the minimum amount necessary to establish and maintain the necessary fish passage through the claimed reaches.

In the alternative, Contestants argue Claimants' water rights should be limited based on equitable considerations. This argument is unavailing in light of the well-established body of controlling case law as well as the Amended Order issued in this case over five years ago.

Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users. *Coleville Confederated Tribes v. Walton*, 752 F.2d at 405 (1984), citing *Cappaert v. United States*, 426 US 128, at 138 through 139. Accordingly, despite the urgings of UBC and other Contestants, this tribunal is not free to balance the interests of the Tribes and non-Indian water users in order to effectuate an equitable distribution of water.

Contestants rely on *City of Sherrill v. Oneida Indian*, 544 U.S. 197 (2005) for the proposition that equitable considerations can and should be applied to curtail the rights of federally recognized Indian tribes. Without addressing the substance of Contestants' legal argument, I find *Sherrill* distinguishable from this case.

Sherrill involved issues surrounding land sold off by the Oneida nation and settled by residents of New York State. Approximately two hundred years later, the Oneida began reacquiring former reservation land through purchases on the open market. The Oneida then sought immunity from property taxes assessed by the City of Sherrill on the reacquired land. The court applied equitable considerations to prevent the Oneida from reviving sovereignty over the lands finding, "[t]he Oneida long ago relinquished governmental reins and cannot regain them through open-market purchases * * *." *Sherrill*, 544 U.S. at 198.

Sherrill involved the tribe's abandonment of control over former reservation land, not treaty rights never abandoned or abolished. In *Sherrill*, the Oneida Indian Nation knowingly relinquished title and control over the subject lands. Two hundred years later, the tribes sought to renew sovereign control over that same land. In this matter, the Klamath Tribes have not, knowingly or otherwise, relinquished the treaty rights they now seek to enforce. The circumstances that permitted the application of equitable principle in *Sherrill* are absent here. Accordingly, I decline the invitation to discard the principles set forth in *Walton* and *Cappaert* identified above.

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IX. Treaty rights on land no longer owned by the Klamath Tribes.

Next, UBC argues the Tribes no longer possess treaty rights on lands not owned by the Tribes. Again, UBC's argument is unavailing. Contestants seem to continually lose site of the scope of these proceedings. As declared above, the purpose of this adjudication is the quantification of Claimants instream water rights necessary to support healthy and productive instream and riparian habitats within the former reservation. Specifically in this case, the purpose is to determine how much, if any, water is necessary to establish passage habitat in the claimed reaches to allow target species to access the former reservation upon successful reintroduction.

To the extent UBC argues the Tribes ceded the lands at issue upon signing the Treaty of 1864, they are correct. However, that has little bearing on the question before this tribunal. The Tribes do not seek to confirm off-reservation water rights to support off-reservation treaty rights. Instead, the Tribes seek to confirm off-reservation water rights to support the on-reservation exercise of Treaty rights. If such waters are necessary to fulfill one or more purposes of the reservation, Claimants are entitled to whatever amount they prove necessary, but not more, to fulfill such purpose, regardless of property ownership.

To the extent UBC continues to argue in favor of limitations on Claimants' water rights through abrogation of the Tribes' Treaty rights within the boundaries of the former reservation, such rights were confirmed by the Ninth Circuit well over two decades after termination of the reservation and the sale of much of the lands therein. (*See, Adair II.*) An analysis of property ownership within the boundaries of the former reservation is unhelpful in these proceedings. Determinations of the extent of the Tribes' Treaty rights are beyond the scope of this quantification proceeding and concomitantly exceed the authority of the ALJ.

X. The Klamath Restoration Act did not limit the restoration of the Tribes' treaty rights.

UBC also contends the Klamath Restoration Act (25 U.S.C. § 566 et. seq.) imposed limitations on the restoration or exercise of the Tribes' Treaty right. Specifically, UBC argues the express language of 25 U.S.C. § 566c excludes the Tribes Treaty rights from restoration. This argument is unavailing.

25 U.S.C. § 566 restored federal recognition of the Klamath Tribes and provides, in relevant part:

* * * * *

(b) Restoration of rights and privileges - All rights and privileges of the tribe and the members of the tribe under any Federal treaty, Executive order, agreement, or statute, or any other Federal authority, which may have been diminished or lost under the [termination] Act * * * are restored, and the provisions of such Act, to the extent that they are inconsistent with this subchapter, shall be inapplicable to the tribe and to members of the tribe after August 27, 1986.

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25 U.S.C. § 566a provides:

Nothing in this subchapter shall affect in any manner any hunting, fishing, trapping, gathering, or water right of the tribe and its members.

The restoration act went into effect seven years after the district court's recognition of the survival of the Tribes' Treaty rights and three years after the Ninth Circuit's confirmation of the same. Nonetheless, UBC still reads the restoration act as a limitation on the Tribes' Treaty rights.

In *Adair I*, the court stated, “[t]reaty 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.” (Internal citations omitted.) 478 F. Supp at 345. This language unequivocally declares the Tribes' Treaty rights survived termination. Nothing in the termination act, or the court's opinion cited herein, can be read to indicate Congress intended to abrogate any portion of those rights. A limitation on the Tribes' Treaty rights is nothing more than partial abrogation of those rights. In this context, Congress passed the restoration act with a full understanding of the Tribes' Treaty rights. Thus, by the plain language of the restoration act, nothing in that act disturbs the Treaty rights that survived termination. Accordingly, any argument in favor of partial or complete abrogation of Treaty rights based upon the termination or restoration acts must fail.

XI. The Endangered Species Act is not a substitute for Claimants' instream water rights.

As a final matter, this order addresses UBC's argument that Claimants are not entitled to the claimed flows because they have failed to show that protections afforded to the target species under the Endangered Species Act (ESA) are insufficient. First, it must be noted that this argument was not raised by UBC in either their original or amended statements of contest. As discussed above, the statements of contest control the scope of the hearing. UBC had ample opportunity to raise this issue through properly filed statements of contest. It failed to do so. It cannot do so now.


Further, UBC provided no direct evidence to support any contest ground. To the extent UBC considered this a valid ground for contest, it failed to offer any evidence in support of this argument. Bare assertions in closing briefs are insufficient to support UBC's argument. UBC provide no evidence demonstrating that either target species is listed in the ESA. Absent such a designation, the protections of the ESA do not apply to the target species. For these reasons, UBC's argument lacks merit. The ESA is not a substitute for the federally reserved water rights at issue in this case.

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ORDER

I propose OWRD issue the following order:

1. The claimed instream flows, 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 671, 672, 673, and those portions of Claim 612 that pertain to the Klamath River, are approved as reflected in Attachment A.



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

Date: April 16, 2012

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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 87 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 58 days after completion of the 90-day period for exceptions in case 286.

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**

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KBA Case No. 282 - Attachment A - Monthly Flow Values

(The table below is taken from page 42 of KBA Case No. 282, Corrected Joint Opening Post-Hearing Brief of Claimants United States Bureau of Indian Affairs and Klamath Tribes)

Table VII-1. Monthly Passage Habitat flow values for Klamath River Claim Reaches/Sub-reaches 671a, 671b, 671c, 672, 673a, and 673b. KBA Case # 282												
	January	February	March	April	May	June	July	August	September	October	November	December
Claim Sub-Reach 671a												
Passage Habitat Claim flow value	200	400	400	400	400	400	--	--/230	230	230	230/200	200
Claim Reach 671b												
Passage Habitat Claim flow value	528	400	400	400	528	420	--	--/420	420	528	528	528
Claim Reach 671c												
Passage Habitat Claim flow value	100	400	400	400	400	400/200	--	--/200	200	100	100	100
Claim Reach 672												
Passage Habitat Claim flow value	420	420	700	700	700	700/400	--	--/700	700	700	700/420	420
Claim Reach 673a												
Passage Habitat Claim flow value	652	652	700	700	700	700	--	--/700	700	700	700/652	652
Claim Reach 673b												
Passage Habitat Claim flow value	347	347	700	700	700	700	--	--/700	700	700	700/347	347

(--) indicates no claim during the specified period

XXX/XXX - specifies two flow claims during the month; one applies to the first half and the second to the second half of the month.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2012, 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:

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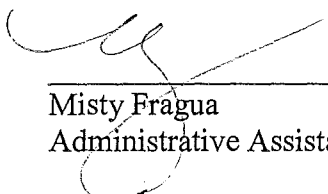
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