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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

~~WaterWatch of Oregon, Inc.~~; Cynthia L. Barrett, Trustee of Sydney's 1995 Irrevocable Trust, uta 12/27/95; Elaine G. Kerns, Sydney K. Giacomini and E. Martin Kerns, as Initial Trustees of the Elaine G. Kerns 1992 Trust uta 1/24/92; Mathis Family Trust; John M. Mosby; Marilyn Mosby; Robert Cook, TPC, LLC; ~~PacifiCorp~~; ~~Horsefly Irrigation District; Langell Valley Irrigation District~~; ~~Rogue River Valley Irrigation District; Medford Irrigation District~~; Roger Nicholson; Richard Nicholson; NBCC, LLC; Agri

PROPOSED ORDER

Case No. 286

Claims: 616 and 622

Contests: ~~2062, 2063~~[1], 2731, 2732, 2741, 2742, ~~3020, 3021~~[2], 3123[3], ~~3253, 3254~~[4], 3318, 3324[5], ~~3648~~[6], ~~3654~~, 3883, 4006, 4012

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1 Pacificorp voluntarily withdrew from Contests 2062 and 2063 on July 26, 2010.

2 WaterWatch of Oregon, Inc.'s Contests 3020 and 3021 were dismissed. ORDER DISMISSING WATERWATCH OF OREGON, INC.'S CONTESTS, May 20, 2003.

3 Change of Title Interest for Contest 3123 from Boyd Braren, Boyd Braren Trust to Robert Cook, TPC, LLC (10/25/05).

4 Horsefly Irrigation District and Langell Valley Irrigation District voluntarily withdrew, without prejudice, from Contests 3253 and 3254 on November 3, 2003. Medford Irrigation District and Rogue River Valley Irrigation District voluntarily withdrew Contests 3253 and 3254 on June 14, 2006.

5 William Bryant voluntarily withdrew from Contests 3318 and 3324 on October 31, 2003. Dave Wood voluntarily withdrew from Contests 3318 and 3324 on October 26, 2004. Change of Title Interest for Contests 3318 and 3324 from Roger Nicholson Cattle Co. to AgriWater, LLC (2/4/05). Change of Title Interest for Contests 3318 and 3324 from Dorothy Nicholson Trust and Lloyd Nicholson Trust to Roger and Richard Nicholson (2/4/05). Change of Title Interest for Contests 3318 and 3324 from Kenneth Hufford, Leslie Hufford, and Hart Estate Investments to Jerry and Linda Neff (2/11/05). Change of Title Interest for Contests 3318 and 3324 from William and Ethel Rust to David Cowan (3/9/05). Change of Title Interest for Contests 3318 and 3324 from Walter Seput to James Wayne, Jr. (5/2/05). Change of Title Interest for Contests 3318 and 3324 from Jim McAuliffe, McAuliffe Ranches, and Joe McAuliffe Co. to Dwight and Helen Mebane (7/8/05). Change of Title Interest for Contests 3318 and 3324 from Anita Nicholson to Nicholson Investments, LLC (7/8/05). Change of portion of Title Interest for Contests 3318 and 3324 from Dwight and Helen Mebane to Sevenmile Creek Ranch, LLC (8/15/05). Kenneth Zamzow voluntarily withdrew from Contests 3318 and 3324 on September 2, 2005. William Knudtsen voluntarily withdrew from Contests 3318 and 3324 on September 13, 2005. Change of Ownership filed for Contests 3318 and 3324 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 3318 and 3324 on March 1, 2007. Franklin Lockwood Barnes, Jr. and Jane M. Barnes voluntarily withdrew from Contests 3318 and 3324 on April 6, 2007. Mary Jane Danforth voluntarily withdrew from Contests 3318 and 3324 on June 19, 2008. Modoc Point Irrigation District voluntarily withdrew from Contests 3318 and 3324 on November 13, 2008. Change of Title Interest for Contests 3318 and 3324 from Robert Bartell to Michael LaGrande (1/9/09). Change of Title Interest for Contests 3318 and 3324 from Elmore E. Nicholson and Mary Ann Nicholson to Nicholson Loving Trust (12/8/09). Change of Title Interest for Contests 3318 and 3324 from Peter M. Bourdet to Peter Bourdet & Linda Long (12/10/09). Jacob D. Wood voluntarily withdrew from Contests 3318 and 3324 on January 15, 2010. Change of portion of Title Interest for Contests 3318 and 3324 from Roger Nicholson and Richard Nicholson to NBCC, LLC (3/17/2010). Change of Title Interest for Contests 3318 and 3324 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).

6 Don Vincent voluntarily withdrew from Contests 3648 and 3654 on December 4, 2000. Berlva Pritchard voluntarily withdrew from Contests 3648 and 3654 on June 24, 2002. Klamath Hills District Improvement Company voluntarily withdrew from Contests 3648 and 3654 on January 15, 2004. The remaining entities comprising Klamath Project Water Users, conditionally withdrew from Contests 3648 and 3654 on May 18, 2009. *See* STIPULATION OF CONDITIONAL WITHDRAWAL OF KPWU'S CONTESTS TO CLAIMS 616 AND 622 AND CONDITIONAL AND INTERIM NO-CALL PROVISIONS BY THE UNITED STATES AND KLAMATH TRIBES (MAY 18, 2009).

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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, LLC; ~~Dwight T. Mebane; Helen Mebane~~; ~~Sevenmile Creek Ranch, LLC~~; James G. Wayne, Jr.; Clifford Rabe; Tom Griffith; William Gallagher; Thomas William Mallams; River Springs Ranch; Pierre A. Kern Trust; ~~William V. Hill~~; Lillian M. Hill; Carolyn Obenchain; Lon Brooks; Newman Enterprise; ~~William C. 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 & Linda Long; Vincent Briggs; J.T. Ranch Co.; Tom Bentley; Thomas Stephens; John Briggs; ~~William Bryant~~; Peggy Marenco; Jerry L. and Linda R. Neff; ~~Klamath Irrigation District; Klamath Drainage District; Tulelake Irrigation District; Klamath Basin Improvement District; Ady District Improvement Company; Enterprise Irrigation District; Malin Irrigation District; Midland District Improvement Co.; Pine Grove Irrigation District; Pioneer District Improvement Company; Poe Valley Improvement District; Shasta View Irrigation District; Sunnyside Irrigation District; Don Johnston & Son; Modoc Lumber Co.; Bradley S. Luscombe; Randy Walthall; Inter-County Title Co.; Winema Hunting Lodge, Inc.; Van Brimmer Ditch Co.; Plevna District Improvement Company; Collins Products, LLC;~~

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 286 (Case 286) involves two claims for waters in Upper Klamath Lake (the Lake), which forms the western boundary of the former Klamath Indian Reservation. Unlike the claims for individual water rights filed in this adjudication, Case 286 involves tribal claims for non-consumptive (in-lake) water rights within the lake. Claimants are the Klamath Tribes (Tribes) and the United States Bureau of Indian Affairs (BIA) as Trustee on behalf of the Tribes.[7] 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) and the Mathis Family Trust (MFT).

On or about April 30, 1997, Claimants filed several claims for instream and in-lake 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, MFT, and other contestants filed the Statements of Contest (Contests) at issue in this case.[8] 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 and in-lake water rights were consolidated into eight cases. Case 286 addresses those claims to water within the Upper Klamath Lake.

On July 8, 2005,[9] the Tribes and the BIA filed a Joint Motion for Ruling on Legal Issues (Summary Determination). On that same date, UBC, MFT, 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).[10] In the Amended Order, ALJ Russell disposed of several contest grounds presented by UBC and MFT. 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' non-consumptive water rights was declared as "time immemorial." Through rulings in the Amended Order, ALJ Russell left the

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7 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.

8 Where appropriate, this order refers to Upper Basin Contestants and Mathis Family Trust collectively as Contestants.

9 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.

10 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.

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question of entitlement to "boundary waters" as well as the quantification of Claimants' water rights for hearing.[11]

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.[12]

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[11] 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 no 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.
>
> 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.
>
> 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 if requested. The parties may offer and rely upon the OWRD data, or they may attack that data or supplement that data with other evidence.
>
> 10. The United States Bureau of Indian Affairs, as trustee for the Klamath Tribes, is entitled to participate in these proceedings as a party.
>
> (Amended Order at 34 and 35. **Bold** and ~~strikethrough~~ omitted.)

[12] 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

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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, Claimants filed written direct testimony and exhibits. Neither UBC nor MFT elected to file direct testimony or exhibits in this case. On February 7, 2011, UBC and MFT filed written rebuttal testimony and exhibits.[13] An in-person cross-examination hearing convened on April 18, 2011, in Salem, Oregon, with Senior ALJ Allen presiding.[14] Between August 15 and December 15, 2011, the parties filed closing, response, and reply briefs. The record closed on December 15, 2011.

At the hearing, and in closing briefs, the parties raised several arguments identical to those raised by these same parties in earlier cases.[15] 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 (Ruling). The Ruling is part of the record in this matter and therefore it is unnecessary to reiterate those evidentiary rulings in this order.

EXPERT TESTIMONY

Claimants provided extensive expert testimony regarding the methodologies for calculating the claim levels and the amount of water necessary, in time and location, to achieve sufficient water quality to establish and maintain a healthy and productive habitat for the target species in Upper Klamath Lake. In addition, BIA's limnologist,[16] biologists, and other experts continued to collect and analyze data for over 10 years after filing the initial claims in this matter. This continued analysis resulted in reduced claim levels at the hearing. Further, Claimants presented extensive testimonial and documentary evidence pertaining to the historic presence of the target species in Upper Klamath Lake as well as reliance on such species by the

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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.

[13] In this case, UBC elected to file, as rebuttal, testimony and evidence of the same or similar nature to that which it had previously filed as direct evidence in Cases 277 through 281 as well as 284 and 285.

[14] 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.

[15] See post hearing briefs in cases 277 through 282 as well as cases 284 and 285.

[16] Limnology is the study of the ecology of inland water bodies such as lakes and ponds.

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Tribes. Much of this evidence also correlates the reduction in target species with the introduction of the Link River Dam and the corresponding alteration of the natural lake elevations.

UCB and MFT presented minimal scientific evidence to rebut the claimed lake levels. Instead, UBC offered extensive evidence related to the purported economic impact of the claims and the direct impact on existing water rights associated with Upper Klamath Lake. MFT offered limited evidence in the form of materials of general publication, with no testimony to provide foundation or context for such material. In addition, UBC offered only a single witness, Larry Larson, Ph.D., who purported to challenge the statistical methodologies implemented by BIA's experts. However, Dr. Larson is an expert in rangeland ecology. Importantly, he is not an expert in fish biology, limnology, or biometrics. Neither his education nor professional experience demonstrate a level of expertise in fields related to biology, water quality, or statistical modeling necessary to rebut the evidence presented by Claimants' experts.

The testimony provided by Claimants' experts is well reasoned and supported by verifiable evidence. Consequently, where testimony conflicts, greater weight is given to the testimonies of Claimants' experts including Drs. Reiser, Kann, Walker, and Hendrix, as well as Mr. Hart.

ISSUES

1. Whether Claimants are entitled to claim water rights within Upper Klamath Lake, which forms the western border of the former reservation, in order to fulfill the purposes of the reservation.

2. Whether the claimed lake levels 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. The Treaty established the western boundary of the reservation as follows:

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Beginning upon the eastern shore of the middle [now Upper] Klamath Lake * * *, about twelve miles below the mouth of Williamson's [sic] River; thence up Wood River to a point one mile north of the bridge at Fort Klamath[.]

(Treaty of 1864, 16 Stats. 70; Ex. 286-KT-2.)[17]

2. 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. 286-KT-2; emphasis added.)

3. The boundaries of the reservation were left largely up to the Tribes and were established to protect the Tribes' traditional hunting, fishing, trapping and gathering places. The United States intended the Tribes to have continuing access to important water bodies in order to ensure the continuing ability to harvest traditional subsistence resources. Accordingly, the Williamson, Sprague, Sycan, and Wood rivers are all within the boundaries of the former reservation. Each of these rivers flows into Upper Klamath Lake. (Exs. 286-US-100 and 286-KT-1; *see also*, Exs. 286-US-118 and 286-US-120.)

4. In 1975, the United States, as trustee for the Tribes, filed a lawsuit in federal court against several water users in the Klamath Basin, primarily along the Williamson River and its tributaries. The government sought to establish the priorities of its claimed federal reserved water rights. In 1979, the District Court issued an opinion finding that the Klamath Tribes had an aboriginal water right to accompany their right to hunt, fish, trap and gather on the former reservation lands. The court further found that the Termination Act of 1954 did not extinguish those aboriginal rights. The court considered the Tribes' exercise of its aboriginal rights to hunt, fish, trap and gather[18] to be one of the primary purposes of the Treaty of 1864. *U.S. v. Adair*, 478 F.Supp. 336 (1979) (*Adair I*).

5. 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.

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[17] The western boundary of the former reservation actually runs along the eastern shore of Upper Klamath Lake and Agency Lake. The Wood River flows into Agency Lake. Upper Klamath Lake and Agency Lake are connected and generally considered to be a single body of water. (*See*, Exs. 286-US-100 and 286-US-200.) As such, references to Upper Klamath Lake in this order include Agency Lake.

[18] 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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The Tribes' reliance on species subject to Treaty rights.

6. 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. 286-KT-1 and 286-KT-100, and 286-US-100.)

7. 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 several species of suckers (referred to by the Tribes as c'waam) including Lost River suckers, Shortnose suckers, and Klamath Largescale suckers.[19] Before construction of dams downstream of the former reservation land, tribal members also fished large quantities of salmon and anadromous trout from these rivers and streams. (Exs. 286-KT-1, 286-KT-100, 286-US-100; and 286-US-200.)

8. Prior to construction of dams downstream of the former reservation, adult Chinook salmon and Steelhead trout 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. (Exs. 286-US-100, 286-US-200, 286-KT-1, and 286-KT 100.)

9. Historically, the Tribes fished for trout, sucker fish, and salmon on the Wood, Sprague, Sycan, and Williamson rivers as well as Upper Klamath Lake.[20] Among the sucker species, the Lost River sucker is highly prized by tribal members for subsistence and ceremonial purposes. (Exs. 286-KT-1, 286-KT-100, and 286-US-100; *See also,* Exs. 286-US-102 through 106, 286-US-110, and 286-US-118.)

10. Some species of suckers and trout are adfluvial. Adfluvial species live in lakes but migrate into rivers and streams to spawn. The Lost River sucker, Klamath Largescale sucker, and Shortnose sucker, as well as redband trout are adfluvial species. Salmon and steelhead trout are anadromous. Anadromous species live in saltwater but migrate into freshwater rivers and streams to spawn. Not all migrating fish species spawn at the same time of year. (Exs. 286-US-100 and 286-US-200.)

11. Historically, fish were of central importance to the Tribes' existence in the Basin. Spawning runs of suckers, trout, and salmon were plentiful and provided a main staple of the Klamath diet as well as a primary trading commodity. Tribal families established fishing camps along the rivers and streams within their aboriginal homeland to coincide with adfluvial and

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[19] Because of their individual significance, the Tribes have specific names identifying each species of sucker fish and trout. The Lost River sucker is referred to as "C'waam," the shortnose sucker is called "Kupdo," and the Klamath Largescale sucker is known as "Yen" in the Tribes' aboriginal language. Trout are referred to as "mey." The Tribes refer to sucker species collectively as c'waam. (Ex. 286-KT-1.)

[20] Case 286 is concerned with habitat for specific sucker, trout, and salmon species. These Treaty resources are referred to as the "target species."

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anadromous fish runs. This allowed extended harvest by tribal families who relied upon fish. The Tribes typically harvested fish by the thousands during such runs. (Exs. 286-KT-1, 286-KT-100, 286-US-100, and 286-US-143 through 286-US-146.)

12. Subsequent to construction of the Link River Dam in 1921, the number and quality of sucker fish and trout in Upper Klamath Lake began to decline. In 1986, the Tribes' voluntarily closed the sucker fishery in the Basin due to declining populations of these fish. The Lost River and Shortnose suckers are currently listed as endangered species under the Endangered Species Act (ESA). (Exs. 286-KT-1, 286-KT-100, 286-US-100, and 286-US-200.)

13. 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. 286-US-200, 286-KT-1, and 286-KT-100.)

Upper Klamath Lake habitat and water quality.

14. The physical habitat claims are intended to identify the monthly lake elevations necessary for suitable fish habitat in Upper Klamath Lake. This includes refuge habitat, spawning habitat, and juvenile rearing habitat, where appropriate. Claimants' recruited a multidisciplinary team of experts including fish biologists, limnologists, biochemists and water quality specialists, ecologists, population biologists and modelers, and biometricians to develop the claims in this case. (Exs. 286-US-200 and 286-US-400.)

15. Claimants' experts conducted research and studies to understand the relationships between lake elevation and physical habitat characteristics in Upper Klamath Lake. These studies included water quality, habitat quantity and quality, and water currents. These experts focused on the influence of these relationships upon the ecology and population dynamics of Lost River suckers, shortnose suckers, and Klamath Largescale suckers, as well as redband and Steelhead trout, and Chinook salmon (collectively, the target species). The goal of these studies was to determine the monthly lake elevations necessary to provide a healthy and productive habitat that will support a harvestable population of Treaty species.[21] (Exs. 286-US-200, 286-US-400, 286-US-500, and 286-US-600; test. of Kann and Walker.)

16. A healthy and productive habitat for the target species is an in-lake environment that allows the species to exist in all life stages in a stable and sound environment, supports the species sustained ability to reproduce, and provides a self-renewing population that can withstand natural and man-made impacts. In the context of this case, such habitat requires sufficient water to provide an environment where the needs of the target species are met and permit sustained reproduction of the species in numbers sufficient to support the exercise of the Tribes' Treaty rights. (Exs. 286-US-200 and 286-US-400.)

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[21] Claimants' experts approach this problem as two distinct components, physical in-lake habitat and water quality. Upon thorough review of the testimony and exhibits in this matter, I find the distinction to be academic. For simplicity, this order addresses both components as elements of the same healthy and productive habitat.

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17. Lakes generally exhibit variable water elevations during various times of the year due to runoff cycles of rivers or streams that feed the lake and/or precipitation changes throughout the year. Water levels in the Upper Klamath Lake historically fluctuated between 4,140 and 4,143 feet about mean sea level (msl). (Exs. 286-US-200 and 286-US-400.)

18. Prior to construction of the Link River Dam, the elevation of Upper Klamath Lake was regulated by a natural sill at the southern end of the Lake where it flows into the Klamath River. (Exs. 286-US-100, 286-US-200, and 286-US-400.)

19. In 1921, the United States Bureau of Reclamation (USBR) constructed the Link River Dam at the southernmost end of Upper Klamath Lake. In doing so, USBR excavated portions of the natural sill to allow additional water release from the Lake. This resulted in the ability to reduce lake elevations to approximately 4,137 ft. msl. (Exs. 286-US-200 and 286-US-400.)

20. Upper Klamath Lake is a large shallow water body with an average depth of 7.1 ft. At the post-dam minimum lake elevation, the surface area of Upper Klamath Lake is reduced by approximately 11,000 acres.[22] This decrease impacts several habitat components of the target species including physical habitat quantity and quality for adult and juvenile fish, water quality throughout the Lake, and access to refuge habitat. (Exs. 286-US-200 and 286-US-400.)

21. Dudley Reiser, Ph.D., is an expert in fish biology and fishery science with over 30 years of experience. Dr. Reiser analyzed the impact of Upper Klamath Lake elevations upon several habitat elements including (i) the quantity and quality of adult sucker habitat; (ii) the accessibility to sucker and trout refuge habitat; (iii) the quantity of in-lake sucker spawning habitat for fluvial species;[23] (iv) the quantity and quality of larval sucker nursery habitat; and (v) the quantity of juvenile rearing habitat. Each of these components is essential for completion of the different life stages of the target species. Dr. Reiser, in conjunction with other experts, determined the lake elevations necessary to provide a healthy and productive habitat for the target species. (Ex. 286-US-200.)

22. Between 1990 and 1999, Dr. Reiser directed and participated in the research and analysis used to develop the BIA's initial and amended claims. Between 1999 and 2010, Dr. Reiser and his team continued to collect and analyze data pertaining to the habitat needs of the target species in Upper Klamath Lake. As a result of these ongoing studies, Dr. Reiser was able to determine lower lake elevations would be sufficient for the habitat needs during many months of the year. (Ex. 286-US-200.)

23. Jacob Kann, Ph.D., is an expert is in aquatic ecology with extensive experience in the area of limnology. Dr. Kann studied the water quality in Upper Klamath Lake to discover the cause of declining water quality and determine the lake levels necessary to improve water quality in order to establish and maintain a healthy and productive habitat for the target species. (Test. of Kann; Ex. 286-US-400.)

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[22] At the minimum lake elevation (4,137), the surface area of the Lake is approximately 56,000 acres. By contrast, at full pool (4,43.3), the surface area of the Lake is approximately 67,000 acres. (Ex. 286-US-200.)

[23] Fluvial fish species live and spawn within the lake environment, in contrast to adfluvial species that migrate out of the lake to spawn. (Ex. 286-US-200.)

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24. William W. Walker, Ph.D. is an environmental engineer with over 30 years of experience in the fields of hydrologic and water quality modeling, eutrophication,[24] and lake/reservoir/wetland restoration. Dr. Walker worked with Drs. Kann and Reiser to analyze water quality in Upper Klamath Lake, evaluate factors responsible for poor water quality, and recommend lake levels that would provide improved water quality in order to establish and maintain a healthy and productive habitat for the target species. (Test. of Walker; Ex. 286-US-500 and 286-US-400.)

25. Drs. Kann and Walker determined the poor water quality in Upper Klamath Lake is caused by a combination of sediment loading from timber and agricultural practices in the Basin as well as decreased water elevations. This combination created the ideal environment for a particular species of blue-green algae (AFA).[25] Drs. Kann and Walker further determined that the presence of these algae adversely impact the habitat for the target species. (Test. of Kann and Walker; Exs. 286-US-400 and 286-US-500.)

26. Albert Noble Hendrix, Ph.D., is a biometrician and aquatic ecologist with numerous years of experience in population modeling, statistics, and quantitative fishery sciences. For Upper Klamath Lake, Dr. Hendrix constructed a statistical model to determine the importance of lake elevation to survival of the target species, particularly Lost River suckers and Shortnose suckers. Dr. Hendrix used this data to forecast survival rates of the target species at different lake elevations. (Ex. 286-US-600)

27. Dr. Hendrix determined that lake elevation could affect the probability of low dissolved oxygen events in Upper Klamath Lake. Dr. Hendrix discovered that, at low wind speeds, lower lake elevations lead to a high probability of low dissolved oxygen in the water column. Dr. Hendrix also found that the probability of low dissolved oxygen in Upper Klamath Lake was less influenced by wind speed at higher lake elevations. (Ex. 286-US-600.)

28. Fluvial sucker species rely on shallow waters (approximately two feet) along the eastern shore of the Lake for spawning grounds. Reduction in water levels dramatically limits the availability of suitable spawning habitat for these species. Larval suckers rely on shallow waters with emergent vegetation, generally located along shorelines, for habitat and refuge from predators. This emergent vegetation is generally present in waters approximately two feet deep. Juvenile suckers also rely on areas of emergent vegetation for food and protection, although to a lesser degree than larvae. Reductions in lake elevation adversely impact the availability of suitable habitat for larval suckers. (Exs. 286-US-200, 286-US-213, 286-US-219, 286-US-220, and 286-US-225.)

29. Adult suckers and trout spend significant portions of their lives in the deeper depths of Upper Klamath Lake. These fish prefer depths greater than six feet in order to avoid airborne

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[24] Eutrophication is a process by which bodies of water, such as lakes and rivers, receive excess nutrients, typically nitrogen and phosphorus, that stimulate excessive plant growth.

[25] The species of algae present in the Lake is almost exclusively one species, *Aphanizomenon flos-aquae* (AFA). (Ex. 286-US-400.)

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predators. Reductions in lake elevation reduce the amount of suitable in-lake habitat for adult suckers and trout. (Exs. 286-US-200 and 286-US-206.)

30. The target species rely on dissolved oxygen in the water to breathe. Wind traveling over the surface of Upper Klamath Lake mixes with water and oxygenates in-lake habitat. Reductions in dissolved oxygen create stressful environments for the target species. Increases in certain types of ammonia also create inhospitable environments for the target species. Such environments can result in poor water quality that may increase mortality among the target species. (Exs. 286-US-200, 286-US-236, 286-US-237, and 286-US-400; test. of Kann.)

31. Large blooms of AFA present in Upper Klamath Lake adversely impact the water quality and fish habitat. The amount and intensity of light that penetrates the water column directly affects algal blooms in Upper Klamath. Shallow lake levels allow light to penetrate deeper into the Lake. As a result, lower lake elevations are directly related to increased algal growth in Upper Klamath Lake. As algal blooms die and decay, the change in pH increases un-ionized ammonia in the Lake to a level toxic to the target species. The decaying algae also reduce dissolved oxygen in the Lake. The decaying blooms also release phosphorus, a nutrient that contributes to increased algal growth. (Test. of Walker and Kann; Exs. 286-US-200, 286-US-400, and 286-US-500.)

32. Algae in Upper Klamath Lake begin to grow in early springtime. Increased lake elevations during this period can improve water quality by controlling the algal bloom in spring. The resulting reduction in algae production can result in lower phosphorus levels. In addition, increased water levels serve to dilute phosphorus in the Lake. (Test. of Kann and Walker; Ex. 286-US-400 and 286-US-500.)

33. In summertime, algae begin to die and decompose. This decomposition alters the chemical composition of Upper Klamath Lake. Around the same period, Upper Klamath Lake elevations tend to drop to their lowest point. This results in less water in the Lake to dilute the high concentrations of phosphorus and nitrogen. This, in turn, creates poor water quality, which is harmful to the target species. (Exs. 286-US-200, 286-US-400, and 286-US-500; test. of Walker and Kann.)

34. During periods of poor water quality in Upper Klamath Lake, adult suckers seek out refuge habitat that provides sufficient water quality and temperature for them to avoid the harmful elements in the Lake. The mouths of the Williamson and Wood rivers maintain cooler, well-oxygenated water as they enter the Lake. These waters provide limited refuge habitat for suckers during periods of poor water quality. The largest refuge habitat available to adult suckers is Pelican Bay, at the northwest corner of Upper Klamath Lake. (Exs. 286-US-200, 286-US-236, 286-US-242, and 286-US-243.)

35. Pelican Bay (Bay) is fed by several cool water springs, which maintain water temperature and quality. Outflows from the Bay into Upper Klamath Lake prevent warmer lake waters, and the algae they contain, from entering the Bay. Water depths in Pelican Bay are suitable for suckers even at lower lake elevations. Nonetheless, shallow bottom contours at approximately 4,135 ft. msl govern entrance to the Bay. Consequently, low lake elevations can

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limit access to the Bay when depths are insufficient for suckers to pass. Without access to sufficient refuge habitat, the likelihood of sucker species die off due to poor water quality is dramatically increased. (Exs. 286-US-200; *See also*, 286-US-236.)

36. In winter months, the top layer of Upper Klamath Lake is subject to freezing. While the Lake is frozen, organisms within the Lake must rely on dissolved oxygen stored in the water, under the ice. At lower elevations, less dissolved oxygen is stored in the water column. If Upper Klamath Lake elevations are below 4,140.0 ft. when the Lake freezes, levels of dissolved oxygen can become critically low, resulting in poor water quality for the target species. Such low dissolved oxygen events can be exacerbated by snow pack over the Lake, which reduces light and, consequently, photosynthesis in plants within the Lake. The resulting poor water quality can be detrimental to the target species. Increased lake elevations during winter months results in greater concentrations of dissolved oxygen under the ice. This results in improved water quality and habitat suitability for the target species. (Exs. 286-US-400, 286-US-402, and 286-US-442.)

Claims and contests.

37. On or about April 29, 1997,[26] the Klamath Tribes filed a Statement and Proof of Claim to the Use of Surface Waters of Upper Klamath Lake[27] (Claim 616). Through Claim 616, the Tribes adopted each claim filed by the BIA, as trustee on behalf of the Tribes, for water of Upper Klamath Lake.[28] On October 1, 1999, the Tribes filed an Amended Statement and Proof of Claim (Amended Claim 612). Amended Claim 616 adopted and incorporated the amended claims filed by the BIA as trustee. (OWRD Ex. 63 at 1 through 22.)

38. On April 30, 1997, the BIA filed Claim 622. On October 1, 1999, the BIA filed amendments to this claim. Amended Claim 622 identified lake elevations for Upper Klamath Lake, 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. Claim 622 identified lake elevations as feet above mean sea level, broken down by month or groups of months as follows:

January 1- March 31	4,143.0[29]
April 1- June 30	4,143.0
July 1- July 31	4,142.0*
August 1- October 31	4,141.0*
November 1- November 30	4,141.5**
December 1- December 31	4,142.0**

*Decreases in water level shall begin no sooner than the last day of the designated period and shall take place over no less than two weeks.

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[26] Consistent with the claim filings of the BIA, the letter from the Tribes' counsel transmitting Claim 616 to OWRD is dated April 30, 1997. However, Claim 616 bears a date stamp from OWRD indicating the department received the claim on April 29, 1997.

[27] Statement and Proof of Claims are referred to throughout this order simply as claims.

[28] For the purposes of this order, Claim 616 incorporates only Claim 622.

[29] The Amended Claim reads, "Consistent with flood control purposes, the water level shall be raised as quickly as possible to elevation 4,143.0." (OWRD Ex. 64 at 156.)

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**Increases in water levels shall be reached later than the last day of the designated period.

(OWRD Ex. 64 at 156, emphasis original.) The priority date for each claim was declared to be "time immemorial." (*Id.*)

39. In October 2010, Claimants filed their written direct testimony and exhibits. Claimants' evidence reflected downward adjustments of Claim 622. The updated claim resulted from continuing data collection and analysis of the physical habitat needs and water quality factors, conducted by BIA's experts. The updated claim was capped at the lesser of necessary lake elevation for physical habitat for the target species or the 1999 Amended Claim, whichever was lower. For Claim 622, this updated calculation resulted in reduced claim levels in more precise claim periods and elevations. In addition, the updated calculations resulted in reduced claim elevations for several months each year. (Exs. 286-US-200, 282-US-400, and 282-US-500.)

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

CONCLUSIONS OF LAW

1. Claimants are entitled to claim water rights within Upper Klamath Lake to fulfill the purposes of the reservation.

2. The claimed lake levels 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. 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 reaches outside the former reservation. Here, Claimants seek to maintain water levels within Upper Klamath Lake, which forms the western border of the former reservation. 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.

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Here, Claimants seek to lay claim to waters that border the former reservation. To succeed, Claimants must demonstrate they are entitled, both legally and factually, to such waters. (Amended Order at 26.) 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).

If Claimants demonstrate the Treaty at issue supports an implicit understanding that sufficient water would be available, in Upper Klamath Lake, to provide habitat necessary for the target 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 waters. Claimants must also demonstrate the Treaty provisions recognized the historical presence and harvest, and contemplated the continued presence and harvest, of the target 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' non-consumptive (instream or in-lake) 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 ALJ 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).

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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 statues 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.

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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 orders previously issued by ALJs Barber and Russell. Judge Panner addressed the quantification standards and the moderate living standard in *United States v. Adair*, 187 F. Supp. 2d 1273 (2002) (*Adair III*), later vacated on ripeness grounds. While *Adair III* is not binding upon the parties, I find Judge Panner's opinion provides instructive guidance on these and other issues relevant to the resolution of the claims before me.

In *Adair III*, Judge Panner declared:

> [T]he assertion that the tribes are entitled only to some "minimum amount" of water is an incorrect statement of the law. In quantifying the right under *Adair I*, the Tribe is entitled to "whatever water is necessary to achieve" the result of supporting productive habitat. [Citation to *Adair I* omitted]. *Once the adjudicator has quantified the Tribes' water rights under the principles announced in Adair I, the moderate living standard may be considered.*
>
> * * * * *
>
> Under the traditional application of the moderate living standard, the initial quantification of a reserved right may be limited "if tribal needs may be satisfied by a lesser amount." [Citation to *Fishing Vessel* omitted]. However, this case is unlike Fishing Vessel where the reserved right could be reduced without completely frustrating the purpose of the reservation. For example, if the tribes' 50% allocation of the harvestable fish run at issue in Fishing Vessel would have been reduced to a 35% allocation, the reserved right would still survive after the reduction. In contrast, the Klamath Tribes' reserved water right does not readily lend itself to such a reduction. *Ultimately, the water level cannot be reduced to a level below that which is required to support productive habitat,* and the Tribes are entitled to "whatever water is necessary to achieve" the result of supporting productive habitat. * * * Reducing the water below a level which would support productive habitat would have the result of abrogating the reserved rights.

Adair III, 187 F. Supp 2d at 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.

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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 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 and statistical 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), a biometrician and aquatic ecologist (Dr. Hendrix), an expert in environmental engineer (Dr. Walker), and an expert in limnology (Dr. Kann). Together, these experts perform data collection and analysis over a twenty-year period to determine the appropriate claim levels.

In addition to the scientific evidence presented, Claimants have provided significant historical data to support the claimed Treaty resources associated with claimed lake levels. This data focused on the historical use of the target species 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.

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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.

In responsive briefs, Contestants argue Claimants impermissibly amended the claims by changing the methodology and data used to calculate habitat and water quality 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. UBC argues that, by adding additional data and methodologies to the calculus, Claimants have abandoned their previous claims. UBC Further asserts that such alterations to the claims are not permitted in this adjudication. UBC fails to explain why they elected to ignore this issue in their initial post-hearing briefs.

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 lake elevations constitute nothing more than a partial withdrawal of the previous claim. 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:

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(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.

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 statue 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.

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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 claimed during various periods. 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 has stated its position multiple times in this adjudication that it views downward adjustments to a claimed water right to be a partial

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withdrawal of the claimed water right. 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 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 lake elevations, they are not prohibited by statute or rule in this adjudication.

V. Claimants have demonstrated lake elevations outside the former reservation are necessary to permit exercise of the Tribes' on-reservation fishing rights.

UBC and MFT argue Claimants are not entitled to off-reservation water to support on-reservation Treaty rights. In support of this argument, Contestants 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.[30] MFT argues that no such right exists because no federal court has declared such a right. For the reasons set forth below, I do not agree.

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[30] This order assumes, for the sake of argument, that the waters of Upper Klamath Lake are entirely outside the former reservation. Contestants' arguments are addressed in that context. However, because that issue is not before this tribunal, nothing in this order shall be construed as a ruling on the question of whether the Tribes' Treaty fishing rights extend to Upper Klamath Lake.

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As an initial matter, it must be noted that a lack of binding case law specifically supporting the claimed right is not dispositive. MFT 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. MFT asserts this tribunal lacks jurisdiction to address this question without binding authority. I disagree. 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 approach 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, Contestants argue Claimants are not entitled to claim 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 waters are necessary to fulfill a primary purpose of the reservation. While I agree Claimants cannot claim hunting, trapping or gathering rights outside the boundaries of the former reservation, I do not agree that lake elevations claimed in waters bordering the reservation and hydrologically connected to the rivers and streams of the reservation are prohibited from consideration in this case.

Contestants' 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 surprsing, therefore, that neither court chose to address a question not before it at the time.

Here, the parties also expend considerable effort arguing over the interpretation and applicability of *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F2d 1032 (9th Cir. 1985). Contestants argue *Kittitas* is inapplicable because the Treaty at issue in that case granted the Yakima Nation (Yakima) off-reservation fishing rights. *Id.* at 1033 ("* * *the right of taking fish at all usual and accustomed places[.]"). This argument, 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 lake elevations off-reservation to protect habitat necessary for the exercise of their Treaty rights.

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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 the target species, considering the integral role they played in the Tribes culture and subsistence practices.

At the time of Treaty signing, adfluvial and anadromous fish species made runs 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 the majority of their subsistence needs for an entire year. The evidence also indicates the Tribes regularly harvested fish directly from Upper Klamath Lake. The evidence also supports the argument that, at the time of Treaty signing, the United States and the Tribes intended the Tribes to have continuing access to this important fishery. The Tribes had no reason to believe such access would cease after signing of the Treaty with the United States. This is supported by the fact that tribal members continued to harvest the target species, just as they always had, until declining water quality in the Lake forced the closure of the Tribes' sucker fishery in 1986. Based on the overwhelming weight of historical evidence, the right to take fish included the right to continue the fishing practices that were central to the Tribes' subsistence and culture. The exclusive right of taking fish implies fish to be taken; that includes the targets species. Should such species be restored to harvestable population in the Basin, the Tribes' Treaty protected rights would certainly include the right to harvest such fish once again. Because the lake elevations claimed here are necessary to establish and maintain a healthy and productive habitat for the target species, 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 616 and 622.

VI. Claimants have demonstrated certain lake elevations in Upper Klamath Lake are necessary to establish and maintain a healthy and productive habitat for the target 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' water rights in Upper Klamath Lake 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.

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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 the target species.

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 lake elevations that will allow the target species to reproduce and subsist in numbers sufficient to allow harvest by the Tribes within the former reservation. As identified previously, Claimants' burden in this matter is to prove, by a preponderance of the evidence, the lake level necessary in a given month to establish and maintain a healthy and productive habitat for Treaty species. As discussed below, Claimants have satisfied their burden.

1. Lake elevations necessary for fish habitat.

The target species are comprised of fluvial, adfluvial, and anadromous fish species. Prior to construction of dams downstream of the former reservation, these species existed in great numbers throughout the Basin. Fluvial species of suckers lived their full lifecycles within Upper Klamath Lake. Adfluvial species spent much of their lifecycles in the Lake but migrated into the rivers and streams of the former reservation to spawn. Anadromous species migrated upstream from the Pacific Ocean, through Upper Klamath Lake, and into the rivers and streams of the Klamath Basin. Historically, the abundance of the target species in the Basin made them a main staple of the Tribes, providing a large part of tribal members' dietary reserves.

Construction of dams below Upper Klamath Lake prevented anadromous species from accessing waters within the former reservation. Construction of the Link River Dam in 1921 altered the composition and surface area of the Lake. Prior to this construction, the minimum lake elevation was regulated by the natural topography of the lakebed. Dam construction in 1921 resulted in excavation that allowed an additional three feet to be withdrawn from the Lake. This reduction in lake level dramatically reduced water quality during certain times of the year by encouraging the growth and non-native algae, which negatively impacted dissolved oxygen levels in the lake.

Claimants' lake level claims seek to provide a healthy and productive habitat for the target species by preserving lake elevations during crucial times of the year.

At the hearing, Claimants provided extensive evidence on the level of water necessary, in each month, to provide a healthy and productive habitat for the target species. This evidence included extensive data collection, modeling and analysis from highly experienced fish biologists, limnologist, environmental engineers, and others. 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 quality to determine the minimum amount of water necessary to establish and maintain a healthy and productive habitat for the target species. In order to avoid claiming more water than necessary, Claimants capped the physical habitat claims using the 1999 claim level.

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In developing the lake elevation requirements for the target species, Claimants considered the various quantitative and qualitative habitat needs of those species in all life stages. In addition, Claimants analyzed water quality factors in Upper Klamath Lake to determine the causes of poor water quality and the lake levels necessary to improve water quality. Throughout this adjudication, Claimants have continued to collect and analyze data in order to ensure the claimed lake elevations were the no higher than necessary to support the habitat needs for the target species.

The habitat claims identified in Attachment A reflect the minimum amount of water necessary to establish and maintain a healthy and productive habitat within the Upper Klamath Lake.

2. Claimants' maximum claim levels are outside the scope of this adjudication.

Claimants' detailed claims for specific lake levels appear to misconstrue the jurisdiction of this tribunal. As stated throughout this and other orders, the purposed of these proceedings is limited to a determination of the Tribes' water rights to support on-reservation Treaty rights. It is not to establish a comprehensive management plan for the Upper Klamath Lake.

The testimony presented, as well as the arguments in Claimants' briefs, appear to go beyond establishment of the minimum amount necessary to accomplish the primary purposes of the reservation. In essence, Claimants appear to ask the ALJ to establish mandatory lake levels, enforceable by OWRD, that would cater to the various lifestages of target species while simultaneously reducing predator species propagation. I decline the invitation to expand the jurisdiction of this tribunal in such a manner.

Claimants' burden is to establish the minimum amount of water necessary to fulfill the purposes of the reservation. Here, that means demonstrating the minimum amount necessary, in time and location, to establish and maintain a healthy and productive habitat for the target species. The right to that established quantity of water is all this tribunal can or should declare. Expressed in the alternative, this tribunal cannot and should not establish target lake levels expressed as minimum and maximum lake levels to be maintained in Upper Klamath Lake.

Claimant may be correct that lake levels above a given point can be harmful to the target species during certain life stages. Nonetheless, establishment of a healthy and productive habitat for the target species is not the goal of these proceedings. Rather, these proceedings are meant to quantify Claimants' non-consumptive (or in-lake) water rights expressed as a minimum lake or stream level at a given time and place. While that level is deemed the amount necessary to establish a healthy and productive habitat, there are many other habitat factors outside the scope of these proceedings. This order does not purport to limit the maximum level of Upper Klamath Lake despite any adverse effects such excess water may have on habitat suitability for the target species.

The evidence demonstrates that, in its natural state, Upper Klamath Lake could have maintained lake elevations between 4,143.3 and 4,140.0 ft. above sea level due to the sill height

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of a naturally occurring reef at the southern end of the Lake. The claims presented appear to seek mandatory drawdown of the Lake during certain times of the year to optimize habitat for the target species. *See*, Claimants' Joint Opening Post-Hearing Brief at 44 ("After June 15 * * *, the Lake level should start to be lowered to provide sufficient water quality * * * and to reduce spawning of a primary predator."). While this may be sound policy for fishery management in the Upper Klamath Lake, it is not an appropriate parameter for the declaration of a water right.

Absent the Link River Dam and irrigation withdrawals by adjacent landowners, Claimants would have no method for lowering the levels of the Lake other than the natural outfall into the Klamath River. As such, it is possible and indeed probable that, during at least some years, the historic elevations of the Lake exceeded the target level during the entire year. The purpose of the tribes' Article 1 Treaty rights was to guarantee the Tribes could continue their historical use of Treaty resources as they occurred in their natural state. This includes contending with naturally occurring levels of the lakes and rivers that might exceed optimal habitat conditions.

This tribunal recognizes Claimants' attempts to repair habitat degradation and reduce the harmful impacts of non-native algae and predators into the Lake through careful control of water levels at key times throughout the year. While this goal is admirable and perhaps even necessary to ensure the Tribes' ability to exercise their Treaty rights, it is beyond the scope of this adjudication. The most this tribunal may declare is the floor, not the ceiling, of Claimants' instream or in-lake water rights. In this case, that is established as the minimum, rather than the maximum, amount of water necessary to support the Tribes' on-reservation fishing rights.

Nothing in this order should be read to impose upon OWRD a duty to maintain any target water levels in Upper Klamath Lake. Instead, this order establishes the minimum at which the Lake shall be maintained during a given period each year. Water storage in the Upper Klamath Lake, above the specified level, is outside jurisdiction of this tribunal.

VII. Contestants failed to rebut Claimants' evidence.

Contestants assert Claimants have failed to prove the lake levels claimed are the minimum amount of water necessary to establish a healthy and productive habitat for the target species. 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 Amended Claims filed in 1999.

The Amended Claims filed in 1999 claimed lake elevations in excess of the current claims for longer periods during the year. Between 1999 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 1999, Claimants were able to abandon large portions of the claims in favor of lower lake elevation, which they determined were sufficient to accomplish the purposes of the reservation. The results were significantly reduced habitat claims for several months. These significantly lower claim levels are reflected in Attachment A. Contestants offered no evidence indicating a lesser amount of water would accomplish the

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necessary habitat for the target species. 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 lake elevations represent the minimum amount necessary to establish and maintain the necessary habitat in Upper Klamath Lake.

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.

VIII. 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 non-consumptive water rights necessary to the exercise of the Tribes' Treaty rights within the former reservation. Specifically in this case, the purpose is to determine how much, if any, water is necessary to establish a healthy and productive habitat in Upper

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Klamath Lake to allow the target species to reproduce and increase in numbers sufficient to support the Tribes' on-reservation fishing rights.

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 exceed the authority of the ALJ.

IX. 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.
>
> 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

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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.

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

As a final matter, this order addresses UBC's and MFT's arguments that Claimants are not entitled to the claimed waters 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 and MFT provided no direct evidence to support any contest ground. To the extent Contestants considered this a valid ground for contest, they failed to offer any direct evidence in support of this argument. Bare assertions in closing briefs are insufficient to support this argument. Contestants provide no evidence demonstrating the protections afforded by the ESA are sufficient to establish and maintain a healthy and productive habitat for the target species. For these reasons, Contestants arguments lack merit. The ESA is not a substitute for the federally reserved water rights at issue in this case.

XI. Conclusion.

Certain parties appear to seek, through this adjudication, a definitive end to the issues related to conflicting Tribal and private interests in the Basin. This ruling likely leaves those parties with more questions than answers. Nonetheless, such questions must be answered outside this adjudication.

The sole purpose of this proceeding has remained consistent; the quantification of the Tribes' non-consumptive water rights in the Klamath Basin. Such quantification must be limited by the minimum amount necessary to fulfill the primary purposes of the reservation. In this case, the relevant purpose is the exercise of the Tribes' fishing rights within the former reservation.

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The claims at issue are likely to establish and preserve the habitat necessary for fluvial, adfluvial, and anadromous Treaty species to return to populations that will again permit harvest by the Tribes. The in-lake water levels in Attachment A should be read to establish the minimum lake levels necessary to support the Tribes' Treaty rights, rather than target levels to be stringently maintained throughout the year.

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 616 and 622 are approved as reflected in Attachment A, subject to the terms outlined in this order.

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 90 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 60 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

KBA Case No. 286 - Attachment A - Monthly Flow Values

(The table below is taken from pages 37-39 of KBA Case No. 286,
Claimant United States Bureau of Indian Affairs' and Claimant Klamath Tribes' Joint Opening Post-Hearing Brief)

Table X-1
Time periods, lake elevations (feet above mean sea level)

Key #	Period Starts	Period Ends	Ending Lake Elevation
1	1-Jan	31-Mar	4143
2	1-Apr	15-May	4143
3	1-Apr	15-Jun	4143
4	1-May	15-Jun	4143
5	16-Jun	30-Jun	4142
6	1-Jul	15-Jul	4141.5
7	16-Jul	15-Aug	4140.5
8	16-Aug	15-Sep	4139.5
9	16-Sep	15-Oct	4139.5
10	16-Oct	30-Nov	4140.5
11	1-Dec	31-Dec	4141

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:

Dwight W. French
Oregon Water Resources Department
725 Summer Street N.E., Suite "A"
Salem, OR 97301
Dwight.W.French@wrd.state.or.us
klamadj@wrd.state.or.us

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

Carl V. Ullman
The Klamath Tribes
PO Box 957
Chiloquin, OR 97624
Phone: 541-783-3081
Fax: 541-783-2698
bullman3@earthlink.net

David L. Gover
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
Phone: 303-447-8760
Fax: 303-443-7776
dgover@narf.org

David W. Harder
USDOJ – Environ & Natural Resource Division
South Terrace, Suite 370
999 18th Street
Denver, CO 80202
Phone: 303-844-1372
Fax: 303-844-1350
David.Harder@usdoj.gov

Douglas W. MacDougal / Adam D. Orford
Marten Law
1001 SW Fifth Avenue Suite 1500
Portland, Oregon 97204
503.241.2656 (Direct)
503.243.2202 (Fax)
dmacdougal@martenlaw.com
aorford@martenlaw.com

Barbara Scott-Brier Special Attorney
USDOJ - Regional Solicitor, PNWR
805 SW Broadway, Suite 600
Portland, OR 97205
barbara.scott-brier@sol.doi.gov
Phone: 503.231.2139
Fax: 503.231.2166

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

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

Paul S. Simmons
Somach, Simmons & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Phone: 916-446-7979
Fax: 916-446-8199
psimmons@somachlaw.com

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Sydney's 1995 Irrevocable Trust
Cynthia L. Barrett, Trustee
1500 SW 1st Avenue, Suite 760
Portland, OR 97201

Susan Y. Noe Atty at Law
C/O Native American Rights Fund
1506 Broadway
Boulder, CO 80302
suenoe@gmail.com

Jerry L. Neff
PO Box 640
Redmond, OR 97756

Tom & Althia Stephens
P O Box 1251
Chiloquin OR 97624

Elaine G. Kerns 1992 Trust
Cynthia L. Barrett, trustee
1500 SW 1st Avenue, Suite 760
Portland, OR 97201

Courtesy Copy
Jay T. Waldron
Jeffrey D. Hern
Schwabe, Williamson & Wyatt, PC
1211 SW 5th Avenue, 19th Fl
Portland, OR 97204
jwaldron@schwabe.com
jhern@schwabe.com

Andrea Rabe
421 Commercial Street
Klamath Falls, OR 97601
andrea@rabeconsultin.com

Misty Fragua
Administrative Assistant

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